

No. 24-704

**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; LAILA
ELHADDAD; WAEIL ELBHASSI; BASIM ELKARRA; DR. OMAR EL-NAJJAR;
AND AYMAN NIJIM,

Plaintiffs-Appellants,

v.

JOSEPH BIDEN, JR., PRESIDENT OF THE UNITED STATES; ANTONY J. BLINKEN,
SECRETARY OF STATE; AND LLOYD JAMES AUSTIN III, SECRETARY OF DEFENSE,

Defendants-Appellees.

On Appeal From the Judgment of the United States District Court
Northern District of California
Case No. 4:23-cv-05829-JSW

**BRIEF OF *AMICUS CURIAE*
THE CENTER FOR JUSTICE & ACCOUNTABILITY
IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR
REHEARING EN BANC AND REVERSAL**

Daniel McLaughlin
Counsel of Record
Lindsay Bailey
Elzbieta T. Matthews
Carmen K. Cheung
THE CENTER FOR JUSTICE &
ACCOUNTABILITY
268 Bush St., #3432
San Francisco, CA 94104

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American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, <i>reprinted in</i> Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003)	5
Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005)	5, 6
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Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. Doc. A/RES/40/34 (Nov. 29, 1985)	5
European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.....	5, 9
International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171	4, 5, 9
League of Arab States, Arab Charter on Human Rights, May 22, 2004, <i>reprinted in</i> 12 INT’L HUM. RTS. REP. 893 (2005)	5
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Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810
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Treatises

Restatement (Fourth) of Foreign Relations Law (Am. L. Inst. 2024).....2

Restatement (Third) of Foreign Relations Law (Am. L. Inst. 1987)2

Other Authorities

Antonios Tzanakopoulos, *Domestic Courts in International Law*, 34 LOY. L.A. INT’L &
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Customary International Humanitarian Law, Vol. 1: Rules (Jean-Marie Henckaerts &
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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

This brief of *amicus curiae* is respectfully submitted pursuant to Federal Rule of Appellate Procedure 29 in support of Plaintiffs-Appellants' Petition for Rehearing En Banc and reversal.

The Center for Justice & Accountability (CJA) is an U.S. based international human rights organization dedicated to seeking accountability for international crimes and other human rights abuses worldwide, including genocide, war crimes, crimes against humanity, torture, and extrajudicial killing. *Amicus curiae* submits this brief to vindicate the public interest in ensuring that U.S. law is properly construed to permit the United States to honor its international commitments to respect, protect, and fulfill international human rights, including by providing a remedy to victims of human rights violations, particularly *jus cogens* violations such as genocide.

No counsel for a party authored this brief in whole or in part and none of the parties or their counsel, or any other person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission. All parties to this appeal have consented to the filing of this brief.

ISSUES

1. Did the Panel err in affirming dismissal of Plaintiffs' Complaint against Defendants for their failure to prevent, and complicity in, genocide on political question grounds because the case implicates "foreign policy," where there is no such

generalized textual commitment to the executive branch and where Defendants' actions are not discretionary policy decisions but violate binding customary international law and statutorily-defined, *erga omnes* (owed to all) legal duties which must be subject to judicial review?

2. Did the Panel err in affirming the District Court's decision failing to separately consider Plaintiffs' independent request for declaratory relief, as is required by this Court, especially where its dismissal relied on the nature of Plaintiffs' requested injunctive relief, and where declaratory relief would not impose on the Executive a judicially-specified course of action?

ARGUMENT

Under international law, victims and survivors of human rights violations—and in particular, *jus cogens* violations such as genocide—have the right to an effective remedy. While international law is generally not self-executing in the United States, it is nonetheless binding, and federal courts have considered it persuasive in interpreting U.S. law.¹ For example, in *Lawrence v. Texas*, the Supreme Court considered international precedents in finding that state laws criminalizing same-sex relations were unconstitutional.² Similarly, in interpreting the Eighth Amendment courts

¹ See Restatement (Fourth) of Foreign Relations Law § 301(c) (Am. L. Inst. 2024) (“Treaties create international legal obligations for the United States, and limitations on the domestic enforceability of treaties do not alter the United States’ obligation under international law to comply with relevant treaty provisions.”); Restatement (Third) of Foreign Relations Law § 702(c) (Am. L. Inst. 1987) (“The customary law of human rights is part of the law of the United States to be applied as such by State as well as federal courts.”).

² 539 U.S. 558, 576 (2003) (citing case law of the European Court of Human Rights).

consider international human rights law to define what constitutes “cruel and unusual punishment.”³ Further, in enacting laws such as the Alien Tort Statute, 18 U.S.C. § 1350, the Torture Victim Protection Act, 18 U.S.C. § 1350, note, and the Trafficking Victim Protection Reauthorization Act, 18 U.S.C. § 1595, Congress has recognized U.S. obligations to ensure victims of international law violations have access to a judicial remedy.⁴ Here, in determining whether Plaintiffs’ claims are justiciable, this Court should consider the importance international law attaches to victims’ right to a remedy. In this case, “the undisputed evidence . . . indicates that the current treatment of Palestinians in the Gaza Strip by the Israeli military may plausibly constitute a genocide in violation of international law”⁵ and there are credible allegations that the

³ See *Thompson v. Oklahoma*, 487 U.S. 815, 831 n.34 (1988) (noting that the International Covenant on Civil and Political Rights, the American Convention on Human Rights and the Geneva Convention Relative to the Protection of Civil Persons in Time of War prohibit juvenile death penalties); *Roper v. Simmons*, 543 U.S. 551, 579 (2005) (relying on international human rights law to hold that sentencing juveniles to death violates the Eighth Amendment).

⁴ See, e.g., S. Rep. No. 102-249, at 3 (1991) (“This legislation will carry out the intent of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was ratified by the U.S. Senate on October 27, 1990. The convention obligates state parties to adopt measures to ensure that torturers within their territories are held legally accountable for their acts. This legislation will do precisely that”); Jennifer K. Elsea, Cong. Res. Serv., RL32118, *The Alien Tort Statute: Legislative History and Executive Branch Views* 10 (2003) (noting that the Alien Tort Statute was “one way for the United States to fulfill its obligations under international law” to remedy breaches of treaties and customary international law); Victims of Trafficking And Violence Protection Act Of 2000, Pub. L. No. 106–386, § 102, 114 Stat 1464, 1468-69 (citing international treaties and recognizing that “nations including the United States must recognize that trafficking is a serious offense . . . by prescribing appropriate punishment, giving priority to the prosecution of trafficking offenses, and protecting rather than punishing the victims of such offenses”); H.R. Rep. No. 108-264, pt. 1, at 17 (2003) (“Subsection (a) amends the Trafficking Victims Protection Act of 2000 to provide additional provisions for the protection of trafficking victims,” including the addition of a private right of action for victims.).

⁵ 1-ER-6.

U.S. government is complicit in those violations.⁶ Denying a remedy here would constitute a further violation of Plaintiffs' rights and U.S. obligations under international law.

Moreover, national courts, not international fora, are the jurisdiction of first resort for *jus cogens* violations. As a result, many national courts have adjudicated claims related to the crime of genocide.

I. Under International Law, States Must Provide Effective Judicial Remedies for *Jus Cogens* Violations.

A State's obligation to provide an effective remedy for human rights violations such as genocide stems from the general principle of international law that breaches must be remedied.⁷ The right to an effective remedy is also expressly enumerated in human rights treaties ratified or signed by the United States, including the International Covenant on Civil and Political Rights, the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the American Convention on Human Rights,⁸ and many other human rights treaties and

⁶ 1-ER-4; 1-ER-10.

⁷ See, e.g., *Chorzów Factory (F.R.G. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17, ¶ 21 (Sept. 13, 1928) (“[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation); see also *Castillo-Páez v. Perú*, 1997 Inter-Am. Ct. H.R. (ser. C) No. 34, ¶ 82 (Nov. 3, 1997) (noting that the right to remedy “is one of the fundamental pillars . . . of the very rule of law in a democratic society”).

⁸ International Covenant on Civil and Political Rights art. 2(3), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (ratified by the United States); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (ratified by the United States); American Convention on

international instruments.⁹ Indeed, the right to remedy for international human rights violations has attained the status of customary international law.¹⁰

Under international law, individuals who have suffered human rights violations must have meaningful access to a procedure capable of providing a remedy.¹¹ For gross violations of international human rights law, such as genocide and torture, and serious violations of international humanitarian law, meaning war crimes, the procedure must be judicial.¹² Once a violation is established, the remedy cannot be merely theoretical or illusory—it must be effective.¹³ The procedure must “function

Human Rights art. 25, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR] (signed by the United States).

⁹ See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms art. 13, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR]; African Charter on Human and Peoples’ Rights art. 7(1)(a), adopted June 27, 1981, 1520 U.N.T.S. 217; League of Arab States, Arab Charter on Human Rights art. 23, May 22, 2004, reprinted in 12 INT’L HUM. RTS. REP. 893 (2005); Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 8, U.N. Doc. A/810 (Dec. 10, 1948); American Declaration of the Rights and Duties of Man arts. 17-18, O.A.S. Res. XXX, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/II.4 Rev. 9 (2003); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, ¶ 4, U.N. Doc. A/RES/40/34 (Nov. 29, 1985); U.N. Human Rts. Comm., General Comment 31, ¶¶ 15-17, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter UNHRC General Comment 31]; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, Principles 18-23, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) [hereinafter U.N. Basic Principles on the Right to a Remedy].

¹⁰ U.N. Basic Principles on the Right to a Remedy, Principles I.1(b) and 2; *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C, Decision on Appropriate Remedy, ¶ 40 (Jan. 31, 2007); *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-A, Decision on Appeal Against Decision on Appropriate Remedy, ¶¶ 23-25 (Sept. 13, 2007); *Cantoral-Benavides v. Perú*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 88, ¶ 40 (Dec. 3, 2001); *Customary International Humanitarian Law, Vol. 1: Rules 537-50* (Jean-Marie Henckaerts & Louise Doswald-Beck, eds. 2005).

¹¹ ICCPR art. 2(3)(b); U.N. Basic Principles on the Right to a Remedy, Principles 2(b), 3(c), 11(a), 12.

¹² U.N. Basic Principles on the Right to a Remedy, Principle VIII.12.

¹³ *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87, 1987 Inter-Am. Ct. H.R. (ser. A) No. 9, ¶ 24 (Oct. 6, 1987); *Chember v. Russia*, 2008-IV Eur. Ct. H.R. 7, ¶¶ 70-71, 73.

effectively in practice” and the remedy must be capable of providing real relief to the victim.¹⁴ The remedy must entail reparation of the harm, including guarantees of non-repetition and changes in relevant laws and practices, as well as bringing those responsible to justice.¹⁵ International law is clear that “cessation of an ongoing violation is an essential element of the right to an effective remedy”¹⁶—particularly relevant in light of the ongoing violations in Gaza.

Jus cogens norms such as the prohibition against genocide are non-derogable, meaning they are “intransgressible principles of customary international law.”¹⁷ The right to remedy for *jus cogens* violations is similarly absolute—States cannot avoid providing a remedy for *jus cogens* violations.¹⁸ For instance, States cannot enact

¹⁴ UNHRC General Comment 31, ¶¶ 15, 20; *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87, 1987 Inter-Am. Ct. H.R. (ser. A) No. 9, ¶ 24 (Oct. 6, 1987); *Velásquez-Rodríguez v. Hond.*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 63, 64, 66 (July 29, 1988); *Martí de Mejía v. Perú*, Case 10.970, Inter-Am. Comm’n H.R., Report No. 5/96, OEA/Ser.L/V/II.91, doc. 7, 157 at 190-91 (1996); *Silver v. U.K.*, Nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75, 3 Eur. Comm’n H.R. Dec. & Rep. 475, ¶ 113 (1983); *Airey v. Ir.*, 32 Eur. Ct. H.R. (ser. A), ¶ 24 (1979); African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247, Principle C(a) (2001).

¹⁵ See UNHRC General Comment No. 31, ¶ 16; U.N. Basic Principles on the Right to a Remedy, Principles 18-23. See also *Velásquez-Rodríguez v. Hond.*, 1989 Inter-Am. Ct. H.R. (ser. C) No. 7, ¶¶ 25-26 (July 21, 1989); *Papamichalopoulos and Others v. Greece*, App. No. 14556/89, 21 Eur. H.R. Rep. 439, ¶ 34 (1995).

¹⁶ UNHRC General Comment No. 31, ¶ 15.

¹⁷ See *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (“[A] *jus cogens* norm, also known as a ‘peremptory norm’ of international law, ‘is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted.’” (quoting Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331)); *Kashef v. BNP Paribas S.A.*, 925 F.3d 53, 61 (2d Cir. 2019) (“[A]trocities such as genocide, mass rape, and ethnic cleansing” violate *jus cogens* norms which “may not be violated, irrespective of the consent or practice of a given State” (internal quotations omitted)); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶157 (July 9).

¹⁸ See *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87, 1987 Inter-Am. Ct. H.R. (ser. A) No. 9, ¶¶ 24-25 (Oct. 6, 1987).

amnesties or statutes of limitations for *jus cogens* violations.¹⁹ Similarly, States cannot refuse to extradite perpetrators of *jus cogens* violations such as genocide on the grounds that the accused’s alleged crimes are political activities, a common exception in extradition treaties.²⁰

The Inter-American Commission of Human Rights (“IACHR”) decision in *Monsignor Romero v. El Salvador* is instructive here.²¹ In *Romero*, the IACHR reviewed El Salvador’s Supreme Court’s refusal to consider the legality of an amnesty law granting immunity from prosecutions for “political crimes” committed during the Salvadoran civil war, including *jus cogens* violations such as torture, extrajudicial killing, and enforced disappearances committed by state agents.²² This amnesty immunized the perpetrators and planners of the extrajudicial killing of Monsignor Oscar Romero,

¹⁹ See, e.g., *Barrios Altos v. Perú*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 41 (Mar. 14, 2001) (finding that amnesties for violations of non-derogable rights such as the rights to be free from torture, extrajudicial, summary or arbitrary execution, and enforced disappearance are prohibited); *Almonacid-Arellano v. Chile*, 2006 Inter-Am. Ct. Hr. (ser. C). No. 154, ¶ 153 (Sept. 26, 2006) (holding that amnesties and statute of limitations for crimes against humanity are devoid of legal effect and ordering compensation to the victims of abuses in Chile and the prosecution of those responsible).

²⁰ See *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶¶ 155-57 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); Convention on the Prevention and Punishment of the Crime of Genocide art. 7, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

²¹ *Romero y Galdámez v. El Salvador*, Case 11.481, Inter-Am. Comm’n H.R. Report No. 37/00, OEA/Ser.L/V/II.106, doc. 6 rev. (1999). The Commission is an organ of the Organization of American States with the authority to evaluate complaints against member States for alleged violations of the ACHR. ACHR arts. 33, 44, 48, 50-51. Although the Commission’s decisions are not binding on the United States, *Mitchell v. United States*, 971 F.3d 1081, 1084 (9th Cir. 2020), U.S. courts have looked to its jurisprudence and publications for guidance on international law. See, e.g., *Doe v. Qi*, 349 F. Supp. 2d 1258, 1322-23 (N.D. Cal. 2004); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 710-11 (N.D. Cal. 1988).

²² *Romero y Galdámez*, ¶¶ 133-34.

preventing their prosecution in El Salvador.²³ When a prosecutor tried to bring charges against one of the perpetrators of the execution, former Captain Alvaro Rafael Saravia, the constitutionality of the amnesty was challenged before the Salvadoran Supreme Court.²⁴ The Supreme Court refused to review the legality of the amnesty law, finding that it was a “non-justiciable political question.”²⁵ The IACHR found the Supreme Court’s refusal to consider the legality of the amnesty law “a consolidation of the impunity which to date has protected the alleged direct perpetrators and planners of the extrajudicial execution of” Romero and a violation of Monsignor Romero’s family’s right to a remedy.²⁶

Here, similarly, the Panel’s finding that it has no jurisdiction based on the political question doctrine leaves Plaintiffs with no remedy *anywhere* for the U.S. government’s role in aiding, abetting, and failing to prevent the commission of genocide in Gaza. The Defendants recognized this during oral arguments before the District Court.²⁷ The Panel’s decision thus infringes on Plaintiffs’ right to a judicial remedy for *jus cogens* violations under international law.

²³ *Id.* ¶ 139.

²⁴ *Id.* Following the unsuccessful prosecution of Saravia in El Salvador, *amicus curiae* represented one of Romero’s family members in a U.S. civil lawsuit against Saravia. *See Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004).

²⁵ *Romero y Galdámez*, ¶ 139.

²⁶ *Id.* ¶ 140.

²⁷ 2-ER-65. Defendants recognized that Plaintiffs have no recourse before the International Court of Justice because it considers claims between States, and the United States must also first consent to its jurisdiction. 2-ER-67. Defendants also acknowledged that they are immune from prosecution under the Genocide Convention Implementation Act, 18 U.S.C. § 1091. 2-ER-59-60.

II. National Courts Are the Courts of First Instance for Adjudicating Claims of Genocide and Providing a Remedy to Victims.

Defendants have suggested that “international fora,” and not U.S. courts, should address violations of the Genocide Convention.²⁸ The Panel likewise recalled *Alperin*’s observation that “we are not a war crimes tribunal”²⁹—suggesting that U.S. courts are not the appropriate forum for such claims.

However, shifting threshold responsibility for remedying violations of international human rights law or international criminal law to international courts is inconsistent with the design of the international legal order. In the international legal system, international courts play a subsidiary role to national courts.³⁰

For example, before an international human rights claim is admissible in an international forum, individuals must first exhaust adequate and available local remedies.³¹ An individual’s claims are only admissible in international fora, including international courts and international treaty monitoring bodies, *after* the claimants have attempted to seek a remedy and enforce their rights in national courts.³² National courts, therefore, are the courts of first instance, with the primary responsibility for adjudicating violations of international human rights law. Thus, where U.S. action is

²⁸ 2-ER-61.

²⁹ Op. at 12 (quoting *Alperin v. Vatican Bank*, 410 F.3d 532, 560 (9th Cir. 2005)).

³⁰ See Antonios Tzanakopoulos, *Domestic Courts in International Law*, 34 LOY. L.A. INT’L & COMP. L. REV. 133, 152 (2011).

³¹ See S. Rep. 102-249, at 10; *Jean v. Dorelien*, 431 F.3d 776, 782 (11th Cir. 2005); ACHR art. 46(1)(a); ECHR art. 35(1); ICCPR art. 41(1)(c).

³² See *Jean*, 431 F.3d at 782; ACHR art. 46(1)(a); ECHR art. 35(1); ICCPR art. 41(1)(c).

implicated in an international human rights violation, it is U.S. courts, not international courts, that should be the first to address the claims.

Similarly, under the principle of complementarity, the International Criminal Court (“ICC”) can only exercise jurisdiction over international crimes, including genocide, war crimes, and crimes against humanity, when national courts are unwilling or unable to remedy these violations.³³ This principle recognizes that national courts “have the first responsibility and right to prosecute international crimes.”³⁴ As a result, one of the functions of the ICC prosecutor is to encourage States to “adopt and implement effective legislation” related to international crimes and “to carry out effective investigations and prosecutions.”³⁵ It is only when national judicial systems “fail to genuinely carry out proceedings” that the ICC may assert jurisdiction over the crimes.³⁶

³³ Rome Statute of the International Criminal Court arts. 1, 17, July 17, 1998, 2187 U.N.T.S. 3.

³⁴ Xabier Agirre et al., *Informal Expert Paper: The Principle of Complementarity in Practice* 3 (International Criminal Court Office of the Prosecutor 2003), <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf>; Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT’L L 869, 870 (2002) (Complementarity “is not a new concept and is consistent with the history of repression of crimes against international law. The primary responsibility for punishing these crimes lies with States.”).

³⁵ Agirre et al., *supra*, at 5.

³⁶ *See id.* at 3; El Zeidy, *supra*, at 903 (Under the principle of complementarity, the ICC may assert jurisdiction where a state fails to act because of “poor administration of justice, or a breakdown of State institutions, such as the national judicial system, or of widespread anarchy. The State must be unable to obtain an accused or key evidence and testimony, and its inability must relate to the total, substantial collapse, or unavailability of its judicial system.”)

The Genocide Convention itself requires that States Parties enact legislation so that their national jurisdictions can ensure effective penalties, and implicitly remedies, for breaches of the Convention.³⁷ As a result, national courts in Rwanda,³⁸ Canada, and in many European jurisdictions have routinely interpreted and adjudicated violations of the Genocide Convention and other international crimes in domestic proceedings.³⁹

In 2013, courts in Guatemala tried and convicted former Guatemalan President General Efraín Ríos Montt for genocide and crimes against humanity for crimes committed while he was the head of state.⁴⁰ His government undertook a deadly counterinsurgency campaign targeting Mayan indigenous regions of the country, which resulted in thousands of civilian deaths.⁴¹ In 1999, a United Nations-sponsored truth commission found that acts of genocide had occurred in Guatemala; however, elements within the Guatemalan state still dispute that the Maya people suffered a genocide.⁴² Though Ríos Montt's conviction was overturned by Guatemala's

³⁷ Genocide Convention art. 5.

³⁸ Maya Sosnov, *The Adjudication of Genocide: Gacaca and the Road to Reconciliation in Rwanda*, 36 DENV. J. INT'L L. & POL'Y 125, 131 (2008). In 2001, the Rwandan government created special courts to prosecute genocide cases. *Id.* at 125. National military tribunals have also prosecuted genocide in Rwanda. *Id.* at 133.

³⁹ See TRIAL International, *Universal Jurisdiction Interactive Map*, <https://ujim.trialinternational.org/> (last visited Sept. 4, 2024).

⁴⁰ Open Society Justice Initiative, *Judging a Dictator: The Trial of Guatemala's Ríos Montt* 1 (2013), <https://www.justiceinitiative.org/uploads/bbdf1b25-f6c4-4370-8a54-f310bbe552f9/judging-dictator-trial-guatemala-rios-montt-11072013.pdf>.

⁴¹ See *id.*; Roddy Brett, *In the Aftermath of Genocide: Guatemala's Failed Reconciliation*, 10 PEACEBUILDING 382, 392 (2022).

⁴² Rebecca Clouser, *Development and Denial: Guatemalan Post-Genocide Development Narratives*, 117 GEOFORUM 93, 93 (2020).

constitutional court on a technicality and his retrial was dismissed following his death in 2018,⁴³ his first trial and conviction highlight the important role national courts play in examining *jus cogens* violations, even where the claims are politically and factually contentious.

Finally, the application of the political question doctrine turns in part on whether there are “judicially discoverable and manageable standards” for resolving the case.⁴⁴ While the Panel concluded that there are “no manageable standards to govern what kind of support to provide an ally in wartime,”⁴⁵ the Genocide Convention clearly prohibits “complicity in genocide.”⁴⁶ The legal standard for determining complicity in genocide was established by the International Court of Justice (ICJ) over a quarter century ago in *Bosnia and Herzegovina v. Serbia and Montenegro*, where it considered whether Serbia was complicit in genocide. The ICJ held that a State may be found in breach of the Genocide Convention for providing assistance in an internationally wrongful act where the State “aids or assists another State in the commission of an internationally wrongful act by the latter,” “with knowledge of the circumstances of the internationally wrongful act.”⁴⁷ U.S. courts could rely on this ICJ

⁴³ Open Society Justice Initiative, *supra*, at 3.

⁴⁴ Op. at 8 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

⁴⁵ Op. at 9.

⁴⁶ Genocide Convention art. 3.

⁴⁷ *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. 43, ¶ 420-21 (Feb. 26) (citing Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, U.N. Doc. A/56/10, art. 16 (2001)). The ICJ’s ruling in this case has undergirded the decisions of international and domestic courts which have

precedent, along with the decisions of numerous international and domestic courts that have adjudicated claims arising from support to a party to a conflict.

CONCLUSION

Under international law, victims of *jus cogens* violations such as genocide must have access to a judicial procedure capable of providing an effective remedy. Where the United States is implicated in the commission of *jus cogens* violations, international law requires that U.S. courts provide access to such a remedy. In the international legal order, it is national courts that should operate as the courts of first instance to address international human rights or international criminal law violations. Where U.S. action is at issue, U.S. courts are those courts of first instance. International legal precedent provides a standard for adjudicating these claims. For the foregoing reasons, *amicus* respectfully urges this Court to grant rehearing of the Panel's decision and reverse the District Court's dismissal of the Plaintiffs' requests for injunctive and declaratory relief.

adjudicated claims arising from support to a party to a conflict. *See, e.g., Stearns v. Islamic Republic of Iran*, 633 F. Supp. 3d 284 (D.D.C. 2022) (holding Iran liable for providing material support to Iraqi militias during the Iraq war); *Prosecutor v. Charles Taylor*, Case No. SCSL-03-01-T, Judgment (Special Ct. for Sierra Leone May 18, 2012) (finding former President of Liberia guilty of aiding and abetting war crimes perpetrated by rebel groups during conflict in Sierra Leone); *Campaign Against Arms Trade v. Sec. of State for Int'l Trade* [2023] EWHC 1343 (Admin) (Eng. and Wales) (adjudicating challenge to the United Kingdom's arms exports to Saudi Arabia for use in the Yemeni civil war).

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Respectfully submitted,

By: s/Daniel McLaughlin

Daniel McLaughlin

Counsel of Record

Lindsay Bailey

Elzbieta T. Matthews

Carmen K. Cheung

THE CENTER FOR JUSTICE &
ACCOUNTABILITY

268 Bush St., #3432

San Francisco, CA 94104

(415) 544-0444

Counsel for *Amicus Curiae*

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