

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,

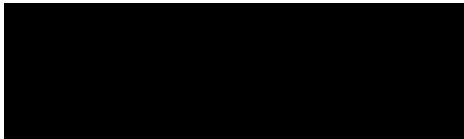
JOSEPH R. BIDEN, JR., *President of the United States*, ANTONY J. BLINKEN, *Secretary of State*, LLOYD JAMES AUSTIN III, *Secretary of Defense*, in their official capacities,

Defendants-Appellees

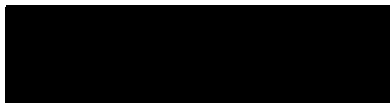
On Appeal from the United States District Court for the Northern District of California
Case No.: 4:23-cv-5829

BRIEF OF *AMICI CURIAE* A JEWISH VOICE FOR PEACE, INC. AND IF NOT NOW EDUCATION FUND IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

A Jewish Voice for Peace, Inc. has no parent corporations. It has no stock, so therefore no publicly held company owns 10% or more of its stock.

If Not Now Education Fund has no parent corporations. It has no stock so therefore no publicly held company owns 10% or more of its stock.

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INTEREST OF AMICI CURIAE¹

A Jewish Voice for Peace, Inc. is a national grassroots organization with over 720,000 members and supporters across the United States. Jewish Voice for Peace is the largest progressive anti-Zionist Jewish organization in the world and has worked for over 25 years to build a future of collective liberation, in which all Palestinians and Israelis can live in justice, equality, and freedom. If Not Now Education Fund is a national movement of American Jews, representing a base of nearly 10,000 dues-paying members, working to reject US support for Israel's apartheid system and demand equality, justice, and a thriving future for Palestinians and Israelis.

Accordingly, the *Amici* have a unique perspective and specific information that can assist the Court beyond what the parties can provide.

As United States-based and Jewish organizations, we are horrified at the carnage being visited upon the civilian population of Gaza by the Government of Israel. As the District Court found,

“. . . the undisputed evidence before this Court comports with the finding of [the International Court of Justice] and indicates that the current treatment of the Palestinians in the Gaza Strip by the Israeli military may plausibly constitute a genocide

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no one, except counsel for the *Amici*, has authored this brief in whole or in part or contributed money toward the preparation of this brief. All parties have consented to the filing of this brief.

in violation of international law. Both the uncontroverted testimony of the Plaintiffs and the expert opinion proffered at the hearing on these motions as well as statements made by various officers of the Israeli government indicate that the ongoing military siege in Gaza is intended to eradicate a whole people and therefore plausibly falls within the international prohibition against genocide.”

2024 WL 390061, *2.

The government of Israel purports to be taking these actions in our names, and the facilitation and support of these murderous actions by the defendants is underwritten by our tax dollars. As Jews, members of one of the groups of people across the globe who have been victims of a genocide, we know, and must stress to this Court, that all human life is sacred. The urgent cry of “Never Again” means never again for anyone. We are morally obligated to struggle against the genocide occurring in Gaza, and to ask that this Court permit the plaintiffs’ action to proceed.

We recognize that Courts often hold that foreign policy choices and decisions are committed to the Executive Branch and to the Congress. But we cannot accept that furthering a genocide in breach of domestic and international law can be beyond the reach of the Court. Genocide was criminalized in the wake of the Holocaust. It cannot be that federal courts must abstain from acting in the face of the “crime of crimes.” Here, as shown below,

Congress and the Executive Branch have enacted unequivocal laws and policies against genocide and against complicity in genocide. The declaratory and injunctive relief being sought in this action represents enforcement of policy choices that have already been made.

Because this case presents an issue of “exceptional importance” (F.R. App. P. 35(a)(2)) the *Amici* seeks to appear in support of plaintiffs-appellants’ petition for rehearing en banc.

ARGUMENT

The Convention on the Prevention and Punishment of the Crime of Genocide has been incorporated in the laws of the United States

We submit this brief as Jews, the principal victims of the genocide that prompted the Convention on the Prevention and Punishment of the Crime of Genocide (“the Genocide Convention”). The Genocide Convention was adopted by the United Nations General Assembly in 1948. Underscoring the gravity of this crime, the first article of the Genocide Convention codified a legal duty to prevent genocide, providing that:

“The Contracting Parties confirm that genocide, whether committed in time of peace, or

time of war, is a crime under International Law which they undertake to prevent and to punish.’ (Genocide Convention Article 1).

Article 2 of the Genocide Convention defines genocide as certain acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such” including:

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

Crimes that can be punished under the Genocide Convention include genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide.

The United States ratified the Genocide Convention in 1988 through legislation that was co-sponsored by Defendant Joseph R. Biden, who was then a Senator. The Genocide Convention was incorporated into domestic law in the form of the Genocide Convention Implementation Act, 18 U.S.C. §1091, providing for punishment of those found guilty of committing,

conspiring to commit, attempting or inciting to commit as well complicity in genocide. The conduct proscribed under the statute tracks Article 3 of the Genocide Convention.

In keeping with the ratification of the Genocide Convention by the United States, and the codification of its prohibitions in United States law, on February 23, 2023, the Administration of Defendant Joseph R. Biden issued a Memorandum of United States Conventional Arms Transfer Policy², which provides in pertinent part as follows:

“Consistent with applicable law, no arms transfer will be authorized where the United States assesses that it is more likely than not that the arms to be transferred will be used by the recipient to commit, facilitate the recipients’ commission of, or to aggravate risks that the recipient could commit: genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, including attacks intentionally directed against civilian objects or civilians protected as such; or other serious violations of international Humanitarian or Human Rights Law, including serious acts of gender-based violence or serious acts of violence against children . . .”

(emphasis supplied).

² National Security Memorandum/NSM-18.

The United States has provided unconditional support for the oppressive policies of the government of Israel in the Occupied Palestinian Territories

For decades, Palestinians have faced systematic and forced displacement, belligerent military occupation, and apartheid rule under the Israeli government, documented extensively by leading human rights organizations, including B’Tselem³, Human Rights Watch⁴, Amnesty International⁵ and Al Haq.⁶ The population of Gaza includes some of the over 750,000 Palestinians who were forced to flee or were forcibly expelled by Israeli forces from their homes and land in 1948 and were not permitted to return. Since 2007, Palestinians in Gaza have also been subject to Israel’s illegal military siege, counting calories allowed in, and permitting the water in Gaza to become undrinkable, creating humanitarian crises widely condemned by the international community. As Sara Roy, of Harvard’s Center for Middle Eastern Studies has written,

“Violence in Gaza has not only or even primarily been a military matter, as it is now. It has

³ https://www.btselem.org/publications/fulltext/202101_this_is_apartheid

⁴ <https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution>

⁵ <https://www.amnestyusa.org/wp-content/uploads/2022/01/Full-Report.pdf>

⁶ <https://aardi.org/2021/04/02/the-legal-architecture-of-apartheid-by-dr-susan-powers-al-haq/>

been a matter of everyday, ordinary acts: the struggle to access water and electricity, feed one's children, find a job, get to school safely, reach a hospital, even bury a loved one. For decades the pressure on Palestinians in Gaza has been immense and unrelenting. The damage it has done — high levels of unemployment and poverty, widespread infrastructural destruction, and environmental degradation, including dangerous contamination of water and soil, among other factors — has become a permanent condition.⁷

For as long as this oppression has existed, so too has the international community sought to hold the Israeli government accountable for its violations of international human rights and humanitarian law. But for the majority of this time, the U.S. government has acted as an unquestioning advocate for the Israeli government's actions, as well as the primary backer of its military.

The words and actions of the government of Israel following the Hamas attacks of October 7, 2023 show an intent to commit genocide, but unconditional United States support has continued

Following the deadly and tragic attacks on Israel carried out by Hamas on October 7, 2023, in which 1200 people were killed and more than two hundred taken hostage, Israel has embarked on a campaign of collective

⁷ <https://www.nybooks.com/online/2023/12/19/the-long-war-on-gaza/>

punishment and destruction against the more than two million residents of Gaza. The rhetoric accompanying this campaign has been explicitly genocidal from the start. Prime Minister Benjamin Netanyahu, for example, invoked the biblical figure of Amalek⁸, a clear reference to the passage from 1 Samuel 15:3: "Now go, attack the Amalekites and totally destroy all that belongs to them. Do not spare them; put to death men and women, children and infants, cattle and sheep, camels and donkeys."

In accordance with the genocidal intention announced by numerous high-level officials, the government of Israel cut off food, fuel, water and electricity in Gaza and launched a devastating campaign of indiscriminate bombing, targeting civilian population centers and civilian infrastructure, followed by a ground invasion and forced transfer of the civilian population. At last count, over 40,000 are dead and over 92,000 wounded, among them thousands of women and children.⁹ The British medical journal, The Lancet, notes that

Armed conflicts have indirect health implications beyond the direct harm from violence. Even if the conflict ends immediately, there will continue to be many indirect deaths in the coming months and years from causes such as reproductive, communicable, and non-communicable diseases. The total death toll is expected to be large given

⁸ <https://www.nytimes.com/2023/11/15/world/middleeast/israel-gaza-war-rhetoric.html>

⁹ <https://www.unocha.org/publications/report/occupied-palestinian-territory/reported-impact-snapshot-gaza-strip-21-august-2024-1500>

the intensity of this conflict; destroyed health-care infrastructure; severe shortages of food, water, and shelter; the population's inability to flee to safe places; and the loss of funding to UNRWA, one of the very few humanitarian organizations still active in the Gaza Strip.

In recent conflicts, such indirect deaths range from three to 15 times the number of direct deaths. Applying a conservative estimate of four indirect deaths per one direct death to the 37 396 deaths reported, it is not implausible to estimate that up to 186 000 or even more deaths could be attributable to the current conflict in Gaza. Using the 2022 Gaza Strip population estimate of 2 375 259, this would translate to 7.9% of the total population in the Gaza Strip.¹⁰

Every university in Gaza has been destroyed as well as most schools and public libraries. More than 600,000 students have no access to education.¹¹

The devastation Israel is inflicting upon the Palestinian people in Gaza is evident in the harrowing words of international officials attempting to provide aid and relief. “The Gaza Strip is poised to witness an explosion in preventable child deaths, which would compound the already unbearable level of child deaths in Gaza,” according to UNICEF Deputy Executive Director for Humanitarian Action and Supply Operations, Ted Chaiban.¹²

¹⁰ [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(24\)01169-3/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(24)01169-3/fulltext) (internal footnotes omitted)

¹¹ <https://www.ohchr.org/en/press-releases/2024/04/un-experts-deeply-concerned-over-scholasticide-gaza>

¹² <https://www.unicef.org/press-releases/childrens-lives-threatened-rising-malnutrition-gaza-strip>

Doctors Without Borders notes that “while the threat of disease and starvation grows, and the bombardment continues, lifesaving health care is increasingly inaccessible. The war has turned Gaza’s chronic humanitarian crisis into a catastrophe.”¹³ On February 29, as hundreds of starved Palestinians waited for humanitarian aid, including flour for bread, the Israeli military opened fire, killing over 100 Palestinians, and wounding over 700.¹⁴ Aryeh Neier, formerly the Executive Director of Human Rights Watch, has written that he is “now persuaded that Israel is engaged in genocide against Palestinians in Gaza. What has changed my mind is its sustained policy of obstructing the movement of humanitarian assistance into the territory.”¹⁵

The Israeli assault on Gaza employs the same tools of dehumanization, intentional starvation, and mass slaughter used in past genocides, and which we, as Jews, recognize as used by Nazi Germany in the Holocaust. Many of us grew up on the images of emaciated people—including our own families—starved in ghettos and concentration camps. Today’s images from Gaza are a rattling echo.

Beyond the death toll are the psychological injuries, which, according

¹³ <https://www.doctorswithoutborders.org/latest/our-response-israel-gaza-war>

¹⁴ <https://www.msn.com/en-us/news/world/flour-massacre-how-gaza-food-killings-unfolded-and-israel-s-story-changed/ar-BB1j9rL7>

¹⁵ <https://www.nybooks.com/articles/2024/06/06/is-israel-committing-genocide-aryeh-neier/>

to Christopher Lockyear, International Secretary General of Doctors without Borders, “have led children as young as five to tell us that they would prefer to die.”¹⁶ To inflict a level of carnage on a civilian population that makes five-year-olds say they would “prefer to die” is to doom that population to generations of unimaginable trauma. Yet the response of the defendants has been a continuation of unquestioning support for the government of Israel through political channels and military equipment.

As evidence has mounted that genocide is being inflicted on Gaza, the defendants have acknowledged in their statements that the level of destruction and death was excessive (in President Biden’s words, “over the top”), but they continue to supply Israel with bombs and tanks shells to continue its assault.

The stark contrast between the defendants’ rhetoric and their action was described in late October by Josh Paul, when he resigned as a director in the State Department’s Bureau of Political-Military Affairs¹⁷:

“For more than a decade, I worked in the State Department bureau responsible for arms transfers and security assistance to foreign governments. In that time, I was involved in many complex and morally challenging debates over what weapons to send where. What I had not seen until this month, however, was a complex and morally challenging transfer in the absence of a debate.”

¹⁶ <https://www.msf.org/msf-briefing-gaza-un-security-council>

¹⁷ <https://www.washingtonpost.com/opinions/2023/10/23/state-department-quit-israel-arms/>

* * *

The idea that U.S. arms should not be used to kill civilians has never been a controversial one in any of the four administrations I have served, dating back to my work helping rebuild the Iraqi security sector in 2004-2006.

Earlier this year, the Biden White House supposedly strengthened protections against such occurrences. Its new Conventional Arms Transfer Policy establishes a standard that transfers will not be authorized if they are “more likely than not” to be used to violate human rights.

In August, the State Department notified all its embassies of a new Civilian Harm Incident Response Guidance (CHIRG), which lays out a set of actions to be taken after a report of civilian harm resulting from use of U.S.-origin weapons. The risk is obvious that American weapons provided to Israel, especially air-to-ground munitions, will inflict civilian harm and violate human rights. But the department was so adamant to avoid any debate on this risk, even the publication of a pending department release about the CHIRG was blocked.”

(emphasis supplied).

When faced with plausible evidence of a genocide in progress, the Courts must have the power to enforce United States law against genocide

What is at stake in this case is the defendants’ responsibility for the United States’ tragic failure to implement and enforce clearly established laws

and policies of the United States that were designed to prevent genocide. Those clearly established laws and policies meaningfully differentiate this case from Corrie v. Caterpillar, Inc. 503 F.3d 972 (9th Cir. 2007). In Corrie,

“ . . . each claim unavoidably rest[ed] on the singular premise that Caterpillar should not have sold its bulldozers to the IDF. Yet these sales were financed by the executive branch pursuant to a congressionally enacted program calling for executive discretion as to what lies in the foreign policy and national security interests of the United States.”

503 F.3d at 982.

As this Court recognized in Alperin v. Vatican Bank, 410 F.3d 532, 549 (9th Cir 2005), whether a court should defer to the political branches is a case-by-case inquiry. There can be no “executive discretion” to disregard the mandatory obligation, set forth in the Genocide Convention and embedded in United States law, to prevent genocide and not to be complicit in genocide. If the unequivocal undertaking by the United States to prevent genocide cannot be enforced in our courts, in the presence of clear evidence found by the International Court of Justice and by the District Court of a plausible ongoing genocide in Gaza, then the undertaking to prevent genocide is a dead letter. The complicity of the United States in Israel’s ongoing genocide not only erases the memory of those Jews and others slaughtered during the Holocaust, but makes a mockery of the Convention itself. If the Convention is not invoked

to stop a genocide unfolding in front of our eyes on social media and beyond, will it ever be invoked? Or, in the words of one of our Jewish sages, “If not now, when?” This is how Christopher Lockyear of Doctors Without Borders put it to the UN Security Council:

“The consequences of casting international humanitarian law to the wind will reverberate well beyond Gaza. It will be an enduring burden on our collective conscience. This is not just political inaction — it has become political complicity.”¹⁸

The results of the failure to implement clearly established laws and policies of the United States that were designed to prevent genocide are clear on the ground in Gaza, as described here by Zak Haniyeh, a researcher and translator trapped in Rafah¹⁹:

“Whether I stay in Gaza or manage to go abroad, how will I live the rest of my life having gone through these experiences? They have been beyond comprehension. I don’t understand how a human being can kill even one child, yet around 12,000 children have been killed. The world is standing by and letting this happen. I wish I could ask the United States government: Is this the just world order you are always talking about? Is this the world we wish to live in as human beings? I have such a deep pain inside of me. The Palestinian people share this feeling — the feeling of being left alone to face genocide.”

¹⁸ <https://www.pressenza.com/2024/02/gaza-msf-speaks-to-the-un-security-council-an-immediate-and-lasting-ceasefire-is-needed/>

¹⁹ <https://jewishcurrents.org/the-scenes-in-rafah-are-straight-from-a-nightmare>

CONCLUSION

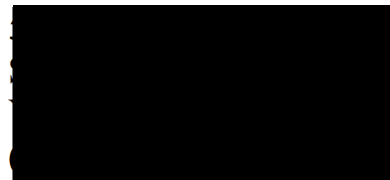
For the reasons set forth above, *Amici Curiae* A Jewish Voice for Peace, Inc. and If Not Now Education Fund pray that the petition of plaintiffs-appellants for rehearing en banc be granted.

Dated: New York, New York
September 9, 2024

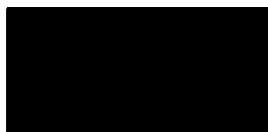
Respectfully submitted,

PROFETA & EISENSTEIN

By /s/ Jethro M. Eisenstein
Jethro M. Eisenstein

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Alan Levine

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Attorneys for *Amici Curiae*

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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I, Jethro M. Eisenstein, hereby certify that I electronically filed the foregoing Brief of *Amicus Curiae*, A Jewish Voice for Peace, Inc. in Support of Plaintiffs-Appellants' Petition for Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 9, 2024, which will send notice of such filing to all registered CM/ECF users.

s/ Jethro M. Eisenstein

Jethro M. Eisenstein

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