No. 24-704

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DEFENSE FOR CHILDREN INTERNATIONAL – PALESTINE; AL-HAQ; AHMED ABU ARTEMA; MOHAMMAED 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
No. 4:23-cv-05829-JSW
Hon. Jeffrey S. White

Brief of Amicus Curiae International Law Scholars In Support of Plaintiff-Appellants

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, I, Paul Hoffman, as counsel for *amici curiae*, state that the Scholars of International Law do not have parent corporations, nor do they issue stock, and thus no publicly held corporation owns 10% or more of their stock.

Dated: March 14, 2024

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STATEMENT OF IDENTITY AND INTERESTS OF AMICI[1]

Amici curiae respectfully submit this brief in support of Plaintiff-Appellants. *Amici*, listed in the Appendix, are professors of law experts on the subject of binding norms of international law and the application of such norms in the United States, as more particularly set forth below.

Through their scholarship and practice, *amici* have contributed to the development of jurisprudence and academic discourse on international law and on the enforcement of international law norms in both domestic and international tribunals. They have an interest in judicial recognition and enforcement of these norms and can provide particular expertise to this Court concerning the international law questions at issue in the present appeal. *Amici* respectfully seek leave to present their views to the United States Court of Appeals for the Ninth Circuit concerning *Defense for Children International, Palestine, et al. v. Joseph R. Biden, et al*. *Amici* do so in order to share their collective

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici curiae* state that: (1) no party's counsel authored this brief in whole or in part; and (2) no person other than *amici curiae* and their counsel made monetary contributions to its preparation or submission. Pursuant to Fed. R. App. P. 29(a)(2), counsel for amicus curiae certifies that all parties have consented to the timely filing of this brief.

expertise on the international legal obligations of the United States at issue in the present appeal, namely, the *jus cogens* norm prohibiting genocide, including complicity in genocide and the duty to prevent genocide.

SUMMARY OF ARGUMENT

The prohibition of genocide, complicity in genocide, and the duty to prevent genocide are peremptory norms of customary international law (*jus cogens*) from which no derogation is permitted. These principles are the heart of the international legal order that the United States helped construct in the wake of the Second World War. They were put in place to ensure that the horrific crimes of the Holocaust were never repeated.

International law requires States to take pre-emptive action to prevent genocide and ensure their non-complicity in its commission. The duty to prevent is a legal imperative and does not require a finding that genocide is, in fact, occurring. Rather, awareness of a serious risk of genocide places an obligation on all States to take whatever action possible to prevent its occurrence or continuation. If, with knowledge that genocide is underway or about to be committed, a State continues to materially support its perpetration, it has failed in its duty to prevent genocide and may also be found complicit in its commission.

The United States has championed these principles for nearly eight decades. Throughout this period, the United States has recognized the *jus cogens* status of the norms prohibiting genocide. As recently as

September 2022, the United States recognized its obligation to prevent genocide. *See* Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (*Ukr. v. Russ.*), Declaration of Intervention Under Article 63 of the Statute Submitted by the United States of America, ¶ 9-10 (Sept. 7, 2022), https://www.icj-cij.org/sites/default/files/case-related/182/182-20220907-WRI-01-00-EN.pdf.

Under international law, domestic courts are relied upon to enforce these apex norms of customary international law that are recognized as peremptory. History, international conventions, and principles of international law all point to the necessity of domestic enforcement of peremptory norms. U.S. courts have accordingly recognized that *jus cogens* norms are subject to domestic enforcement. Simply put: if international law is to vindicate the rights of individuals to be protected from acts of genocide, the domestic courts of all States—including the United States—must enforce the prohibition on genocide.

ARGUMENT

I. The Prohibition of Genocide, including the Duty to Prevent Genocide and Complicity in Genocide, is a Peremptory Norm

The prohibition of genocide is a peremptory norm of international law from which no derogation is permitted. Application of Convention on Prevention and Punishment of Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. 43, ¶ 161 (Feb. 26); *see also Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Trial Judgement, 203, ¶ 520 (Int'l Crim. Trib. For the former Yugoslavia, Jan. 14, 2000).[2] The prohibition extends to the duty to prevent genocide and complicity in genocide. Convention on the Prevention and Punishment of the Crime of Genocide arts. I, III, Dec. 9, 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277 (Genocide Convention). The United States has recognized these principles for over seven decades. *See Ukr. v. Russ.*, Declaration of Intervention Under Article 63 of Statute Submitted by the United States of America, ¶ 10.

[2] Decisions by international courts and tribunals, including the International Court of Justice, are authoritative but not precedential under international law. *See* Statute of the International Court of Justice, art. 38(1)(d), Oct. 24, 1945 (including judicial decisions "as subsidiary means for the determination of rules of law").

a. The Prohibition of Genocide is a Peremptory Norm of International Law

In 1946, the United Nations General Assembly (UNGA) adopted Assembly Resolution 96(I), titled "The Crime of Genocide." The resolution affirmed that genocide was, even then, "a crime under international law which the civilized world condemns" and invited States to "prevent[] and punish[] . . . this crime." *See* G.A. Res. 96(I) (Dec. 11, 1946).

Two years later, on December 9, 1948,[3] the UNGA adopted the Genocide Convention. The Genocide Convention defines genocide as:

> [A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;

[3] The Convention came into effect in 1951. There are currently 153 State Parties to the Convention, including the United States, Israel, and the State of Palestine. Genocide Convention, Status Table, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4 (accessed March 14, 2024).

> (e) Forcibly transferring children of the group to another group.

Genocide Convention. art. II.

Since then, the International Court of Justice (ICJ) and other international tribunals have repeatedly affirmed that the prohibition of genocide is *jus cogens*—a peremptory norm of customary international law. *See, e.g., Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. ¶ 161 ("the norm prohibiting genocide was assuredly a peremptory norm of international law (*jus cogens*)"); Case Concerning Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Rwanda*), Judgment on Jurisdiction of the Court and Admissibility of the Application, 2006 I.C.J. 219, ¶ 64 (Feb. 3); *Prosecutor v. Jelisić,* Case No. IT-95-10-T, Trial Judgement, 18, ¶ 60 (Int'l Crim. Trib. for the former Yugoslavia Dec. 14, 1999) ("There can be absolutely no doubt" that the prohibition of genocide falls "under customary international law" and is now "on the level of *jus cogens*.").

A peremptory norm of international law (*jus cogens*) is "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, *opened for signature* May 23, 1969, 1155

U.N.T.S. 331.[4] No circumstances—neither armed conflict nor the exercise of the right of self-defense—can legitimatize the violation of peremptory norms. *See* 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, ¶ 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).

As the ICJ has concluded, "the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without conventional obligation." Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (*Reservations to the Convention*), Advisory Opinion, 1951 I.C.J.

[4] The U.S. recognizes the Vienna Convention on the Law of Treaties (VCLT) as customary international law. *See, e.g.*, Assistant Legal Advisor for Treaty Affairs at the Department of State and Secretary of State Roger's Report to the President, Oct. 18, 1971, 65 Dep't St. Bull. 684, 685 (1971); *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2nd Cir. 2000) (cert. denied). Additionally, the Third Restatement of Foreign Relations Law recognizes the Vienna Convention as a codification of the customary international law of treaties. *See* Restatement (Third) of Foreign Relations Law, Introduction 4 (1987).

15, 23 (May 28). Those principles include the duty to prevent genocide and to refrain from complicity in its commission.[5]

b. The Peremptory Norm Prohibiting Genocide Encompasses the Duty to Prevent Genocide

The peremptory norm prohibiting genocide imposes binding obligations on all States to prevent genocide. *Reservations to the Convention*, 1951 I.C.J. at 23 (recognizing the "*universal character* both of the condemnation of genocide and *of the co-operation required 'in order to liberate mankind from such an odious scourge'*") (citing Genocide Convention, pmbl.)) (emphasis added). The United States has itself acknowledged the binding obligation to prevent genocide. *See* § I.d.

Article I of the Genocide Convention codifies the obligations to prevent and punish acts of genocide. Genocide Convention, art. 1. This is not merely an aspirational statement. The ICJ has confirmed the

[5] Prevention and non-complicity are distinct obligations: "[W]hile complicity results from commission, violation of the obligation to prevent results from omission; this is merely the reflection of the notion that the ban on genocide and the other acts listed in Article III, including complicity, places States under a negative obligation, the obligation not to commit the prohibited acts, while the duty to prevent places States under positive obligations, to do their best to ensure that such acts do not occur." Application of Convention on Prevention and Punishment of Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. 43, ¶ 161 (Feb. 26).

"operative and non-preambular character of Article I" and affirmed that Article I "impose[s] distinct obligations over and above those imposed by other Articles of the Convention." *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. ¶¶ 164, 165.

The duty to prevent genocide, therefore, creates a legal imperative for all States. The duty does not require a finding that genocide is occurring; rather, awareness of a serious risk of genocide places an obligation on all States to take whatever action possible and necessary to prevent its occurrence or continuation. *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. ¶ 431.

i. The Duty to Prevent Genocide Arises When a State Learns of a Serious Risk that Genocide Will be Committed

The obligation to prevent arises "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." *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. ¶ 431 (emphasis added); *see also Ukr. v. Russ.*, Declaration of Intervention Under Article 63 of Statute Submitted by the United States of America, ¶ 22. "From that moment onwards, if 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. v. Serb. & Montenegro*, 2007 I.C.J. ¶ 431.

A State's obligation to prevent genocide does not necessitate a conclusion that genocide is taking place; "that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act." *Id.* Instead, it is sufficient that the "dangers [are] known" and "seem[]to be of an order that could suggest intent to commit genocide, unless brought under control." *Id.* ¶ 438. For the duty to prevent genocide to arise, it is sufficient that there be a serious risk that genocide *will* be committed. 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.* ¶ 432.

ii. States Must Employ All Reasonable Means to Prevent Genocide

States are required to "employ all means reasonably available to them, so as to prevent genocide so far as possible." *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. ¶ 430. A State's degree of responsibility to

prevent genocide depends on its "*capacity to influence effectively* the action of persons likely to commit, or already committing, genocide." *Id.* (emphasis added). This, 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.*

The capacity to influence includes, at a minimum, circumstances in which a State is providing military or financial assistance to the perpetrator of the alleged genocide. *Id.* ¶ 434. Even if a particular State is not found complicit in the commission of genocide, it may incur liability for failing to take action to prevent genocide perpetrated by actors over which it has such influence. *Id.* ¶¶ 430-32.

A State's capacity to influence those committing acts of genocide is not territorially restricted. Instead, the obligation applies globally, *id.* ¶ 183, underscoring the duty to prevent as a fundamental component of the *jus cogens* norm prohibiting genocide.

iii. The Duty to Prevent Genocide Is a Duty of Conduct, Not of Result

The duty to prevent genocide is "one of conduct and not one of result." *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. ¶ 430. A State

must, therefore, discharge this duty regardless of whether it is guaranteed or even likely to stop the genocide in question. *Id*. A State's duty to prevent genocide is not tied to whether it sufficiently prevents the commission of genocide but whether it took "all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide." *Id*.

Assertions that even if a State "had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide" are immaterial, "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." *Id*.

The United States is aware of the serious risk of genocide occurring in Gaza. On January 26, 2024, the ICJ issued provisional orders in *South Africa v. Israel.* Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*S. Afr. v. Isr.*),

Order, 2024 I.C.J. 1, ¶ 66 (Jan. 26).[6] It found that "there is a real and imminent risk that irreparable prejudice will be caused to the rights found by the Court to be plausible," *id.* ¶ 74, "namely the right of Palestinians in the Gaza Strip to be protected from acts of genocide and related prohibited acts identified in Article III of the Genocide Convention." *Id.* ¶ 66.

The United States and all other States are, therefore, obligated to take all measures within their power to prevent genocide in the present case.

c. The Peremptory Norm Prohibiting Genocide Encompasses Complicity in Genocide

The peremptory norm prohibiting genocide also includes complicity in genocide. Article III of the Genocide Convention identifies "complicity in genocide" as a punishable act related to genocide. Genocide Convention, art. III(e); *see also* William A. Schabas, *Genocide in*

[6] Given the procedural posture of the provisional measure, the ICJ was confined to ruling exclusively on plausibility. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (S. Afr. v. Isr.), Order, 2024 I.C.J. 1, ¶ 36. (Jan. 26) ("At this stage of the proceedings . . . the Court is not called upon to determine definitively whether the rights which South Africa wishes to see protected exist. It need only decide whether the rights claimed by South Africa . . . are plausible.").

International Law 307 (2d. ed. 2009) ("[C]omplicity in genocide should hardly be viewed as being less serious than genocide itself.").

Complicity is also incorporated as part of the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), both of which were established pursuant to Security Council resolutions with the assent of the United States as a permanent member. Statute of the International Criminal Tribunal for the former Yugoslavia, art. 4(3)(e), May 25, 1993, S.C. Res. 827; Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, art. 2(3)(e), Nov. 8, 1993, S.C. Res. 955.

The prohibition of genocide imposes binding obligations not only on States perpetrating genocide but on all States in the international community to avoid complicity in its commission. *See Bosn. & Herz. v. Serb. & Montenegro,* 2007 I.C.J. ¶¶ 167, 380, 432. States, in addition to

individuals, may be held responsible under international law for genocide and associated acts, including complicity in genocide. *Id.* ¶ 167. ("It would . . . not be in keeping with the object and purpose of the [Genocide] Convention to deny that the international responsibility of a State . . . can be engaged through one of the acts, other than genocide itself, enumerated in Article III").

The ICJ has found that the standard for "complicity in genocide," when applied to State action, should be interpreted in light of Article 16 of the Articles on State Responsibility, which itself is a rule of customary international law. *Id.* ¶ 419-20. Article 16 of the Articles on State Responsibility provides that a State can be held internationally responsible if it "aids or assists another State in the commission of an internationally wrongful act" and does so with "knowledge of the circumstances of the internationally wrongful act." International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, A/56/10 (2001), art. 16, (ILC Articles on State Responsibility).

i. A State May Be Found Complicit in Genocide if it Provides Means to Enable or Facilitate the Commission of Genocide

A State is liable for complicity under customary international law if it "provides aid or assistance to another [State] with a view to facilitating the commission of an internationally wrongful act." ILC Articles on State Responsibility, art. 16, cmt. ¶ 1. This may include the provision of "an essential facility or financing the activity in question." *Id.*

For a State to be liable for complicity, it must provide support "with a view" to facilitating the commission of the act and the actual commission of the act must occur. *Id.* art. 16, cmt. ¶ 5. However, "[t]here is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act." *Id.*

In the context of genocide specifically, "there is no doubt that 'complicity', in the sense of Article III, paragraph (*e*), of the Convention, *includes the provision of means to enable or facilitate the commission of the crime; it is thus on this aspect that the Court must focus*." *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. ¶ 419 (emphasis added). Such

means include, for example, the provision of military, political, or financial aid. *Id.* ¶ 422.

ii. A State Need Only Knowledge that a Genocide is Underway or About to be Committed to be Found Complicit in its Commission

A State is liable for complicity under customary international law if it provides aid or assistance to another State in the commission of a wrongful act with "knowledge of the circumstances of the internationally wrongful act." ILC Articles on State Responsibility, art. 16. The State does not itself need to harbor genocidal intent. Rather, a State may be complicit in genocide if it is "aware that genocide was about to be committed or was under way." *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. ¶ 432. Knowledge that a genocide was about to be committed is therefore sufficient to trigger obligations under international law to take action to avoid complicity in its commission.

As noted in Section I.b.iii, in light of the January 26, 2024, ICJ order, the United States is aware of the serious risk of genocide occurring in Gaza, giving rise to a duty to prevent genocide. If the United States nonetheless continues to materially support Israel's actions and it is established that genocide has occurred, the United States and other

supporting States may also be found to be complicit in its commission under the customary international law of State responsibility.

d. The United States Has Long Recognized the *Jus Cogens* Prohibition of Genocide, Including the Obligation to Prevent and Not Be Complicit in Genocide

The United States accepts that the prohibition of genocide is foundational to the rights-based international order. The United States signed the Genocide Convention on December 11, 1948, and ratified it on November 25, 1988. In proceedings before the ICJ in 1951, the United States outlined its understanding of the Convention's origins:

> The Genocide Convention resulted from inhuman and barbarous practices which prevailed in certain countries prior to and during World War II, when entire religious, racial and national minority groups were threatened with and subjected to deliberate extermination. . . . Not once, but twice, [the General Assembly of the United Nations] declared unanimously that the practice of genocide is criminal under international law and that States ought to take steps to prevent and punish genocide.

Written Statement of the United States, *Reservations to the Convention* 1951 I.C.J. Pleadings 12, at 25 (May 28).

The United States has since codified the prohibition of genocide in domestic law. Genocide Convention Implementation Act, 18 U.S.C. § 1091. And, U.S. Courts have recognized that "genocide violates the law

of nations." *Al-Tamimi v. Adelson*, 916 F.3d 1, 11 (D.C. Cir. 2019); *see also Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995).

The United States has similarly reaffirmed the international consensus that States must prevent and punish genocide. Intervening in the case brought by Ukraine against the Russian Federation, the United States highlighted what it described as its "long history of supporting efforts to prevent and punish genocide." *See Ukr. v. Russ.*, Declaration of Intervention Under Article 63 of Statute Submitted by the United States of America, ¶ 10.

The United States also noted that in *Bosn. & Herz. v. Serb. & Montenegro*, the ICJ "interpreted Article I [of the Genocide Convention], in particular its undertaking to prevent genocide, to create obligations distinct from those that appear in the subsequent articles of the Convention, which primarily address the punishment of genocide by individuals." *Id.* ¶ 22. Finally, it noted that a "State's obligation to prevent, and the corresponding duty to act, arise 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.*

The United States recognizes that the prohibition of genocide—a *jus cogens* norm allowing for no derogation—is integral to the fabric of the rights-based international legal order. For this order to remain effective, the obligations of States to prevent and not be complicit in genocide must be enforced.

II. U.S. District Courts Have a Duty to Enforce International Law

The system of international law recognizes and frequently requires that domestic courts provide redress for violations of international law. This is particularly true for *jus cogens* norms, including genocide, that are integral to international law. As the Supreme Court has long recognized, "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their administration." *The Paquete Habana*, 175 U.S. 677, 700 (1900). History, international conventions, and principles of international law all confirm that domestic courts play a critical role in enforcing foundational rights under international law.

a. International Law Has Historically Been Enforced in Domestic Courts

Prior to the twentieth century, domestic enforcement was the primary and, at times, exclusive method of addressing international law violations. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 163 n.16 (2d Cir. 2010) (Leval, J., concurring), *aff'd*, 569 U.S. 108 (2013). Of interest to the First Congress, piracy, violations of safe conduct, and offenses against ambassadors were "punished not by an international tribunal but by the domestic courts of England under the domestic law of England." *Id.* (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715, 719 (2004)).[7]

U.S. federal courts were accustomed to upholding the "laws of nations" in the face of both legislative and executive overreach throughout the nineteenth century. *See, e.g.*, *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (holding that "an act of Congress ought never to be construed to violate the law of nations, if any other

[7] Both of these cases concern the application of the Alien Tort Statute (28 U.S.C. §1350); *Sosa* involved customary international law norms not at issue in this case, whereas the *jus cogens* status of the genocide prohibition is well settled. *Kiobel* was decided based on the presumption against extraterritorial application of a domestic statute, which is also not at issue here.

possible construction remains"); *Little v. Barreme*, 6 U.S. 170, 174 (1804) (holding that the President's seizure of a foreign ship violated the international law of neutrality); *The Paquete Habana*, 175 U.S. at 700.

The establishment of the Permanent Court of International Justice, the precursor to the ICJ, in the early twentieth century, began an effort by which international courts, in addition to domestic courts, could enforce international law. *Kiobel*, 621 F.3d at 163 n.16. International courts, however, did not replace domestic adjudication and enforcement of international law. *See* André Nollkaemper, *National Courts and the International Rule of Law* 27 (2011). Rather, treaties codifying *jus cogens* norms, as well as enduring principles of international law, continue to require domestic enforcement of international law.

b. Core Human Rights and Humanitarian Law Treaties Require Domestic Enforcement

The core international law treaties adopted following the Second World War, partially in response to the horrors of the Holocaust, establish the rights of individuals to be protected from state violence, including genocide, torture, and war crimes. Under these treaties, States are obliged to give effect to these rights domestically.

These treaties all explicitly require domestic enforcement. The Genocide Convention requires contracting parties to "give effect to the provisions" of the Convention and "provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III." Genocide Convention, art. IV.

The Convention Against Torture requires States to make torture punishable and to prosecute or extradite persons in their jurisdiction alleged to have violated the Convention. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), arts. 4.2, 7.1, Dec. 10, 1984, S. Treaty Doc. No. 100-20 1465 U.N.T.S. 85. The ICJ has made clear that domestic enforcement is obligatory, not voluntary, holding that the failure to prosecute or extradite persons accused of violating the CAT is itself a breach of international law. Questions Relating to Obligation to Prosecute or Extradite (*Belg. v. Sen.*), Judgment, 2012 I.C.J. 422, ¶ 68 (July 20). Recognizing that the protection of core internationally recognized rights necessitates domestic enforcement, the ICJ went so far as to hold that this wholly domestic obligation of prosecution or extradition is itself an obligation owed to all State parties to the CAT. *Id.* ¶ 69.

Likewise, all four Geneva Conventions, which form the core of international humanitarian law, contain provisions requiring each State Party to prosecute individuals for committing grave breaches of the respective Geneva Conventions. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Times of War, art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

Notably, these treaties all impose obligations recognized as obligations *erga omnes* or *erga omnes partes* between States.[8] *See, e.g.,*

[8] Obligations that are *erga omnes* are obligations, which by "their very nature . . . are the concern of all States," and which "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection." Case Concerning the Barcelona Traction, Light and Power Company (*Belg. v. Sp.*), Judgment, 1970 I.C.J. 3, ¶ 33 (Feb. 5). Obligations that are *erga omnes partes* provide legal standing to

Case Concerning the Barcelona Traction, Light and Power Company (*Belg. v. Sp.*), Judgment, 1970 I.C.J. 3, ¶¶ 33-34 (Feb. 5) (recognizing the prohibition on genocide as an obligation *erga omnes*); *Belg. v. Sen.*, 2012 I.C.J. ¶ 69 (recognizing the prohibition on torture as an obligation *erga omnes partes*); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 155 (July 9) (recognizing certain rules of international humanitarian law as obligations *erga omnes*). Genocide, in particular, is recognized as an obligation *erga omnes*: an obligation that, by its "very nature . . . [is] the concern of all states." *Belg. v. Sp.*, 1970 I.C.J. ¶ 33-34.

c. Principles of International Law Further Call for the Domestic Execution of International Law

Two further principles of international law embody the expectation, and in some instances requirement, of domestic adjudication and enforcement of international law.

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all States that are party to a treaty to bring claims against other State Parties. Questions Relating to Obligation to Prosecute or Extradite (*Belg. v. Sen.*), Judgment, 2012 I.C.J 422, ¶ 68 (July 20).

i. Principle of Exhaustion

Exhaustion of local remedies is a centuries-old norm that foregrounds the role of national courts in enforcing international law. As the ICJ has explained:

> The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law. . . . Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.

Interhandel (*Switz. v. U.S.*), Judgment, 1959 I.C.J. 6, 27 (Mar. 21); *see also* Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*), Judgment, 2007 I.C.J. 582, ¶ 44 (May 24)*;* Tamás Kende, *Distant Cousins: The Exhaustion of Local Remedies in Customary International Law and in the European Human Rights Contexts*, 2020 ELTE L. J. 127, 128 (2020).

ii. Principle of Complementarity

Similarly, the principle of complementarity views State courts as the primary mechanism for adjudicating violations of the prohibition of genocide. This long-standing principle is reflected in the expectation of

domestic enforcement in the core international law treaties discussed above. *See* Section II.b, *supra*.

Most recently, the principle of complementarity was recognized and codified in the Rome Statute of the International Criminal Court (ICC). The Rome Statute created an international accountability mechanism to prosecute individual defendants guilty of committing war crimes, genocide, crimes against humanity, and the crime of aggression where domestic courts fail to do so.[9] It recognizes the international law expectation that the "most serious crimes of concern to the international community," including genocide, are "investigated and prosecuted" in domestic courts. Rome Statute of the International Criminal Court (Rome Statute), pmbl., arts. 5-6, 17(1)(d), July 17, 1998, 2187 U.N.T.S. 3.

Under the Rome Statute, the ICC may only adjudicate cases where domestic courts are "unwilling or unable" to exercise that obligation. *Id.*, art. 17(1)(a). The absence of "a genuine national investigation and prosecution should be regarded as the *core criterion* for the exercise of

[9] Although the United States is not a party to the Rome Statute, we cite to it as a preeminent example of the international law expectation of national enforcement since it is indicative of customary international law on national enforcement.

jurisdiction by the ICC." Xavier Philippe, *The principles of universal jurisdiction and complementarity: how do the two principles intermesh?*, 88 Int'l Review of the Red Cross 375, 382 (2006) (emphasis added).

d. U.S. Courts Have Recognized that *Jus Cogens* Norms are Binding and Subject to Domestic Enforcement

U.S. Courts have recognized that *jus cogens* norms "confer an unquestionable right on each individual to be free from States violating those norms" and create binding obligations on States under international law that are enforceable in domestic courts. *Al Shimari v. CACI Premier Tech.*, Inc., 368 F. Supp. 3d 935, 959 (E.D. Va. 2019) ("[T]here is today a federal common law right derived from international law that entitles individuals not to be the victims of *jus cogens* violations"); *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 158-59 (4th Cir. 2016) (recognizing, in an earlier appeal in the same case, that alleged violations of customary international law are justiciable in U.S. courts); *United States v. Matta-Ballesteros*, 71 F.3d 754, 764 n.5 (9th Cir 1995), *opinion amended on denial of reh'g*, 98 F.3d 1100 (9th Cir. 1996) (recognizing that a *jus cogens* norm "would be justiciable in our courts even absent a domestic law"); *Estate of Hernandez-Rojas v. United States*, 2013 WL 5353822, at *4 (S.D. Cal. Sept. 24, 2013) (noting that *jus cogens*

norms of international law are binding on all States and do not depend on State consent).

Thus, the system of international law expects—and in the context of the *jus cogens* norm prohibiting genocide, requires—domestic courts to play a prominent role in vindicating violations of international law.

CONCLUSION

Under international law, U.S. courts must enforce the *jus cogens* norm prohibiting genocide, including the duty to prevent genocide and the prohibition on complicity in genocide. Nothing in international law suggests that the duty to prevent genocide requires a legal conclusion that genocide is occurring. Rather, international law requires domestic courts to enforce the binding obligations on States to prevent genocide and not be complicit in its occurrence, particularly when a State has the capacity and influence to do so.

Dated: March 14, 2024

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