

No. 24-704

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

DEFENSE FOR CHILDREN INTERNATIONAL – PALESTINE;
AL-HAQ; AHMED ABU ARTEMA; MOHAMMED AHMED ABU
ROKBEH; MOHAMMAD HERZALLAH; AYMAN NIJIM; LAILA
ELHADDAD; WAEIL ELBHASSI; BASIM ELKARRA; and DR.
OMAR EL-NAJJAR,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
No. 4:23-cv-05829-JSW

**BRIEF OF AMICUS CURIAE CENTER FOR CIVILIANS IN CONFLICT
IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING EN
BANC**

John Washington, SBN 315991

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Counsel for Amicus Curiae Center for Civilians in Conflict

CORPORATE DISCLOSURE STATEMENT

Amicus curiae Center for Civilians in Conflict (CIVIC) is a nonprofit corporation that has no parent corporation nor stock held by any publicly held corporation.

TABLE OF CONTENTS

	Page(s)
CORPORATE DISCLOSURE STATEMENT.....	i
TABLE OF AUTHORITIES.....	iii
STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE.....	1
ARGUMENT.....	1
I. The Executive Has Consistently Facilitated Weapons Transfers to Israel Since the Beginning of Its Operations in Gaza.....	2
II. Israeli Forces Have Consistently Used Weapons from the United States to Harm Civilians and Apparently Violate International Humanitarian Law.....	9
III. The Risk of the Israeli Military Using U.S. Weapons in Atrocity Crimes Has Been Clear	18
CONCLUSION.....	21

TABLE OF AUTHORITIES

	Page(s)
Rules of Appellate Procedure	
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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

This brief of *amicus curiae* is respectfully submitted pursuant to Circuit Rule 29-2(a). All parties to this appeal have consented to the filing of this brief.

Center for Civilians in Conflict (CIVIC) is an international organization dedicated to promoting the protection of civilians in conflict. CIVIC's mission is to work with armed actors and civilians in conflict to develop and implement solutions to prevent, mitigate, and respond to civilian harm. *Amicus curiae* submits this brief to show the vast scale and scope of US weapons assistance to Israel's assault on Gaza since October 7, and in support of Plaintiff's petition for rehearing.

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.

ARGUMENT

The Panel's decision affirming the dismissal of Plaintiffs' case on the basis of the political question doctrine resulted in the Panel declining to review whether executive branch officials are aiding and abetting atrocity crimes by transferring weapons to Israel knowing they are being used to violate international law. It cannot be that the Defendants can supply the very means to carry out international

crimes and that the courts have no role to play in reviewing the legality of their conduct and Executive adherence to U.S. statute.

The Executive has provided extensive support to Israel during the war in Gaza in the form of arms transfers and has continued to send weapons to the Israeli government despite evidence that Israeli forces have used weapons from the United States (U.S.) to harm civilians and perpetrate apparent violations of international law. Weapons transfers have persisted even as U.S. policy processes have provided sufficient information for the Executive to know that Israel has used U.S. weapons in apparent violation of international law.

I. The Executive Has Consistently Facilitated Weapons Transfers to Israel Since the Beginning of Its Operations in Gaza.

Since Israel's campaign in Gaza began in October 2023, the Executive has approved transfers of tens of thousands of weapons to the Israeli government, making it the leading supporter of Israel's attacks in Gaza. Israeli authorities confirmed that U.S. shipments from October 2023 - August 26, 2024, exceeded 50,000 tons of armaments and equipment.¹ Exports of defense articles or services from the U.S. may only proceed with the approval of the Executive.

¹ See Emanuel Fabian, *Israel says US shipments of arms and equipment during war exceed 50,000 tons*, Times of Israel (Aug. 26, 2024), <https://www.timesofisrael.com/israel-says-us-shipments-of-arms-and-equipment-during-war-exceeds-50000-tons/>.

From October 7, 2023, to June 28, 2024, the Executive provided the Israeli government with at least 24,100 bombs, including at least 14,000 2,000-pound bombs, 6,500 500-pound bombs, 1,000 bunker-buster bombs, and 2,600 small-diameter bombs.² U.S. companies operating under government-granted export licenses have also sent bombs to Israel. Transfers began within days of October 7, 2023, when a U.S. company accelerated the delivery of 1,000 small-diameter bombs comprising part of a 2021 sale.³ By December 1, the U.S. had provided 100 2000-pound bunker buster bombs, 5,400 2,000-pound general purpose bombs, and over 5,000 500-pound general purpose bombs to Israel.⁴ On April 1, 2024, the Administration authorized the transfer of 1,000 500-pound bombs and 1,000 small-

² See Humeyra Pamuk & Mike Stone, *Exclusive: US has sent Israel thousands of 2,000-pound bombs since Oct. 7*, Reuters (June 29, 2024), <https://www.reuters.com/world/us-has-sent-israel-thousands-2000-pound-bombs-since-oct-7-2024-06-28/>.

³ See Anthony Capaccio, *Boeing Sped 1,000 Smart Bombs to Israel After Hamas Attacks*, Bloomberg (Oct. 10, 2023), <https://www.bloomberg.com/news/articles/2023-10-10/boeing-sped-1-000-smart-bombs-to-israel-after-the-hamas-attacks>.

⁴ See Jared Malsin & Nancy A. Youssef, *U.S. Sends Israel 2,000-Pound Bunker Buster Bombs for Gaza War*, Wall Street Journal (Dec. 1, 2023), <https://www.wsj.com/world/middle-east/u-s-sends-israel-2-000-pound-bunker-buster-bombs-for-gaza-war-82898638>.

diameter bombs.⁵ After initially suspending a transfer of 1,700 500-pound bombs on May 7, 2024,⁶ the Administration proceeded with the transfer on July 10.⁷

The Executive and U.S. companies have sent thousands of guidance kits to Israel since October 2023. Guidance kits are weapons components that can be attached to air-dropped bombs to guide them to their intended target. The guidance kit most frequently transferred to Israel from the U.S. is the Boeing-manufactured Joint Direct Attack Munition (JDAM). The first publicly reported transfer of guidance kits to Israel after the commencement of Israeli operations in Gaza was an October 18 transfer of 1,800 JDAM kits that were part of a 2021 sale.⁸ On October 31, the State Department proceeded with an export license modification

⁵ See Natasha Bertrand, *US recently authorized more bombs for Israel*, CNN (Apr. 4, 2024), <https://www.cnn.com/2024/04/04/politics/us-israel-bombs-transfer/index.html>.

⁶ See John Hudson, *U.S. pauses shipment of thousands of bombs to Israel amid Rafah rift*, Washington Post (May 7, 2024), <https://www.washingtonpost.com/national-security/2024/05/07/biden-delays-weapons-israel-rafah/>.

⁷ See John Hudson, *U.S. to again ship 500-pound bombs to Israel, reversing suspension*, Washington Post (July 10, 2024), <https://www.washingtonpost.com/national-security/2024/07/10/us-israel-500-pound-bomb/>.

⁸ See Anthony Capaccio, *Boeing Accelerates Delivery of Up to 1,800 GPS-Guidance Bomb Kits to Israel*, Bloomberg (Oct. 18, 2023), <https://www.bloomberg.com/news/articles/2023-10-18/boeing-accelerates-delivery-of-up-to-1-800-gps-guidance-bomb-kits-to-israel?embedded-checkout=true>.

authorizing the export of \$320 million in guidance kits.⁹ By December 1, 2023, the quantity of JDAMs delivered to Israel exceeded 3,000.¹⁰ On August 9, 2024, the Administration notified Congress of a Direct Commercial Sale of 6,500 JDAMs to Israel.¹¹

In addition to bombs and guidance kits, the United States has provided air-to-ground guided missiles to the Israeli government. U.S. companies sent \$108 million worth of parts for guided missiles in October 2023.¹² Part of a shipment of 2,000 Hellfire missiles had been delivered by November 14.¹³ By June 28, 2024, the United States had transferred at least 3,000 Hellfire missiles to Israel.¹⁴

⁹ See Letter from Naz Durakoglu, Assistant Secretary of Bureau of Legislative Affairs, to Speaker of the House of Representatives, House Committee on Foreign Affairs, & Senate Committee on Foreign Relations (Oct. 31, 2023), available at <https://static01.nyt.com/newsgraphics/documenttools/5b66fdb955baeecd/5608873d-full.pdf>.

¹⁰ See Malsin & Youssef, *supra* note 4.

¹¹ See Prem Thakker, *EXCLUSIVE: Biden Administration Sending 6,500 Munitions to Israel, Despite Ongoing Killing of Civilians in Gaza*, Zeteo (Aug. 9, 2024), <https://zeteo.com/p/exclusive-biden-administration-sending>.

¹² See John Lindsay-Poland, *US Gun Exports to Israel Surge*, American Friends Service Committee (Dec. 17, 2023), <https://afsc.org/newsroom/us-gun-exports-israel-surge>.

¹³ See Anthony Capaccio, *US Is Quietly Sending Israel More Ammunition, Missiles*, Bloomberg (Nov. 14, 2023), <https://www.bloomberg.com/news/articles/2023-11-14/pentagon-is-quietly-sending-israel-ammunition-laser-guided-missiles?embedded-checkout=true>.

¹⁴ See Humeyra Pamuk & Mike Stone, *Exclusive: US has sent Israel thousands of 2,000-pound bombs since Oct. 7*, Reuters (June 29, 2024), <https://www.reuters.com/world/us-has-sent-israel-thousands-2000-pound-bombs-since-oct-7-2024-06-28/>.

The Executive has sustained Israel's military aircraft and proposed major sales of war planes. Soon after Israeli operations in Gaza commenced, the Administration began surging sustainment support for Israel's fleet of F-35s, including by providing mission data files, accelerating weapons capabilities, and supplying spare parts.¹⁵ In March 2024, the Administration authorized a transfer of 25 F-35A fighter jets and engines to Israel valued at \$2.5 billion.¹⁶ The U.S. continues to export JP8 Jet Fuel for use in Israeli military aircraft.¹⁷ On August 13, the State Department approved an \$18 billion sale of up to 50 F-15IA fighter aircraft, modification kits for 25 F-15I fighter aircraft, and other fighter aircraft equipment.¹⁸

The United States has provided tens of thousands of 155mm artillery shells to Israel during Israel's campaign in Gaza. In October, Oxfam warned that 155mm

¹⁵ See Audrey Decker, *US rushed new F-35 capabilities to Israel after Hamas attack*, Defense One (Dec. 12, 2023), https://www.defenseone.com/technology/2023/12/us-rushed-new-f-35-capabilities-israel-after-hamas-attack/392718/?oref=defenseone_today_nl.

¹⁶ See John Hudson, *U.S. signs off on more bombs, warplanes for Israel*, Washington Post (Mar. 29, 2024), <https://www.washingtonpost.com/national-security/2024/03/29/us-weapons-israel-gaza-war/>.

¹⁷ See *Behind the Barrel: New Insights into the Countries and Companies Behind Israel's Fuel Supply*, Oil Change International (Aug. 19, 2024), <https://priceofoil.org/2024/08/19/behind-the-barrel-new-insights-into-the-countries-and-companies-behind-israels-fuel-supply/>.

¹⁸ See Press Release, Defense Security Cooperation Agency, ISRAEL – F-15IA AND F-15I+ AIRCRAFT (Aug 13, 2024), available at <https://www.dsca.mil/press-media/major-arms-sales/israel-f-15ia-and-f-15i-aircraft>.

artillery shell use “would be virtually assured to be indiscriminate, unlawful, and devastating to civilians in Gaza.”¹⁹ Before October 19, 2023, the Administration directed 57,000 shells to Israel.²⁰ On December 29, 2023, the State Department notified Congress of a proposed sale of 52,229 155mm artillery rounds and related equipment.²¹

The Executive has authorized the sale of tens of thousands of 120mm tank cartridges to Israel. The State Department notified Congress of a Foreign Military Sale of 13,981 120mm tank cartridges on December 8.²² Another notification for a sale of 32,739 more cartridges followed on August 13, 2024.²³

¹⁹ *Artillery Shells Transfer*, Oxfam America (October 2023), https://webassets.oxfamamerica.org/media/documents/Artillery_Shells_Transver_Policy_BriefingNote_1.pdf.

²⁰ See Cappacio, *supra* note 13; Barak Ravid, *Scoop: U.S. to send Israel artillery shells initially destined for Ukraine*, Axios (Oct. 19, 2023), <https://www.axios.com/2023/10/19/us-israel-artillery-shells-ukraine-weapons-gaza>.

²¹ See Press Release, Defense Security Cooperation Agency, ISRAEL – 155MM ARTILLERY AMMUNITION (Dec. 29, 2023), available at <https://www.dsca.mil/press-media/major-arms-sales/israel-155mm-artillery-ammunition>.

²² See Press Release, Defense Security Cooperation Agency, ISRAEL – M830A1 120MM TANK CARTRIDGES (Dec. 9, 2023), available at <https://www.dsca.mil/press-media/major-arms-sales/israel-m830a1-120mm-tank-cartridges>.

²³ Press Release, Defense Security Cooperation Agency, ISRAEL – 120MM TANK CARTRIDGES (Aug. 13, 2024), available at <https://www.dsca.mil/press-media/major-arms-sales/israel-120mm-tank-cartridges>.

The U.S. has also exported millions of rounds of ammunition to Israel. By October 19, 2023, the U.S. had transferred “tens of thousands” of 30mm rounds for autocannons and “nearly a million” rounds of 7.62mm ammunition for rifles.²⁴ U.S. export data revealed that U.S. companies sent 2 million bullets in October in addition to 2,679 military rifles and 5,515 handguns.²⁵ A November 14 article reported that the U.S. has transferred 36,000 rounds of 30mm cannon ammunition for Apache gunships.²⁶

Other weapons transfers have included more than 100 short-range reconnaissance drones delivered in October;²⁷ 1,800 M141 hand-held bunker-buster munitions delivered before November 14;²⁸ 50,000 mortar shells notified to Congress on August 13;²⁹ and \$500 million in tactical vehicles notified to Congress on August 13.³⁰

²⁴ See Nancy Youssef, *Israel Receives Ammunition from U.S.*, Wall Street Journal (Oct. 19, 2023), <https://www.wsj.com/livecoverage/israel-hamas-war-biden/card/israel-receives-ammunition-from-u-s--Lfhy3X0Qf2JFnFjiLofQ>.

²⁵ See Lindsay-Poland, *supra* note 12.

²⁶ Capaccio, *supra* note 13.

²⁷ See Mohar Chatterjee, *Israel's appetite for high-tech weapons highlights a Biden policy gap*, Politico (Nov. 25, 2024), <https://www.politico.eu/article/israel-drones-high-tech-weapons-united-states-ai/>.

²⁸ See Capaccio, *supra* note 13.

²⁹ See Press Release, Defense Security Cooperation Agency, ISRAEL – M933A1 120MM HIGH EXPLOSIVE MORTAR CARTRIDGES (Aug 13, 2024), available at <https://www.dsca.mil/press-media/major-arms-sales/israel-m933a1-120mm-high-explosive-mortar-cartridges>.

³⁰ See Press Release, Defense Security Cooperation Agency, ISRAEL – M1148A1P2 FAMILY OF MEDIUM TACTICAL VEHICLES (Aug. 13, 2024),

U.S. legal and policy frameworks regarding the public disclosure of arms transfers allow for many transfers to proceed without public knowledge.³¹ At least 100 U.S. arms transfers to Israel occurred in the first five months of the war without triggering requirements for public disclosure or congressional notification.³²

II. Israeli Forces Have Consistently Used Weapons from the United States to Harm Civilians and Apparently Violate International Humanitarian Law.

During Israeli operations in Gaza, investigators have regularly published findings that Israeli forces have used U.S.-origin weapons in attacks that have killed civilians, violated international law, and possibly amounted to war crimes. Israeli authorities have blocked access to Gaza, preventing many investigators from examining specific attacks and ascertaining whether U.S. weapons were involved. Due to access constraints and Israeli forces' significant reliance on U.S. arms, the following attacks using U.S. weapons likely constitute a fraction of

<https://www.dsca.mil/press-media/major-arms-sales/israel-m1148a1p2-family-medium-tactical-vehicles>.

³¹ See Elias Yousif, *Diminishing Transparency in the US Arms Trade*, Stimson Center (July 9, 2024), <https://www.stimson.org/2024/diminishing-transparency-in-the-us-arms-trade/>.

³² See John Hudson, *U.S. floods arms into Israel despite mounting alarm over war's conduct*, Washington Post (Mar. 6, 2024), <https://www.washingtonpost.com/national-security/2024/03/06/us-weapons-israel-gaza/>.

Israeli attacks using U.S. weapons to harm civilians or apparently violate international law.

On October 9, 2024, an attack in Jabalia refugee camp killed 42 people, including 14 children.³³ The Office of the High Commissioner for Human Rights (OHCHR) concluded that the strike likely used one or two GBU-31 munitions, each of which comprises a U.S.-made 2000-pound bomb and JDAM.³⁴ The Administration included the attack in its report to Congress provided under National Security Memorandum 20 (NSM-20).³⁵

On October 10, Israeli forces attacked the al-Najjar family home in Deir al-Balah with a U.S.-origin JDAM, killing 24 civilians.³⁶ Amnesty International

³³ See *Thematic Report: Indiscriminate and disproportionate attacks during the conflict in Gaza (October – December 2023)*, Office of the High Commissioner for Human Rights (June 19, 2024), at 6, <https://www.ohchr.org/sites/default/files/documents/countries/opt/20240619-ohchr-thematic-report-indiscrim-disprop-attacks-gaza-oct-dec2023.pdf#page=7>.

³⁴ See *id.*

³⁵ See Report to Congress under Section 2 of the National Security Memorandum on Safeguards and Accountability with Respect to Transferred Defense Articles and Defense Services (NSM-20) 25 (hereinafter “NSM-20 Report”) (May 10, 2024), available at <https://www.justsecurity.org/wp-content/uploads/2024/05/Report-to-Congress-under-Section-2-of-the-National-Security-Memorandum-on-Safeguards-and-Accountability-with-Respect-to-Transferred-Defense.pdf>.

³⁶ See *Israel/OPT: US-made munitions killed 43 civilians in two documented Israeli air strikes in Gaza – new investigation*, Amnesty International (Dec. 5, 2023), <https://www.amnesty.org/en/latest/news/2023/12/israel-opt-us-made-munitions-killed-43-civilians-in-two-documented-israeli-air-strikes-in-gaza-new-investigation/>.

concluded that the attack was a direct attack on civilians or an indiscriminate attack, either of which violates international humanitarian law.³⁷

On October 17, an attack on the al-Lamdani family home in Khan Yunis killed between “15 and 40 civilians,” according to civilian harm watchdog Airwars.³⁸ Remnants of a U.S.-made 2000-pound bomb were identified at the scene.³⁹

On October 22, an attack on three homes belonging to the Abu Mu’eileq family in Deir al-Balah killed 19 civilians.⁴⁰ Researchers identified fragments of JDAMs at the scene of the attack.⁴¹ Amnesty International concluded that the attack violated international humanitarian law, either as a direct attack on civilians or civilian objects or an indiscriminate attack.⁴² The Administration included the attack in its May report to Congress provided in accordance with NSM-20.⁴³

³⁷ *See id.*

³⁸ *ISPT0283*, Airwars (last visited Sep. 7, 2024), <https://airwars.org/civilian-casualties/ispt0283-october-17-2023/>.

³⁹ *OSMP505*, Open Source Munitions Portal (last visited Sep. 7, 2024), <https://osmp.ngo/osmp505/>.

⁴⁰ *See Israel/OPT: US-made munitions killed 43 civilians in two documented Israeli air strikes in Gaza – new investigation*, *supra* note 36.

⁴¹ *See id.*

⁴² *See id.*

⁴³ *See NSM-20 Report supra* note 35 at 25.

On October 31, an Israeli military attack reportedly killed at least 195 Palestinians in Jabalia refugee camp.⁴⁴ Based on visual evidence, weapons identification experts concluded that the Israeli forces used U.S.-made JDAMs in the attack.⁴⁵ The Administration included the attack in its report to Congress provided under NSM-20.⁴⁶

On January 9, 2024, the Israeli military killed 18 civilians in an airstrike on the Nofal family home in Tel al-Sultan. Amnesty International identified fragments of a GBU-39 small-diameter bomb in the rubble and concluded that the attack likely violated international humanitarian law as a direct attack on civilians.⁴⁷

On January 18, the Israeli military attacked a residential housing compound in al-Mawasi used by humanitarian aid groups.⁴⁸ The attack “injured several” aid workers and caused significant damage to the building.⁴⁹ A United Nations

⁴⁴ Emma Graham-Harrison et al., *Cratered ground and destroyed lives: piecing together the Jabalia camp airstrike*, The Guardian (Nov. 1, 2023), <https://www.theguardian.com/world/2023/nov/01/jabalia-camp-airstrike-gaza>.

⁴⁵ *See id.*

⁴⁶ NSM-20 Report *supra* note 35 at 25.

⁴⁷ *See Israel/OPT: New evidence of unlawful Israeli attacks in Gaza causing mass civilian casualties amid real risk of genocide*, Amnesty International (Feb. 12, 2024), <https://www.amnesty.org/en/latest/news/2024/02/israel-opt-new-evidence-of-unlawful-israeli-attacks-in-gaza-causing-mass-civilian-casualties-amid-real-risk-of-genocide/>.

⁴⁸ *See Gaza: IRC and MAP additional statement on airstrike on residential compound housing Emergency Medical Team*, International Rescue Committee (Mar. 13, 2024), <https://www.rescue.org/press-release/gaza-irc-and-map-additional-statement-airstrike-residential-compound-housing>.

⁴⁹ *Id.*

investigation found that the attack “most likely involved a GBU32 (MK83) missile package,” which comprises a U.S.-origin JDAM and 1000-pound bomb.⁵⁰

International Rescue Committee reported that an F-16 jet, manufactured in the United States or United Kingdom, dropped the bomb.⁵¹ The Administration included the attack in its May report to Congress provided in accordance with NSM-20.⁵²

On January 29, an attack in Gaza City killed six-year-old Hind Rajab and two paramedics. Investigators identified a U.S.-made high explosive tank round at the site of the attack, and munitions experts described the attack on the paramedics’ ambulance as consistent with the use of a round fired from Israeli tanks.⁵³

On April 19, Israeli forces bombed the Abu Radwan family home in Tel al-Sultan, killing nine Palestinian civilians.⁵⁴ Amnesty International identified

⁵⁰ *See id.*

⁵¹ *Id.*

⁵² *See* NSM-20 Report *supra* note 35 at 24.

⁵³ *See* Meg Kelly et al., *Palestinian paramedics said Israel gave them safe passage to save a 6-year-old girl in Gaza. They were all killed*, Washington Post (Apr. 16, 2024), <https://www.washingtonpost.com/world/interactive/2024/hind-rajab-israel-gaza-killing-timeline/>.

⁵⁴ *See Israel/OPT: Israeli air strikes that killed 44 civilians further evidence of war crimes – new investigation*, Amnesty International (May 27, 2024), <https://www.amnesty.org/en/latest/news/2024/05/israel-opt-israeli-air-strikes-that-killed-44-civilians-further-evidence-of-war-crimes-new-investigation/>.

fragments from a guidance kit manufactured by a U.S. company.⁵⁵ Investigators did not find evidence of a military target at the site, “raising serious concerns” that the attack constituted a direct attack on civilians, which is a war crime.⁵⁶

On May 13, Israeli forces bombed the Karaja family home and a school-turned-shelter in Nuseirat. Estimates of deaths ranged from 15 to 30 Palestinians.⁵⁷ The New York Times reported that a tail fin from a GBU-39 small-diameter bomb was identified at the scene.⁵⁸

On May 26, the Israeli military attacked a camp for internally displaced people in Tel al-Sultan with two US-made GBU-39 small-diameter bombs, killing at least 36 Palestinians and injuring more than 100 others. Amnesty International concluded that the bombing “likely constituted a disproportionate and indiscriminate attack,” which violates international humanitarian law.⁵⁹

⁵⁵ *See id.*

⁵⁶ *See id.*

⁵⁷ *See U.N. Lowers Count of Women and Children Killed, Citing Incomplete Information*, New York Times (May 14, 2024), <https://www.nytimes.com/live/2024/05/14/world/israel-gaza-war-hamas-rafah?smid=url-share#israel-and-hamas-do-battle-in-gazas-north-and-south>.

⁵⁸ Lara Jakes, *A Small American Bomb Killing Palestinians by the Dozen in Gaza*, New York Times (June 8, 2024), <https://www.nytimes.com/2024/06/08/world/middleeast/us-israel-bomb-gbu39-gaza.html>.

⁵⁹ *Israel/OPT: Israeli attacks targeting Hamas and other armed group fighters that killed scores of displaced civilians in Rafah should be investigated as war crimes*, Amnesty International (Aug. 27, 2024), <https://www.amnesty.org/en/latest/news/2024/08/israel-opt-israeli-attacks->

On June 6, an Israeli airstrike on a school turned shelter in Nuseirat reportedly killed at least 40 people.⁶⁰ CNN investigators identified fragments of at least two GBU-39 small-diameter bombs, which are manufactured in the U.S., at the site of the attack.⁶¹

On June 8, Israeli forces carried out an operation to rescue four hostages in Nuseirat in which Israeli forces reportedly killed 274 Palestinians and injured 698. CNN investigators identified two U.S.-made Hellfire missiles in video of the operation.⁶² OHCHR warned, “The manner in which the raid was conducted in such a densely populated area seriously calls into question whether the principles of distinction, proportionality and precaution...were respected by the Israeli forces.”⁶³

targeting-hamas-and-other-armed-group-fighters-that-killed-scores-of-displaced-civilians-in-rafah-should-be-investigated-as-war-crimes/.

⁶⁰ See Allegra Goodwin et al., *Israel strike on UN school that left dozens dead used US munitions, CNN analysis finds*, CNN (June 7, 2024)

<https://www.cnn.com/2024/06/06/middleeast/israel-airstrike-un-school-gaza-intl-hnk/index.html>.

⁶¹ See *id.*

⁶² See Benjamin Brown et al., *Inside Israel’s deadly operation to rescue four hostages*, CNN (June 11, 2024),

<https://www.cnn.com/2024/06/10/middleeast/inside-israels-hostage-rescue-intl-dst/index.html>.

⁶³ *Shock at impact on civilians of Israeli raid in Gaza to free hostages*, Office of the High Commissioner for Human Rights (June 11, 2024),

<https://www.ohchr.org/en/press-briefing-notes/2024/06/shock-impact-civilians-israeli-raid-gaza-free-hostages>.

On July 9, the Israeli military attacked a school-turned-shelter in Khan Yunis, reportedly killing at least 27 Palestinians.⁶⁴ Weapons experts identified a fragment of a GBU-39 small-diameter bomb in video from the site of the attack.⁶⁵

On July 13, an Israeli strike on an internally displaced people camp reportedly killed more than 90 Palestinians in al-Mawasi.⁶⁶ CNN investigators identified a JDAM tail fin in video from the site of the attack.⁶⁷

On July 14, the Israeli military attacked a school-turned-shelter in Nuseirat, reportedly killing at least 22 Palestinians.⁶⁸ Weapons experts identified fragments of a GBU-39 small-diameter bomb and Hellfire missile, both made in the U.S..⁶⁹

On August 10, an Israeli strike on a mosque and school in Gaza City killed at least 93 Palestinians, according to local authorities.⁷⁰ Weapons experts identified

⁶⁴ *See Israel Urges Gaza City Residents to Evacuate, Calling It a 'Combat Zone,'* New York Times (July 10, 2024), <https://www.nytimes.com/live/2024/07/10/world/israel-gaza-war-hamas>.

⁶⁵ *See id.*

⁶⁶ *See Abeer Salman et al., At least 90 Palestinians reported killed in Israeli strike targeting Hamas military chief,* CNN (July 14, 2024), <https://www.cnn.com/2024/07/13/middleeast/mawasi-deif-israel-hamas-gaza-intl>.

⁶⁷ *See id.*

⁶⁸ *See Abeer Salman et al., US-made munitions used in Israeli strike on Gaza school that killed 22, experts say,* CNN (July 15, 2024), <https://www.cnn.com/2024/07/15/middleeast/us-munitions-israeli-strike-gaza-school-intl-latam/index.html>.

⁶⁹ *See id.*

⁷⁰ *See Irene Nasser et al., Israeli strike on mosque and school in Gaza kills scores, sparking international outrage,* CNN (Aug. 11, 2024), <https://www.cnn.com/2024/08/10/middleeast/israeli-school-strike-gaza-intl-hnk/index.html>.

fragments of a U.S.-manufactured GBU-39 small-diameter bomb in video from the site of the attack.⁷¹

U.S. weapons also contribute to broader patterns of harm. In general, when explosive weapons are used in populated areas, about 90% of victims are civilians.⁷² Explosive weapon attacks on hospitals and other healthcare facilities have decimated Gaza's medical system,⁷³ contributing to outbreaks of preventable disease, including polio.⁷⁴ Israeli attacks have destroyed Gaza's water and sanitation systems, exacerbating the health crisis.⁷⁵ Oxfam concludes that the Israeli government has "systematically weaponized water against the Palestinians in its latest assault on Gaza."⁷⁶ Israeli military operations and restrictions on the

⁷¹ *See id.*

⁷² *Explosive weapons in populated areas*, Office for the Coordination of Humanitarian Affairs (last visited Sep. 4, 2024), <https://www.unocha.org/explosive-weapons-populated-areas>.

⁷³ *Gaza's silent killings: The destruction of the healthcare system in Rafah*, Mediciens Sans Frontieres (Apr. 29, 2024), <https://www.msf.org/gazas-silent-killings-destruction-healthcare-system-rafah>.

⁷⁴ Tedros Adhanom Ghebreyesus, *Children in Gaza are now at risk of polio as well as bombs – we need a ceasefire now*, World Health Organization (Aug. 1, 2024), <https://www.who.int/news-room/commentaries/detail/children-in-gaza-are-now-at-risk-of-polio-as-well-as-bombs---we-need-a-ceasefire-now>.

⁷⁵ *Water War Crimes: How Israel has weaponised water in its military campaign in Gaza*, Oxfam (July 18, 2024), <https://policy-practice.oxfam.org/resources/water-war-crimes-how-israel-has-weaponised-water-in-its-military-campaign-in-ga-621609/>.

⁷⁶ *See id.*

delivery of humanitarian aid have contributed to widespread starvation,⁷⁷ and Human Rights Watch has found that the Israeli government is using starvation as a weapon of war in Gaza.⁷⁸

III. The Risk of the Israeli Military Using U.S. Weapons in Atrocity Crimes Has Been Clear.

The Administration has continued the transfer of weapons despite a clear risk that weapons from the United States will be used to violate international law, including in atrocity crimes. President Biden has characterized the Israeli military's bombing as "indiscriminate"⁷⁹ and acknowledged that "Civilians have been killed in Gaza as a consequence of those bombs and other ways in which they go after population centers."⁸⁰

⁷⁷ See *Gaza Strip: Acute Food Insecurity Situation for 1 May - 15 June and Projection for 16 June - 30 September 2024*, Integrated Food Security Phase Classification (last visited Sep, 4, 2024), <https://www.ipcinfo.org/ipc-country-analysis/details-map/en/c/1157065/?iso3=PSE>.

⁷⁸ See *Israel: Starvation Used as Weapon of War in Gaza*, Human Rights Watch (Dec. 18, 2024), <https://www.hrw.org/news/2023/12/18/israel-starvation-used-weapon-war-gaza>.

⁷⁹ Kevin Liptak & Jeremy Diamond, *Rifts between Biden and Netanyahu spill into public view*, CNN (Dec. 12, 2024), <https://www.cnn.com/2023/12/12/politics/biden-israel-losing-support-netanyahu/index.html>.

⁸⁰ Kevin Liptak, *Biden says he will stop sending bombs and artillery shells to Israel if it launches major invasion of Rafah*, CNN (May 9, 2024), <https://www.cnn.com/2024/05/08/politics/joe-biden-interview-cnntv/index.html>.

Executive policy processes require the assessment of international law risks associated with arms transfers and security assistance. Due to these processes, the Administration has tracked reports of civilian harm and international humanitarian law violations by Israeli forces. Under National Security Memorandum 18, the Executive must consider on a case-by-case basis international law risks arising from arms transfers.⁸¹ The policy establishes that the U.S. will not export a weapon when it is “more likely than not” that it will be used to commit, facilitate, or aggravate the risk of genocide, crimes against humanity, or a serious violation of international human rights or humanitarian law.⁸²

NSM-20 requires recipients of U.S. weapons purchased with U.S. appropriated funds to provide “credible and reliable written assurances” regarding compliance with international law, implementation of civilian harm mitigation best practices, and the facilitation of the delivery of humanitarian aid.⁸³ NSM-20 also creates a framework for the regular review of the credibility and reliability of such

⁸¹ See Memorandum on United States Conventional Arms Transfer Policy (Feb. 23, 2023) (hereinafter “NSM-18”), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/23/memorandum-on-united-states-conventional-arms-transfer-policy/>.

⁸² *Id.*

⁸³ National Security Memorandum on Safeguards and Accountability With Respect to Transferred Defense Articles and Defense Services (Feb. 8, 2024) (hereinafter “NSM-20”), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2024/02/08/national-security-memorandum-on-safeguards-and-accountability-with-respect-to-transferred-defense-articles-and-defense-services/>.

assurances.⁸⁴ Non-governmental organizations have regularly communicated findings regarding civilian harm and international law compliance to the Executive, including in submissions through the NSM-20 process.⁸⁵

In its report provided to Congress under NSM-20, the Administration acknowledged that “given Israel’s significant reliance on U.S.-made defense articles, it is reasonable to assess that defense articles covered under NSM-20 have been used by Israeli security forces since October 7 in instances inconsistent with its IHL obligations or with established best practices for mitigating civilian harm.”⁸⁶ The Civilian Harm Incident Response Guidance (CHIRG) provides a process for the State Department to track reports of civilian harm caused by U.S.-origin weapons.⁸⁷ The Administration has reviewed reports of civilian harm in Gaza under the CHIRG.⁸⁸ The Leahy Law requires the consideration of whether

⁸⁴ *See id.*

⁸⁵ *See, e.g., Memorandum from Oxfam and Human Rights Watch in Response to NSM-20*, Oxfam America (Mar. 19, 2024), <https://www.oxfamamerica.org/explore/research-publications/memorandum-from-oxfam-and-human-rights-watch-in-response-to-nsm-20/>; *AMNESTY INTERNATIONAL USA SUBMISSION TO NSM-20*, Amnesty International USA (Apr. 29, 2024), <https://www.amnestyusa.org/wp-content/uploads/2024/04/4.29.2024-NSM-20-AIUSA-submission-re-Israel.pdf>.

⁸⁶ NSM-20 Report *supra* note 35 at 22.

⁸⁷ *See* Missy Ryan, *Biden administration will track civilian deaths from U.S.-supplied arms*, Washington Post (Sep. 13, 2024), <https://www.washingtonpost.com/national-security/2023/09/13/state-department-chirg-civilian-deaths/>.

⁸⁸ *See* Humeyra Pamuk & Simon Lewis, *US reviewing reports of civilian harm by Israel, State Dept says*, Reuters (Feb. 13, 2024),

units of foreign security forces have committed a gross violation of human rights.⁸⁹ The State Department has assessed information regarding such violations by Israeli security forces.⁹⁰

CONCLUSION

Since October 2023, the U.S. has consistently transferred large quantities of weapons to the Israeli government. It has done so even as Israeli forces have used such weapons to kill civilians and apparently violate international law. Despite the well-documented use of U.S. weapons in apparent violations of international law, including likely atrocity crimes, weapons transfers have continued. In light of U.S. policy processes, the Executive knows that U.S. weapons are contributing to apparent violations of international law. This supports Plaintiffs' claim that U.S. officials are knowingly providing assistance to the Israeli government's apparent violations of international law.

Dated: September 9, 2024

By: /s John Washington
John Washington

[REDACTED]

[REDACTED]

Attorney for Amicus Curiae

<https://www.reuters.com/world/middle-east/us-reviewing-reports-civilian-harm-by-israel-state-dept-says-2024-02-13/>.

⁸⁹ See Charles O. Blaha, *Israel and the Leahy Law*, Just Security (June 10, 2024), <https://www.justsecurity.org/96522/israel-leahy-law/>.

⁹⁰ See Simon Lewis & Patricia Zengerle, *US implicates 5 Israeli units in rights violations before Gaza war, no restrictions on assistance*, Reuters (Apr. 29, 2024), <https://www.reuters.com/world/middle-east/us-found-five-israeli-military-units-committed-gross-human-rights-violations-2024-04-29/>.

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Brief of Amicus Curiae Center for Civilians in Conflict in Support of Appellants' Petition for Rehearing En Banc

Signature

Date

(use "s/[typed name]" to sign electronically-filed documents)

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