UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
SPRINGFIELD DIVISION

SEXUAL MINORITIES UGANDA

Plaintiff,

v.

SCOTT LIVELY, individually and as President of Abiding Truth Ministries

Defendant.

Civil Action

3:12-CV-30051

Leave to File Excess Pages Granted July 6, 2012

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

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INTRODUCTION

[T]he Court is bound by the law of nations which is a part of the law of the land.

-Chief Justice John Marshall
The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815)

In bringing this case, Sexual Minorities Uganda asks this Court to apply international law via the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), in a manner that is respectful of and fully consistent with United States constitutional principles. Not only is every claim asserted by Plaintiff consistent with First Amendment doctrine, Plaintiff's case seeks to vindicate the very rights of expression, association and equality that the U.S. Constitution and international law are designed to protect. After all, Defendant's speech is relevant only to show his discriminatory animus and intent, and participation in a conspiracy, and does not form the basis for any of the substantive claims in the case. Rather, it is Defendant, through his coordinated campaign to silence, criminalize and eradicate the lesbian, gay, bisexual, transgender and intersex ("LGBTI") community in Uganda, who violates fundamental constitutional and human rights norms, by denying to this group one of the most sublime benefits of free and equal speech – the right to change people's minds.

An individual who prefers censorship and repression over expression, who seeks to codify the inequality of an entire class of human beings and who actively deploys strategies to achieve these repressive ends cannot plausibly clothe himself with the legal or moral authority of the First Amendment. Indeed, the congressional framers of the Fourteenth Amendment recognized as much by passing the Ku Klux Klan Act of 1871, which proscribes domestic

conspiracies to intentionally deprive classes of persons the rights of speech, association and other constitutional protections. *See* 42 U.S.C.A. §1985(3).

Similarly, Defendant's protestations of modesty – that he is an ordinary citizen merely expressing his personal opinion – are both disingenuous and ironic. Far from merely contributing fairly and honestly to the marketplace of ideas, Defendant has actively sought to implement a concrete and coordinated strategy via real legislation, policy and practice to deprive LGBTI persons of their elementary human right to equal coexistence. His protestations are also ironic in light of his leadership role in implementing this long-term, multi-faceted strategy to *criminalize* the expression of viewpoints because they are contrary to his own, and to strive for a regime of *de jure* or *de facto* forms of discrimination and oppression of a disfavored group.

International human rights law has, since at least the Trials at Nuremberg, prohibited such attempts to persecute a class of persons by engaging in a campaign to systematically deprive persons of their fundamental human rights. The Alien Tort Statute authorizes this Court to hold Defendant accountable for his gross and intentional violations of international law – which has been a part of U.S. law for over 200 years.

Defendant's motion to dismiss, which is long and in many places confused, should be denied. First, the ATS, which authorizes U.S. courts to hear claims brought by aliens for violations of the "law of nations" that have reached the status of customary international law, recognizes the claim Plaintiff asserts here. Prohibition of crimes against humanity has represented a *jus cogens* norm, at least since the Nuremberg Trials. Likewise, the specific crime against humanity of persecution – *i.e*., the widespread and systematic denial to a class of persons of fundamental human rights, including the rights of nondiscrimination, expression, association, assembly and freedom from arbitrary arrest and cruel, inhuman and degrading treatment – are

likewise sufficiently specific and universal to be cognizable by the ATS. That LGBTI persons are, like any other class of persons, entitled to protections from such group-based persecution is plain, and evidenced by consensus of international opinion reflected in international treaties, jurist and scholarly opinions, opinions of international tribunals, and broad-based state practice.

Second, Plaintiff has stated a valid cause of action under various theories of Defendant's accessory liability for persecution – *i.e*., conspiracy, joint criminal enterprise, and aiding and abetting. The ATS recognizes these modes of liability – i.e. causes of action – grounded as they are in federal common law (as well as in international law), as a mechanism to enforce an independent, substantive legal norm that constitutes a violation of the "law of nations" – in this case, the crime of humanity of persecution. These forms of accessory liability have long been recognized in ATS cases and have key elements in common: they proscribe entering into a common agreement, plan or conspiracy to carry out an unlawful goal, and punish members of that conspiracy for any foreseeable harms that might arise from that conspiracy. Plaintiff has exhaustively pled facts that plausibly support a claim (under federal common law, international law and Massachusetts common law) that Defendant entered an agreement and conspiracy with other persons in Uganda, with knowledge of and for the express purpose of, achieving the unlawful end of depriving LGBTI persons of their fundamental rights. As a result, the law commands that Defendant is liable for the persecutory acts that were taken in furtherance of the conspiracy's goals, even if he did not know of or participate in all of the details of the conspiracy's implementation.

Third, contrary to Defendant's central defense, none of Plaintiff's claims are predicated on any speech or writing of the Defendant, odious and ignorant as they may be. His speech is merely circumstantial evidence of the discriminatory intent and motive behind his campaign to

deprive LGBTI persons of fundamental rights and thus admissible to help prove the elements of the conspiracy to persecute. Similarly, as numerous cases recognize, Defendant has no First Amendment right to petition the government of a foreign country, nor may he seek protection from the petition clause when demanding such a government undertake illegal action.

Fourth, Plaintiff has standing to pursue their claims both in their own capacity as an organizational entity and in their representative capacity on behalf of members of SMUG. The organizational harms – to SMUG's mission and to resources that were diverted in response to persecutory acts – are, under existing doctrine, fairly traceable to Defendant, even if other individuals contributed to those harms. SMUG's damages claims are also obviously redressable, as are their equitable claims, for a declaration that Defendant's conduct is illegal and an injunction against continuing persecution would alleviate some of (even if not all of) Plaintiff's injury. Plaintiff also has associational standing, as numerous of its members or member organizations have suffered harm attributable to the Defendant's conspiracy to persecute.

Fifth, the state law claims for civil conspiracy and negligence are not time barred. Under Massachusetts law, the three-year statute of limitations for civil conspiracy (and negligence) begins to run at the time a plaintiff reasonably discovers the cause of her injury (and not at the time of the first wrongful act). Plaintiff recognized Defendant's role in the conspiracy some time after the March 2009 Anti-Gay Conference in Kampala, which means that not only are the most recent human rights deprivations (i.e. the raids in 2012) actionable, but also the harms occurring prior to the March 2009 Conference that Plaintiff learned of within the past three years. Any factual ambiguity about when Plaintiff reasonably discovered the cause of its injuries cannot be resolved at the motion to dismiss stage. In addition, choice-of-law principles do not dictate that this Court cannot apply Massachusetts tort law in this case.

Finally, this court should decline Defendant's invitation to be the first court to rule that the Alien Tort Statute, and it's recognition of causes of action for violations of the "law of nations" cannot apply to torts that occur outside the territorial United States. Defendant's proposition has no basis in the law or logic of the ATS.

Once this Court sets aside Defendant's heated and misplaced rhetoric about the First Amendment and conscientiously examines the framework for assessing international law violations under the ATS and its centuries-old legacy, the question in the case can be boiled down to one very basic question: is it permissible to deny a group of people the equal protection of the law, and the other basic human rights protections, solely on the basis of their identity? The answer to this question is legally and morally clear. This court should grant Plaintiff the relief it seeks, including a declaration regarding Defendant's unlawful conduct and an injunction preventing him from continuing the campaign of persecution against LGBTI persons in Uganda. Beyond awarding the direct relief Plaintiff seeks, such a judgment will send a strong message that in this Century, as in the prior, persecution of vulnerable and disfavored groups – and the ominous possibility that it could progress to produce even more severe and regrettable consequences – has no place.

STATEMENT OF FACTS

Scott Lively's Intentional Plan to Deprive LGBTI People of Fundamental Rights

Defendant Scott Lively billed himself as an expert on the "gay movement" which he variously described as "evil," pedophilic, fascist, genocidal and as a "highly organized army." FAC ¶¶ 8, 24, 72-74, 80-83, n. 22. Referring to himself as an "international human rights consultant," with service in over thirty countries, Lively frequently assisted government leaders, politicians and civil society leaders in repressing what he calls "the most dangerous social and political movement of our time." FAC ¶¶ 23, 58-60. Lively has boasted of his instrumental work with government and political leaders in Eastern Europe in defeating legislation intended to protect sexual minorities against discrimination, *i.e.*, so that discrimination against lesbian, gay, bisexual, transgender and Intersex ("LGBTI") people can continue unabated and progress even further. FAC ¶¶ 60-64, n. 18, 22. With a Latvian colleague, he founded Watchmen on the Walls, based in Riga, from which they coordinated their global coalition to repress the "homosexual movement." FAC ¶ 58. In doing so, he prominently advanced his theories that the Nazi movement, and its concomitant horrors, was essentially the product of gay fascism, FAC ¶¶ 24, 82-84, and did not hesitate to suggest a gay underpinning of other mass crimes, such as the genocide in Rwanda. FAC ¶¶ 24, 82. These theories are not merely the ravings of an idiosyncratic editorialist – they are deployed specifically as part of a broader campaign to repress LGBTI persons – a central premise in his push for concrete mechanisms to deprive LGBTI persons of their right to equality and equal expression. *See* FAC ¶¶ 46, 64, 67

A key component of Lively's strategic vision to silence LGBTI communities where he has operated is to push for and help bring about the criminalization of advocacy for the rights of LGBTI people. He widely advised that the "easiest way to discourage 'gay pride' parades and

other homosexual advocacy is to make such activity illegal." FAC ¶ 67. He has emphasized that homosexuality should continue to be criminalized so that advocacy on LGBTI rights can be criminalized as well. FAC ¶ 70. Lively's most effective tactic which he actively encourages, and employs, is to sound alarms about a purported danger LGBTI people pose to children of "recruitment" and sexual violence, even advising in his publications and trainings that "[a]n effective strategy is to emphasize the issue of homosexual recruitment of children." FAC ¶¶ 72-74.

Joining Forces in Uganda: Conspiracy and Common Enterprise

Motivated by this avowedly discriminatory agenda, in 2002, Lively joined forces with two people who would become the key players at the forefront of all anti-gay developments in Uganda over the next 10 years – Stephen Langa and Martin Ssempa. FAC ¶¶ 47-56. Lively travelled to Uganda twice in 2002 and cemented his presence and relationships with these two men. *Id.* He first advised municipal leaders in Kampala to use their "power of censorship" with regard to issues of sexual orientation and gender identity during these trips. FAC ¶ 52. He acknowledged more recently that he was very instrumental in helping Langa and Ssempa start their anti-gay "movement" at that time. FAC ¶ 56. From 2002 on, Lively maintained contact with Langa, in particular, and they continue to coordinate plan for further eroding rights of LGBTI people. FAC ¶ 94.

In Uganda, Langa and Ssempa carried forward the plan to deepen the discrimination against sexual minorities. In 2003, Ssempa was instrumental in efforts to exclude LGBTI persons from Uganda's HIV/AIDS prevention programs and policies. FAC ¶ 121. As Ugandan First Lady Janet Museveni's special representative to the Task Force on AIDS, he asserted that "[h]omosexuals should absolutely *not* be included in Uganda's HIV/AIDS framework. It is a

crime, and when you are trying to stamp out a crime you don't include it in your programmes." FAC ¶ 125. Langa went on to build more of a following and support for his anti-gay agenda by amplifying Lively's message that children are in danger from the evils of homosexuality. FAC ¶ 97.

Langa and Ssempa also teamed up with James Buturo, who served as President Museveni's Minister for Information and Broadcasting from 2001-2006, and then as Minister of Ethics and Integrity until 2011. FAC ¶ 141. Together, with Buturo in a key ministerial position and Langa and Ssempa with ready-made constituencies, the three continued work to sustain and deepen the discrimination against and dehumanization of LGBTI people in Uganda. Buturo uses his ministerial positions to silence discussion and censor media relating to LGBTI issues, FAC ¶ 146, assists Ssempa's effort to exclude LGBTI people from HIV/AIDS policy, FAC ¶ 147, suggests LGBTI people should "go to another country," FAC ¶ 150, and announces that the government was considering "having catalogues of people" believed to be "perpetuating the vice of homosexuality." FAC ¶ 152. Langa boasted about his successful efforts with Buturo to defeat legislation intended to provide protections for sexual minorities from discrimination. FAC ¶ 98. Ssempa began "outing" campaigns where he publicly identified LGBTI rights advocates with their contact information calling them "homosexual promoters," FAC ¶¶ 125-127, a practice which was later picked up by different media outlets in Uganda, including one run by Ssempa's protégées. FAC ¶ 134-138. Following Ssempa's outings, Buturo and other officials demanded the arrest of the activists. FAC ¶ 127.

Escalating the Plan to Deprive LGBTI People of Fundamental Rights

The anti-gay agenda driven by Langa, Ssempa and Buturo, with assistance from Lively, proceeded apace, virtually unchecked, until December of 2008, when the High Court of Uganda

ruled in *Mukasa v. Attorney General*, that a prominent gay activist and his associate were entitled to basic fundamental rights – on the same terms as anyone else – to be free from unwarranted invasions of privacy, and torture, cruel, inhuman and degrading treatment. FAC ¶¶ 30, 34, 99. The case sent the leaders of the anti-gay movement into over-drive. Langa called on his associate Lively to return to Uganda to help their efforts to counter this recognition of the right to equal protection of the law and to be free from torture, cruel, inhuman and degrading treatment. FAC ¶¶ 99-101. Within three months of the High Court's ruling, Langa had brought together government officials, politicians, police and others, for the Seminar on Exposing the Homosexual Agenda, which Lively headlined, in March 2009. FAC ¶¶ 100-104. Langa repeatedly referred to the *Mukasa* case as demonstrating that the laws in Uganda were not strong enough. FAC ¶ 102.

At the time of the March 2009 anti-gay conference, Lively knew how harsh Ugandan law was toward LGBTI persons, having reported back to his readers that "homosexuality is literally illegal in this country. Imagine how bad things would be if the criminal law were abandoned." FAC n. 14. Nevertheless, Lively acknowledged that he traveled to Uganda to help Langa and other allies strategize and build the base of support for *strengthening* the laws against homosexuality in Uganda "so that when the [new] law came out they'd have an easier time implementing it." FAC ¶ 85. Lively willingly chose to enter this planned conspiracy to further deprive the LGBTI community of fundamental rights. Langa also arranged for Lively to meet at length – for over four hours – with members of Parliament and other government officials to discuss the need to criminalize advocacy and for a harsher law. FAC ¶¶ 78, 103-105. As he has advised elsewhere and consistent with his pattern, Lively coached the participants at the meetings that the way go gain support for their anti-gay positions was to emphasize the danger to

children posed by "homosexuals" and he himself conflated sexual violence against children with "homosexuality." FAC ¶¶ 72-74, 81-84, 93, 163, 217-219. Subsequent to the gatherings, this message took strong hold in the media and in the political discourse in sensationalistic ways, at times even calling for outright violence. FAC ¶ 84, 217.

During the March 2009 conference, David Bahati, a member of Parliament, joined with Langa, Ssempa, Buturo and Lively in their efforts to strategize around putting forth the draft legislation. FAC ¶¶ 157-160. A month after the March conference, Bahati introduced the Anti-Homosexuality Bill, which proposed the death penalty for consensual sex between adults of the same sex, criminalized advocacy and speech about LGBTI issues with lengthy prison terms, and proposed prison sentences for persons who failed to report their family members, patients, acquaintances who they suspected of being gay. FAC ¶ 9. Lively later acknowledged reviewing and commenting upon the draft of the bill before it was introduced. FAC ¶ 86. As Lively has so often instructed, Bahati introduced the bill by talking about the rape of a child, conflated that with homosexuality, and decried the need to protect children. FAC ¶ 163-164. Subsequent to Bahati's introduction of the draft bill, a Minister in attendance at the session stated: "We must exterminate homosexuals before they exterminate society." FAC ¶ 8.

Lively and Langa reveled in their successful interventions to bring about further discrimination and denial of rights for LGBTI people in Uganda, basking in the observation that their efforts were "like a nuclear bomb against the 'gay' agenda in Uganda." FAC ¶ 88. Lively later stated, "I'm proud of that, and I hope the nuclear bomb spreads across the whole world, against the gay movement." FAC ¶ 89.

Sexual Minorities Uganda Bears the Brunt of Lively's Anti-Gay Strategies

Founded in 2004 to advocate on behalf of LGBTI people in Uganda who were being excluded from access to critical government services and from policies relating to HIV/AIDS prevention and care, as well as the subject of harsh and violent rhetoric and discrimination, Plaintiff Sexual Minorities Uganda ("SMUG") quickly came under attack. The backlash against Plaintiff quickly increased to the point where a partially State-owned newspaper urged the arrest of LGBTI people and demanded that, "[t]he police should visit the holes [sic] mentioned in the press, spy on the perverts, arrest and prosecute them. Relevant government departments must outlaw or restrict websites, magazines, newspapers and television channels promoting… homosexuality, lesbianism, pornography, etc." FAC ¶ 29. Two weeks later, the home of Victor Mukasa, a transgender LGBTI rights advocate and founding director of Sexual Minorities Uganda, was raided by local authorities who unlawfully forced their way into his home, arrested his guest, Yvonne Oyo, and seized documents and files. Oyo was taken to a police station where she was forced to strip naked in front of male authorities to "prove her sex," and was subsequently sexually assaulted. FAC ¶ 30.

From its inception, Plaintiff has been called upon to assist LGBTI persons in emergent situations in Uganda, devoting a substantial amount of time and staff resources to helping people who have been arbitrarily arrested, harassed and/or mistreated by the police, including efforts to help find legal representation and advocating their behalf. Plaintiff has also been required to assist people forcibly evicted from their homes by landlords who suspect them of being gay, as well as assisting people who have fled the persecution and seek asylum in other countries. FAC ¶¶ 226-228. In 2007, Plaintiff held a press conference entitled "Let Us Live in Peace." FAC ¶ 122. Their request was met with virulent responses from Ssempa, who launched an effort to

"out" LGBTI rights advocates, and Buturo who called for their arrests and announced the government's intention to create a "catalogue" of those perpetuating the vice of homosexuality. FAC ¶ 123-127. A number of LGBTI advocates went into hiding and some fled the country, including some of Plaintiff's staff. FAC ¶ 128. In 2008, Pepe Onziema, an advocate and staff member of Plaintiff, and Val Kalende, on staff at a member organization, were arrested as they were silently protesting the exclusion of LGBTI people from Uganda's HIV/AIDS policies. While in detention, Onziema's clothing was forcibly removed and an officer groped Onziema's genitals for confirmation. FAC ¶ 188.

The discrimination, harassment and repression that the Plaintiff had experienced to that point took on a new level after High Court's ruling in favor of Victor Mukasa and Yvonne Oyo and Langa's March 2009 conference. Predictable and planned media frenzy ensued with sordid, sensationalistic depictions of LGBTI people, raising alarms about the purported dangers to children as well as with frequent outings of LGBTI people, and the introduction of the Anti-Homosexuality Bill. FAC ¶¶ 217-225. Among the most notorious examples was the publication of a tabloid calling to "HANG THEM" with the alleged quote "We Shall Recruit 1000,000 [sic] Innocent Kids by 2012 – Homos." FAC ¶ 218. Inside the tabloid, another headline screamed, "HANG THEM; THEY ARE AFTER OUR KIDS!!" FAC ¶ 219.

More recently, Plaintiff's convenings have been raided and shut down by the government and 38 allied human rights and humanitarian organizations have been threatened with de-registration simply for supporting gay rights. FAC ¶¶ 173-175. Specifically, on February 14, 2012, the current Minister of Ethics and Integrity, accompanied by police, raided and shut down a conference organized by Plaintiff and one of its member organizations, seized materials and attempted to arrest a conference organizer. FAC ¶¶176-185. The Minister announced that

because the laws in Uganda "do not support bestiality and lesbianism," those gathered "were illegally associated" and called them "terrorists." FAC ¶ 183. On June 18, 2012, the government raided and shut down a skills-building workshop for LGBTI rights advocates and police laid siege to the hotel and detained a number of attendees, as well as hotel staff, for several hours. FAC ¶ 165-172. The Minister of Ethics and Integrity acknowledged that he ordered the raid and was seeking to have the local LGBTI activists arrested so that "everybody else will know that at least in Uganda we have no room here for homosexuals and lesbians." FAC ¶ 171.

ARGUMENT

I. DEFENDANT'S PARTICIPATION IN THE CONSPIRACY TO DEPRIVE PERSONS OF FUNDAMENTAL RIGHTS ON THE BASIS OF THEIR IDENTITY IS NOT PROTECTED FIRST AMENDMENT ACTIVITY.

Defendant's invocation of First Amendment doctrine widely misses the mark. Plaintiff does not contend that Defendant's writing and speeches – irrational and odious as they are – would not, in the ordinary course, receive First Amendment protection, nor does Plaintiff contend that such speech is, on its own, substantively actionable in tort. Rather, Defendant's speeches and writing are relevant insofar as they represent voluminous, circumstantial evidence of Defendant's discriminatory animus and intent, as well as the persecutory goals of his conspiratorial acts, plans and agreements. Defendant's statements stand as proof of an independent agreement in furtherance of illegal conduct, i.e. persecution. Viewed properly in this way, the court can quickly dispense of Defendant's lengthy disquisition on free speech and the modern incitement doctrine. In addition, Defendant has no constitutionally protected interest in petitioning a foreign government for redress, nor could the Petition Clause of the First Amendment shield him from attempts to seek unlawful outcomes.

A. Defendant's Speech Is Not the Basis of Plaintiff's Claims But Is Admissible Against Him as Evidence of His Intent and Existence of the Conspiracy.

The Supreme Court has held that the "First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." *Wisconsin v. Mitchell,* 508 U.S. 476, 489-490 (1993) (*citing Haupt v. United States,* 330 U.S. 631 (1947) (evidence of conversations admissible as proof of motive); *see also Price Waterhouse v. Hopkins,* 490 U.S. 228, 251-252 (1989) (plurality opinion) (allowing evidentiary use of defendant's speech in evaluating Title VII discrimination claim). Similarly, the Sixth

Circuit has held in a case alleging a private conspiracy to violate civil rights brought under 42 U.S.C. §1985(3), that while the statute does not give rise to a cause of action for slander, "slanderous remarks might constitute an integral part of the clause (3) conspiracy." *Azar v. Conley*, 456 F.2d 1382, 1388-89 (6th Cir. 1972).[1]

As demonstrated in more detail in Section III, the claims in this matter do not arise out of Defendant's speech like claims alleging incitement to imminent lawless action governed by *Brandenburg v. Ohio*, 395 U.S. 444 (1969), nor in the sense that the words themselves are alleged to be the cause of harm as in *Snyder v. Phelps*, 131 S.Ct. 1207 (2011). Rather, Defendant's statements are admissible against him as party-opponent admissions under Fed. R. Evid. 801(d)(2). Defendant's statements go to show his motive, discriminatory intent and/or

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[1] The Supreme Court has for decades recognized that the First Amendment does not protect otherwise illegal agreements, solicitations or conspiracies, where the speech was an "integral part of conduct in violation" of law. *Giboney v. Empire Storage & Ice. Co*. 336 U.S. 490, 498 (1949). As Justice Black explained:

> But it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.

Id. *See also Osborne v. Ohio,* 495 U.S. 103, 110, (1990) (*quoting Giboney*, 336 U.S. at 498); *New York v. Ferber*, 458 U.S. 747, 761-62 (1982). Justice Brennan similarly explained:

> Although agreements to engage in illegal conduct undoubtedly possess some element of association, the State may ban such illegal agreements without trenching on any right of association protected by the First Amendment. The fact that such an agreement necessarily takes the form of words does not confer upon it, or upon the underlying conduct, the constitutional immunities that the First Amendment extends to speech.

Brown v. Hartlage, 456 U.S. 45, 55 (1982).

involvement in the conspiracy to deprive persons of their fundamental rights on the basis of their sexual orientation and gender identity.

Put another way, they evidence the illegal motive, design and goals of his conspiracy. For example, no one would doubt that an individual heard to say, "The mayor's policies are destroying New York City; he has to be stopped from doing any more harm," would be entitled to First Amendment protection as a form of political expression. But no one would also dare doubt that, in a criminal prosecution of that same person for conspiring to assault the mayor, this statement would be admissible to prove the defendant's motives, purpose and plan. That is the precise distinction that makes Defendant's statements relevant in this case, and his First Amendment objections immaterial.

For example, as discussed more in Sec. II discriminatory intent is an element of the crime of persecution. Defendant's statement that "anti-discrimination law is the seed that contains the entire tree of the homosexual agenda, with all of its poisonous fruit," FAC ¶ 62, and his admissions concerning his efforts to defeat anti-discrimination efforts constitute clear evidence of his *mens rea,* or his intent to discriminate on the basis of sexual orientation and gender identity. FAC ¶ 63, n. 18 and 22. While alarming and offensive, they are not the basis of the claims, just evidence that helps prove them.

Similarly, as the First Circuit has recognized, "the agreement that rests at the heart of a conspiracy is seldom susceptible of direct proof. More often than not such an agreement must be inferred from all the circumstances." *Earle v. Benoit,* 850 F.2d 836, 843 (1st Cir. 1988). Defendant's statements describing his long history of working with "his ministry partner" Stephen Langa, FAC ¶ 88, his work and communication with Martin Ssempa, FAC ¶¶ 119, 139, meeting with James Buturo, Former Minister of Ethics and Integrity, FAC ¶ 143, his efforts to

help his co-conspirators have an "easier time" implementing harsh and discriminatory legislation, FAC ¶ 85, help to establish the existence of a conspiracy, particularly when taken together with other detailed factual allegations set out in the amended complaint.

Likewise, the numerous statements of Defendant's co-conspirators, while also irrational and odious, are admissible under Fed. R. Evid. 801(d)(2)(E) as statements by the party's co-conspirators during the course and in furtherance of the conspiracy, as well as the shared intent of the conspiracy. *See Bourjaily v. United States*, 483 U.S. 171, 180 (1987) (co-conspirator's statements could themselves be probative of the existence of a conspiracy and the participation of both the defendant and the declarant in the conspiracy).

B. The First Amendment Right to Petition Does Not Shield Political Participation for 'Fraudulent or Unlawful Purposes.'

Defendant argues that his conspiracy with Ugandan government officials to persecute is protected by the Petition Clause of the First Amendment. His argument is unavailing. First, numerous courts have held the Clause does not protect interactions with foreign governments. *See Australia/Eastern U.S.A. v. United States,* 537 F.Supp. 807, 812 (D.D.C. 1982) ("[o]f course, the First Amendment was not intended to protect the right to petition foreign governments"); *Occidental Petroleum Corp. v. Buttes Gas and Oil Co*., 331 F.Supp. 92 (C.D. Cal. 1971), ("[t]he constitutional freedom 'to petition the Government' carries limited if indeed any applicability to the petitioning of foreign governments"), *aff'd*, 461 F.2d 1261 (9th Cir. 1972); *Guessous v. Chrome Hearts, LLC,*179 Cal. App. 4th 1177, 1184 (Cal. App. 2009) (California statute covering a person's right of petition "under the United States or California Constitution" does not shield petitioning activity undertaken in a foreign country). This is because the theory of self-government undergirding the right to petition the government ensures that citizens have the

freedom to change policies of *United States*' legislatures.[2] It is true that the First Amendment generally traveled with Lively to Uganda, but neither the Massachusetts legislators nor Congress traveled with him.

Second, even if the Clause were to apply to petitioning foreign governments, it would not shield Defendant's activity. In this context, the Supreme Court has held that "First Amendment rights may not be used as the means or pretext for achieving 'substantive evils' which the legislature has the power to control." *Cal. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 514 (1972) (*citing Continental Ore Co. v. Union Carbide & Carbon Corp*., 370 U.S. 690, 707 (1962) (conspiracy with a licensing authority to eliminate a competitor). *Rangen, Inc. v. Sterling Nelson & Sons,* 351 F.2d 851 (9th Cir. 1965) (bribery of a public purchasing agent)).

In this case his activities are undertaken for unlawful purposes and toward unlawful ends, as part of and in furtherance of a conspiracy to persecute others on the basis of sexual orientation and gender identity. The fact that Defendant may, in part, seek to bring about such denial of fundamental rights through effecting policy or legislative changes in a foreign country, does not mean such ends are lawful. Indeed they are supremely unlawful as evidenced by the recognition in the statute of the International Military Tribunal at Nuremberg (IMT) that persecution was within the IMT's jurisdiction, "whether or not in violation of the domestic law of the country where perpetrated." Charter of the International Military Tribunal - Annex to the Agreement for

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[2] The text of the Petition Clause prohibits Congress from abridging "the right of the people […] to petition *the Government* for a redress of grievances." U.S. CONST. I (emphasis added). To the limited extent this provision was discussed in the Constitutional Convention, it was clear that it contemplated domestic legislative application. James Madison explained that the clause should mean, "[t]he people shall not be restrained […] from applying to *the Legislature* by petitions, or remonstrances, for redress of their grievances." 1 ANNALS OF CONG. 434 (J. Gales ed. 1789).

the Prosecution and Punishment of the Major War Criminals of the European Axis ("London Charter" or "Nuremberg Charter"), 59 Stat. 1544, 82 U.N.T.S. 279 (Aug. 8, 1945), Art. 6(c).

Finally, while there is precedent in international law for holding individuals accountable for persecution or incitement to genocide on the basis of their speech, Plaintiff does not seek to do so here. *See e.g.,* Nazi Conspiracy and Aggression, Opinion and Judgment (October 1, 1946), Office of the U.S. Chief of Counsel for Prosecution of Axis Criminality 56 (1947) (Julius Streicher convicted of persecution for his "25 years of speaking, writing, and preaching hatred of the Jews"). *See also Prosecutor v. Nahimana,* Judgment, ICTR-99-52-T, (Dec. 3, 2003) ("*Nahimana* Trial Judgment").[3]

II. THE CRIME AGAINST HUMANITY OF PERSECUTION CLEARLY CONSTITUTES A VIOLATION OF AN INTERNATIONAL NORM THAT MEETS THE *SOSA* STANDARD.

The ATS grants federal courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. §1350. Interpreting this statute in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court emphasized that, "[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations." *Id*. at 729.[4]

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[3] Judgments of the ICTR are available at: http://www.unictr.org/Cases/tabid/204/Default.aspx.

[4] The Court cited to a number of cases recognizing that "international law is part of our law." *E.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) ("[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances"); *The Paquete Habana*, 175 U.S 677, 700 (1900) ("International 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 determination"); *see also Texas Indus., Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 641 (1981) (recognizing that "international disputes implicating … our relations with foreign nations" are one of the "narrow areas" in which "federal common law" continues to exist).

The Court held that the ATS authorizes federal courts to use their common law powers to recognize a "narrow set" of causes of action for international law violations, other than those arising under a treaty of the United States, that have no less "definite content" and "acceptance among civilized nations" than the claims familiar to Congress at the time the statute was enacted. *Id.* at 724-25, 732. *See also In re Estate of Marcos Human Rights Litig.* (*Hilao v. Marcos*), 25 F.3d 1467, 1475 (9th Cir. 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory") (cited with approval by *Sosa*, 542 U.S. at 732). The Supreme Court has made clear that claims brought under the ATS "must be gauged against the current state of international law." *Sosa*, 542 at 733.

The Supreme Court has advised that the existence and content of international law should be derived from reference to certain sources:

> where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Sosa, 542 at 734 (*quoting The Paquete Habana,* 175 U.S. at 700); *See also United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-161 (1820); *Abdullahi v. Pfizer, Inc*., 562 F.3d 163, 176 (2d Cir. 2009). The Restatement (Third) on Foreign Relations Law subsequently identified similar sources from which rules of international law are to be derived, namely (1) customary international law, (2) international agreements and (3) general principles of law. Rest. (Third) Foreign Relations Law §102. These categories and sources are mirrored in the statute of the

International Court of Justice, which is considered the definitive statement on the sources of international law.[5]

Examining these sources and applying the standard set forth in *Sosa* to the claim in this case confirms that persecution, as a crime against humanity, is actionable under the ATS.

A. The Crime Against Humanity of Persecution Is Among the 'Narrow Set' of International Law Violations Envisioned by *Sosa*.

Crimes against humanity, including persecution, satisfy the *Sosa* standard. Crimes against humanity are among the most serious violations that can be committed and have been recognized as a norm of customary international law, which is binding on all States.[6] This norm has been reflected in international agreements, judicial decisions recognizing and enforcing the law, as well as the works of jurists and practice of nations. Indeed, crimes against humanity as a widely accepted and clearly defined violation of international law dates back to the 19th century and having been codified in every international criminal tribunal since the International Military Tribunal at Nuremberg ("IMT" or "Nuremberg Tribunal").[7]

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[5] Statute of the International Court of Justice, June 26, 1945, 33 U.N.T.S. 993, Art. 38 (1): "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

[6] *See, e.g., B. et al.,* Case, 4 May 1948, in *Entscheindungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*, Vol. 1 (1950) 3 (*quoted* in Antonio Cassese, *Crimes Against Humanity in* The Rome Statute of the International Criminal Court: A Commentary, Vol. 1A 355 (Antonio Cassese et al. eds., 2002) ("Crimes against humanity in the end offend against and injure a transcendent good, the value of the human being in the moral code, a value that cannot be compromised")).

[7] *See* M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law 1-44 (1999) (discussing international legal recognition of crimes against humanity in the St. Petersburg Declaration of 1868, the Hague Convention of 1899, and the Fourth Hague

Additionally, courts in the United States have affirmed crimes against humanity as actionable under the ATS. *See Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005); *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 244 n. 18, 249-250 (2d Cir. 2003); *In re Chiquita Brands Int'l, Inc.*, 792 F. Supp. 2d 1301, 1334 (S.D. Fla. 2011); *Mehinovic v. Vuckovic,* 198 F. Supp. 2d 1322 (N.D. Ga. 2002); *Doe v. Saravia,* 348 F. Supp. 2d 1112, 1157 (E.D. Cal. 2004); *Kiobel v. Royal Dutch Petroleum Co.,* 456 F. Supp. 2d 457, 466-467 (S.D.N.Y. 2006). *See also Kadić v. Karadžić*, 70 F.3d 232, 236 (2d Cir. 1995); *Abdullahi v. Pfizer, Inc*., 562 F.3d 163 (2d Cir. 2009).

A crime against humanity under international law is defined as any one of a list of acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." *See e.g., Saravia*, 348 F. Supp. 2d at 1156. Significantly, for purposes of this case, "attack," as used in the definition of crimes against humanity, is not limited to a military attack. *See, e.g.,* Roger S. Clark, *Crimes Against Humanity at Nuremberg, in* The Nuremberg Trial And International Law 194-96 (George Ginsburgs & Vladimir Kudriavtsev eds., 1990). Indeed, the "attack" need not "involve military forces or armed hostilities, *or any violent force at all*." *See* Rodney Dixon, *Crimes Against Humanity: Analysis and Interpretation of Elements*, *in* Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article 124-125 (Otto Triffterer ed., 1999) (emphasis added).

Convention of 1907). *See also* Nuremberg Charter, Art. 6(c); Charter of the International Military Tribunal for the Far East Art. 5, Apr. 26, 1946, 4 Bevans 27 (replacing the original Charter, Jan. 19, 1946, 4 Bevans 20). Statute of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), Art. 5; Statute of the International Criminal Tribunal for Rwanda ("ICTR"), Art. 3; Rome Statute of the International Criminal Court ("ICC Statute" or "Rome Statute"), Art. 7; Statute of the Special Court for Sierra Leone, Art. 2; Statute of the Extraordinary Chambers in the Courts of Cambodia, Art. 3.

The ICTR has observed:

> An attack may also be non violent in nature, like imposing a system of apartheid… or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.

Prosecutor v. Akayesu, Opinion and Judgment, Case No ICTR-96-4-T, ¶ 581 (Sept. 2, 1998) ("*Akayesu* Trial Judgment").

Additionally, the reference to "any civilian population" "does not mean that the entire population of a State, entity or territory must be subjected to the attack" but implies instead "the collective nature of the crimes to the exclusion of single acts." *Dixon*, *supra* at 127; *see also Bowoto v. Chevron Corp.*, No. 99-02506, 2007 U.S. Dist. LEXIS 59374 *15 (N.D. Cal. Aug. 14, 2007). With respect to the requirement that the acts be committed on a widespread or systematic basis, it need only be shown that a specified act was committed as part of an attack against a civilian population that was *either* widespread *or* systematic – the attack need not be both. *See Bowoto*, 2007 U.S. Dist. LEXIS 59374 *11 ("the requirement [is] disjunctive rather than cumulative"); *see also Prosecutor v. Kordić/Čerkez*, Case No. IT-95-14-2-T, Judgment, ¶ 178 (Feb. 26, 2001) ("*Kordić/Čerkez* Judgment").[8]

The systematic quality of the attack may be established by circumstantial facts revealing that it was of an organized nature unlikely to have occurred randomly. *Kordić/Čerkez* Judgment, at ¶ 94; *see also Bowoto* 2007 U.S. Dist. LEXIS 59374, at *11-13 (*citing Prosecutor v. Limaj,* No. ICTY-03-66-T, Judgment, ¶ 183 (Nov. 30, 2005). As for "widespread," an aggregation of a few crimes can suffice to constitute a widespread attack; indeed, a single act may qualify as a

[8] Judgments of the ICTY are available at: http://www.icty.org/sections/TheCases/JudgementList.

widespread attack if it is linked to other such attacks. *See Saravia,* 348 F. Supp. 2d at 1156; *Almog v. Arab Bank, PLC,* 471 F. Supp. 2d 257, 275 (E.D.N.Y. 2007); *Prosecutor v. Tadić,* Case No.IT-94-1-T, Judgment, ¶ 248 n.311 (May 7, 1997) ("*Tadić* Trial Judgment"). An attack is widespread if it reflects the "cumulative effect of a series of inhumane acts." *Kordić/Čerkez* Judgment, ¶ 179.

Crimes against humanity not only meet, but exceed what is required by *Sosa,* in that they have attained the status of *jus cogens*, or peremptory norms. *See, e.g.,* M. Cherif Bassiouni, International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*, Law & Contemporary Problems, 59: 63-74 (1997).[9] The Restatement defines *jus cogens* as rules of international law "recognized by the international community of states as peremptory, permitting no derogation" and further advises that "these rules prevail over and invalidate international agreements and other rules of international law in conflict with them." Rest. (Third) on Foreign . Law, §102, cmt. k.

The Ninth Circuit has explained the relationship between *jus cogens* norms and other norms in customary international law:

> While *jus cogens* and customary international law are related, they differ in one important respect. Customary international law, like international law defined by treaties and other international agreements, rests on the consent of states. A state that persistently objects to a norm of customary international law that other states

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[9] Bassiouni notes:

> The legal literature discloses that the following international crimes are *jus cogens*: aggression, genocide, *crimes against humanity,* war crimes, piracy, slavery and slave-related practices, and torture. Sufficient legal basis exists to reach the conclusion that all these crimes are part of *jus cogens*. This legal basis consists of the following: (1) international pronouncements, or what can be called international *opinio juris*, reflecting the recognition that these crimes are deemed part of general customary law; (2) language in preambles or other provisions of treaties applicable to these crimes which indicates these crimes' higher status in international law; (3) the large number of states which have ratified treaties related to these crimes; and (4) the *ad hoc* international investigations and prosecutions of perpetrators of these crimes. *Id*. at 68.

> accept is not bound by that norm… just as a state that is not party to an international agreement is not bound by the terms of that agreement….
>
> In contrast, *jus cogens* embraces customary laws considered binding on all nations … and is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations. Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent, as exemplified by the theories underlying the judgments of the Nuremberg tribunals following World War II.

Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992) (internal citations omitted); *see also Committee of United States Citizens Living in Nicaragua v. Reagan,* 859 F.2d 929 (D.C. Cir. 1988))

Indeed, as a *jus cogens* norm, the crime against humanity of persecution exists at the innermost core of the "narrow set of common law actions derived from the law nations" permitted under the ATS. *Sosa*, 542 U.S. at 721; *see also Siderman de Blake*, 965 F.2d at 715 ("*jus cogens* is an elite subset of the norms recognized as customary international law" from which no derogation is permitted).

B. Persecution Consists of the Deprivation of a Fundamental Right on the Basis of the Identity of the Group or Collectivity.

Persecution is a well-recognized crime against humanity. The essential elements of persecution have been identified by modern international criminal tribunals and consistently applied. Persecution is defined as discrimination that results in the denial or infringement of a fundamental right. *See, e.g., Prosecutor v. Stakić* (Appeal Judgement), IT-97-24-A, Judgment, ¶ 327 (Mar. 22 2006) ("*Stakić* Appeal Judgment").

The Nuremberg Charter established that crimes against humanity encompassed "persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of

the country where perpetrated." Nuremberg Charter, Art. 6(c). The indictment included the charge that the German government committed persecutions prior to the war as well as during and that it was particularly directed at Jews and any person who had a political or spiritual belief in conflict with the Nazi Party agenda. *See* Nuremberg Trial Proceedings, Indictment: Count Four - Crimes Against Humanity Sec. X (B). In addition to the unprecedented violence committed against Jews after the start of the war, the Tribunal also viewed as forms of persecution laws which stipulated that all Jews should be treated as foreigners, banned from holding public office, denied further immigration into Germany and prohibited from publishing German newspapers. *See* Nuremberg Judgment: War Crimes and Crimes Against Humanity, Persecution of the Jews.

The elements of the crime were further distilled through the jurisprudence of the ICTY. In the first persecution case since Nuremberg, the ICTY found that there must be "some form of discrimination that is intended to and results in an infringement of an individual's fundamental rights." *Tadić* Trial Judgment, ¶ 697. In particular, the ICTY noted:

> It is the violation of the right to equality in some serious fashion that infringes on the enjoyment of a basic or fundamental right that constitutes persecution, although the discrimination must be on one of the listed grounds[10] to constitute persecution under the Statute.

Id. The Tribunal further found that the crime of persecution can encompass many acts, including those of a physical, economic or judicial character, which "violate an individual's right to equal enjoyment of his basic rights." *Id.* ¶ 710. The ICTY has further clarified that acts which underlie a persecution claim "should be examined in their context and with consideration of their

[10] While the ICTY's jurisdiction is statutorily limited to a defined set of prohibited grounds, the Court has observed that "[t]here are no definitive grounds in customary international law on which persecution must be based and a variety of different grounds have been listed in international instruments." *Tadić* Trial Judgment, ¶ 711.

cumulative effect." *Prosecutor v. Perišić*, IT-04-81-T, Judgement ¶ 119 (Sept. 6, 2011); *see also Prosecutor v. Nahimana,* Judgment, ICTR-99-52-A, ¶ 987 (Nov. 28, 2007) ("*Nahimana* Appeal Judgment") (the cumulative effect of the underlying acts and the context in which they take place are important to assessing their gravity); *Prosecutor v. Brdjanin*, Judgment, IT-99-36-1-A, ¶ 294 (Apr. 3, 2007) ("*Brdjanin* Appeal Judgment") (the cumulative effect of the denial of rights to employment, freedom of movement, proper judicial process and proper medical care is a denial of fundamental rights).

Those fundamental rights that are at risk and thus protected by enforcement of the crime of persecution, an ICTY Trial Chamber recognized the significance of the Universal Declaration of Human Rights ("UDHR"), the International Covenant on Civil and Political Rights ("ICCPR") as well as the International Covenant on Economic, Social and Cultural Rights as sources of guidance. *See Prosecutor v. Kupreškić*, Judgement, IT-95-16-T, ¶ 621 (Jan. 14, 2000) ("*Kupreškić* Trial Judgment"). However, the underlying acts that constitute persecution need not be considered a crime under international law. *See Brdjanin* Appeal Judgment, ¶ 296.

In harmonizing the jurisprudence developing in the ICTY, the court set out the following elements of the crime of persecution:

> [P]ersecution is an act or omission which does the following: 1.[D]iscriminates in fact and which denies or infringes upon a fundamental right laid down in international or customary or treaty law (the *actus reus*); and 2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).

Prosecutor v. Krnojelac, Judgment, Case No. IT-97-25-T, ¶ 431 (Mar. 15, 2002) ("*Krnojelac* Trial Judgment").[11]

[11] This definition has been consistently adopted at the ICTY. *See e.g., Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment, ¶ 185 (Sept. 17, 2003) ("*Krnojelac* Appeal Judgment"); *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Judgment, ¶ 320 (Feb. 28, 2005);

The ICTR has also applied the ICTY's definition of persecution as set out in the *Krnojelac* case. *See Nahimana* Appeal Judgment, ¶ 985. Indeed, the ICTR Appeals Chamber even held that hate speech alone constituted persecution (a claim not made in this case) as a violation of the right to dignity of the human being and the right to security.[12] *Id*. at ¶ 986. While the Appeals Chamber found in this case that the discrimination was based on ethnicity, it included "or any other discriminatory ground" as a means by which the "right to respect for dignity of the members of the targeted group as human beings" could be violated. *Id.*

Because Plaintiff referenced the Rome Statute's definition of persecution in the Amended Complaint, Defendant argues at great length that the Rome Statute is not binding on this court and does not itself establish that the crime of persecution meets the requirements of *Sosa*. Def. Br. at pp. 29-31. At least on this point, Defendant is correct. Rather than being binding on the court, Rome Statute is simply evidence, like other treaties, of both the content of customary international law and of the specificity or clear definition of the norm required by *Sosa*. *See, e.g., Saravia,* 348 F. Supp. 2d at 1155 (Rome Statute an "interpretation of crimes against humanity in international law"); *see also, Pfizer,* 562 F.3d at 176 (whether a treaty that embodies the alleged crimes is self-executing is relevant to, but not determinative of, the question of whether the norm permits ATS jurisdiction).

Likewise, Defendant's argument, Def. Br. 42-43, that Plaintiff has failed to state an essential element because it has failed to allege another offense contained in Article 7 of the

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Prosecutor v. Vasiljević, Case No. IT-98-32-A, Judgment, ¶ 113 (Feb. 25, 2004) ("*Vasiljević* Appeal Judgment").

[12] The Appeals Chamber held that while hate speech alone could constitute persecution, it could not by itself amount to a violation of the rights to life, freedom and physical integrity of the human being rising to the level of offenses it deemed as falling within the ICTR's criminal jurisdiction. *Nahimana* Appeal Judgment, ¶ 986.

Rome Statute fails, as the statute does not provide the basis of the claim; customary international law does. The Rome Statute's requirement that persecution be committed in connection with another enumerated offense is a jurisdictional limitation on that court and does not reflect a limitation of the substantive scope of the international law norm of persecution, which is broader. *See* Roger S. Clark, *Crimes Against Humanity and the Rome Statute of the International Criminal Court, in* The Rome Statute of the International Criminal Court: A Challenge to Impunity 86, 88-89 (Mauro Politi and Giuseppe Nesi eds., 2001).

C. Persecution on the Basis of Sexual Orientation Is Proscribed by Customary International Law.

1. The Rights to Equality and Non-Discrimination Constitute *Jus Cogens*, Peremptory Norms in International Law.

The rights to equality and non-discrimination constitute peremptory, *jus cogens* norms from which there can be no derogation. *See Atala Riffo and daughters v. Chile,* Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 79 (Feb. 24, 2012). These norms come together in the crime against humanity of persecution and reinforce the importance of the principles of equality and non-discrimination to prevent, as one ICTY Trial Chamber noted, the intentional "[exclusion of] a person from society on discriminatory grounds." *Kupreškić* Trial Judgment, ¶ 621. *See also* Commentary to the International Law Commission 1996 Draft code of Crimes Against Peace and Security of Mankind, Art. 18(11) *available at* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf (finding "persecution may take many forms with its common characteristic being the denial of human rights and fundamental freedoms to which every individual is entitled without distinction").

Persecution, exercised as the denial of equality, is an offense rooted in discriminatory animus toward a class of persons, particularly where such animus typically reflects archaic and

irrational prejudice or fear and produces a denial of fundamental rights. The law seeks to root out the harmful effects of such systemic prejudice where it appears.

As the Inter-American Court of Human Rights recently held, discrimination on the basis of sexual orientation and gender identity constitutes a violation of the American Convention on Human Rights:

> Regarding the principle of equality before the law and non-discrimination, the Court has stated that "*the notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority*. *It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified*." The Court's case law has also indicated that at the present stage of development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*. The juridical framework of national and international public order rests on this principle and permeates the entire legal system.

Atala Riffo, at ¶ 79 (emphasis added) (citations omitted).

As discussed further in Section II.C.3, the prohibition of discrimination on the basis of sexual orientation and gender identity has been made explicit by an overwhelming international consensus. Even absent such a widespread, explicit recognition of a binding prohibition, persecution on the basis of sexual orientation and gender identity – indeed on the basis of any group characteristic – is prohibited in international law. To take one well-accepted articulation, Bassiouni has identified grounds of persecution as the "victim's beliefs, views, or membership in a given identifiable group (religious, social, ethnic, linguistic, etc.), or simply because the perpetrator sought to single out a given category of victims for reasons peculiar to the

perpetrator."[13] The norm reflects the elementary notion that a group characteristic (i.e. identity or affiliation) is not a rational or moral basis upon which to deny persons fundamental rights.

The ICTY has observed that, "[t]here are no definitive grounds in customary international law on which persecution must be based and a variety of different grounds have been listed in international instruments." *Tadić* Trial Judgment, ¶ 711. The ICTY, whose jurisdiction was *statutorily* limited to the grounds of race, politics and religion, has nevertheless instructed that "the targeted group must be interpreted broadly." *Prosecutor v. Naletilić and Martinović*, Judgement, IT-98-34-T, ¶ 636 (Mar. 31, 2003) ("*Naletilić and Martinović* Judgment") (the targeted group "may, in particular, include such persons who are *defined by the perpetrator as belonging to the victim group due to their close affiliations or sympathies for the victim group*") (emphasis in original). The Trial Chamber in the *Kvočka* case also held that the discriminatory intent could be negatively defined as well, in terms of the targeting of "non-groups," *i.e*. "non-Serbs" or "non-Croats," which could include the targeting of a group of individuals who may actually be associated with different races, ethnicities or religions simply on the basis of their non-identification or non-affiliation with the group to which the persecutors belong. *Prosecutor v. Kvočka*, Case No. IT-98-30/1-T, Judgement, ¶ 195 (Nov. 2, 2001) (finding that "is disingenuous to contend that religion, politics, and ethnicity did not define the group targeted for attack").

The ICTR cited the reasoning of this line of cases with approval when it moved beyond its own statutory limitation on persecution (i.e., political, racial and religious grounds) to find persecution based on *ethnic* grounds. *See Nahimana* Trial Judgment, ¶ 1071. Additionally, the Trial Chamber notes that Tutsi women as were targeted as women – a basis not found in the

[13] *See* M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law 7, 317 (1992) (quoted in *Tadić* Trial Judgment, ¶ 695).

ICTR Statute – for persecution. *Id*. ¶ 1079. Finally, the ICTY made the critical observation that often, "it is the perpetrator who defines the victim group while the targeted victims have no influence on the definition of their status." *Naletilić and Martinović* Judgment, ¶ 636.

2. The Ongoing Commission of Discriminatory Acts Does Not Negate the International Norm Prohibiting Them.

Defendant highlights a number of statistics which indicate that forms of *de jure* and *de facto* discrimination on the basis of sexual orientation and gender identity persist in some places. From this limited observation, he surmises that the prohibition of sexual orientation and gender identity has not attained the status of a prohibited norm. Def. Br. 29-32. This conjecture reflects a fundamental misunderstanding of law.

To begin with Defendant's proffer of such statistics underscores the very import of this case: the existence and continued vulnerability of, and severe discrimination against, sexual minorities in places around the world – a troubling context which Defendant opportunistically seeks to tap into and expand.

Second, the argument rests on the deeply flawed assumptions that *violations* of a legal rule negates the rule of law that proscribes them, or that binding legal norms cannot be enforced in a particular case simply because the norm has failed to correct its every violation. Indulging this exception leads to absurd results and undermines the entire concept of law. *See Filártiga v. Peña-Irala*, 630 F.2d 876, 884 n. 15 (2d Cir. 1980) ("The fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law."). Defendant's position ultimately seeks legal *ratification* of continuing prejudice and persecution of a persecution of LGBTI persons, simply because social prejudice against these groups persists in some quarters. That manner of thinking – which would have foreclosed legal condemnation

of Apartheid or Jim Crow – has no place in domestic or international jurisprudence. *See, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (Harlan, J., dissenting) (social acceptance of discrimination cannot be given "the sanction of law"); *Brown v. Board of Ed*, 347 U.S. 483 (1954) (same); *Cf. Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The Constitution cannot control such [racial] prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly give them effect."). The fact that oppressive and dehumanizing forms of discrimination such as Apartheid or Jim Crow persisted, did not make them legal, nor undermine the weight of legal prohibitions against them.

The rights to equality and non-discrimination constitute peremptory, *jus cogens* norms. As such, and unlike other norms of customary international law, *these rights apply despite the fact that some states that have not accepted them or act in the breach and violate them*. Henkin, *et al*., International Law: Cases and Materials 93 (3d ed..1993). As the Inter-American Court stated in the *Atala* case:

> With regard to the State's argument that, on the date on which the Supreme Court issued its ruling there was a lack of consensus regarding sexual orientation as a prohibited category for discrimination, the Court points out that the alleged lack of consensus in some countries regarding full respect for the rights of sexual minorities cannot be considered a valid argument to deny or restrict their human rights or to perpetuate and reproduce the historical and structural discrimination that these minorities have suffered.

Atala Riffo, at ¶ 92. (citations omitted).

Moreover, to establish a norm meets the requisite level of universality, specificity and obligation for purposes of *Sosa*, Plaintiff need not establish unanimity among nations but rather a general recognition among the international community that a practice is prohibited. *See, e.g., Forti v. Suarez-Mason*, 694 F. Supp. 707, 709 (N.D. Cal. 1988). By definition, for the norm of to

reach *jus cogens* status, all States need not have consented to it. Such rights, as "fundamental and universal norms constituting *jus cogens* transcend such consent." Rest. (Third) on Foreign Relations § 102, cmt. k. *see also Siderman de Blake*, 965 F.2d at 714-716.

3. Customary International Law Clearly and Unequivocally Proscribes Discrimination on the Basis of Sexual Orientation and Gender Identity.

If there were any doubt that the rights to equality, non-discrimination and other fundamental rights belong to all people, *including* lesbian, gay, bisexual, transgender and intersex people, the overwhelming weight of authority in international law has made it clear and explicit. That international consensus of authority on this rule – which has gone effectively unchallenged – is formed by decisions of international and regional bodies and courts of human rights interpreting the non-discrimination provisions in their treaties, the opinions of experts and scholars, judgments and opinions of national judicial tribunals and pronouncements by states.[14] That this particular consensus around nondiscrimination on the basis of sexual orientation is a comparatively recent one, does not undermine its universal authority. *See* Rest. (Third) on Foreign Relations Law § 102, cmt b ("[t]he practice necessary to create customary law may be of comparatively short duration," and "can be general even if it is not universally followed.")

a. The United Nations System for the Protection of Human Rights

In 1992, the United Nations Human Rights Committee, which was established to monitor States' compliance with the ICCPR, held that the state of Tasmania's law criminalizing same-sex conduct discriminated on the basis of sexual orientation and was therefore in violation of the

[14] Additionally, "[t]he practice of international subjects other than States [e.g. the United Nations, European Union, NATO, etc.] is also considered by international courts and tribunals when ascertaining the existence of rules of customary international law..." Antonio Cassese, Guido Acquaviva, Mary Fan, and Alex Whiting, International Criminal Law: Cases and Commentary 5 (Oxford University Press 2011).

ICCPR. *Toonen v. Australia,* Communication No. 488/1992, CCPR/C/50/D/488/1992, April 4, 1992*; see also Young v. Australia,* Communication No. 941/2000, CCPR/C/78/D/941/2000, Sept. 18, 3003 (finding that Australia's veterans' entitlement laws discriminated against same-sex couples with regard to veterans pensions in violation of the ICCPR). Similarly, the Committee on Economic, Social and Cultural Rights has held that discrimination on the basis of sexual orientation and gender identity is prohibited under the International Covenant on Economic, Social and Cultural Rights ("ICESCR") as "any other social condition." *See* United Nations, Committee on Economic, Social and Cultural Rights, *General Comment No. 20*, *Non-Discrimination in Economic, Social and Cultural Rights*, E/C.12/GC/20, (July 2, 2009) *available at* http://www2.ohchr.org/english/bodies/cescr/comments.htm.[15]

Other United Nations treaty bodies have addressed the inclusion of sexual orientation and gender identity as prohibited grounds of discrimination in the context of their general observations and recommendations. The United Nations Committee on the Rights of the Child, established to oversee compliance with the Convention on the Rights of the Child, has identified discrimination based on sexual orientation as a concern with respect to access to healthcare related to prevention and treatment of HIV/AIDS. *See* United Nations, Committee on the Rights of the Child, *General Comment No. 3*, *HIV/AIDS and the rights of the child*, CRC/GC/2003/3, ¶ 8 (March 17, 2003). The Committee has further held that "States Parties have the obligation to ensure that all human beings under 18 enjoy all the rights set forth in the Convention without

[15] Additionally, the Committee has held that the Covenant "prohibits any discrimination in access to and maintenance of employment for reasons of […] sexual orientation." United Nations, Committee on Economic, Social and Cultural Rights, *General Comment No.18*, *The Right to Work*, E/C.12/GC/18, ¶ 12 (Feb. 6, 2006); and further that "the Covenant proscribes all discrimination in access to health care and the underlying determinants of health, and to the means for their procurement, on the grounds of […] sexual orientation." *Id*., *General Comment No. 14*, *The right to enjoy the highest attainable level of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2000/4, ¶ 18 (Aug. 11, 2000).

discrimination (Art. 2), regardless of 'race, color, sex, language, religion, or political or other opinion, national, ethnic or social origin, property, birth, disability or other status.' These grounds also cover sexual orientation." *Id*., *General Comment No. 4*, Adolescent Health and Development in the Context of the Convention on the Rights of the Child, CRC/GC/2003/4, ¶ 6 (July 21, 2003).

The United Nations Committee Against Torture, established to oversee compliance with the Convention Against Torture, has held that: "[t]he principle of non-discrimination is a basic and general principle in the protection of human rights and fundamental to the interpretation and application of the Convention. […] States Parties must ensure that, insofar as the obligations arising under the Convention are concerned, their laws are in practice applied to all persons, regardless of their […]sexual orientation." *General Comment No. 2*, *Application of Article 2 by States Parties*, CAT/C/GC/2, ¶¶ 20, 21 (Jan. 24, 2008).

Similarly, the Committee on the Elimination of Discrimination Against Women, established to monitor State compliance with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), has included sexual orientation within its understanding of and approach to discrimination. *See General Recommendation No. 27 on Women of Age and The Protection of Their Human Rights*, CEDAW/C/GC/27, ¶ 13 (Dec. 16, 2010). *See also General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women*, CEDAW/C/GC/28, ¶ 18 (Dec. 16, 2010).

In 2008, the United Nations General Assembly adopted the "Declaration on Human Rights, Sexual Orientation, and Gender Identity," reaffirming the principle of non-discrimination, which requires that human rights apply equally to ever human being, regardless

of sexual orientation or gender identity."[16] Similarly, in June, 2011, the United Nations Human Rights Council passed a resolution entitled "Human Rights, Sexual Orientation and Gender Identity," which condemns violence and discrimination on the basis of sexual orientation and gender identity.[17]

Additionally, United Nations Human Rights experts have similarly condemned discrimination and other human rights violations on the basis of sexual orientation and gender identity. Known as Special Rapporteurs, independent experts, or special representatives, these experts appointed by the Human Rights Council address thematic or country-specific issues. Discrimination on the basis of sexual orientation and gender identity has been addressed within the mandates of the special rapporteurs on violence against women, torture, extrajudicial executions, minorities, migrants, terrorism, freedom of religion or belief, housing, education, the independence of lawyers and judges, racism, human rights defenders, and health. [18]

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[16] *Statement on human rights, sexual orientation and gender identity*, U.N. G.A. 63rd Sess., U.N. Doc. A/63/635, ¶ 3 (Dec. 18, 2008) *available at* http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/311-1.pdf.

[17] United Nations Human Rights Council, Resolution Regarding Human Rights, Sexual Orientation and Gender Identity, A/HRC/17/L.9/Rev.1 (June 15, 2011).

[18] *See*, *e.g.,* Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Fifteen Years of the United Nations Special Rapporteur on Violence Against Women, Its Causes and Consequences–A Critical Review*, p. 11 (2009), *available at* http://www2.ohchr.org/english/issues/women/rapporteur/docs/15YearReviewof VAWMandate.pdf; Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment, A/56/156, ¶¶ 17-25 (July 3, 2001); Report on Civil and Political Rights, In Particular Questions Related to Torture and Detention, E/CN.4/2002/76, p. 14 (Dec. 27, 2001); Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Nigeria*, A/HRC/7/3/Add.4 (Nov. 22, 2007); Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Civil and Political Rights, In Particular Questions Related to Disappearances and Summary Executions, E/CN.4/2003/3, ¶¶ 66, 67 (Jan. 13, 2003); Report of the Independent Expert on Minority Issues, A/HRC/13/23 (Jan. 7, 2010).

Other United Nations entities have integrated issues of sexual orientation and gender identity into their work as well, including the Office of the United Nations High Commissioner for Human Rights (OHCHR), the United Nations Development Programme (UNDP), the United Nations Children's Fund (UNICEF), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Office of the United Nations High Commissioner for Refugees (UNHCR), the International Labour Organization (ILO), the World Health Organization (WHO), the United Nations Population Fund (UNFPA) and the Joint United Nations Programme on HIV/AIDS (UNAIDS).[19]

b. The European System for the Protection of Human Rights

The European Court of Human Rights ("ECtHR") has repeatedly found laws discriminating against persons on the basis of sexual orientation to be a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). In *Dudgeon v. the United Kingdom*, App. No. 7525/76, Eur. Ct. H.R. (1981) and subsequently in *Norris v. Ireland*, App. No. 10581/83, Eur. Ct. H.R. (1988) and *Modinos v. Cyprus*, App. No. 15070/89, Eur. Ct. H.R. (1993), the Court held that 19th century-era laws criminalizing male same-sex sex violated Art. 8 (right to privacy) of the European Convention. In 1997, the Court held that a higher age of consent for male same-sex sex as compared to that of heterosexual acts was discriminatory and in violation of Art. 14 (right to non-discrimination). *Sutherland v. United Kingdom*, App. No. 25186/94, Eur. Ct. H.R. (March 27, 2001). The Court has also held that discrimination on the basis of sexual orientation in the military was a violation of Art. 8. *Lustig-Prean and Beckett v. United Kingdom*, App. Nos. 31417/96 and 32377/96, Eur. Ct. H.R. (1999).

[19] Report of the United Nations High Commission for Human Rights Navanethem Pillay, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, A/HRC/19/41, ¶ 3 (Nov. 27, 2011), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/170/75/PDF/G1117075.pdf?OpenElement.

In *Salgueiro da Silva Mouta v. Portugal,* the Court found that a Portuguese court's denial of custody to a parent based solely on his sexual orientation was a form of discrimination prohibited by Art. 8 and Art. 14 of the Convention. App. No. 33290/96, Eur. Ct. H.R. (1999). More recently, the Court ruled that a ban of a gay rights demonstration violated the petitioner's rights to freedom of expression (Art. 10), peaceful assembly (Art. 11) and to be free from discrimination (Art. 14). *GenderDoc-M v. Moldova*, App. No. 9106/06, Eur. Ct. H.R. (2012). Additionally, the Court of Justice of the European Union has established that discrimination against transgender persons, or gender identity discrimination, is to be regarded as a form of sex discrimination. Case C-13/94, *P v S and Cornwall County Council*, 1996 E.C.R. I-2143 (holding that the dismissal of an individual following gender reassignment was unlawful discrimination on the basis of sex.).

In addition, a number of other mechanisms explicitly provide for the protection against discrimination on the basis of sexual orientation and gender identity. The Treaty of Amsterdam, which amended the founding treaties of the European Union, effected a specific amendment to make the prohibition of discrimination on the basis of sexual orientation explicit.[20] In 2000, the Council of the European Union adopted a binding council directive establishing a general framework for equal treatment in employment and occupation which explicitly prohibits direct and indirect discrimination the basis of sexual orientation.[21] The Charter of Fundamental Rights of the European Union also prohibits "any discrimination on any ground such as [...] sexual

[20] Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts, Art. 6, *entered into force* May 1, 1999.

[21] Council of the European Union, Council Directive 2000/78/EC (Nov. 27, 2000), *available at* http://www1.umn.edu/humanrts/instree/EUframeworkdirective2000.pdf

orientation."[22] In 1995, the Parliamentary Assembly of the Organization for Security and Cooperation in Europe (to which the United States and Canada belong) passed a declaration calling on Member States to provide equal protection against discrimination for all and specifically included sexual orientation.[23, 24]

c. The Inter-American System for the Protection of Human Rights

Each year since 2008, the General Assembly of the Organization of American States has passed resolutions entitled "Human Rights, Sexual Orientation and Gender Identity," in which the Assembly has condemned discrimination against persons on the basis of their sexual orientation and gender identity and urged UN Member States to prevent, sanction and eradicate such discrimination.[25]

The Inter-American Court of Human Rights has held discrimination on the basis of sexual orientation and gender identity to be a violation of the American Convention on Human Rights in a case in which the Chilean Supreme Court was found to have stripped a lesbian mother and judge of custody of her three daughters on the basis of her sexual orientation. *Atala*

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[22] Charter of Fundamental Rights of the European Union, art. 21(1), *entered into force* Dec. 1, 2009, *available at* http://www.europarl.europa.eu/charter/default_en.htm.

[23] Ottawa Declaration of the OSCE Parliamentary Assembly, Chap. III, Art. 29 (July 8, 1995) *available at* http://www.osce.org/pa/38133.

[24] The OSCE describes itself as "the world's largest regional security organization" and is comprised of 56 member states from Europe, North America and Central Asia. *See* http://www.osce.org/who/.

[25] *See* Human rights, sexual orientation and gender identity, AG/RES. 2435 (XXXVIII-O/08), June 3, 2008; Human Rights, sexual orientation and gender identity, AG/RES. 2504 (XXXIX-O/09), June 4, 2009; Human rights, sexual orientation and gender identity, AG/RES. 2600 (XL-O/10) June 8, 2010; Human rights, sexual orientation and gender identity, AG/RES. 2653 (XLI-O/11) June 7, 2011; Human rights, sexual orientation and gender identity, AG/RES. 2721 (XLII-O/12) June 4, 2012.

Riffo case. As early as 1999, in a case alleging discriminatory treatment on the basis of sexual orientation with respect to a Colombian prison's policies regarding conjugal visits, the Inter-American Commission on Human Rights (IACHR) deemed the case admissible on the grounds that it could amount to a violation of the American Convention on Human Rights. *Marta Lucia Alvarez Giraldo*, Case 11.656, Inter-Am. Comm'n H.R., Report No. 71/99 (1999). In addition, the Commission has undertaken country visits to investigate issues relating to discrimination and violence against lesbian, gay, bisexual, transgender and intersex people,[26] conducted thematic hearings on these issues,[27] and issued precautionary measures for lesbian, gay, bisexual, transgender, and intersex persons at risk.[28]

d. The Rome Statute Is Further Evidence of the Proscription of Persecution on the Basis of Sexual Orientation and Gender Identity

The Rome Statute contains an expanded set of prohibited grounds of persecution as compared to other international tribunals. These include political, racial, national, ethnic, cultural, religious, gender, or other grounds that are "universally recognized as impermissible under international law." Rome Statute Art. 7(h).

The legislative history of the Rome Statute reveals that the listed grounds allow the court to consider persecution on the basis of sexual orientation or gender identity. *See* Cate Steains, *Gender Issues,* in The International Criminal Court: The Making of the Rome Statute, R. Lee (Ed.) 374 (Kluwer 1999) (indicating that Rome statute permits left term open to permit courts to

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[26] Reports of Thematic Hearings *available at* http://www.oas.org/es/cidh/audiencias/TopicsList.aspx?Lang=en&Topic=32.

[27] *IACHR Issues Preliminary Observations On Visit To Jamaica*, Inter-Am Comm'n H.R., Report No. 59/08, *at* http://www.cidh.org/comunicados/english/2008/59.08eng.htm.

[28] *Honduras: Human Rights and the Coup d'état*, Inter-Am. Comm'n H.R.,OEA/Ser.L/V/II., doc. 55 p. 52 n.222 (Dec. 30, 2009) (The IACHR has granted precautionary measures for members of the LGTB Community").

decide whether sexual orientation would be included within the definition of gender). .Additionally, the legislative history indicates that the catchall provision of other grounds "universally recognized" in international law is to be understood as meaning "widely recognized" and not as requiring unanimity. Machtheld Boot and Christopher K. Hall, *Persecution,* in Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article 150 (Otto Triffterer (Ed.)) (Nomos Verlagsgesellschaft, Baden-Baden 1999). Even while not unanimous, the prohibition of discrimination on the basis of sexual orientation and gender identity is certainly widely recognized

e. Rapidly Growing Consensus Among States

A number of countries have long recognized persecution on the basis of sexual orientation as grounds for granting asylum.[29] The United Nations High Commission for Refugees has advised since 1991 that "persons facing attack, inhuman treatment, or serious discrimination because of their homosexuality, and whose governments are unable or unwilling to protect them, should be recognized as refugees."[30] Additionally, in recognition of the discriminatory nature of laws of criminalizing same-sex conduct, nearly two-thirds, or 113, of the world's countries have moved to repeal such laws.[31] Fifty-two countries prohibit

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[29] *See* Michael Carl Budd, *Mistakes in Identity: Sexual Orientation and Credibility in the Asylum Process (Masters Thesis)*, The American University in Cairo (Dec. 2009), *available at* http://www.aucegypt.edu/GAPP/cmrs/Documents/MichaelCarlBudd_Thesis.pdf (Countries that regularly grant asylum due to a claim of persecution based on sexual orientation/gender identity, "are Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Latvia, the Netherlands, New Zealand, Norway, South Africa, Spain, Thailand, the United Kingdom, and the United States").

[30] United Nations High Commissioner for Refugees, *The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, 20 Refugee Surv. Q. 77 (Oct. 2001).

[31] Lucas Paoli Itaborahy, *State-Sponsored Homophobia: A world survey of laws criminalising*

discrimination based on sexual orientation in employment,[32] nineteen prohibited discrimination in employment based on gender identity,[33] and six countries have explicit constitutional prohibitions against discrimination based on sexual orientation.[34] Incitement to hatred based on sexual orientation is prohibited in twenty-four countries.[35] National courts have also begun to recognize sexual orientation as a prohibited ground of discrimination and strike down laws prohibiting same-sex intercourse.[36]

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same-sex sexual acts between consenting adults, The International Lesbian, Gay, Bisexual, Trans and Intersex Association (2012), *available at* http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2012.pdf.

[32] *Id*. at 15-16.

[33] *Id*. at 16.

[34] *Id.*

[35] *Id.*

[36] *See*, *e.g.*, *Egan v. Canada*, [1995] 2 S.C.R. 513, 175 (Can.) (holding that sexual orientation is a prohibited ground for discrimination and that "homosexuals, whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage"); *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 102 (Can.) ("[C]oncealment of true identity ... must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection."); *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice*, 1998 (12) BCLR 1517 (CC) (S. Afr.), *available at* 1998 SACLR LEXIS 36 (holding the law prohibiting homosexual intercourse unconstitutional and that homosexuals as a coherent group are deserving of protection against discrimination); *El Al Isr. Airlines Ltd. v. Danilowitz*, [1994] Isr.S.C. 48(5) 749, 15-17 (Isr. Sup. Ct.), *available at* http://www.tau.ac.il/law/aeyalgross/Danilowitz.htm (prohibiting discrimination against homosexuals in the granting of employment benefits); *Leung TC William Roy v Secretary for Justice*, [2006] 4 H.K.L.R.D. 211 (CA) (H.C.) (Hong Kong) (prohibiting unjustified differential treatments based upon one's sexual orientation); *Naz Foundation v. Govt. of NCT of Delhi*, [2009] 160 Delhi Law Times 277 (Delhi H.C.) (India) (holding that treating consensual homosexual sex between adults as a crime is a violation of fundamental rights protected by India's Constitution) (*appeal pending* in the Supreme Court).

Even if there were some ambiguity on the issue, it would be illogical and contrary to broader international human rights norms, to suggest that such "ambiguity should be resolved *in favor* of discrimination." Rhonda Copelon, *Gender Crimes As War Crimes: Integrating Crimes Against Women Into International Criminal Law*, 46 McGill L.J. 217, 237 (2000). Indeed, in determining the scope and application of the non-discrimination provision of the American Convention on Human Rights to the category of "any other social group," "it is always necessary to choose the alternative that is most favorable to the protection of the rights enshrined in said treaty, based on the principle of the rule most favorable to the human being." *Atala Riffo*, ¶ 84 (citing Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (ser. A) No. 5, ¶ 52 (Nov. 13, 1985).

In light of the absolute prohibition in international law against equality and non-discrimination, observing this principle is vital.

III. PLAINTIFF'S DETAILED COMPLAINT STATES AND PLAUSIBLY PLEADS COGNIZABLE CLAIMS FOR DEFENDANT'S LIABILITY FOR THE PERSECUTION OF PLAINTIFF.

The First Amended Complaint ("FAC") plainly states valid claims under the ATS and state tort laws upon which relief can be granted. When considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a court must accept the complaint's well-pleaded facts as true and draw all reasonable inferences therefrom in the pleader's favor. *Haley v. City of Boston*, 657 F.3d 39, 46 (1st Cir. 2011). Plaintiff has asserted three theories of Defendant's accessory liability: (i) that he participated in a conspiracy; (ii) that he was part of a joint criminal enterprise; and (iii) that he aided and abetted in the persecution of Plaintiff. Contrary to Defendant's principle argument, it is primarily federal common law, and not exclusively international law, that defines the contours of these forms of accessory liability. Thus, it is not surprising, as detailed below,

that courts have long held that the ATS recognizes causes of action involving these theories of liability.

To satisfy the pleading requirements of Federal Rule of Civil Procedure 8, detailed factual allegations are not necessary, although the complaint must "contain sufficient factual matter…to 'state a claim to relief that is plausible on its face.'" *Haley*, 657 F.3d at 46 (*citing Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007)). Evaluating the plausibility of a pleaded scenario is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id*. at 52-53 (*citing Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). To "nudge" a complaint across the plausibility threshold, *Iqbal*, 556 U.S. at 680, "a claim does not need to be probable, but it must give rise to more than a mere possibility of liability." *Grajales v. Puerto Rico Ports Auth.*, 682 F.3d 40, 44-45 (1st Cir. 2012) (*citing Iqbal*, 556 U.S. at 678). *See also Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1312 (2011) (unanimous opinion) (courts should take a "holistic" review of complaint to ask if allegations "raise a reasonable expectation that discovery will reveal [relevant] evidence…to allow the court to draw the reasonable inference that the defendant" had the requisite scienter, *i.e*. "intent to deceive, manipulate or defraud"). Nor does the Court's decision in *Iqbal* give courts license to decide which of the competing inferences are more likely to be true. *Iqbal*, 556 U.S. at 678. Instead, all plaintiffs must do is "give enough details about the subject matter of the case to present a story that holds together. . . . The court will ask itself *could* these things have happened, not *did* they happen." *Swanson v. City Bank, N.A.* 614 F.3d 400, 404 (7th Cir. 2010) (Posner, J., dissenting).

Thus, in a case alleging political discrimination post *Twombly* and *Iqbal*, the First Circuit has held that,

> [P]aucity of direct evidence is not fatal in the plausibility inquiry. Smoking gun proof of discrimination is rarely available, especially at the pleading stage. Nor is

> such proof necessary. When a protean issue such as an actor's motive or intent is at stake, telltale clues may be gathered from the circumstances surrounding the adverse employment action. The plausibility threshold simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of the illegal conduct.

Grajales, 682 F.3d at 49 (internal quotation marks and citations omitted).

As Defendant himself repeatedly protests, Plaintiff's complaint is no boilerplate; it is sixty-one pages long and contains hundreds of detailed allegations (including Lively's own statements) that tell a plausible story about his role in a plan to persecute on the basis of sexual orientation and deprive LGBTI persons of their fundamental rights. As such, Plaintiff states a claim for a violation of the ATS – under each of three theories of accessory liability – and state law civil conspiracy and negligence.

A. Because the ATS Recognizes Federal Common Law for Accessory Liability, Plaintiff Plausibly States Claims for Defendants' Liability.

Defendant makes two broad objections to the assertion of accessory liability over him. First, he contends that conspiracy and joint criminal enterprise ("JCE") are not recognized as independent torts under international law and thus cannot be pled as a basis for liability under the ATS. Second, he asserts a much higher *mens rea* standard than required by law for each form of accessory liability and erroneously concludes that Plaintiff's allegations do not meet them.

Even if conspiracy (beyond certain limited crimes) and JCE do not exist as free-standing substantive torts,[37] that does not preclude their recognition under the ATS as a mechanism for imposing liability (*i.e*. a cause of action) for violations of accepted international law norms. The

[37] *See Beck v. Prupis*, 529 U.S. 494, 503 (2000) ("[Civil] conspiracy is not independently actionable; rather, it is a means for establishing vicarious liability for the underlying tort."); *Hamdan v. Rumsfeld*, 548 U.S. 557, 611 n.40 (2006) ("'[J]oint criminal enterprise' theory of liability…is a species of liability for the substantive offense (akin to aiding and abetting), not a crime on its own.").

ATS's grant of jurisdiction was "enacted on the understanding that the common law would provide a cause of action" for certain torts (*i.e.*, those "in violation of the law of nations"). *Sosa,* 542 U.S. 692 at 724; *see also In re Estate of Marcos Human Rights Litig.*, 25 F.3d at 1475 (the ATS "does not require that the action 'arise under' the law of nations, but only mandates a 'violation of the law of nations' in order to create a cause of action.").

Accordingly, courts look primarily to federal common law in order to determine whether a cause of action in the form of accessory liability exists for ATS suits to enforce the relevant substantive international law norm.[38] *See, e.g., Filártiga v. Peña-Irala*, 577 F. Supp. 860, 863 (E.D.N.Y. 1984) ("By enacting Section 1350 Congress…gave [federal courts] power to choose and develop federal remedies to effectuate the purposes of the international law incorporated into United States common law."); *Xuncax v. Gramajo,* 886 F. Supp. 162, 182-83 (D. Mass. 1995) ("[L]iability standards applicable to international law violations" should be developed "through the generation of federal common law."); *Cabello*, 402 F.3d at 1156 n.2, 1159 (employing federal common law principles to give effect to substantive violations of customary international law).[39] Indeed, international law itself recognizes this approach by leaving "the task of defining

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[38] This is the general approach courts take in determining standards of liability under federal statutes where none were specifically provided by Congress. *See Meyer v. Holley*, 537 U.S. 280, 285 (2003) ("When Congress creates a tort action, it legislates against a background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules."). *See also, e.g., Kling v. Fid. Mgmt. Trust Co.*, 323 F. Supp. 2d 132, 146-47 (D.Mass. 2003) (recognizing respondeat superior liability under ERISA).

[39] It is true that federal courts are split on whether federal common law principles or principles derived from international law govern accessory liability. *Compare Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (applying international law) *with*, *e.g.*, *Cabello*, 402 F.3d at 1156-60 (applying federal common law). Recognizing this split, the one court has concluded that "[t]ort principles from federal common law may be more useful." *Doe v. Islamic Salvation Front*, 257 F.Supp.2d 115, 121 n.12 (D.D.C. 2003). This Court should follow suit. Not only is the application of federal common law the correct approach – *Talisman* reads a footnote in *Sosa*, which is non-binding dicta, overbroadly: the

the remedies that are available for international law violations" up to individual states. *Kadić*, 70 F.3d at 246. *See also Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 286 (Hall, J., concurring) ("[I]nternational law does not specify the means of its domestic enforcement.").

Moreover, because the "law of nations" was commonly believed to be part of our common law, *see Filártiga*, 630 F.2d at 886 (*citing* 1 William Blackstone, Commentaries 263-64)), there is no reason to look to international law independently of federal common law, *see*, *e.g.*, *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 623 (1983) (applying "principles ...common to both international law and federal common law"). Accessory liability – conspiratorial and aiding and abetting – have long been a part of federal common law and international law and have thus long been cognizable under ATS cases as a mechanism to prove a substantive violation of the "law of nations" – in this case, the crime against humanity of persecution.

1. Plaintiff Has Plausibly Stated a Cognizable Claim for Defendant's Participation in a Conspiracy.

U.S. courts have incorporated long-standing federal common law principles in recognizing conspiracy liability under the ATS. *Cabello,* 402 F.3d at 1159; *Lizarbe v. Rondon*, 642 F.Supp.2d 473, 490 (D. Md. 2009); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1094 (S.D. Fla. 1997). At the same time, conspiratorial liability is well-established in international law. According to Article 6 of the Nuremberg Charter:

> [L]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such a plan.

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footnote addresses only direct liability (who may be liable), not address secondary liability (what behavior may incur liability), *see Talisman*, 582 F.3d at 258 (*citing Sosa*, 542 U.S. at 732 n.20); it also follows this Court's precedent. *See Xuncax*, 886 F. Supp. at 182-83.

Indeed, a long line of cases have recognized conspiracy liability for violations under ATS for substantive law violations beyond genocide and aggression. *See, e.g., Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1267-69 (11th Cir. 2009); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005); *Hilao v. Estate of Marcos*, 103 F.3d 767, 776 (9th Cir. 1996); *Carmichael v. United Techn. Corp.*, 835 F.2d 109, 115 (5th Cir. 1988); *In re Terrorist Attacks on September 11, 2001,* 392 F. Supp. 2d 539, 565 (S.D.N.Y. 2005); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 100 (D.D.C. 2003); *Doe v. Unocal Corp.*, 963 F. Supp. 880, 896 (C.D. Cal. 1997); *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004).[40]

The Eleventh Circuit articulated the elements of conspiracy liability under the ATS:

(1) two or more persons agreed to commit a wrongful act;

(2) the defendant joined the conspiracy knowing of at least one of the goals of the conspiracy and intending to help accomplish it; and

(3) one or more of the violations were committed by someone who was a member of the conspiracy and acted in furtherance of the conspiracy.

Cabello, 402 F.3d at 1158. Further, under federal common law, a defendant may "be held liable for the substantive offenses of his co-conspirators if those offenses were reasonably foreseeable

[40] One of the cases cited by the Defendant to argue that conspiracy claims cannot be brought under the ATS actually assumes such a claim is cognizable in dismissing the adequacy of the factual allegations supporting it. *See Abecassis v. Wyatt*, 704 F.Supp.2d 623, 655-56 (S.D. Tex. 2010). The other two cases upon which Defendant relies confuse conspiracy as a theory of liability with the inchoate crime of conspiracy. *See In re South African Apartheid Litig.*, 617 F. Supp. 228, 263 (S.D.N.Y. 2009) (*citing Hamdan*, 548 U.S. at 610 (discussing conspiracy only as a stand-alone offense under international law); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 662-65 (S.D.N.Y. 2006) (*citing Hamdan*, 548 U.S. 557, and *Brief for Specialists in Conspiracy and International Law as Amicus Curiae Supporting Petitioner*, *Hamdan*, 548 U.S. 557 (2006) (05-184) (stating "conspiracy as a criterion of complicity for the commission of substantive crimes" is "accepted in international law"), ICTR Statute Art. 2 (listing the standalone offense of conspiracy to commit genocide), and ICTY Statute Art. 4 (same)).

and committed in furtherance of the conspiracy." *United States v. Díaz*, 670 F.3d 332, 342 (1st Cir. 2012) (*citing Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946)). *See also United States v. Vazquez-Botet*, 532 F.3d 37, 62 (1st Cir. 2008).

a. The Complaint Contains Sufficient Factual Allegations to Plausibly Plead a Conspiracy to Persecute the LGBTI Community.

The FAC adequately alleges the Defendant's knowledge of the conspiracy's unlawful objective of persecution of the LGBTI community in Uganda by depriving them of their fundamental rights of nondiscrimination and freedom of expression/association, among others. Lively acknowledged that he has worked closely with two prominent leaders of the LGBTI-persecution campaign in Uganda, Stephen Langa and Martin Ssempa. FAC ¶¶ 47-55. *See also id*. ¶ 56 (acknowledging that his work was instrumental in helping Langa and Ssempa initiate their anti-gay strategies); *id*. ¶¶ 94, 97-98, 108-111, 126, 130 (alleging Lively and Langa maintained contact and coordinated campaigns to legislate against equality, deploy anti-gay propaganda and urge denying rights of expression and association). The conference Lively's co-conspirators invited him to participate in was explicitly designed to propel an anti-gay movement. *See*, *e.g*., *id*. ¶¶ 26, 36. In coordination with Langa, Lively met at length with members of Parliament and other government officials to discuss the asserted need to criminalize advocacy. *Id*. ¶¶ 78, 103-105. Lively reviewed and commented upon legislation that criminalized advocacy in favor of LGBTI rights. *Id*. ¶¶ 68, 86. Lively even boasted about the extent of his involvement and his investment in the persecution campaign in Uganda, which produced the persecutory results he helped to plot:

> [M]y host and ministry partner in Kampala, Stephen LANGA, was overjoyed with the *results of our efforts* … He said that a respected observer of society in Kampala had told him *that our campaign* was like a nuclear bomb against the "gay" agenda in Uganda. *I pray that this, and the predictions, are true.*

Id. ¶¶ 88-89 (emphases added).[41]

b. Defendant Is Liable for the Acts of His Co-Conspirators.

Defendant suggests that because neither he, nor the co-conspirators named in the complaint – Langa, Ssempa, Buturo, or Bahati – are alleged to have finally carried out the acts that violated Plaintiff's fundamental rights, he cannot be held responsible. This argument fails. The *mens rea* for civil conspiracy is reflected in the defendant's knowledge of the conspiracy's unlawful objective, even where the defendant is unaware of the identity of all co-conspirators or details of the conspiracy. *Ungar v. Islamic Republic of Iran*, 211 F. Supp. 2d 91, 100 (D.D.C. 2002); *see also Jones v. Chicago*, 856 F.2d 985, 992 (7th Cir. 1998) ("[Y]ou need not have agreed on the details of the conspiratorial scheme or even know who the other conspirators are. It is enough if you understand the general objectives of the scheme, accept them, and agree, either explicitly or implicitly, to do your part to further them."); *Daily v. Gusto Records, Inc*., 14 Fed. Appx. 579, 587 (6th Cir. 2001) ("[I]it is not essential that each conspirator have knowledge of the details of the conspiracy."). Indeed, a person may be held responsible for the entire conspiracy although that person has had a comparatively small part in it and even if the person joined the conspiracy after it was well underway. *Metro. Prop. & Cas. Ins., Co. v. Boston Reg'l Physical Therapy, Inc.,* 550 F. Supp. 2d 199, 203 (D. Mass. 2008); *W. Reserve Life Assur. Co. v. Conreal LLC,* 715 F. Supp. 2d 270 (D.R.I. 2010).

One of the clear goals of the long-standing conspiracy in Uganda is to silence LGBTI advocates and organizations by criminalizing advocacy. *See* FAC ¶¶ 67-71 (Lively's suggestion

[41] The allegations also reveal that Lively's role in Ugandawas deliberate, strategic and well-coordinated, not merely incidental or episodic. *See* FAC ¶¶ 57-67 (describing Lively's parallel efforts in other parts of the world to, *inter alia*, defeat non-discrimination legislation and criminalize advocacy using some of the same methods he used and coached others to use in Uganda); *id*. ¶¶ 58-60 (his parallel and intentional discriminatory campaign in Latvia); *id.* ¶¶61-64 (Moldova); *id*. ¶ 67 (Russia).

that "[t]he easiest way to discourage 'gay pride' parades and other homosexual advocacy is to make such activity illegal."); *id*. ¶¶ 68-70, 86 (anti-homosexuality bill that Lively reviewed and commented on banned organizations that advocate for LGBTI rights and criminalized such advocacy with severe penalties); *id*. ¶¶ 173-175 (co-conspirator Lokodo's announcement that he would de-register 38 non-governmental organizations that support the rights of sexual minorities). Thus Defendant can plausibly be held liable for the raids of Plaintiff's 2012 convenings, even if Defendant did not know that Simon Lokodo, Buturo's successor as Minister of Ethics and Integrity, was a part of the conspiracy – although discovery could lead to relevant evidence suggesting he may have known. It is sufficient that Lokodo picked up where Buturo's role in the conspiracy left off and carried forward the conspiracy's persecutory objectives in which Lively had been knowingly involved for years. *See* FAC ¶ 52 (Lively's early strategy for censorship in Uganda). The Defendant can also plausibly be held liable for the violations that occurred in June 2008 and July 2005, *id*. ¶¶ 186-193; the crack-down in 2007 which forced some of Plaintiff's staff members and staff of member organizations to flee for safety, *id*. ¶¶ 199-208; and the forms of invidious discrimination that have impacted the work of Sexual Minorities Uganda, *id*. ¶¶ 226-228. *See Vazquez-Botet*, 532 F.3d at 60, 62-63 (finding that a "plausible rendition of the record" supported the defendant's conviction for the substantive offense "since extortion was committed in furtherance of the conspiracy (and indeed was the conspiracy's object), and was a reasonably foreseeable result of the conspiracy").

2. Plaintiff Has Properly and Sufficiently Pled Facts Supporting Defendant's Liability Under The Doctrine of Joint Criminal Enterprise.

If the court agrees with Defendant that it must look to international law to determine modes of liability, Def. Br. 58-59, the Court would then need to assess whether the complaint

sufficiently alleges Defendant's liability under the "analog" to conspiracy in international law – *i.e.*, "joint criminal enterprise." *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 260 (2d Cir. 2009) (*citing Hamdan*, 548 U.S. at 611 n.40). Joint criminal enterprise is, under recognized international law, "a species of liability for the substantive offense (akin to aiding and abetting)." *Hamdan*, 548 U.S. at 611 n.40 (*citing Prosecutor v. Tadić*, Judgment, Case No. IT-94-1-A, Judgment ¶¶ 185-226 (July 15, 1999) ("*Tadić* Appeal Judgment"). (surveying international jurisprudence, treaties and conventions, and the law of individual states and concluding that liability for common criminal purpose or design is a well-established customary rule). Accordingly, courts have recognized this form of liability under the ATS. *See*, *e.g.*, *Lizarbe*, 642 F. Supp. 2d at 490 (recognizing JCE liability for ATS claims); *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2006 U.S. Dist. LEXIS 63209, at *33 n.13 (N.D. Cal. Aug. 22, 2006) (same).

Similar to *Pinkerton* liability under federal common law, 328 U.S. at 646-48, JCE liability may attach in "cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose." *Tadić* Appeal Judgment ¶ 204; *id.*, ¶ 224 n. 289.[42] *See also Lizarbe*, 642 F.Supp.2d at 490 (same). The *mens rea* required for this level of JCE liability is knowledge of potential

[42] *Accord Vasiljević* Appeal Judgment, ¶ 99 ("While murder may not have been explicitly acknowledged to be part of the common purpose, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians."); *Prosecutor v. Karemera*, Case No. ICTR-98-44-I, Amended Indictment, ¶¶ 7, 15, 66, 69 (Feb. 23, 2005) (charging government officials with rape where they were aware that rape was widespread and the "natural and foreseeable" consequence of the object of the enterprise to destroy the Tutsi as a group and where the defendants nonetheless knowingly and willfully participated in that enterprise).

consequences. *See Lizarbe*, 642 F. Supp. 2d at 490 ("awareness that such a crime was a possible consequence of the execution of the enterprise"); *Tadić* Appeal Judgment, ¶ 229(iv) ("either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed").

As the standards for conspiracy liability under U.S. common law, including *Pinkerton* liability, are the same as those outlined above for JCE liability as recognized by international law, the allegations set forth in the FAC adequately plead liability under the doctrine of joint criminal enterprise.[43]

If the Court were to impose the higher *mens rea* standard of purpose or intent as suggested by the Defendant, Def. Br. 61, 63, which is not required, it would find that Plaintiff's allegations meet this standard as well. The FAC identifies as evidence of Defendant's intent and purpose, that he published handbooks and traveled to different countries with the purpose of spreading "a comprehensive plan for building a multi-pronged attack to repress the 'gay movement.'" FAC ¶¶ 58-67. He visited Uganda, in particular, for the express purpose of "teaching about the 'gay' agenda in churches, schools colleges, community groups and in Parliament." Scott Lively, *Report from Uganda: Comments about March 3-9 Pro-Family Mission to Uganda*, Mar. 17, 2009, *available at* http://www.defendthefamily.com/pfrc/archives.php?id=2345952 (*last visited* Sept. 18, 2012)

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[43] The facts alleged here are analogous to the case of *Milomir Stakić* before the ICTY, where Stakić was a member of a JCE that had as its common purpose "a discriminatory campaign to ethnically cleanse the Municipality of Prijedor by deporting and persecuting Bosnian Muslims and Bosnian Croats in order to establish Serbian control" and the campaign consisted of the crimes against humanity of persecution, deportation, and other acts. *Stakić* Appeal Judgment,,¶ 73. The Appeals Chamber held that murder, as both a crime against humanity and a war crime, and extermination were natural and foreseeable consequences of ethnic cleansing and that Stakić was aware of these crimes and "reconciled himself to that likelihood." *Id*., ¶¶ 88-98.

("*Lively Report from Uganda*") (*cited in* FAC ¶ 55 n.14). And when told that his campaign "was like a nuclear bomb against the 'gay' agenda in Uganda," he expressed his pride and hope that the "bomb spreads across the whole world, against the gay movement." FAC ¶¶ 88-89.

The allegations here are distinguishable from those set forth in *Liu Bo Shan v. China Construction Bank Corp.*, 421 Fed. App'x 89 (2d Cir. 2011), upon which the Defendant relies. Def. Br. 61. In *Liu Bo Shan*, the plaintiff sought to bring an ATS claim against a Chinese bank on the theory that the bank conspired with the Chinese police to torture the plaintiff. *Id*. at 91-92. The court found that, "[a]t most, the amended complaint alleges that the Bank falsified evidence and induced the police to arrest Liu in retaliation for his release of the audit, *knowing* that the police would subject him to mistreatment." *Id*. at 94 (emphasis added). Plaintiff alleges far more than mere knowledge and acquiescence. By contrast, the FAC alleges that the Defendant acted in concert with his co-conspirators for the purpose of persecuting the LGBTI community in Uganda.

3. Plaintiff Has Stated a Plausible Claim for Defendant's Aiding and Abetting Liability.

"Virtually every court to address the issue [of aiding and abetting liability under the ATS], before and after *Sosa*" has held that it exists. *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 19 (D.C. Cir. 2011). Courts have long applied federal common law principles to determine aiding and abetting liability for a violation of international law. *See*, *e.g*., *Talbot v. Janson*, 3 U.S. 133, 156-58 (1795); *Cabello*, 402 F.3d at 1156 n.2; *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315-16 (11th Cir. 2008); *Lizarbe*, 642 F. Supp. 2d at 490-91. Nevertheless, as with conspiratorial liability, the standard for aiding and abetting liability is the same under federal common law and international law: the *actus reus* required is assistance or encouragement that

has a substantial effect on the perpetration of a wrongful act, and the *mens rea* required is knowledge of one's role in the wrongful activity. The allegations in the FAC meet both requirements as well as the higher "purpose" standard of *mens rea* Defendant incorrectly proposes.[44]

a. The FAC Adequately Alleges the Defendant's *Actus Reus* for Aiding and Abetting Liability.

Under federal common law, a defendant's conduct constitutes aiding and abetting when it "gives substantial assistance or encouragement to" the perpetrator of the crime. Restatement (Second) of Torts § 876(b) (1979). *See also McMullen v. Sevigny*, 386 F.3d 320, 331 (1st Cir. 2004). Advice or moral support to a tortfeasor may be sufficient to subject the defendant to aiding and abetting liability. *See* Restatement (Second) of Torts § 876 cmt. d. *See also Friendly Hotel Boutique Corp. v. Me&A Capital*, Civil No. 11-1709, 2012 U.S. Dist. LEXIS 131777, at *9 (D.P.R. 2012) (aiding and abetting "encompasses all assistance rendered by words, acts, encouragement, support, or presence, but which falls short of actionable participation in the direction of the alleged enterprise.") (internal quotations omitted); *Estate of Davis v. United States*, 340 F. Supp. 2d 79, 92 n.11 (D. Mass. 2004) (*citing Brown v. Perkins*, 83 Mass. 89, 1 Allen 89 (1861) ("[A]ny person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks, or signs, or who in any way or by any means

[44] Defendant suggests that the standard for determining aiding and abetting liability under international law must "meet *Sosa*'s standard of specificity and universal acceptance among civilized nations to support a claim under the Alien Tort State." Def. Br. 54 (*citing Doe v. Nestle*, S.A., 748 F. Supp. 2d 1057, 1108 (C.D. Cal. 2010)). Meeting *Sosa*'s "specific, universal and obligatory" standard for a violation of the law of nations "is not necessary for proscribing an aiding and abetting violation of international law" because aiding and abetting "falls within the rubric of the ancillary rules of the particular norm…to be determined by the federal common law analysis." *See* Paul L. Hoffman and Daniel A. Zaheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act*, 26 Loy. L.A. Int'l & Comp. L. Rev. 47, 70 (2003).

countenances or approves the same, is in law deemed to be an aider and abettor.""")). The context of the overall operation in which the defendant assisted the principal tortfeasor(s) is important. *See Estate of Davis*, 340 F. Supp. 2d at 92 ("although the amount of assistance [the defendant] gave [the principal] may not have been overwhelming as to any given burglary in the five-year life of this criminal operation, it added up over time to an essential part of the pattern") (*quoting Halberstam v. Welch*, 705 F.2d 472, 488 (D.C. Cir. 1983)). Liability extends to all the wrongs that were reasonably foreseeable results of the wrong that the defendant encouraged. Restatement (Second) of Torts § 876 cmt. d; *Halberstam*, 705 F.2d at 484.

Similarly, under international law, "[p]ractical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime" constitutes the *actus reus* for aiding and abetting liability. *Prosecutor v. Furundžija*, Case No. IT-95-17/1/T, Judgment, ¶¶ 235, 192-234 (Dec. 10, 1998) ("*Furundžija* Trial Judgment") (reviewing cases from U.S. military commissions, British military courts, the German Supreme Court, the United Nations War Crimes Commission, and other ICTY tribunals).[45] A defendant who provides "additional confidence to his companions" that "facilitates the commission of the crime" may be subject to aiding and abetting liability. *Id*. ¶ 202. To demonstrate a "substantial effect," the defendant's conduct must have "made some difference to the course of events," but it need not have been the but-for cause of the commission of the offense. *Id*., ¶¶ 221. Further, the defendant need not have exerted some form of control over the principal(s); that the defendant was able to "modify" the way in which the act was committed suffices. *Id*. ¶ 219.

[45] Decisions of the ICTY and ICTR are "especially helpful for ascertaining the current standard for aiding and abetting under international law as it pertains to the [ATS]." *Doe v. Unocal*, 395 F.3d 932, 950 (9th Cir. 2002), *vacated by grant of en banc review*, 395 F.3d 978 (9th Cir. 2003). The standards *Furundžija* sets out for criminal aiding and abetting liability has been followed by the ICTY and ICTR for more than a decade.

The Defendant incorrectly interprets the FAC to allege that the Defendant merely provided "moral support" or "tacit encouragement and approval." Def. Br. 54. While the moral support he provided to those who carried out persecution would be, based on the foregoing standards, sufficient to state an aiding and abetting claim, he did much more. In additional to "motivational sermons," in which Lively "[taught] about the 'gay' agenda," *Lively Report from Uganda*, Lively held trainings for pastors, students, and governments officials on his theories about the "dangers" of the LGBTI community and "practical suggestions" for dealing with the community, FAC ¶¶ 50-52. He provided Ugandans and co-conspirators with specific tactics to persecute the LGBTI community, including "conflat[ing] LGBTI orientation and identity with sexual violence against children" and "attribut[ing] the genocides in Germany and Rwanda to 'supermarcho' gays…insinuat[ing] that Uganda may be subject to similar genocidal fates unless it followed his strategy for the eradication of LGBTI identity and advocacy." *Id*. ¶¶ 81-82. He assisted with "efforts to strengthen the laws [against homosexuality] and embolden the leaders of society 'so that when the law came out they'd have an easier time' implementing it," and "review[ed] and comment[ed] upon the draft of the [Anti-Homosexuality Bill] before it was introduced." *Id*. ¶¶ 85-86. Lively himself recognized how instrumental he was in launching and developing Uganda's anti-gay movement. *Id*. ¶¶ 56, 88.

The court in *Nestle,* 748 F. Supp. 2d at 1109 – a case upon which the Defendant heavily relies, Def. Br. 54-55 – distinguished the complaint before it, which alleged merely an omission by the defendant (failure to exercise economic leverage), from the complaint in *Presbyterian Church of Sudan v. Talisman Energy*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003), where the court concluded the plaintiff stated a claim. In *Talisman*, "the complaint alleged that the defendants… held 'regular meetings' with Sudanese government, developed a 'joint . . . strategy . . .to execute,

enslave or displace' civilians, and issued 'directives' and 'request[s]' to the Sudanese government." *Id*. (*citing Talisman*, 244 F. Supp. 2d at 300-01). In fact, the *Nestle* Court would have accepted allegations of training actors to commit the specific wrongful act alleged, as alleged in this case, as sufficient to show "practical assistance." *See Nestle*, 748 F.Supp.2d at 1101.

Relying on *Nestle*, along with *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009), and *Aziz v. Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011), Defendant attempts to argue that "expressing opinions to government officials cannot constitute aiding and abetting." Def. Br. 54. In *Nestle*, the court held that the defendant's alleged provision of financial assistance and farming supplies "establish[ed], at most, that Defendants generally assisted the Ivorian farmers in the act of growing crops and managing their business – not that Defendants substantially assisted the farmers in the acts of committing human rights abuses." *Nestle*, 748 F.Supp.2d at 1057. Similarly, in *Aziz*, the court found that the only conduct alleged was the placing "into the stream of international commerce" chemicals that had "many lawful commercial applications." *Aziz*, 658 F.3d at 401, 390; *accord In re South African Apartheid Litig*, 617 F. Supp. 2d at 258 ("The provision of goods specifically designed to kill, to inflict pain, or to cause other injuries resulting from violations of customary international law bear a closer causal connection to the principal crime than the sale of raw materials or the provision of loans."). Unlike in the above described scenarios, the Defendant's conduct here was only consistent with encouraging and training Ugandan actors to persecute the LGBTI community in Uganda. There is no lawful use of the Defendant's "assistance."

b. The FAC Adequately Alleges the Defendant's *Mens Rea* for Aiding and Abetting Liability.

Under federal common law, a defendant must have been "aware of his role in the overall wrongful activity when he provided the assistance" for aiding and abetting liability to attach. *McMullen*, 386 F.3d at 331. *Accord Halberstam*, 705 F.2d at 477. The defendant is only required to know of the principal's wrongful enterprise, not the particular, reasonably foreseeable activities of the enterprise. *See* Restatement (Second) of Torts 876(b) cmt. d; *Halberstam*, 705 F.2d at 488.

Under international law, the *mens rea* standard is the same – knowledge of potential consequences. *See*, *e.g.*, *Exxon*, 654 F.3d at 39; *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2006 U.S. Dist. LEXIS 63209, at *17-18 (N.D. Cal. 2006); *Mehinovic*, 198 F. Supp. 2d at 1356. This standard was established by post-World War II jurisprudence of national military courts and the Nuremberg Military Tribunals, *see, e.g., Furundžija* Trial Judgment, ¶¶ 238, 239, 240 n.261, 248 (discussing Nuremberg era cases where the courts found knowledge sufficient); *United States v. Flick*, 6 Tr. War Crim. 1187, 1222 (1947) (finding criminal liability where defendant made vital financial contributions to the SS despite knowledge of their widespread abuses, even though the defendant "did not approve nor . . . condone the atrocities of the SS").[46] Present day international criminal tribunals, including the ICTY[47] and ICTR[48] have continued to apply it.[49]

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[46] *See also United States v. Ohlendorf (The Einsatzgruppen Case),* 4 Tr. War Crim. 411, 569 (1948) (convicting defendant of crimes against humanity, noting that "in locating, evaluating and turning over lists of Communist party functionaries to the executive department of his organization he was *aware* that the people listed would be executed when found") (emphasis added)); *United States v. Von Weizsaecker (The Ministries Case)*, 14 Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10 [Tr. War Crim.] 308, 478, 953 (1949) *available at* http://www.loc.gov/rr/frd/Military_Law/NTs_war-criminals.html (explaining that even though the defendants "neither originated [the deportation program], gave it enthusiastic support, nor in their hearts approved of it [,] [t]he question is whether they knew of the program and whether in any substantial manner they aided, abetted, or

The FAC adequately alleges that the Defendant provided his assistance to those who have carried out the persecution of Uganda's LGBTI community with the knowledge that his assistance would facilitate persecution. *See*, *e.g.*, FAC ¶¶ 56, 88, 90 (referencing Lively's acknowledgement of the deep impact his visits had on the campaign of persecution of the LGBTI community in Uganda).)

The FAC would even survive before a court that (incorrectly) applies a purpose standard for aiding and abetting liability. Under this standard, a complaint must allege that the defendant "acted with the purpose or intent to assist in [an international-law] violation." *In re Chiquita Brands Int'l, Inc.*,, 792 F. Supp. 2d at 1343. The FAC does exactly that. The violation of international law alleged here is persecution; throughout the FAC, every allegation describing Defendant's conduct is coupled with allegations demonstrating that he acted with the purpose or

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implemented it"). The Second Circuit misreads *The Ministries Case* to stand for the proposition that the *mens rea* standard for aiding and abetting liability under international law is purpose, rather than knowledge. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009).

[47] *See*, *e.g.*, *Tadić* Appeal Judgment, ¶¶ 674, 692; *Furundžija* Trial Judgment, ¶ 245; *Krnojelac* Appeal Judgment, ¶ 51.

[48] *See, e.g.*, *Prosecutor v. Ndindabahizi*, Case No. ICTR-01-71-A, Judgment, ¶ 122 (Jan. 16, 2007); *Prosecutor v. Ntagerura*, Case No. ICTR-99-46-A, Judgment, ¶ 370 (July 7, 2006); *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment, ¶ 180 (Jan. 27, 2000); *Akayesu* Trial Judgment, ¶ 545.

[49] While the Rome Statute employs "purpose" language for aiding and abetting liability in Article 25(3)(c), the *mens rea* standard for aiding and abetting liability has "yet to be construed by the [ICC]," so "[the Statute's] precise contours and the extent to which it may differ from customary international law thus remain somewhat uncertain." *Khulumani*, 504 F.3d at 275-76 (Katzmann, J., concurring). "[U]ntil the judges of the ICC rule on the *mens rea* requirement for aiding and abetting under the Rome Statute, no national court can dictate that one standard (such as purpose or shared intention) negates a second standard (such as knowledge) in the ICC's constitutional framework or in its practice." David Scheffer and Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 Berkeley J. Int'l L. 334, 353 (2011).

intent to assist in the persecution of the LGBTI community in Uganda. *See*, *e.g.*, FAC ¶¶ 75-89 (describing Lively's meetings with "influential leaders" at the Anti-Gay Conference, where "he was 'teaching about the 'gay' agenda'" and aimed to act as "a nuclear bomb against the 'gay' agenda in Uganda"). *Compare Nestle*, 748 F. Supp. 2d at 1110 (where plaintiffs conceded that they could not allege that the defendants "acted with the purpose and intent that their conduct would perpetuate child slavery"); *Liu Bo Shan*, 421 Fed. App'x at 94 (where plaintiff only alleged the defendant's "knowledge of certain mistreatment" at the hands of the police, not intent for the plaintiff to be tortured). Lively intended to achieve the results he advocated.

Furthermore, the FAC need not allege that the defendant intended to persecute "the specific individuals alleged in the complaint"; only that the defended acted "with the specific purpose that the [principals] commit the international-law offenses alleged in the complaint[]." *In re Chiquita*, 792 F.Supp.2d at 1347. In *Chiquita*, this rule meant that the plaintiffs needed to "allege that Chiquita intended for the AUC to torture and kill civilians in Colombia's banana-growing regions, which is the conduct that allegedly harmed or killed Plaintiffs' relatives." *Id*. at 1344-45. Here, the Plaintiff specifically alleged that the Defendant intended to persecute the LGBTI community in Uganda, (*see*, *e.g.*, FAC ¶ 43 ("Lively has worked extensively with key anti-gay political and religious leaders in Uganda with the overall purpose of depriving LGBTI persons of their fundamental rights.")), which is the conduct that harmed SMUG and its members.

B. Plaintiff Has Plausibly Pled a Cognizable Claim for the Crime Against Humanity of Persecution.

1. The FAC Alleges Intentional Acts of Discrimination and Deprivation of Rights Constituting Persecution.

As set out in Section II, international tribunals have held that the core elements of the crime of persecution consist of an act or omission which (1) discriminates in fact and which denies or infringes upon a fundamental right laid down in international law (the *actus reus*); and (2) was carried out deliberately with the intention to discriminate (the *mens rea*). *See Krnojelac* Trial Judgment ¶ 431. The "fundamental rights" referred to in the definition of persecution are generally understood to be those found in the UDHR and ICCPR including the rights to life, liberty, security of person, equality and non-discrimination, freedom of expression and assembly and religion and to be free from arbitrary arrest, detention and cruel, inhuman and degrading treatment.[50] *See* Section II (B).

The Complaint sets forth numerous factual allegations that create a plausible inference that Plaintiff suffered persecution. It describes with specificity instances involving the severe deprivation of Plaintiff's fundamental rights and those of its staff. *See* FAC ¶¶ 29, 32, 124, 152, 171, 173-175, 180-183, 200, 201, 205 (describing calls by government officials for the arrest of LGBTI advocates, the censoring of media favorable to LGBTI issues and rights, and threats to shut down non-governmental organizations supportive of LGBTI rights); *id*. ¶¶ 165-185 (attempted criminalization of advocacy and association by government officials); *id*. ¶¶ 28, 190-98 (persistent exclusion of LGBTI persons from HIV/AIDS health strategies); *id*. ¶¶ 30, 209-214 (2005 home raid and arbitrary arrest of SMUG staff member Victor Mukasa); *id*. ¶¶ 33, 186-

[50] *See* ICCPR, Art. 2, Art. 26 (equality and non-discrimination), Art. 7 (freedom from cruel, inhuman or degrading treatment), Art. 9 (liberty and security of person/freedom from arbitrary arrest and detention), Art. 19 (freedom of expression), Art. 21 (peaceful assembly), and Art. 22 (freedom of association).

193 (2008 arrests of SMUG staff member Pepe Oziema, and abusive prison treatment, following peaceful demonstration protesting the exclusion of LGBTI people from the country's HIV/AIDS strategy); *id*. ¶¶ 176-185 (February 14, 2012, raid and by Minister of Ethics Simon Lokodo, of conference organized by Plaintiff and one of its member organizations); *id*. ¶¶ 40-42, 165-175 (June 18, 2012 raid).

Additionally, the complaint sets out facts establishing the second element of a persecution claim – that the deprivation of Plaintiff's fundamental rights was motivated by *discriminatory* intent and animus toward LGBTI. Defendant could not possibly argue otherwise, because, by his own admission, he regards gays and lesbians as evil, pedophilic, homicidal, predatory and largely responsible for genocides in Nazi Germany and Rwanda. *See* FAC ¶¶ 8, 24, 72-74, 80-83, n. 22. Equally indisputable is that his co-conspirators share his hatred of LGBTI persons and his desire to strip them of dignity and rights of equality. *See id*. ¶ 183 (Minister of Ethics justified February 14, 2012 raid by stating that workshop organizers were "recruiting people to go out and divulge the ideology of LGBT" and were "terrorists."); *id*. ¶¶ 99-118 (Langa organized the March 2009, and recruited Lively to participate in order to "raise the alarm" and "strengthen" laws against homosexuality). Indeed, co-conspirator Langa directly justified acts of persecution, including the February 2012 raid by exclaiming:

> It is now approaching three years since we first raised an alarm and made public the molesting, defilement and recruitment of our children into homosexuality… To date, our children are still vulnerable and no tangible deterrent action has been put in place to safeguard them and the nation from the vice of homosexuality."

Id. ¶ 171.

2. The FAC Alleges Widespread or Systematic Deprivation of Fundamental Rights Constituting a Crime Against Humanity.

As set out Section II (A), courts have identified the following threshold elements to be established for any crime against humanity, including: (1) a violation of one of the enumerated acts; (2) committed as part of a widespread or systematic attack; (3) directed against a civilian population; and (4) committed with knowledge of the attack. *See Saravia*, 348 F.Supp. 2d at 1156. An attack need not be military, of course. *See* Section II (A).

In addition to the numerous detailed allegations supporting a claim of persecution, additional evidence of the systematic or widespread nature of the attacks on the LGBTI community in Uganda includes: arbitrary arrests, harassment and mistreatment by police; discrimination by private actors in housing, employment, education and healthcare; and the number of persons requiring assistance from Plaintiff as they flee from persecution and seek asylum elsewhere. FAC ¶¶ 226-228. The sensationalistic and dehumanizing treatment of LGBTI issues and advocates in the media, including with exhortations to violence against LGBTI persons, is additional evidence of the hostile and dangerous climate in which these violations took place. FAC ¶¶ 215-221. *See also id*. ¶¶ 156, 8 (aggressive and threatening statements).

Defendant suggests that the violations alleged by Plaintiff are not serious enough to meet ATS standards, and in the process continues to attempt to front Lively's speech as the operative basis of the claims. Def. Br. 37. But, the crime of "persecution encompasses acts of varying severity, from killing to a limitation on the type of professions open to the targeted group," *Tadić* Trial Judgment, ¶ 704. *See also Kupreškić* Trial Judgment, ¶ 568 ("It is clear that persecution may take diverse forms, and does not necessarily require a physical element."); *Prosecutor v. Blaškić,* IT-95-14-T, Judgment, ¶¶ 227, 233 (Mar. 3, 2000) ("[T]he crime of 'persecution' encompasses not only bodily and mental harm and infringements upon individual freedom but

also acts which appear less serious, such as those targeting property, so long as the victimised persons were specially selected on grounds linked to their belonging to a particular community.")[51]

Taken together, with their mutually reinforcing effects, the violations Plaintiff has experienced in the context of the larger widespread and systematic attack against the LGBTI community in Uganda are shocking and egregious. Most troubling, if one is to believe the co-conspirators in this case, it foreshadows a dangerous progression. *See, e.g.* FAC ¶¶ 56, 8 (proclamations of government officials and parliamentarians allied with Defendant, that "the days of homosexuals are over," and "we must exterminate homosexuals before they exterminate society").

C. As a Non-State Actor, Defendant Can Be Held Liable for Persecution.

Contrary to Defendant's erroneous reading of *Kadić*, Def. Br. 45-47, private actors may be held liable for crimes against humanity. *See Kadić*, 70 F.3d at 236. The second paragraph of the court's opinion, states that private actors could be held responsible for genocide, war crimes and crimes against humanity as they do not require state action. *Id.* Indeed, the very first codification of the crime of persecution in international law recognized that non-state actors could be held liable for the offense of persecution. In 1951, the International Law Commission included persecution "against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State *or by private individuals acting at the instigation or with the toleration of such authorities*" in the Draft Code of Offences Against the Peace and

[51] It should be noted that the ICTY's jurisdiction, like that of the Nuremberg Tribunal, required that offenses be connected with an armed conflict. ICTY Statute, Art. 5.

Security of Mankind.[52] The first prosecution for the crime of persecution involved a non-state actor when Julius Streicher was tried and convicted of crimes against humanity by the Nuremberg Tribunal for his "twenty-five years of speaking, writing and preaching hatred of the Jews." Nazi Conspiracy and Aggression, Opinion and Judgment (October 1, 1946), Office of the U.S. Chief of Counsel for Prosecution of Axis Criminality 56 (1947). Likewise, in the modern era, non-state actors have been held accountable for persecution. See *Nahimana* Trial Judgment. ((owner and editor-in-chief of newspaper convicted of incitement to genocide and persecution, though persecution conviction reversed on appeal because timeframe of the paper's publication did not coincide with the underlying basis of the charge).

Defendant suggests the Supreme Court in *Sosa* intended to limit the ATS to liability for state action. Def. Br. 45. *Sosa*, however, merely reiterated what courts had already done in inquiring whether, under international law, *certain* violations (not those pled here) must necessarily be committed through state action. 542 U.S. 692. As set forth above, international law recognized liability for private actors for the crime against humanity of persecution from the very beginning.

D. Plaintiff Has Properly and Sufficient Pled Facts Supporting Defendant's Liability for Civil Conspiracy under Massachusetts State Law.

Massachusetts courts recognize a stand-alone form of civil conspiracy, also referred to as "true conspiracy." A true conspiracy occurs when (1) the conspirators, acting in unison, (2) exercise a peculiar power of coercion over the plaintiff that (3) they would not have had if they had acted alone. *Limone v. United States,* 497 F.Supp.2d 143 (D. Mass. 2007).

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[52] The International Law Commission is a United Nations body that promotes the progressive development of international law and its codification. *See* Statute of the International Law Commission, Art. 1. *Available at*: http://untreaty.un.org/ilc/texts/instruments/english/statute/statute_e.pdf.

The factual allegations in the complaint state a claim for this form of civil conspiracy. Acting alone, without access to and collaboration with government leaders like the Minister of Ethics and Integrity, highly influential civil society leaders with ready-made constituencies through their congregations like Stephen Langa and Martin Ssempa, as well as willing parliamentarians like Bahati, Lively would not have been able to advance his anti-gay agenda in Uganda, as he has elsewhere in the world, *e.g*. Moldova, Latvia, and Russia. Without Lively, perceived and billed to the Ugandan audience as an expert in the history, manifestation and the extreme dangers of homosexuality, FAC ¶ 80, 106, Langa would not have been able to mobilize the support he needed to (i) bring about legislation to strengthen anti-gay legislation; and (ii) successfully advocate for harsher and more oppressive actions by the government even before the law goes into effect.

Indeed, subsequent to the pivotal March 2009 conference, Langa held meetings in which he repeatedly referred to and relied on Lively's groundwork. FAC ¶¶ 106-107. Likewise, absent the support and pressure Langa and Ssempa were able to mobilize with Lively's assistance and support, Bahati and Buturo would not have been able to gain traction for their anti-gay strategies. Langa and Lively saw their plan as a joint initiative describing it as "*our* campaign." FAC ¶ 88 (emphasis added).

E. Plaintiff Has Properly and Sufficiently Pled Facts Supporting Defendant's Liability for Negligence under Massachusetts State Law.

Massachusetts courts have held that one who takes action ordinarily owes to everyone else, who may be affected thereby, a duty to act reasonably. *Onofrio v. Dep't of Mental Health*, 562 N.E.2d 1341,1344-45, 610 (Mass. 1990). Moreover, a duty can exist even when the unreasonably dangerous condition involves the foreseeable criminal or negligent conduct of an

intermediary. *Jupin v. Kask,* 849 N.E.2d 829, 836-37 (Mass. 2006). As detailed above in Section III (B), the Complaint clearly sets out the ways in which the Defendant created an unreasonably dangerous condition which was rife with the possibility, indeed the actuality, of severe violations of the rights of LGBTI organizations and individuals and failed to act reasonably to prevent the ensuing harm. And while this claim necessarily involves negligence, as opposed to the specific intent to cause that harm as set out above, Massachusetts courts allow plaintiffs to plead alternative and even inconsistent claims. *Haley,* 657 F.3d at 39.

IV. SMUG HAS SUFFICIENTLY PLED BOTH ORGANIZATIONAL STANDING AND ASSOCIATIONAL STANDING.

To sufficiently plead Article III standing, a plaintiff must demonstrate (1) an injury in fact, which is (2) fairly traceable to the defendant's misconduct, and which can be (3) redressed by a favorable decision of the court. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). The elements of standing need only "be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e*., with the manner and degree of evidence required at the successive stages of the litigation.'" *Id*. Thus, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Id*. (internal quotation omitted).

A. SMUG Has Organizational Standing.

Organizations have interests separate and apart from individuals comprising them. As such, courts have long recognized that they are entitled to sue for injuries to their organizational status. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 377 n.19 (1982); *accord Mass.*

Delivery Assoc. v. Coakley, 671 F.3d 33, 44 n.7 (1st Cir. 2012). SMUG, as an entity, has sufficiently pled the requirements to demonstrate that it has standing.

1. SMUG Adequately Alleges an "Injury in Fact."

Defendant does not dispute that SMUG adequately pled an injury in fact. Def. Br. 89-90. Nor could he. SMUG has suffered injury in two distinct ways. First, SMUG has been a victim of persecution. Second, SMUG has been forced to devote significant efforts to counteracting the persecution caused by the Defendant, perceptibly impairing SMUG's ability to carry out its objectives.

a. SMUG Has Suffered From Persecution.

SMUG, "as an entity," has suffered a "severe deprivation of fundamental rights," amounting to persecution. FAC ¶ 5. SMUG's "association has been criminalized" and its advocacy "suppressed and punished." *Id*. ¶ 6. SMUG's "meetings and trainings have been raided and disbanded." *Id*. ¶¶ 10, 165-70, 176-79. *See*, *e.g*., *Sinaltrainal v. Coca-Cola Co*., 256 F. Supp.2d 1345 (S.D. Fla. 2003) (allowing a union to bring suit under the ATS based on claim that defendants denied its rights to associate); *Estate of Rodriquez v. Drummond Co*., 256 F. Supp. 2d 1250 (N.D. Ala. 2003) (same). It has been prevented from attending meetings to further its objective to end discrimination against LGBTI persons, FAC ¶¶ 186-90, and it has been targeted and punished for speaking out publicly against the persecution of the LGBTI community, *id*. ¶¶ 199-204. *See, e.g., Irish Lesbian and Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d Cir. 1998) ("The denial of a particular opportunity to express one's views can give rise to a compensable injury…An organization, as well as an individual, may suffer from the lost opportunity to express its message.") (collecting cases). Defendant's "decade-long campaign" to persecute the LGBTI community in Uganda has frustrated SMUG's objective to "advocate for

the rights of [LGBTI persons] in Uganda." FAC ¶ 1. *See NAACP v. Button*, 371 U.S. 415 (1963) (permitting organization that solicits legal business to challenge the constitutionality of a statute's ban on "the improper solicitation of any legal or professional business"); *Dev. Disabilities Advocacy Ctr., Inc. v. Melton*, 689 F.2d 281 (1st Cir. 1982) (permitting organization to challenge an institution's visitation rules on the basis that they "infringe[d] its own organizational rights as a legal advocacy group to effectively communicate with a population it was created to serve").

The Defendant attempts to argue that because SMUG is not a natural human being, it cannot assert a claim for persecution, a crime against humanity. *See* Def. Br. 40-42. International law defines persecution only by the acts that constitute persecution, not against whom or what they are committed. *See*, *e.g.*, Rome Statute, art. 7(2)(g) ("'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."); ICTY Statute, art. 5(h) ("persecution" not defined; simply stating that "persecutions on political, racial and religious grounds" constitute crimes against humanity); ICTR Statute, art. 3(h) (same). It is universally recognized that organizations may be victim to crimes against humanity and, in particular, persecution. Crimes against humanity are, by definition, crimes against "civilian populations." *See*, *e.g.*, Rome Statute, art. 7(1); ICTY Statute, art. 5; ICTR Statute, art. 3. Collective victimization implies that organizational actors, such as SMUG, can be victim to crimes against humanity. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 331 (S.D.N.Y. 2003) (finding that a church could be victim to genocide or war crimes); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 759 (9th Cir. 2011) ("[The ICJ's] clarity about collective responsibility implies that organizational actors such as corporations or paramilitary groups may commit genocide.")

The type of "persecution" recognized as a crime against humanity is "[p]ersecution against any identifiable *group or collectivity*." *See*, *e.g.*, *Rome Statute*, art. 7(1)(h). Historically, international jurisprudence has recognized the persecution of organizations. *See*, *e.g.*, Judgment of the International Military Tribunal for the Trial of German Major War Criminals, *available at* http://www.yale.edu/lawweb/avalon/imt/proc/judwarcr.htm (listing injuries to synagogues and Jewish businesses as "persecution"); Claire Hulme and Dr. Michael Salter, *The Nazi's Persecution of Religion as a War Crime: The Oss's Response Within the Nuremberg Trials Process*, 3 Rutgers J. Law & Relig. 4, n.6 (2001) (describing prosecution of the Gauleiter of Vienna who had "initiated wartime measures persecuting the Churches in Austria").[53]

[53] Defendant cites the Second Circuit's observation that "only states and individuals have 'rights, duties and liabilities' in the international human rights arena" in support of his argument that organizations do not have rights that they may assert under the ATS. Def. Br. 41-42 (*citing Kiobel v. Royal Dutch Petroleum Co*., 621 F.3d 111 (2d Cir. 2010)). This language from *Kiobel* concerns whether or not corporations can be held liable under the ATS, and *Kiobel*'s holding – that they cannot – is an outlier. *See*, *e.g.*, *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 748 (9th Cir. 2011); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 41 (D.C. Cir. 2011); *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.32d 1013 (7th Cir. 2011); *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008). Moreover, *Kiobel*'s reading of the law to be restricted to natural persons only applies to the question of *liability*. *See Kiobel*, 621 F.3d at 118. The court's holding is predicated on its finding that "[n]o corporation has ever been subject to any form of *liability*…under the customary international law of human rights," *id*. at 148-49 (emphasis added), not that "corporate defendants, [*as*] *organizations*…cannot violate international law," as suggested by Defendant, Def. Br. 41) (emphasis added). In its reasoning, the Second Circuit found it "particularly significant…that no international tribunal…has ever held a corporation liable for a violation of the law of nations." *Id*. 132. By contrast, international human rights bodies have recognized the standing of organizations to assert violations of their fundamental rights. *See*, *e.g.*, U.N. Human Rights Council, *Institution-Building of the United Nations Human Rights Council* art. 87(d) (June 18, 2007). *See also*, *generally*, Lloyd Hitoshi Mayer, *NGO Standing and Influence in Regional Human Rights Courts and Commissions*, 36 Brook. J. Int'l L. 911 (2011).

b. SMUG's Ability to Carry Out Its Objectives Has Been Significantly Impaired.

Where an organizational plaintiff has been forced to "devote significant resources to identify and counteract" the defendant's discriminatory practices, thus "perceptibly impairing" the organization's ability to carry out its objectives, "there can be no question that the organization has suffered injury in fact." *Havens Realty*, 455 U.S. at 379. SMUG has been forced to concentrate its efforts on "addressing the resulting and continuing crisis arising out of the conspirators' efforts to ensure LGBTI persons would not be beneficiaries along with everyone else of basic human rights," FAC ¶ 214, in particular, by (i) assisting LGBTI persons in finding necessary medical care, housing and needed resources, *id*. ¶¶ 194, 198; (ii) "assisting those persons who have fled the persecution and seek asylum in other countries," *id*. ¶ 228; and *(iii)* "assisting LGBTI persons who have been arbitrarily arrested and harassed and/or mistreated by the police, including responding to urgent calls about arrests or harassment and arranging for legal representation and advocating on their behalf," *id*. ¶ 227. *See also Gr. Boston Chamber of Commerce v. City of Boston*, 772 F. Supp. 696, 698 n.7 (D.Mass. 1991) (finding injury where defendant's labor legislation would frustrate plaintiff organization's objective to protect business owners); *NAACP v. Harris*, 567 F.Supp. 637, 639 (D.Mass. 1983) (finding injury where defendants' discriminatory activity frustrated plaintiff organization's efforts to achieve racial justice). SMUG's staff members have also been subject to unlawful arrest, detention, sexual assault, and other forms of persecution, FAC ¶¶ 170, 187, 188, 207, 209-211, forcing them into hiding and SMUG to divert its attention to "seeking redress and accountability for the violations," *id*. ¶ 213, and to adopt additional security measures and relocate its operations, *id*. ¶ 224. *See Estate of Rodriquez*, 256 F.Supp. 2d at1259 (finding injury where "union has alleged that defendants' complicity in the attack against the union's leaders has forced a number of other

members and leaders of the union to go into hiding, has threatened its viability, and has forced it to expend scarce resources in providing security and protection to its members"); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 19 (D.D.C. 1998) (cognizable injury where organization's leaders were forced to go into hiding "preventing the [organization] from carrying out its activities of advancing the rights of women in Algeria"), *ruling on standing rev'd on other grounds*, 257 F. Supp. 2d 115, 119-20 (D.D.C. 2003).

SMUG's injuries, when properly viewed in the context of widespread or systematic persecution of the LGBTI community in Uganda – a crime against humanity, fall into the zone of interests to be protected by the ATS. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (2004) (Breyer, J.) (listing crimes against humanity as a "subset" of "universally condemned behavior" over which "universal jurisdiction exists to prosecute"). *Cf. Talisman*, 244 F. Supp. 2d at 331 (finding property damage to constitute injury under the ATS on the ground that it "may violate the law of nations when committed in the context of a genocide or war crimes").

2. SMUG's Allegations Demonstrate That Its Injuries Are Traceable to Defendant's Conduct.

Defendant's assertion that SMUG fails to plead sufficient facts to meet the traceability requirement for standing mischaracterizes the relevant law and factual allegations. Defendant erroneously contends that "causation is absent if the injury stems from the independent action of a third party," referencing the allegations in the FAC involving third parties. Def. Br. 85-87. This categorical statement is incomplete. While the presence of a third party may be relevant to the inquiry as to whether plaintiff's injuries are traceable to a defendant, such presence is certainly not fatal to the traceability analysis. The injuries need only be "*fairly* traceable to the defendant's acts or omissions." *Vill. of Arlington Heights v. Metropolitan Housing Dev't Corp.*,

429 U.S. 252, 261 (1977) (emphasis added). In other words, the defendant's actions need not "be the very last step in the chain of causation." *Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgmt. Council*, 589 F.3d 458, 467 (1st Cir. 2009) (internal quotations omitted). Rather, they may be the indirect cause of the plaintiff's injuries. *Vill. of Arlington Heights*, 429 U.S. at 261.

The Defendant has played the role of one of "the principal strategists and actors behind this decade-long persecutory campaign" against the LGBTI community and organizations like SMUG that advocate on its behalf, FAC ¶ 25, which has caused, and continues to cause, great injury to the Plaintiff. As the Defendant worked through a conspiracy in which other actors carried out the acts of persecution that have affected SMUG, *id*. ¶¶ 43-45, third parties were necessarily involved. But their involvement does not negate the Defendant's role in causing harm to the Plaintiff. Such a rule would make it impossible for any plaintiff to sue a ringleader of a conspiracy, who typically participates in the planning of a wrongful act without actually committing it himself.

In *Massachusetts v. Environmental Protection Agency*, the Environmental Protection Agency ("EPA") was sued for failing to regulate greenhouse gas emissions from new motor vehicles. 549 U.S. 497 (2007). The Supreme Court found causation even though the EPA asserted that the greenhouse gas emissions at issue "contribute[d] so insignificantly to petitioner's injuries," and "greenhouse gas emissions from developing nations, particularly China and India, are likely to offset any marginal domestic decrease." *Id*. at 523-24. Similarly, in *CoxCom v. Chaffee*, a cable company brought suit against the sellers of filters capable of bypassing CoxCom's pay-per-view billing mechanisms. 536 F.3d 101 (1st Cir. 2008). Even though there was "no showing that any CoxCom subscriber actually used one of the filters

purchased from [the defendants] to cause financial harm to CoxCom, the chain of events that can result from the sale of filters in CoxCom's service area" was sufficient to find a causal link between the defendants' sales and future injury to be suffered by CoxCom. *Id*. at 108. Here, the Defendant has acknowledged the *significant* role he has played in the persecution of the LGBTI community in Uganda, as one of the "fathers" of the anti-gay movement in Uganda, FAC ¶ 90, whose actions have impacted the country with the force of a "nuclear bomb," *id*. ¶ 88. And as opposed to intervention by independent third parties, the Defendant has worked *in concert* with those who have directly carried out the persecution or engaged others to do so. *id* ¶ 45.

Defendant attempts to recast his First Amendment claim into a standing objection by suggesting that, to meet the traceability requirement, the acts of persecution alleged by SMUG must be sufficiently close in time to Defendant's speeches to constitute "imminent incitement" of persecution. Def. Br. 85-87. He cites no cases (as there are none) that suggest that for an injury to be "fairly traceable" to the defendant, it must be "imminent."[54] By conflating these two separate and distinct issues, Defendant inappropriately uses the standing doctrine's gatekeeping function to analyze the merits of the case. *See*, *e.g.*, *Donahue v. City of Boston*, 304 F.3d 110, 117 (1st Cir. 2002) ("[T]he Court must resolve questions pertaining to its subject-matter jurisdiction before it may address the merits of a case.").

[54] Defendant solely relies on *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 927-28 (1982), which addresses the merits of a First Amendment claim, not standing. In the standing analysis, "imminence" is considered in determining whether there is an injury in fact, not causation. *See Lujan*, 504 U.S. at 560 (holding that, for standing, the injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"). The injury's imminence must only be shown "where the complaint relies only on prospective harm." *Adams v. Watson*, 10 F.3d 915, 922 (1st Cir. 1993). Here, the Plaintiff's injury is actual and ongoing, rather than prospective.

3. SMUG's Allegations Demonstrate That Its Injuries Are Redressable.

Defendant does not attempt to argue that SMUG's injuries are not redressable. The money damages SMUG seeks would serve to redress its past injuries. However, Defendant argues that the *equitable* relief SMUG seeks – an injunction prohibiting Lively from continuing persecution of SMUG – is not "substantially likely" to redress its injuries because neither Defendant's four co-conspirators nor the Ugandan actors cited in the FAC as involved in SMUG's persecution "are before this Court." Def. Br. 83, 91. This misses the point.

Redressability is not a zero-sum proposition; "it is a matter of degree." *Katz v. Pershing*, LLC, 672 F.3d 64, 72 (1st Cir. 2012). To fulfill the burden of showing that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision," *Lujan*, 504 U.S. at 561, SMUG "need only show that a favorable ruling could potentially lessen its injury; it need not definitively demonstrate that a victory would completely remedy the harm," *Antilles Cement Corp. v. Fortuño*, 670 F.3d 310, 318 (1st Cir. 2012). *See Weaver's Cove*, 589 F.3d at 467-68 (a favorable decision would provide plaintiff "effectual relief" by removing "a barrier to achieving approval" even though additional regulatory hurdles would need to be cleared before project could be commenced); *Vill. of Arlington Heights*, 429 U.S. at 261-62 (injunctive relief sought by the plaintiff would remove one barrier to the construction of the plaintiff's building, but not guarantee that the building would be built, as its construction would still be contingent upon other factors); *Massachusetts v. EPA*, 549 U.S. at 524-26 (damage to Massachusetts coastline redressable by nominally decreasing U.S. greenhouse gases, even where predominant cause of harm is by foreign countries).

Given the Defendant's leadership role in conceptualizing, coordinating and implementing the campaign of persecution against the LGBTI community in Uganda and that Ugandan

government officials, police and media have "parrot[ed]" his characterizations of LGBTI persons to persecute the LGBTI community, (*see*, *e.g.*, ¶ 10), SMUG's "injury would at least be alleviated" – even if not completely abated – by a ruling declaring that Defendant's acts violate the law of nations and enjoining him from further plotting and conspiring with others to persecute SMUG. *See Antilles*, 670 F.3d at 319.[55]

Defendant cites to *Lujan* and *Igartua-De La Rosa v. United States*, 417 F.3d 145 (1st Cir. 2005), in support of his contention that the equitable relief sought by SMUG "cannot reach independent third parties who are also responsible for the harm alleged," and, thus, SMUG's equitable claims are not redressable. Def. Br. 83-84. In *Lujan*, the Supreme Court held that the plaintiffs' claims were not redressable because granting plaintiffs' request that the U.S. Interior Secretary reconsider his decision to limit the scope of Endangered Species Act regulations would not necessarily change the regulation's scope nor terminate the agency's programs that purportedly caused injury to the plaintiff. 504 U.S. at 569-71. By contrast, enjoining the Defendant from conspiring to persecute SMUG would *lessen* the persecution from which it suffers. Unlike a specific program or policy, persecution does not have an "all or nothing" effect, but rather causes injury as a matter of degree, and SMUG is authorized to seek a court order to lessen the degree of harm inflicted upon it. In *Igartua*, the plaintiff sought a judgment declaring that the United States violated its treaty obligation. The court concluded that its inability to control the actions of the legislature (to comply with the terms of the treaty) deprives

[55] Nowhere in the FAC does SMUG suggest that its claims for equitable relief would merely redress its injury by "deter[ring] the risk of future harm" or "psychic satisfaction" as speculated by Defendant. Def. Br. 84. Unlike in the case cited by Defendant to support his assertion that such redress is inappropriate for standing – *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106-07 (1998), which concerns the claim for civil penalties to be paid, not to the plaintiff, but to a third party, the United States Treasury – SMUG seeks equitable remedies that would directly benefit SMUG, by alleviating the *continuing* persecution it is facing as a result of the Defendant's *ongoing* conduct towards it.

the action entirely of redressability. 417 F.3d at 149. Here, SMUG is seeking to have the acts of a person, over whom the Court may exert control, declared to be in violation of the law of nations, thus, guaranteeing at least some diminution of the harm suffered by SMUG. The prospect that a court cannot stop all the harm suffered by a plaintiff does not deprive it of the power to redress harm caused by the defendant actually before the court.

B. SMUG Has Adequately Pled Associational Standing.

Even if the Court were to conclude that SMUG has not adequately pled organizational standing, SMUG still has standing to sue based on its representative capacity. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975). Associational standing requires that (1) at least one member has standing, in his own right, to present a claim asserted by the association; (2) the interests sought to be protected are germane to the association's purpose; and (3) neither the claim asserted nor the relief requested requires that the members participate individually in the suit. *Hunt v. Wash. State Adver. Comm'n*, 432 U.S. 333, 343 (1977).

SMUG satisfies the first prong of the *Hunt* test: The FAC has clearly alleged that at least some of its members "are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth*, 422 U.S. at 512. SMUG brings this instant action on behalf of the individual members of its constituent organizations: "Ugandan organizations advocating on behalf of [LGBTI] communities." FAC ¶ 18. *See Council of Ins. Agents & Brokers v. Juarbe-Jimenez*, 363 F.Supp.2d 47, 54 (D.PR. 2005) ("[B]ecause the Council has associational standing to assert the rights of its members and the members have standing to assert the rights of their employees and partners . . . the Council thus has standing to assert the rights of the employees and partners."). SMUG also brings representative capacity claims on behalf of "the LGBTI

community in Uganda," FAC ¶ 13, a "defined and discrete constituency," alleging a harm not suffered by most of the population. *See NAACP v. Harris*, 567 F.Supp. at 640 (allowing the NAACP to bring suit on behalf of black people in Boston). Members of SMUG have "have suffered persecution, and associated harms as a result of Lively's actions," FAC ¶ 21, including, *inter alia*: raids of their meetings and workshops followed by unlawful arrests and detention, *id*. ¶¶ 165-69, 176-82, 186-87; exclusion from the government's HIV/AIDS policies and programs, *id*. ¶¶ 191-93; public "outings" and harassment, *id*. ¶¶ 204, 217-20; discrimination in housing employment, health and education, *id*. ¶ 226; mistreatment by the police, *id*. ¶ 227; and forced evictions, *id*. ¶ 228. The FAC names one of SMUG's member organizations, Freedom and Roam Uganda, *id*. ¶¶ 176-80, and some LGBTI activists – Kasha Jacqueline Nabagasera, *id*. ¶¶ 181-82, Val Kalende, *id*. ¶¶ 186-87, Yvonne Oyo, *id*. ¶¶ 210-11, and all those "outed" by Defendant's co-conspirator Martin Ssempa, *id*. ¶¶ 204, and the Ugandan tabloids, *id*. ¶¶ 217-18 – as victims to the persecution.[56] These harms are both traceable to Defendant's conduct and redressable in the same manner as the injuries inflicted upon SMUG.

SMUG also satisfies the second prong of the *Hunt* test – that of germaneness. SMUG's primary purpose is "to unify and support sexual minority groups in Uganda." FAC ¶ 18. The interests SMUG seeks to protect in this lawsuit – namely, those of the LGBTI community in Uganda – are thus germane to its purposes. *See Hunt*, 432 U.S. at 343.

[56] As "[m]any individual members of SMUG and its constituent organizations live in persistent fear of harassment, arbitrary arrest and physical harm, even death," FAC ¶ 6, they "reasonably fear that there would be reprisal" if they were to bring this litigation on their own, *Council of Ins. Agents & Brokers*, 363 F.Supp.2d at 53.

1. SMUG's Claims on Behalf of Its Members do Not Require Individual Participation.

The third prong of the *Hunt* test – not considered a "constitutional necessity," but rather simply a matter of administrative convenience and efficiency," *United Food and Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 556-57 (1996) – asks whether the suit requires individual participation. Given that SMUG seeks only declaratory and injunctive relief on behalf of its members (as opposed to both equitable and damages relief for SMUG as an organization), it "can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." *Warth*, 422 U. S., at 515; *accord NAACP v. Harris*, 567 F. Supp. at 639-40. Since it is not making a claim for monetary damages on behalf of its members, there is "no need…for the members to participate as parties." *Pharma. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 307 (1st Cir. 2005) (*citing Playboy Enter. v. Public Service Comm'n of Puerto Rico*, 906 F.2d 25, 35-36 (1st Cir. 1990)).

In any event, that a claim may require individualized proof will not necessarily defeat associational standing. *See Playboy Enter.*, 906 F.2d at 35 ("[J]ust because a claim may require proof specific to individual members of an association does not mean the members are required to participate *as parties* in the lawsuit." (emphasis in original)). *Accord Pharma. Care*, 429 F.3d at 306 (holding that even though a takings inquiry is "intensely fact specific and the [organization] will be required to introduce proof of specific [member] practices and effects of the [challenged legislation] on specific [members]," there was "no reason" why the organization's members "would be required to participate as parties in this litigation"). This is true regardless of the fact that the "claims for injunctive and declaratory relief sound in tort," Def. Br. 79. *See*, *e.g.*, *Coll. of Dental Surgs. of P.R. v. Conn. Gen. Life Ins. Co.*, 585 F.3d 33, 41 (1st Cir. 2009) (where dental association's claims arose from defendants' alleged fraudulent

practices, finding third prong of *Hunt* test met even though evidence would be required from individual dentists).

Since the tort alleged here, persecution, is by definition a group crime, *see supra*, it is well suited for associational standing. While some of SMUG's members may be called to provide evidence of instances where LGBTI persons were deprived of his or her rights on the basis of their gender and/or sexual orientation and gender identity, they do not need to be named parties to the litigation to win equitable relief on a claim of persecution.[57] *See Playboy Enter.*, 906 F.2d at 35 ("The members could still have been called to testify…and could have been deposed and subjected to subpoenas *duces tecum* by the defendants without being parties to the suit…We see no reason why the claim for injunctive relief in this case requires the participation of any Cable Association member."); *Penn. Psychiatric Soc. v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 287 (3d Cir. 2002) (finding associational standing where the claim "may be established with sample testimony, which may not involve specific, factually intensive, individual…determinations") (*cited with approval in N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 72-73 (1st Cir. 2006)) .

2. SMUG Has Associational Authority to Bring This Action.

That SMUG has authority to advocate an end to any persecution based on "gender and/or sexual orientation and gender identity" in Uganda FAC ¶ 1 – including through the instant litigation – on behalf of its members and the LGBTI community in Uganda is evidenced by its very existence as an "umbrella organization" housing a "coalition of Ugandan organizations advocating on behalf of [LGBTI] communities," *id*. ¶ 18. *See Auto. Workers Union v. Brock*,

[57] Defendant misreads the FAC to assert separate and distinct claims of the violations of various fundamental rights Def. Br. 81; rather, the allegations of specific instances where those rights were violated merely demonstrate persecution of the LGBTI community in Uganda.

477 U.S. 274, 290 (1986) ("[T]he doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others."). The "very forces that cause[d]" SMUG's member organizations (and the LGBTI members of those organizations) "to band together in an association…provide[s] some guarantee that the association will work to promote their interests." *Brock*, 477 U.S. at 290. *See also Int'l Union, United Auto., Aerospace and Agric. Workers*, 477 U.S. at 274 (holding that because representative groups are often borne of a desire to vindicate common interests, they are likely to be adequate representatives of their members and "can draw upon a preexisting reservoir of expertise and capital").

Defendant misleadingly asserts that SMUG must allege that "it has been authorized to bring this suit on behalf of its members, employees or the 'LGBTI community' at large." Def. Br. 88. This Court imposes no such requirement. To the contrary, in *NAACP v. Harris*, the Court held that the NAACP could represent the interests of its constituency – "all black people in the metropolitan area of Boston" – as opposed to its membership, even though they did not possess "the indicia of membership in an organization" and clearly could not provide their consent. 567 F. Supp. at 640. Defendant cites to no First Circuit cases supporting his assertion, but rather a footnote to a Central District of California decision that merely states that an organization must have "clear mandate from its membership to *take the position asserted* in the litigation," and that the members must "have either requested to be represented or 'consented to be represented'" by SMUG. Def. Br. 88 (*quoting Nat'l Coal. Gov't of Union of Burma v. Unocal*, 176 F.R.D. 329, 344 n.16 (C.D. Cal. 1997) (emphasis added)). One of the primary activities of SMUG – to which its members consented simply by forming or joining the association – is to "speak[] out against discrimination and violence based on sexual orientation

and/or gender identity." FAC ¶ 20. As that is precisely the objective of the instant litigation (*i.e.*, to end "the decade-long campaign [Lively] has waged…to persecute persons on the basis of their gender and/or sexual orientation and gender identity" *id*. ¶ 1), it is axiomatic that SMUG's membership has consented to "the position asserted" by SMUG in this litigation.

V. THE COURT HAS THE AUTHORITY UNDER THE ATS TO ADJUDICATE TORTS THAT OCCUR OUTSIDE THE UNITED STATES.

Seizing upon the Supreme Court's decision in *Morrison v. Nat'l Australia Bank Ltd*, 130 S. Ct. 2869 (2010), which addressed the limited extraterritorial reach of the U.S. securities fraud statute – as well as a collection of citations to a student comment in the Pepperdine Law Review – Defendant seeks to impose an utterly novel limitation on the heretofore undisputed scope of the ATS. Indeed, in suggesting there is not "even a scintilla of proof" in support the extraterritorial reach of the ATS, Defendant effectively ignores decades of an unchallenged judicial consensus regarding the ATS's scope, which has been endorsed by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and is supported by the text, purpose and jurisprudential logic of the statute. This court should decline Defendant's request that it be the first court in the country – of the hundreds that have reviewed the ATS since *Filártiga v. Peña-Irala*, 630 F.2d 875 (2d Cir. 1980) – to read the ATS to foreclose claims based on conduct occuring abroad.

A. The Supreme Court in *Sosa* As Well As Every Other Court in the Country Has Specifically Held or Otherwise Uncontroversially Assumed that the ATS Reaches Conduct That Occurs Abroad.

In *Sosa*, the Supreme Court endorsed the "birth of the modern line of cases" starting with the Second Circuit's landmark decision in *Filártiga*, 542 U.S. at 724-25 – cases which involved successful ATS claims against human rights violations occurring in foreign countries. *See Sosa*, 542 U.S. at 731-2 ("The position we take today has been assumed by federal courts for 24 years,

ever since the Second Circuit decided *Filártiga*….”). In *Filártiga*, the Second Circuit awarded Paraguayan citizens a substantial judgment in their suit against a former Paraguayan police official for torture that occurred in Paraguay, *Filártiga*, 630 F.2d at 878, elaborating on the long pedigree of federal court adjudication of tort claims arising in foreign countries, *id*. at 885-86.

Every court since *Sosa* to have considered the contention that the ATS does not reach extraterritorial conduct has thoroughly rejected it. *See Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 745-47 (9th Cir. 2011) (en banc) (permitting Papua New Guinea residents to sue a corporation under ATS for extraterritorial human rights abuses because Congress “had overseas conduct in mind” when it drafted the ATS in 1789); *Doe v. Exxon Mobil Corp*., 654 F.3d 11, 20-27 (D.C. Cir. 2011) (concluding that, unlike the statute in *Morrison*, the ATS has “obvious extraterritorial reach”); *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1025 (7th Cir. 2011) (observing that *Sosa* itself involved “non-maritime extraterritorial conduct”).

Defendant simply ignores the Ninth Circuit’s en banc decision in *Sarei* which considers and rejects his position. In attempting to marginalize the D.C. Circuit’s thorough opinion in *Doe v. Exxon*, Defendant states the obvious, that the D.C. Circuit is not binding on this court, *but see Xuncaz*, 886 F. Supp. 162, but criticizes the court for ignoring his idiosyncratic theory about Founding-era conceptions of piracy and incorrectly suggests the court paid “lip-service” to the “text-structure-structure-history” analysis Defendant demands be employed to assess whether the ATS has extraterritorial reach. Def. Br. 101. Quite to the contrary, the D.C. Circuit considered similar arguments and correctly concluded that applying the canon of construction regarding extraterritorial statutes simply does not make sense for a jurisdictional statute such as the ATS and that, in any event, the ATS plainly is meant to reach conduct that occurs abroad. *Doe v. Exxon*, 654 F.3d at 20-28; *see also infra* Section V (B). Finally, Defendant criticizes the Seventh

Circuit's *Flomo* decision for giving short-shrift to his extraterritoriality argument. True, but Judge Posner's otherwise erudite opinion gives this contention the passing attention it deserves. He explained:

> Courts have been applying the statute extraterritorially (and not just to violations at sea) since the beginning; no court to our knowledge has ever held that it doesn't apply extraterritorially; and *Sosa* was a case of non-maritime extraterritorial conduct yet no Justice suggested that therefore it couldn't be maintained.

Flomo, 643 F.3d at 1025.

Defendant also observes that the numerous other courts accepting the extraterritorial jurisdiction of the ATS have merely assumed the proposition to be true, without engaging in the analysis Defendant has proposed here. Defendant does not appreciate how utterly intuitive and deeply-held this assumption is. After all, as described *infra*, the first Congress drafted the ATS in part to reach the manifestly extraterritorial crime of piracy; the statute permits "aliens" to sue specifically for international law violations ("law of nations"); and, as *Filártiga* made clear, the ATS reflects a centuries-old rule regarding the extraterritorial reach of transitory torts. Nor does Defendant appreciate how broad and long-standing this assumption is. Cases taking this elementary proposition for granted – from every Circuit and nearly every judicial district, including this District, *see Xuncaz*, 886 F. Supp. 162 – are in the many dozens.[58]

[58] *See, e.g.*, *Mamani v. Berzain*, 654 F.3d 1148 (11th Cir. 2011) (Bolivia); *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004) (China); *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009) (Somalia); *Aziz v. Alcolac*, *Inc.*, 658 F.3d 388 (4th Cir. 2011) (Iraq); *El-Shifa Pharmaceutical Industries Co. v. U.S.*, 607 F.3d 836 (D.C. Cir. 2010) (Sudan); *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005) (Nigeria); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007) (Israel); *Abecassis v. Wyatt*, 704 F. Supp. 2d 623 (S.D. Tex. 2010) (Israel); *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702 (D. Md. 2010) (Iraq); *Ali Shafi v. Palestinian Authority*, 642 F.3d 1088 (D.C. Cir. 2011) (West Bank); *Chavez v. Carranza*, 413 F. Supp. 2d 891 (W.D. Tenn. 2005) (El Salvador); *Chowdhury v. WorldTel Bangladesh Holding, Ltd.*, 588 F. Supp. 2d 375 (E.D.N.Y. 2008) (Bangladesh); *Genocide Victims of Krajina v. L-3 Services, Inc.*, 804 F. Supp. 2d 814 (N.D. Ill. 2011) (Croatia); *In re Chiquita Brands Intern., Inc.*, 792 F. Supp. 2d 1301 (S.D. Fla. 2011) (Colombia); *Lizarbe v. Rondon*, 642 F. Supp. 2d 473 (D. Md. 2009) (Peru); *M.C. v. Bianchi*, 782

B. Because the ATS is a Jurisdictional Statute that Does Not Export Substantive U.S. Law Norms, a Presumption against Extraterritorial Application Does Not Apply.

It makes little sense to apply the "presumption against extraterritoriality" to the ATS. The ATS does not authorize the making or application of U.S. substantive law at all, let alone extraterritorially. As *Sosa* repeatedly emphasized, the ATS is a jurisdictional statute that does not by itself create a cause of action; instead, it provides United States courts with jurisdiction to hear claims by aliens for torts committed in violation of the law of nations. *Sosa*, 542 U.S. at 713-71. Indeed, the very point of *Sosa* is that U.S. courts are not permitted to create substantive U.S. law; but merely enforce the "law of nations" – i.e. "a specific, universal and obligatory" norm of *international* law. Thus, comparison to cases such as *Morrison*, which prohibit the application of substantive U.S. legal norms, is entirely inapposite. Second, the "presumption against extraterritoriality" is a "canon of construction," designed to "preserv[e] a stable background against which Congress can legislate with predictable effects." *Morrison*, 130 S.Ct. at 2881. Applying this relatively new canon of construction to a statute over 200 years old makes little sense.

Equally important to understanding the operation of this presumption, Congress itself has acknowledged and sanctioned the extraterritorial scope of the ATS. When Congress enacted the Torture Victims Protection Act of 1992 ("TVPA"), it expressly endorsed *Filártiga* and the extraterritorial reach of ATS. H.R. Rep. No. 367, 102d Cong. 1st Sess. Pt.1, at 3-4 (stating that the "Filártiga case [has been] met with general approval" and "[w]hile the [ATS] provides a

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F. Supp. 2d 127 (E.D. Pa. 2011) (Moldova); *Taveras v. Taveraz*, 477 F.3d 767 (6th Cir. 2007) (Dominican Republic); *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010) (Ivory Coast); *El-Masri v. Tenet*, 479 F.3d 296 (4th Cir. 2007) (Macedonia and Afghanistan); *Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank*, 807 F. Supp. 2d 689 (N.D. Ill. 2011) (Hungary); *Jean v. Dorelien*, 431 F.3d 776 (11 Cir. 2005) (Haiti); *Tachiona v. U.S.*, 386 F.3d 205 (2d Cir. 2004) (Zimbabwe); *Vietnam Ass'n for Victims of Agent Organ v. Dow Chemical Co.*, 517 F.3d 104 (2d Cir. 2008) (Vietnam).

remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured aboard"); *see also* S. Rep. No. 249, 102d Cong. 1st Sess., at 5 (1991) (also stating that the TVPA "enhance[d] the remedy already available under" the ATS).

C. The Text, Context, and History of the ATS Clearly Demonstrate that It Contemplates Common Law Causes of Action that Occur Abroad.

Setting aside Defendant's incorrect assumption that the "presumption of extraterritoriality" applies to a jurisdictional statute such as the ATS, it is nevertheless abundantly clear from the text, context, and history of the ATS that the act contemplates causes of action arising from torts occurring in territories outside the United States.

1. The Text of the ATS provides a "Clear Indication" that Congress Intended to Grant Federal Courts Jurisdiction over Torts Occurring Abroad.

Defendant strains to argue that the ATS' reference to "aliens" or to "any . . . action" do not demonstrate the extraterritorial reach of the ATS. But he dutifully avoids the most obvious and conclusive textual proof of ATS' scope: the statute's authorization of causes of action for torts in violation of "laws of nations" – a concept that is by definition universal and applies within every sovereign's territory. *See, e.g.*, *Sarei*, 671 F.3d at 746, 782-83 (concluding that the inclusion of the "law of nations" was a "clear indication" that Congress intended the ATS to grant jurisdiction for torts occurring outside of the United States). Indeed, even at the time the ATS was enacted, "all piracies and trespasses committed against the general law of nations, [were] enquirable, and [could be] proceeded against, in any nation…." *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 159–60 (1795) (opinion of Iredell, J.).[59]

[59] By contrast, when Congress sought to circumscribe the extraterritorial scope of jurisdiction in the Judiciary Act of 1789, it did so explicitly. The language of the ATS stands in sharp contrast to other provisions in Section 9 of the Judiciary Act of 1789 which conferred

2. The Inclusion of Piracy among the Principal Violations of the Law of Nations Demonstrates that the Founders' Intended for the Statute to Apply Extraterritorially.

In support of Defendant's assertion that the context of ATS' enactment does not support its extraterritorial reach, Defendant imagines that the Framers understood piracy and other acts on the high seas – which were indisputably covered by ATS – to be within the *domestic* jurisdiction of the United States. (Def. Br. 96). This conclusion is neither supported by case law (even the case law that Defendant cites) nor statutory definitions of piracy contemporaneous with the adoption of the ATS.

In 1790, the year after the First Congress promulgated the ATS, it expressively defined piracy as "murder or robbery, or any other offence, which, *if committed within the body of a county*, would, by the laws of the United States, be punishable with death," but which took place "upon the high seas, or in any river, haven, basin or bay, *out of the jurisdiction of any particular state*." Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 113-114 (1790) (emphasis added).[60] Understanding piracy to include acts "out of the jurisdiction of any state," the First Congress felt compelled to enact the ATS to make piracy punishable within the United States. In line with this understanding, the Supreme Court has consistently held that the "high seas" is not within the domestic jurisdiction of the United States. *See, e.g., Sale v. Haitian Ctrs. Council, Inc*., 509 U.S. 155, 173–74 (1993) (declining to apply Immigration and Nationality Act to high seas since the Act "contains no reference to a possible extraterritorial application"); *Argentine Republic v.*

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jurisdiction subject to express geographical limitation. Judiciary Act of 1789, ch.20, §9, 1 Stat. 73 (establishing exclusive jurisdiction of "civil causes of admiralty and maritime jurisdiction for committed within their respective districts as well as upon the high seas").

[60] The same act also provided that "the trial of, crimes committed on the high seas, or in any place out of the jurisdiction of a particular state, shall be in the district where the offender is apprehended, or into which he may first be brought." *Id*.

Amerada Hess Shipping Corp., 488 U.S. 428, 440 (1989) (holding that the Foreign Sovereign Immunities Act has effect "only within the territorial jurisdiction of the United States" and not the high seas). Under U.S. law – from 1789 to the present – the "high seas" was considered extraterritorial; the ATS' coverage of piracy is thus conclusively evidence that Congress intended the statute to apply to conduct outside the territory of the U.S.

Still, Defendant insists that "piracy was considered domestic in nature," citing *United States v. Palmer*, 16 U.S. 610, 633-4 (1818), a case in which the U.S. Supreme Court limited *criminal* punishment for robbery on the high seas to offenses committed aboard vessels of the United States. Yet, in *Palmer*, the Supreme Court relied on the plain language of the title of the act (i.e. "an act for the punishment of certain *crimes against the United States*") to conclude that "offenses against the United States, not offenses against the human race, were the crimes which the legislature intended by this law to punish." *Id*. at 631. The ATS contains no such jurisdiction-limiting language and for that reason has been interpreted, without exception, to extend jurisdiction for violations of the law of nations beyond U.S. territorial limits.

3. The History of the ATS Clearly Demonstrates that It Contemplates Common Law Causes of Action that Arise Abroad.

Despite defendants contorted arguments to the contrary, the history of the ATS clearly demonstrates that it is properly interpreted to reach certain torts that arise abroad. At the time the ATS was enacted, the domestic adjudication of tortious conduct occurring abroad was commonplace. *See* 3 William Blackstone, *Commentaries on The Laws of England* 384 (1758) ("*all over the world*, actions transitory follow the person of the defendant") (emphasis added); Joseph Story, *Commentaries On The Conflict of Laws*, §§ 543, 554 (1846) ("by common law personal actions, being transitory, may be brought in any place, where the party defendant may

be found."). Indeed, United States Supreme Court decisions contemporaneous with the enactment of the ATS repeatedly acknowledged the transitory nature of torts under the common law. *See, e.g., McKenna v. Fisk*, 42 U.S. 241, 249 (1843) (stating that "the courts in England have been open in cases of trespass … committed within the realm and out of the realm"); *Dennick v. Central R. Co. of New Jersey*, 103 U.S. 11, 18-19 (1880) (concluding that "[i]t is no objection that … the cause of action arose abroad"). The First Congress was concerned about "the inadequate vindication of the law of nations" in state courts and enacted the ATS merely to provide a uniform, federal forum for alien tort claims involving violations of international law. *Sosa*, 542 U.S. at 715-19 & 722.[61] *See also Filártiga*, 630 F.2d at 885 ("[c]ommon law courts of general jurisdiction regularly adjudicate transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred.").

Finally, application of the ATS to Defendants' conduct is particularly important given that he is a U.S. citizen who resides in this country. While the United States has an interest in denying safe haven to all human rights abusers, this interest is particularly strong in cases like this where the perpetrator has actually lives in the U.S. and seeks to evade accountability for his heinous human rights abuses abroad. In addition, the United States, as a promoter of international human rights, has a moral imperative to provide survivors a forum to seek redress for serious and universally-condemned human rights abuses. As the State Department explained

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[61] Any argument that territorial limitations were assumed by the Founders, but left unstated, is further put to rest by the 1795 opinion of Attorney General William Bradford, Breach of Neutrality, 1 Op. Att'y Gen. 57 (1795), cited with approval by the United States Supreme Court in *Sosa*. 542 U.S., at 721 (stating that the decision made "clear that a federal court was open for the prosecution of a tort action" involving injury which occurred abroad); s*ee also Doe v. Exxon Mobil Corp.*, 654 F.3d at 24. In his 1795 opinion, which contemplates whether U.S. citizens could be held accountable for their plunder of a slave colony in Sierra Leone, Attorney General Bradford expressed "no doubt that the company or individuals who ha[d] been injured by th[o]se acts of hostility ha[d] a remedy by a *civil* suit in the courts of the United States" under the ATS.[61] *Id.* at 59 (emphasis in original) (quoting 1 Op. Atty. Gen. 57, 59).

in its amicus brief in *Filártiga*, "a refusal to recognize a private cause of action [for universally recognized human rights violations] might seriously damage the credibility of our nation's commitment to the protection of human rights." U.S. Amicus Mem. at 22-23, *Filártiga*, *supra* (No. 79-6090).

VI. PLAINTIFF'S STATE LAW CLAIMS ARE TIMELY AND COGNIZABLE.

A. In Accordance With *Applicable* Accrual and Tolling Rules, Plaintiff's Civil Conspiracy and Negligence Claims Are Brought Well Within the Limitations Period.

Defendant simply applies the wrong legal framework to assess the timeliness of Plaintiff's state law conspiracy and negligence claims. Contrary to Defendant's contention, Plaintiff's claims are not governed by a rule that starts the statute-of-limitations period at the time of the first wrongful act, as that rule applies only to federal and state statutory civil rights claims not asserted by Plaintiff here.[62] *See Pagliuca v. City of Boston*, 626 N.E.2d 625, 627-28, (Mass. App. Ct. 1994) (distinguishing time of first wrongful act theory applicable to federal and state civil rights statutes and time of injury theory applicable to common law civil conspiracy).[63]

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[62] All five of the cases Defendant cites for the proposition that the civil conspiracy claim in this case should be deemed as accruing from the first overt act pertain only to civil rights conspiracy claims brought under 42 U.S.C. §1983 and the Massachusetts Civil Rights Act. *See Nieves v. McSweeney*, No. 99-05457-J, 2001 Mass. Super. LEXIS 476 (Mass. Super. Ct. 2001) (state civil rights conspiracy); *Lamoureux v. Smith*, Docket No. 07-953-B, 2007 Mass. Super. LEXIS 532 (Mass. Super. Ct. 2007) (state and federal civil rights conspiracy); *Nieves v. McSweeney*, 241 F.3d. 46 (1st Cir. 2001) (federal civil rights conspiracy); *Gual Morales v. Hernandez Vega*, 579 F.2d 677 (1st Cir. 1978) (federal civil rights conspiracy); *Kadar Corp. v. Milbury*, 549 F.2d 230 (1st Cir. 1977) (federal civil rights conspiracies).

[63] Even if the accrual rule for civil rights conspiracies were applied to Plaintiff's claims, they would not be time-barred. The First Circuit has held that even in civil rights conspiracy cases, the "continuing violation" theory would apply if the conspiratorial agreement pre-dated the wrongful act/s, or in the case when the conspiracy begins before the violation and encompasses it. *Nieves* , 241 F.3d. at 52.

Under the state law tort claims of civil conspiracy and negligence – the claims actually asserted by Plaintiff – the applicable three-year statute of limitations period starts to run at the point at which Plaintiff was injured, or reasonably discovers the cause of its injury. There can be no doubt that the most recent injuries, occurring in the three years prior to the March 14, 2012, filing of the Complaint, fall within the statute of limitations. In addition, because Plaintiff only discovered the extent of Defendant's role in the persecutory efforts in Uganda in the three years prior to the March 14, 2012, filing, the earlier violations can be maintained as well..

1. Civil Conspiracy and Negligence Claims Are Subject to Three-Year Limitations Period and Accrue at Time of *Injury*.

The Massachusetts statute of limitations should be applied to Plaintiff's state law claims of civil conspiracy and negligence. *See Guaranty Trust Co. v. York,* 326 U.S. 99, 110 (1945) (state statutes of limitations to apply in diversity cases); *Dykes v. Depuy, Inc.,* 140 F.3d 31 (1st Cir. 1998). Similarly, Massachusetts state law rules for accrual and tolling statute of limitations apply to the adjudication of state law claims. *See Walker v. Armco Steel Corp.,* 446 U.S. 740, 751-52 (1980) (holding that state law controlled tolling of state statutes of limitations); 17A J. Moore et al., Moore's Federal Practice § 124.03[2][a] (3d ed. 2009) (state rules that are integral to the state statute of limitations usually apply in federal court). *See also Nett v. Bellucci*, 269 F.3d 1 (1st Cir. 2001).

Under Massachusetts law, negligence and civil conspiracy actions are subject to a three-year statute of limitations. *See* Mass. Gen. Laws ch. 260, § 2A.; *See also Genereux v. Am. Beryllia Corp*., 577 F.3d 350, 359 (1st Cir. 2009) (*citing Olsen v. Bell Tel. Labs., Inc*., 445 N.E.2d 609 (Mass. 1983) (negligence claim)); *Pagliuca,* 626 N.E.2d at 627-28 (Mass. App. Ct. 1994) (civil conspiracy).

It is also well-settled in Massachusetts that causes of action in tort accrue at the time the plaintiff is injured, or reasonably discovers the cause of her injury. *See Genereux*, 577 F.3d at 359-63 (*citing Koe v. Mercer*, 876 N.E.2d 831 (Mass. 2007)). This accrual rule applies as well to civil conspiracy and negligence claims. *See Pagliuca, 626 N.E.2d* at 625 (civil conspiracy); *John Beaudette, Inc. v. Sentry Ins.,* 94 F. Supp. 2d 77, 108 (D. Mass. 1999) (negligence) (*citing Cantu v. St. Paul Companies*, 514 N.E.2d 666 (Mass. 1987)).

Based on this principle, there can be no doubt that Plaintiff has suffered injuries within the three years prior to the filing of the Complaint – in particular, the raids of Plaintiff's convenings in February and June, 2012. FAC ¶¶ 165-198.

2. Massachusetts' Discovery Rule Provides that a Claim Accrues When Plaintiff Has Knowledge that Defendant Was Likely *Cause* of Injury.

Massachusetts law further provides that under the "discovery rule" a "cause of action does not accrue until the plaintiffs know or reasonably should have known that they were injured as a result of the defendant's conduct." *See Genereaux*, 577 F.3d at 359-360; *Riley v. Presnell*, 565 N.E.2d 780, 785-786 (Mass. 1991) (although plaintiff knew of his injury, claim would not accrue until a reasonable person would have been aware of its causal connection to the defendant's actions). Knowledge is assessed by asking "what a reasonable person in [the plaintiff's] position would have known or on inquiry would have discovered." *Bowen v. Eli Lilly & Co.*, 557 N.E.2d 739 (Mass. 1990). Specifically, a plaintiff must have "(1) knowledge or sufficient notice that she was harmed and (2) knowledge or sufficient notice of what the cause of harm was." *Id*. at 742; *see also Fidler v. Eastman Kodak Co.*,714 F.2d 192, 198 (1st Cir. 1983) ("Such notice [to start the statute of limitations] includes not only knowledge that one has been

injured but knowledge of its cause – that plaintiff has been harmed as a result of the defendant's conduct.") (internal quotations omitted); *Riley*, 565 N.E.2d at 784-85.

Defendant argues incorrectly that Plaintiff's claims are rooted in Defendant's speech and that because the Defendant's speeches were publicized during his visits in 2002, Plaintiff should be deemed on notice as of then. To the contrary, it is precisely because Plaintiff's claims are not rooted in the Defendant's speech that Defendant's argument fails. It was not until after the pivotal March 2009 conference when Defendant himself began reporting on and publicly acknowledging on March 17, 2009, FAC ¶ 55, n. 14, the degree of his involvement behind the scenes with those leading the anti-gay efforts in Uganda, that Plaintiff began to become aware that Defendant had been playing an integral role in the conspiracy to deprive Plaintiff of fundamental rights.

Thus, because the Complaint was filed within the three years of learning about Defendant's role in the continuing conspiracy, all of the allegations are timely..

3. At the Motion to Dismiss Stage, Defendant Cannot Meet His Burden of Proving the Statute of Limitations Defense with "Certitude."

To prevail on a statute of limitations defense at the motion to dismiss stage, the Defendant must establish that the necessary and relevant facts: (1) are definitively ascertainable from the complaint and other allowable sources of information, and (2) suffice to establish the affirmative defense with certitude. *See NAGE v. Mulligan*, Civil No. 11-11123-NMG, 2012 U.S. Dist. LEXIS 45548, at *8-10 (D. Mass. Mar. 30, 2012) (*citing Gray v. Evercore Restructuring L.L.C.*, 544 F.3d 320, 324 (1st Cir. 2008). If the defendant at this stage cannot establish the relevant defense with "certitude," or if the applicability of relevant exceptions to the statute of

limitations turns on disputed facts, those facts "must be resolved by a jury." *Id*. (*quoting Taygeta Corp. v. Varian Assocs., Inc.*, 763 N.E.2d 1053, 1063 (Mass. 2002)).

To the extent that there is any factual ambiguity about when Plaintiff could reasonably have had knowledge of Defendant's role in causing its injuries, that ambiguity must be resolved by the trier of fact and not at the motion to dismiss stage.

B. Massachusetts Law Should Govern Plaintiff's State Tort Claims.

In arguing that this Court cannot apply its own state law tort standards to a Massachusetts resident, Defendant relies on faulty logic, unsupported by law. According to Defendant's summary reasoning: (1) Massachusetts conflict of law rules require that Ugandan law apply; (2) Ugandan law does not affirmatively recognize a common law tort of civil conspiracy, nor negligence claims brought on the basis alleged in the complaint; therefore, (3) no tort law can apply to Defendant's conduct. Defendant cites only one case in support of his artful construction, Def. Br. 69 (*quoting Clarendon Nat'l. Ins. Co. v. Arbella Mut. Ins. Co.,* 803 N.E.2d 750, 752 (Mass. App. Ct. 2004) (Massachusetts' approach is "explicitly guided by the Restatement (Second) of Conflict of Laws.")), but fails to offer any analysis beyond the general observation that choice of law questions require a balancing of interests. This argument cannot carry the day.

First, as the party seeking to apply foreign law (point 1 of Defendant's syllogism), Defendant bore the burden of proving its substance to a reasonable certainty. *In re Avantel, S.A.*, 343 F.3d 311, 321-22 (5th Cir. 2003). Defendant simply failed to demonstrate that Ugandan law does not recognize a claim of civil conspiracy or negligence as alleged in this case – the factual predicate of his choice of law analysis. This default is fatal to his motion to dismiss the state law claims. *See Nameh v. Muratex Corp.,* 34 Fed. Appx. 808, 810 (2d Cir. 2002) (finding New York

law properly governed agreement because party failed to produce sufficient evidence of foreign contract law to demonstrate a substantive conflict with the forum state); *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 205 (1st Cir. 1988) (applying forum's law where parties failed to adequately raise issue of foreign law). On this basis alone, this Court should apply Massachusetts law. [64]

Second, Massachusetts rejects a formalistic, *lex loci* choice-of-law analysis; it instead applies a functional approach to ascertaining whether Massachusetts law should apply to torts that occur outside its jurisdiction. *See Bushkin Assocs., Inc. v. Raytheon Co.*, 473 N.E.2d 662, 668 (1985) ("Our approach, however, while producing less predictability, rejects artificial constructions").[65] Even assuming that Uganda chooses not to recognize a tort of civil conspiracy or a negligence action based on similar conduct, this would suggest there would be no substantive conflict between competing sets of two sovereign's legal rules. To the extent Uganda has not defined the contours or limitations of any civil conspiracy law, the application of Massachusetts' civil conspiracy law would not impinge on any sovereign prerogatives or policy preferences of the Ugandan government, particularly where the Defendant is a Massachusetts' resident, not a Ugandan national.

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[64] Should Defendant attempt for the first time to present proof regarding the existence of a civil law conspiracy claim in Uganda in his Reply briefing, Plaintiffs would request an opportunity to respond.

[65] As such, Defendant's implicit contention that the location of the tort determines the relevant law to be applied, is flatly wrong. Massachusetts conflicts law is "not…tie[d] . . . to any specific choice-of-law doctrine." *Bushkin*, 473 N.E.2d at 668. The Court should employ a "functional choice-of-law approach that responds to the interests of the parties, the States involved, and the interstate system as a whole." *Id.* Resolution of choice-of-law questions rests on an assessment of "various choice-influencing considerations," which will inevitably be fact-specific and will provide only minimal guidance for "anticipating the 'fair result' in other cases." *Id.*

The animating principle of the conflict-of-laws doctrine is to respect comity among sovereigns and "further harmonious relations between states." Restatement (Second) Conflict of Laws, Comments § 6 ("Probably the most important function of choice of law rules is to make the interstate and international systems work well."). The Supreme Court has reasoned in analyzing the *forum non conveniens* doctrine – a doctrine that is closely aligned with (and ultimately derived from) choice of law principles, *see Mercier v. Sheraton Int'l, Inc.,* 981 F.2d 1345, 1354 (1st Cir. 1992) – precisely this way. It has held that "dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute." *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 254-255 (1981) (*citing Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.,* 78 F.R.D. 445 (D. Del. 1978) (refusing to dismiss, where alternative forum is Ecuador, because there was no generally codified Ecuadorean legal remedy for the unjust enrichment and tort claims asserted)). Likewise here, even assuming that Uganda has no developed law regarding civil conspiracy, dismissal of Plaintiff's state law claims would be inappropriate. *See In re Air Crash Disaster near New Orleans*, 789 F.2d 1092 (5th Cir. 1986) (proper to apply Uruguayan law recognizing nephew's claim for wrongful death of his aunt in Louisiana, where Louisiana law provided no remedy but Uruguay did) *vacated on other grounds and remanded sub nom. Pan American World Airways, Inc. v. Lopez,* 490 U.S. 1032 (1989).

Were the Defendant in this case a Ugandan citizen, Uganda might have had a stronger interest in this case. But, even assuming Uganda has no conflicting substantive law of civil conspiracy, and given Massachusetts has an interest in adjudicating its own law over its own

state citizen – the prerogative of a sovereign state – Massachusetts law should apply to the torts committed by Lively.[66]

C. Plaintiff Adequately States and Sufficiently Pleads Valid Claims for Civil Conspiracy and Negligence Under Massachusetts Law.

1. Plaintiff Adequately States a Cause of Action for Civil Conspiracy Under Massachusetts Law.

As discussed in Section III (D), the FAC sets forth facts that more than adequately state a claim for civil conspiracy under state law. Massachusetts law allows a tort for a stand-alone form of civil conspiracy, which is defined as occurring "when the conspirators, acting in unison, exercise a peculiar power of coercion over the plaintiff that they would not have had if they had acted alone." *Limone v. United States*, 497 F.Supp.2d 143, 224 (D. Mass. 2007). Defendant conveniently, again, misstates the law and urges that it requires that the Defendant have "coerced [Plaintiff] to do" something, and further that it requires direct economic coercion. Def. Br. 72. In fact, courts have held that, in a conspiracy, "the wrong was the particular combination of the defendants rather than in the tortious nature of the underlying conduct." *Kurker v. Hill,* 689 N.E.2d 833, 836 (Mass. App. Ct. 1998); *see also Massachusetts Laborers' Health & Welfare Fund v. Philip Morris, Inc.,* 62 F.Supp. 2d 236, 244 (D. Mass. 1999) ("the exercise of this 'peculiar power of coercion' is itself the wrong, and no other tortious act need be shown"). Indeed, in *Limone*, the court found that there was "no better example of the 'peculiar power of coercion'" than the conduct of FBI agents that resulted in the deprivation of plaintiffs'

[66] Similarly, if Uganda had a particularly unfair or onerous conspiracy law that conflicted with Massachusetts law (as opposed to no conspiracy law), then Massachusetts would have an interest in not importing such an unfair or poorly constructed law to apply to one of its own citizens. These counterfactuals demonstrate that the precise fact-specific circumstances of this case compel the application of Massachusetts law here.

fundamental rights. *Limone*, 497 F. Supp. 2d at 224-226. That is, the power of coercion did not force the plaintiffs *to do* something, neither was it a form of direct economic coercion.

Defendant also wrongly asserts that the coercion must be directed specifically at the Plaintiff. Def. Br. 72. First, in so urging, Defendant ignores the facts in the FAC that show that the combined power of coercion was specifically directed at the Plaintiff. Sexual Minorities Uganda is a highly visible advocacy group that has held press conferences and campaigns that have incurred the wrath of anti-gay leaders, like Stephen Langa and Martin Ssempa, and government officials, like James Buturo. FAC ¶¶18-21, 199-208. The Plaintiff's staff members have been individually targeted for arrests, for unlawful searches, and in the media. FAC ¶¶ 186-198, 209-225. Additionally, as set out in the FAC, Stephen Langa repeatedly referred to a case involving Plaintiff's staff member as the reason for calling the conference that Lively attended and for urgently strategizing about strengthening the laws against homosexuality. FAC ¶ 102.

Defendant also conveniently ignores cases recognizing that such claims may be brought even when the peculiar power of coercion was not directly targeted at the particular plaintiff. In *Limone*, the defendant FBI agents were acting to prevent others from uncovering or exposing the truth about their dealings with confidential informants and other malfeasance. In seeking to protect their own interests, they prevented important evidence from coming to light that would have exculpated the plaintiffs. *Limone*, 497 F. Supp. 2d at 226. Similarly, in S*hirokov v. Dunlap, Grubb & Weaver PLLC*, Civil Action No. 10-12043-GAO, 2012 U.S. Dist. LEXIS 42787 (D. Mass. Mar. 1, 2012), the plaintiff brought a proposed class action alleging a scheme to profit from copyright infringement through fraud and extortion and alleged the state law tort of conspiracy. While the court dismissed defendant's claim for the true conspiracy form of the tort, it did so on the ground that plaintiff was not actually harmed by their combined power of

coercion (in fact he did not yield to the coercive force), not on the grounds that the coercion was not specifically directed at the plaintiff. *Id*. *at* *76.

2. Plaintiff Adequately States a Cause of Action for Negligence Under Massachusetts Law.

Finally, the complaint sufficiently states a valid and plausible cause of action for negligence which requires a showing (1) of the existence of a legal duty; (2) a breach of that duty; and (3) damages proximately caused by that breach. *Onofrio v. Dep't of Mental Health*, 562 N.E.2d 1341, 1344-1345 (Mass. 1990). As discussed in Section III (E) the FAC plainly states sufficient facts which establish Plaintiff's claim for negligence.

In arguing that this claim is based on his speech, Def. Br. 70, Defendant unsurprisingly omits the fact that, in addition to helping to create a "virulently hostile environment" (which he claims, without any basis, carries no duty of care for one who creates it), the negligence claim is also based on his work "with his co-conspirators to severely deprive Plaintiff, and the LGBTI community in Uganda, of basic fundamental rights." FAC ¶ 258. Massachusetts courts have held that one who takes action ordinarily owes to everyone else who may be affected thereby a duty to act reasonably. *Onofrio*, 562 N.E.2d at 1344-1345. Moreover, a duty can exist even when the unreasonably dangerous condition involves the foreseeable criminal or negligent conduct of an intermediary. *Jupin v. Kask,* 849 N.E.2d 829, 836-837 (Mass. 2006).

CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss should be denied.

Dated: September 21, 2012

Respectfully submitted,

/s/Pamela Spees

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was filed electronically, that it will be served electronically upon all parties of record who are registered CM/ECF participants via the NEF, and that paper copies will be sent to any parties indicated on the NEF as non-registered participants on September 21, 2012.

/s/Pamela Spees
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