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 **NO. 3-12-CV-30051-MAP**

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Plaintiff Sexual Minorities Uganda ("SMUG" or "Plaintiff") respectfully submits this memorandum of law in opposition to Defendant Scott Lively's Motion for Summary Judgment.

INTRODUCTION

In denying Defendant's motion to dismiss, this Court held that Plaintiff's allegations that, "in concert with others, Defendant – through actions taken both within the United States and in Uganda – has . . . to a substantial degree has been successful in fomenting, an atmosphere of harsh and frightening repression of LGBTI[1] people in Uganda," plausibly stated a claim under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), for Defendant's liability for the crime against humanity of persecution. Memorandum and Order Regarding Defendant's Motion to Dismiss, Dkt 59 (Aug. 13, 2013) ("MTD Decision") at 1. In its Order, this Court made numerous legal rulings that remain binding as the law of the case, and invited Plaintiff to substantiate its detailed allegations so as to permit a reasonable juror to conclude that Defendant did, in fact, further a conspiracy and/or aid and abet other actors who took concrete actions to deprive the LGBTI population in Uganda of their fundamental rights on a widespread or systematic basis.

As set forth in painstaking detail in Plaintiff's Statement of Facts ("PSOF"), the record indeed paints a "harsh and frightening" picture, MTD Decision at 1, that there has been for years a widespread and systematic attack – in the form of, *inter alia*, vilifications and dangerous media "outings," legislation criminalizing LGBTI status and advocacy, and arrests and violence – on a civilian population of nearly a half-million Ugandan LGBTI individuals. Indeed, the attack continues nearly literally to this day. Within the past week, Ugandan police raided a gay pride event in Kampala, Uganda and arrested twenty individuals, including Plaintiff's Executive Director Frank Mugisha and Programme Director Pepe Oziema who was beaten while in

[1] Lesbian, Gay, Bisexual, Transgender, and Intersex.

custody. *See* PSOF ¶¶ 210-211; *Ugandan Police Break Up Gay Pride Event, Briefly Detain Some*, N.Y. Times, Aug. 5, 2016.

The record also contains voluminous evidence – including from Defendant's extensive email correspondence with his Ugandan co-conspirators[2] – demonstrating Defendant's "management of actual crimes," MTD Decision at 62, *i.e*., that Defendant was responsible for – and indeed took credit for – prospectively devising the multifaceted strategy to criminalize LGBTI status and advocacy, that he was integral in coaching, advising and assisting his Ugandan co-conspirators in carrying out a variety of repressive measures, and that he retrospectively praised the collective efforts of the conspirators in effectuating much of their ambitious, repressive enterprise.

Defendant labors in 175 pages to re-litigate (without sufficient basis) settled legal questions in this case, to cast doubt on Plaintiff's heavily substantiated version of events and – without any sense of irony or self-reflection – attempts to cast himself in the virtuous glow of the First Amendment, even as he pursues a decades-long project to deprive the vulnerable LGBTI population of the benefits of speech or association. Yet, any 175-page document purporting to show that there are no disputed issues of material fact is effectively proof in and of itself that numerous factual issues are in dispute. More fundamentally, Defendant's factual presentation to this Court is so self-serving, selective and ultimately misleading, that it cannot (particularly when compared to Plaintiff's significant record testimony) permit the dismissal of this case as a matter of law. Similarly, Defendant's legal arguments, including those that ask the Court to revisit settled legal questions, often rely on mischaracterized authorities and are consistently misguided,

[2] As a legal matter, Plaintiff proceeds on alternative theories of accessory liability including conspiracy (or joint criminal enterprise liability) and aiding and abetting, all of which is fully explicated in Section II(B), *infra*. However, throughout this brief, Plaintiff uses the terms "conspiracy" or "co-conspirators" as a colloquial way to describe the collective efforts of the participants to the persecutory project – and in doing so, Plaintiff does not abandon alternative theories of accessory liability.

particularly where they concern Defendant's hypocritical invocation of the First Amendment. A brief overview of these errors follows:

Factual Deficiencies

A comprehensive rebuttal of Defendant's incorrect factual assertions is contained in Plaintiff's response to Defendant's 56.1 statement. However, Plaintiff highlights two critical features of Defendant's false factual analysis that infect his entire motion and generally underscores why summary judgment is inappropriate.

First, as this Court's careful review of the voluminous evidence will reveal, Defendant's characterization of the record evidence as to specific conduct and his intent is implausibly self-serving, incomplete and often misleading. For one example, Defendant presents himself as a humble pastor with little more than a "pro family" perspective that seeks to teach – with love – that homosexuality is merely a sin akin to theft or adultery. Def's Br. at 5. In fact, Lively is a crusader obsessed with the "gay movement" and "gay agenda," an obsession informed by his view of the "sin" of homosexuality as *sui generis*, and akin to those of the Nazis or other genocidal movements. PSOF ¶¶ 7-9. These views are what motivated him to take a leadership role in an effort to eliminate the purported existential threat of the LGBT community including by criminalizing viewpoints regarding that community contrary to his own. PSOF ¶ 149. A clearer example of a genuine issue of material fact could hardly exist.

Likewise, to this Court, Defendant now actively denies that he had or has any desire to criminalize the status of LGBT persons or to criminalize advocacy in support of LGBTI rights. However, the record is replete with repeated and indisputable statements from Defendant himself demonstrating that criminalization of status and advocacy is at the heart of his strategy of repression in Europe and Uganda. *See, e.g*. PSOF ¶ 149 ("I am against advocacy. And actually I

take the position that homosexuality should be criminalized […] so that you have a public policy basis to prevent the advocacy that I think should be prohibited."). Defendant even acknowledges more than once that the repressive laws such as those he pursues elsewhere would not be permissible in the United States. *Id.* Again, a prototypical issue of material fact exists (although Defendant would be hard pressed to convince a jury that he believes in free expression for the LGBTI community, given the evidence).

Equally misleading, Defendant suggests that his only role in the Ugandan legislation criminalizing LGBTI status and advocacy was to ameliorate the harshness of the death penalty provisions in the draft bills. But, Defendant's own words (including in the form of authenticated written statements) show that his suggested softening of the provisions was little more than a cynical strategy to ease passage of the bill and dampen criticism of him in the West. PSOF ¶ 121. Indeed, Defendant supported fully the other provisions of the bills which mandated long jail sentences for advocacy, which was consistent with the anti-gay strategies he had long espoused in writing and otherwise. This represents another critical issue of material fact in dispute, although, again, one as to which Defendant would have great difficulty convincing a fact finder.

The second broad fact-related fallacy of Defendant appears throughout the brief. Defendant triumphantly claims *ad seriatim* that Plaintiff's representatives do not themselves have personal knowledge of his acts in furtherance of the conspiracy – a purported flaw that Defendant relies heavily upon in arguing that Plaintiff cannot meet its evidentiary burden at this stage. Obviously, however, there is no requirement that a plaintiff prove claims based on her own personal observations, especially in conspiracy cases where the evidence usually is by its nature, related to covert conduct. This is why courts permit discovery, which in this case includes dozens of Defendant's private emails and other communications that preclude

Defendant's motion from being granted. And, indeed, for obvious reasons, Defendant scarcely comments on the evidence that comes in the form of his own inculpatory statements.

Legal Deficiencies

Defendant's legal arguments also do not support summary judgment.[3] First, as explained in Section II(A) of the Argument, voluminous record evidence establishes the elements of the crime against humanity of persecution at this stage. Beyond that, there can be no doubt that the attacks on the fundamental rights of LGBTI Ugandans – including the rights to association and speech, the right to equality/non-discrimination and the right to be free from arbitrary detention and arrest – are *widespread* because the numerous incidences of rights deprivations are not isolated, but rather form a discernible pattern of actions targeting a population of nearly a half million; and the attacks are *systematic* because they are implemented broadly, including through the execution of state policy. Defendant's objection that he is not directly responsible for all of the widespread and systematic attacks on the LGBTI population is not relevant to the assessment of the existence of the persecution in Uganda; it only goes to the separate factual question of his accessory liability the persecution (discussed in Section II(B) below).

In addition, Defendant's requests that the Court reverse itself on legal issues already decided are serial, but baseless. For example, there is no reason to revisit this Court's decision (which is law of the case) that the *jus cogens* crime against humanity of persecution is sufficiently universal and obligatory to satisfy the jurisdictional requirements of *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Nor should the Court accept Defendant's invitation to revisit its decision that LGBTI persons are equally entitled to the protections of the ATS – as that argument turns on a regressive view of law that would condone additional rights deprivations in Uganda

[3] In responding to Defendant's Motion, Plaintiffs do not follow Defendant's sequence of arguments.

because other countries (including countries in which Defendant sought to deny equal rights) discriminate against LGBT persons.

As explained in Section II(B), there is substantial record evidence to support each of Plaintiff's theories regarding Defendant's accessory liability and that sufficiently demonstrates causation under each theory. This is the case whether the Court applies federal common law theories of liability or those arising under international law. Under federal conspiracy law the record contains substantial evidence: (i) of an agreement between Defendant and his co-conspirators; (ii) that Defendant knowingly (and enthusiastically) entered the conspiracy intending to accomplish its persecutory goals; and (iii) member(s) of the conspiracy committed overt acts in furtherance of the conspiracy. Should the Court choose to apply international law to assess liability, there is likewise sufficient evidence to defeat summary judgment under the international law analog to conspiracy – joint criminal enterprise. Plaintiff's evidence is likewise sufficient to defeat summary judgment under the independent aiding and abetting theory of liability. For analysis of both conspiracy and aiding and abetting liability, there is sufficient evidence on the appropriate standard of *mens rea* – knowledge – and even in the event the Court accepts a heightened *mens rea* standard of purpose.

As explained in Section II(C) below, there is likewise no reason for this Court to revisit its conclusion that the presumption against territoriality set forth in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013), does not foreclose all ATS claims if the injury occurs abroad. The First Circuit has not issued any guidance to the contrary, numerous Circuits have followed this Court's correct interpretation of *Kiobel*, and there is ample record evidence demonstrating not only Defendant's U.S. citizenship, but also that he pursued his directorial role in the conspiracy primarily from his base in Massachusetts.

As explained in Section II(D), Plaintiffs have sufficient evidence regarding damages to preclude summary judgment. As a threshold matter, Defendant is simply wrong that a Plaintiff must prove pecuniary harm in order to secure a judgment under the ATS. In fact, scores of ATS cases have awarded damages – which the First Circuit instructs should be assessed by a jury – for harms resulting from non-economic violations of human rights. Defendant's presentation of case law on this issue is emblematic of a pattern of misleadingly rendering of governing law. In addition, Plaintiff provided Defendant notice of the categories of economic harms it has suffered and supporting documentation, which is sufficient to present to the jury for an award of economic damages.

As explained in Section III, Plaintiff's state law claims for civil conspiracy and negligence survive summary judgment. There is direct evidence from Defendant and others demonstrating that the conspiracy sought to impose non-economic forms of coercion (of a kind the Court already concluded were legally sufficient) to support a civil conspiracy claim. Likewise, there is sufficient evidence to show that Defendant's role in the conspiracy was negligent with respect to Plaintiff's right to be free from persecution. Under a correct reading of the case law, it is indisputable that these state law torts can be sustained based on non-economic damages, contrary to Defendant's argument. Similarly, there is no support for Defendant's incorrect assertion that diversity jurisdiction – which has been pled in good faith – can be rendered non-existent at summary judgment on the grounds that Defendant contests the ultimate amount in controversy. Defendant's restated arguments do nothing to weaken the Court's holding that Plaintiffs claims are not outside the statute of limitations. Moreover, as a proper reading of the case law quickly demonstrates, the presumption against extraterritoriality applies only to statutory claims, not to the common law claims asserted here.

As explained in Section IV, there is no reason to revisit this Court's ruling that Plaintiffs have both organizational and associational standing. Voluminous evidence demonstrates that Plaintiff as an organizational entity has suffered from persecution by having its speech and associational rights suppressed, enduring police raids of its meetings, and enduring arbitrary arrests and detentions of its members – all of which has caused it to divert core organizational resources to respond to these harms. And, as this Court has already held, Plaintiff has associational standing to act on behalf of its members and the broader Ugandan LGBTI community that suffer from the harms of ongoing persecution, and can pursue claims on their behalf without the need for individualized hearings. All of the harms are fairly traceable to Defendant's role in the conspiracy to persecute, even if there have been other, exacerbating factors relating to the persecution. And the Court can redress the harms by awarding damages for Plaintiff's economic and non-economic injuries and by issuing a tailored injunction preventing Lively from continuing his role in persecution in Uganda.

As explained in Section V, the Act of State doctrine, properly understood, has no application to this litigation. As the plain reading of the lead cases – even those relied on by Defendant – make clear, the doctrine only prohibits U.S. courts from rendering judgments on the *validity* of a foreign government's laws; it does not preclude courts from rendering judgments against U.S. actors before the court, even if such judgment might reflect criticism of a foreign law. Indeed, U.S. courts do the latter every day in affirming grants of political asylum or in enforcing a foreigner's right to *non-refoulement* to a country with repressive legal systems.

Finally, Defendant's overwrought invocation of elementary First Amendment principles is both analytically misguided and remarkably hypocritical. This is not an incitement case, and Plaintiff does not seek to impose liability for any of Defendant's abstract advocacy. As this

Court has already recognized, Defendant's retrograde statements and writings characterizing LGBTI individuals collectively as pedophiles with genocidal aspirations – shamefully ignorant as they are – do not form the basis of liability in this case. Such statements – and Defendant's repressive work in other countries – are relevant to show Defendant's discriminatory intent in targeting LGBTI communities in Uganda for severe rights deprivations and relevant to show his invidious motives in executing so damaging a persecutory campaign over such a long course of time. The substantive basis of Defendant's liability ultimately is his agreement and planning with his co-conspirators – which takes verbal and written form – to advance the widespread and systematic rights deprivations of a population of half-a-million LGBT Ugandans.

But, what makes Defendant's speciously romantic invocation of the First Amendment so remarkable is that for years he has carried out a comprehensive and premeditated campaign to deprive a vulnerable minority population of their own rights to speech, assembly and association – under sanction of dehumanization, imprisonment and violence. In fact, Defendant has celebrated the anti-gay laws he was instrumental in passing, such as in Russia, while acknowledging they could not have been enacted in the United States because of the First Amendment. That smacks of despotism, not freedom. Ultimately, Defendant resents the First Amendment values he cynically praises here: as he has explicitly stated, he seeks to prevent the possibility that Plaintiff and the LGBTI community in Uganda might themselves exercise fundamental speech and associational rights so as to convince the Ugandan public – on a fair playing field of ideas – that the worldview he and his co-conspirators seek to enforce through criminal sanction and violence (like all regressive worldviews that speech and activism have defeated) must be displaced by recognition of the equal dignity and respect owed to LGBTI persons.

FACTUAL BACKGROUND

A. Defendant's Discriminatory Motives and Plan: Defeat the "Global Homosexual Political Movement" And "Counter the Effect of the International 'Gay' Agenda on the U.S."

Defendant Scott Lively, president and founder of Abiding Truth Ministries, is a self-proclaimed "strategist against the satanic 'gay' agenda," who has served as a "government consultant" "in more than 30 countries."[4] PSOF ¶ 5. His stated mission is to defeat the "global homosexual political movement" by "stop[ing] the homosexual agenda [] in places it is just getting started" and "building bridges" to strong pro-family "power centers in other nations" and "counter the effect of the international 'gay' agenda on the U.S." PSOF ¶ ¶ 9, 12. In pursuit of that goal, Defendant has carried out significant efforts in Uganda, as well as Central and Eastern Europe, including Russia, directing these efforts primarily from his base in Springfield, Massachusetts. PSOF ¶ 10. Defendant engages with "political and religious leaders" in these countries to help them design and carry out "practical projects," including by implementing legislation, to criminalize, and otherwise silence, those who advocate the human rights of lesbian, gay, bisexual, transgender and intersex ("LGBTI") persons. PSOF ¶ 11. As Defendant himself has unabashedly admitted: "I am against advocacy. And actually I take the position that homosexuality should be criminalized […] so that you have a public policy basis to prevent the advocacy that I think should be prohibited." PSOF ¶ 149.

These statements and the actions described below expressly contradict Defendant's self-serving claims in his Rule 56.1 statement that (a) he is opposed to "any attempt to criminalize or

[4] Throughout this brief the abbreviation "PSOF" refers to "Plaintiff's Concise Statement of Material Facts of Record Omitted by Defendant" (Plaintiff's Statement of Omitted Facts) and "P. Resp. to D-MFR" refers to Plaintiff's Response to Defendant's Local Civil Rule 56.1 Statement of Facts, which are contained in the same document filed concurrently herewith. "D-MF" refers to Defendants Statement of Material Facts filed as part of his Memorandum of Law in Support of his Motion for Summary Judgment, dkt. 257 at 5-47.

punish any form of 'status' or sexual 'identity' or 'orientation'" and (b) he would be "against prohibiting homosexual persons or organizations [sic] from using legal means and the democratic process to advocate for changes to laws they oppose." *See* D-MF ¶¶ 8-9. These are just two prominent examples of disputed issues of material fact that preclude summary judgment.

Defendant's *modus operandi* in achieving his goal of criminalizing LGBTI status and advocacy is first, to foster a sense of urgency in a given country that criminalization of the activities of LGBTI persons and LGBTI-related advocacy is an existential necessity. In this vein, Defendant purports to expose the "dangers" of the "gay movement," including attributing mass atrocities and rampant pedophilia to the LGBTI population and suggesting that the "gay movement" seeks to fulfill its "destructive agenda" by "recruiting" children. See e.g., PSOF ¶ ¶ 70-72; P. Resp. to D-MFR 5. With the assistance of local partners, Defendant identifies issues of concern in a given country, which he uses as context for introducing his theories regarding the "gay movement," *e.g.*, exploiting a society's concern about exposing children to pornography by claiming that pornography is a tool used by the "gay movement" to promote societal acceptance of homosexuality or raising the issue of sex tourism involving children by equating pedophilia with homosexuality. *Id.* Defendant's strategy to intentionally dehumanize and vilify LGBTI persons – to render them enemies of civil society – has been essential to making their persecution acceptable, and even necessary.

Having generated urgent public demand for repression, Defendant then works with his local partners – government officials, civil society leaders and clergy – to engage in the persecution of the LGBTI community. *See e.g.,* PSOF ¶ ¶ 3, 9-20. Defendant, who identifies himself as an attorney, international human rights consultant, PSOF 5, and the person who knows more about the topic of homosexuality "than almost anyone in the world," PSOF ¶ 69,

meets with and advises those responsible for law and policy-making, drafts legislation and/or comments on existing drafts, and offers strategies to facilitate the passage of legislation. PSOF 9-20, 78. Defendant has explained the strategy he has developed and deployed (including ultimately in Uganda), in a series of books which he distributes to "influential people," PSOF ¶ 115, in the various countries where he works to map implementation in their jurisdictions. These books include:

1) *The Pink Swastika: Homosexuality in the Nazi Party*, in which Defendant argues that the rise of Nazism – with its resultant horrors – was engineered and driven by a violent and fascist gay movement in Germany; PSOF ¶ 7.

2) *The Poisoned Stream*, where Defendant describes "a dark and powerful homosexual presence in other historical periods: the Spanish Inquisition, the French 'Reign of Terror,' the era of South African apartheid, and the two centuries of American slavery"; PSOF ¶ 8.

3) *Seven Steps to Recruit-Proof Your Child*, in which Defendant describes "'gay' recruitment" as "a process of changing someone's attitude about sexuality, rendering him or her more likely to take that first step into the 'gay' lifestyle," and contending that this "process" is "being conducted by 'gay' propagandists" or "homosexualists," referring those "who work[] to legitimize homosexuality in our society" as fulfilling the "destructive agenda" of the "'gay' movement"; P. Resp. to D-MFR ¶ ¶ 11-14(F); PSOF ¶ 76.

4) *Defend the Family: Activist Handbook*, which presents Defendant's comprehensive plan to stop the "homosexual political and social agenda" pushed forward by the "gay movement," which he describes as a "highly organized army of social engineers with a single purpose" and as the "most dangerous social and political movement of our time"; PSOF ¶ 13 and

5) *Redeeming the Rainbow*, in which he further recommends strategies to defeat the "gay movement," including by: (i) "emphasiz[ing] the issue of homosexual recruitment of children" as that would supersede any argument for LGBTI persons as rights holders because, according to Defendant, once parents and grandparents accept that recruitment of children is possible, they become interested in seeing all the evidence against recognizing rights for LGBTI persons; (ii) framing pornography as a "gateway into the 'gay' lifestyle"; (iii) legalizing broad-based systematic discrimination against people on the basis of sexual orientation and gender identity; and (iv) criminalizing LGBTI persons "us[ing] the organs of government to advance their philosophy as normal and healthy." PSOF ¶ 19.

Over the past 15 years, working from his home base in the United States, Defendant has focused on implementing these strategies in foreign countries in Europe and Africa, knowing "[a]s an attorney," that in the United States "you can't have unequal treatment of like groups." PSOF ¶ 149. In 2006, Defendant formally launched Defend the Family International, a division of Abiding Truth Ministries in the United States, to build international alliances to "stop the homosexual agenda, especially in places it is just getting started." PSOF ¶ ¶ 5, 12. Defendant founded a Defend the Family affiliate in Latvia and had plans under way to establish similar organizations in Lithuania, Germany, and Russia, as well as Uganda. PSOF ¶ 14.

In Latvia, Defendant drafted and unveiled the *Riga Declaration on Religious Freedom, Family Values and Human Rights*, which declares that "the human rights of religious and moral people to protect family values is far superior to any claimed human right of those who practice homosexuality and other sexual deviance." PSOF ¶ 13. This manifesto calls on the European Union and the international community to "immediately abandon" initiatives to recognize the rights of LGBTI people. *Id.* In Lithuania, Defendant "helped produce two strong pro-family laws there" and helped achieve what he described as a "huge victory" when the mayor of Vilnius, Lithuania refused to grant permission for "May 'Rainbow Day' events" planned by LGBTI rights advocates. PSOF ¶ 17. In Moldova, Defendant helped defeat the passage of a law in Parliament that would have prohibited discrimination on the basis of sexual orientation and "taught the Moldovans" that discrimination is necessary because "anti-discrimination law is the seed that contains the entire tree of the homosexual agenda, with all of its poisonous fruit." PSOF ¶ 20.

In Russia, Defendant urged resistance to laws "prohibiting discrimination against homosexuals" and urged Russian leaders to "criminalize the public advocacy of homosexuality,"

claiming that "homosexuality is destructive to individuals and to society" and the "easiest way to discourage 'gay pride' parades and other homosexual advocacy is to make such activity illegal in the interest of public health and morality." PSOF ¶ 18. In 2013, the Russian Duma implemented Defendant's strategy by passing the Anti-Propaganda Law, which imposed harsh fines and possible jail terms for disseminating "propaganda" aimed at minors concerning "nontraditional sexual relations." *Id*. The law was then used to prevent or punish speech, including media reporting about harms faced by LGBTI persons, and to prevent public assembly of LGBTI persons. Defendant boasted of his role in the enactment of this law and applauded the Russian government, acknowledging at the same time that a law like that would not be permissible in the United States because of First Amendment protections. *Id.*

Over the course of at least six years, Defendant worked to connect his co-conspirators in Uganda with his partners in Europe and Russia in furtherance of his strategy to connect different pro-family "power centers" around the world to "counter the effect of the international 'gay' agenda on the U.S." See e.g., PSOF ¶ 52-53, 174, 176. At times, he sought to institutionalize these efforts through an institution he co-founded (again, directing the effort from his base in Massachusetts) with one of his Latvian partners, known as Watchmen on the Walls. P. Resp. to D-MFR ¶ ¶ 22-24. At other times, his efforts to connect his partners were more informal or through other international fora, such as the World Congress of Families, where he wanted "to unify African nations and align them with coonterparts [sic] throughout the world;" or help Ugandan leaders build an alliance with those in Russia against "the homosexual agenda." P. Resp. to D-MFR ¶ 73; PSOF ¶ 81.

B. Defendant's Actions to Persecute the LGBTI Community in Uganda: "Uganda May Be a Secret Weapon For Us" and "The Key to Africa"

Defendant also focused substantial energy to promote persecution in Uganda. Believing it to be "the key to Africa," Defendant saw Uganda as the "secret weapon" in his efforts to defeat the "'gay' movement" globally. PSOF ¶ 81. Beginning in 2002, Defendant began to work with co-conspirators Martin Ssempa,[5] Stephen Langa, and James Nsaba Buturo to implement his plan to "counter" the "international 'gay' agenda" in Uganda.

- Martin Ssempa is a pastor and the founder and executive director of the Family Policy and Human Rights Centre, through which he coordinates "[r]esearch [], advocacy and policy formation." He has also been "one of the leading media figures" in Uganda, having hosted several nationally televised programs, and has long held the ear of high-level Uganda government officials. PSOF ¶ 2(b).

- Stephen Langa, also a pastor, is the founder and executive director of the Family Life Network. Like Ssempa, Langa has long collaborated with high-level government officials. PSOF ¶ 2(a).

- James Buturo was one of those officials who worked closely with Langa and Ssempa, as the former Minister of Information and, subsequently, as the Minister of Ethics and Integrity until he was forced to leave his post when he failed to get re-elected to Parliament. After leaving that office, he continued to participate in and pursue the persecution of the LGBI community as a private actor. PSOF ¶ 2(e)

Defendant traveled to Uganda twice in 2002 at Langa's invitation to address what was purported to be the primary area of concern at the time – pornography. Langa Decl., dkt 257-2, at ¶ 4. In 2002, Uganda's penal code, which was set in place during the time of British colonization, criminalized same-sex sexual conduct, but as in many former British colonies, that law was rarely enforced. PSOF ¶ 21. LGBTI persons primarily experienced private discrimination – not with active or sustained explicit state sanction. PSOF ¶ 22.

[5] Because Mr. Sssempa is a U.S. citizen, on April 9, 2015, Plaintiff requested that the Court issue a subpoena to Mr. Ssempa to testify at a deposition. Dkt. 141. On April 24, 2015, the Court granted the motion, dkt. 146, and signed the subpoena on April 27, 2015. Dkt 148. Subsequently, Plaintiff has attempted to serve Mr. Ssempa in Uganda and at his last known address in the United States but has been unable to locate him.

Defendant used the underlying homophobia and Langa's and Ssempa's concerns around pornography and sexual promiscuity as an opportunity to introduce his theories about a purported gay agenda. He shared with them his theories that pornography and the "sexual revolution" were designed to lead to social acceptance of homosexuality and, as Ssempa observed, the purported dangers, of "homosexual groups" that "are actively growing through recruitment" of children into "homosexual even lesbian club[s]." PSOF ¶ 32. In addition to Langa and Ssempa, Defendant shared these theories at meetings coordinated by Langa with the "heads of nearly every religious denomination, cabinet ministers, and a justice of the Supreme Court" and on Ssempa's national television show. PSOF ¶ 25, 32. As a result of Defendant's efforts during his visits to Uganda in 2002, he laid the groundwork for the persecution of Uganda's LGBTI community, leading to his becoming known as the "father" of Uganda's anti-LGBTI movement. PSOF ¶ 5.

Following Defendant's 2002 visits, one co-conspirator who was a public official – Buturo – took many actions in accordance with Defendant's warnings that the purported dangers of the LGBTI community had to be dealt with severely. As Minister of Information, he ordered the investigation of and "appropriate action against" an LGBTI rights group, PSOF ¶ 36; publicly denounced a Ugandan radio station for featuring openly gay guests which was then sanctioned with a suspension, PSOF 47-48; warned United Nations and Ugandan AIDS agencies not to include LGBTI persons or LGBTI-related messaging in their HIV/AIDS initiatives, PSOF ¶ 38

Buturo continued these efforts when he became the Minister of Ethics and Integrity. In 2007, in response to a radio program that featured SMUG co-founder and lesbian activist, Victor Mukasa, and a press conference held by Plaintiff concerning the right of the LGBTI community to live without fear of attack, Buturo stated that, as minister, he was seeking to have "catalogues

of people we think are involved in perpetuating the vice of homosexuality" and to revise the law to "address the critical issue of the promotion of homosexuality." PSOF ¶ ¶ 47-48. He further declared that he would "block" efforts to advocate for the rights of LGBTI people, calling on LGBTI activists to "go to another country." PSOF ¶ 51. Continuing his attack on LGBTI advocacy, Buturo blocked a showing of a documentary on gay rights that was sponsored by the United Nations High Commissioner for Human Rights and the Uganda Human Rights Centre, entitled "Do Not Discriminate," because he deemed it the promotion of homosexuality. PSOF ¶ 133.

Taking a page from Defendant's European campaign, Buturo helped ensure that a law intended to provide anti-discrimination protection for minorities could not be used by LGBTI people to address discrimination based on sexual orientation and gender identity. PSOF ¶ 42. Similarly, continuing to fuel public demand for the full criminalization of LGBTI persons, Buturo and Ssempa participated in a rally against Plaintiff where they accused Plaintiff of "promotion of homosexuality" as part of "a well-orchestrated effort… to intimidate the government" and further called for stronger government action against LGBTI activists. PSOF ¶ 45.

In pressing their agenda, the co-conspirators' shared language and approach in creating fear of the "recruitment" of children into homosexuality by homosexual "promoters" (referring to LGBTI activists) began taking hold among other public officials. *See* PSOF ¶ 45, 48, 51. But concerns about these purported dangers did not spread much further into Ugandan society until after Defendant's third visit to Uganda, this in 2009. PSOF ¶ 100.

In 2008, the co-conspirators' attempts to push LGBTI persons out of public view were threatened by a Ugandan court ruling, which found that LGBTI persons enjoyed the basic

protections of law. The decision arose out of a 2005 raid of the home of SMUG co-founder Victor Mukasa, where local officials confiscated documents and other records, and detained a house guest. PSOF ¶ ¶ 57-58. Mukasa sued the officials for violating their rights under the Ugandan Constitution. *Id.* Ssempa attended the court hearings, and was seen engaging with the government attorney as well as the official who had raided Mukasa's home before and after the official testified. PSOF ¶ 57. Langa also followed the case and communicated actively with Defendant about it, writing, "We are [] engaged in a fierce battale [sic] in Uganda on homosexuals who have taken the government to court over gay rights." PSOF ¶ 52. Langa inquired whether Defendant was still willing to participate in a conference on homosexuality in Africa that they had agreed would be held the following year. *Id.* Defendant responded affirmatively and advised Langa to "beware" that the judge in Mukasa's case might be offered "bribes" by the LGBTI community. *Id.* Defendant sent from the U.S., a copy of his *Activist Handbook*, which he described as presenting a comprehensive plan to stop the "homosexual political and social agenda"; he directed an eager Langa to "[r]ead the attached booklet tolearn [sic] how we're organizing people in other countries." *Id.*

When the court issued a ruling in favor of Mukasa in December 2008, Ssempa appeared on national television, parroting Defendant's earlier warning to Langa that the judge was bribed by gays. PSOF ¶ 59. Ssempa said "we" would appeal the ruling because Uganda should not accept homosexuals. *Id.* Ssempa also told one of Plaintiff's staff members, "We're going to move to undo the ruling." PSOF ¶ 62. He contacted Defendant for assistance in those efforts, claiming "Uganda Needs Your Help" and "we are in a battle against homosexuality in our nation Uganda." PSOF ¶ 60. Defendant agreed that Ssempa would use his book, *Seven Steps to Recruit-Proof Your Child*, describing purported efforts of "gay activists" to "recruit" children,

and discussed the conference on homosexuality that Langa was planning. *Id.* Defendant's engagement with Langa and Ssempa around the ruling in Mukasa's case eventually led to Defendant's third visit to Uganda, the purpose of which was to "educate the leaders of the society so that when the [Anti-Homosexuality Bill] came out that they have an easier time…being able to implement it." PSOF ¶ 78.

In the lead-up to Defendant's 2009 visit to Uganda, Charles Tuhaise appeared in the conspiracy. Tuhaise has served as a Principal Research Officer for the Parliament of Uganda since 2005. Tuhaise Decl., dkt. 257-3, ¶ 2. In this role, Tuhaise works closely with members of Parliament as they consider and draft legislation. *Id.* Langa contacted Tuhaise about having Defendant meet with members of Parliament when Defendant came to Uganda. PSOF ¶ 64. That meeting occurred in early March 2009. PSOF ¶ ¶ 67, 68. There, Defendant met with Buturo. Another member of the conspiracy, then-Parliamentarian David Bahati was in attendance at that meeting as well. *Id.* Defendant directly advised these lawmakers on a strategy of criminalization: he "urged them to pattern their [anti-homosexuality law] on some American laws regarding alcoholism and drug abuse" because "[c]riminalization of the drug prevents its users from promoting it." PSOF ¶ 68.

Defendant also met with civil society leaders during his 2009 visit, and claimed to know more about the topic of homosexuality "than almost anyone in the world." PSOF ¶ 69. In these meetings, Defendant followed his script, conflating same-sex sexual orientation with sexual violence against children and attributing violent, criminal, and even genocidal behavior to LGBTI people. Characterizing the "gay movement" as an "evil institution" and "the movement that we hate," P. Resp. to D-MFR ¶ ¶ 67-68, Defendant emphasized the importance of targeting those LGBTI persons engaged in political advocacy, and urged the prevention of activities

"promoting [homosexuality]" and trying to "change all the laws and create a pro gay society." PSOF ¶ 73.

Defendant's meetings and efforts in Uganda in 2009, in the words of his co-conspirators, "planted deep seeds" and "fueled a desire for change." PSOF ¶ 93. Langa informed Defendant that it had been described as having the effect of a "nuclear bomb" against the "gay agenda." PSOF ¶ 75. This was evident in the heightened activity on the part of Defendant's co-conspirators to draft and gain acceptance for what became the 2009 Anti-Homosexuality Bill – a bill that proposed harsh penalties for consensual same-sex activity, criminalized advocacy in support of LGBTI rights, and required reporting of those suspected to be in violation of the law. Days after Defendant's visit, Langa used Defendant's materials in meetings with major Ugandan newspapers to argue against "homosexuals who come in the guise of human rights." PSOF ¶ 79. Beginning in April 2009, Uganda experienced a sharp uptick in the "outings" of LGBTI persons by newspapers and media articles claiming that groups, including SMUG and its member organizations, were "recruiting" youth into homosexuality. PSOF ¶ 100.

In the same period, Langa and Tuhaise held a meeting to discuss strategies to address the dangers Defendant raised of the "modern gay movement." PSOF ¶ 82. Tuhaise expressed the purported need for a new law that "takes into account" the "gay agenda," given that the existing provisions of the Ugandan penal code criminalizing same-sex sexual conduct between consenting adults were insufficient. *Id.* Others in attendance also discussed the failure of existing law to criminalize "the promotion of homosexuality and membership to homosexual groups." *Id*. Heavily involved in these discussions in Parliament, Buturo also raised the specter of recruitment of youth and echoed Defendant's recommendation of involuntary conversion "therapy" for "victims of homosexuality" as an effectively coercive alternative to prison. PSOF

¶ 87-91. Yet, despite framing this approach to the gay agenda as "therapy,"[6] these efforts led one government minister to articulate the real goal, "We must exterminate homosexuals before they exterminate society." PSOF ¶ 91.

The co-conspirators were closely involved in subsequent efforts to draft legislation that would "hinder and silence advocacy" by LGBTI persons. PSOF ¶ 93. In this context, they sought Defendant's "careful input," from his base in Massachusetts, in particular to make the draft legislation "stronger." PSOF ¶ 94. A resulting draft law provided for, *inter alia*, imprisonment up to 10 years for a first offense of same-sex sexual conduct between consenting adults; the death penalty for certain acts, including a second offense of consensual same-sex sex between consenting adults; and life imprisonment for "Promotion of Homosexuality," which would apply to any person who:

> (a) Participates in production, trafficking, procuring, marketing, broadcasting, disseminating, publishing homosexual materials;
>
> (b) Funds or sponsors homosexuality or other related activities;
>
> (c) Offers premises and other fixed or moveable assets;
>
> (d) Uses electronic devices which include internet, films, mobile phones and
>
> (f) (sic) Who acts as an accomplice or attempts to legitimize or in any way abets homosexuality and related practices.

[6] Defendant places much emphasis on his urging a "therapeutic" component to the AHB as an alternative to incarceration. Therapy under such circumstances is hardly voluntary; and therapy to convert sexual orientation or gender identity is deemed to represent "a serious threat to the health and well-being – even the lives – of affected people," Sullivan Decl. Ex. 179, and under some circumstances constitutes mental or physical torture. *Pitcherskaia v. INS*, No 95-70887 (1997). *See also* United States v. Karl Brandt et al., NMT Case 1 (the Doctors Case) (Aug. 1947) (prosecutor charged medical experimentation involving a purported "cure" for homosexuality as a crime against humanity; the tribunal found that prosecution had not established the defendant's connection to the experiments beyond a reasonable doubt).

This latter provision also applied to corporate entities, business, associations and non-governmental organizations, and provided that organizational registrations would be cancelled, and that directors, proprietors and promoters would be criminally liable for violations. The draft also provided for imprisonment up to two years or a fine for a "Failure to Report," which was to apply to "[a]ny person who being aware of the commission of any offense under this Act omits to report the offense to the relevant authorities within 24 hours." PSOF ¶ 95.

As he actively communicated with various co-conspirators from his base in Massachusetts, Defendant suggested changing the death penalty provision to 20 years or life imprisonment and the penalty for "Promotion of Homosexuality" to five years' imprisonment. PSOF ¶ 96. He also urged the inclusion of "therapy" as an alternative to imprisonment, but stated that otherwise, the draft legislation "looks like it will solve your problems." *Id.* Defendant explained later that he recommended "moderation" in sentencing in order to "make it more palatable to the international community." PSOF ¶ 107. He still viewed the bill as it stood (without any of his suggested modifications) as "one of the first laws of this century to recognize that the destructiveness of the 'gay' agenda warrants opposition by government," PSOF ¶ 108, and believed that that the harsh provisions of the law were better than no law, P. Resp. to D-MFR 50-52.

On April 29, 2009, David Bahati moved to introduce the AHB as a Private Members Bill in the Uganda Parliament. PSOF ¶ 98. With Langa and Ssempa present in the gallery, Bahati echoed remarks made by Defendant during his visit to Uganda the month prior when Defendant opened his speech at the anti-homosexuality seminar with the story of a young boy who had been sexually assaulted by an adult male. Bahati took that a step further and presented a young victim of sexual assault to the gallery as he introduced the bill. *Id.* When Bahati formally introduced the

bill later that year, it included Defendant's recommendation regarding the sentence for "Promotion of Homosexuality." P. Resp. to D-MFR 82-88. While the bill still included the death penalty for "aggravated homosexuality" and did not mention "therapy," Defendant's co-conspirators wrote to Defendant in Springfield that they were still seeking to make those amendments. P. Resp. to D-MFR ¶ ¶ 82-88(B). Ultimately, a so-called therapy component was not adopted because it was "technically" not feasible within the parameters of the Ugandan legislative process. PSOF ¶ 166. Regardless, the co-conspirators agreed that their "greatest weapon on the bill is the aspect of recruitment and promotion" in order to "stop[]…the destructive propaganda efforts of groups like SMUG." P. Resp. to D-MFR ¶ ¶ 82-88(C).

In the years following the introduction of the AHB, the co-conspirators worked in concert to devise strategies for its passage. Defendant continued to offer guidance from Massachusetts to the group to ensure passage of the AHB by minimizing opposition to the AHB from the international community, again recommending that the death penalty provision alone be removed and "therapy" as an alternative to incarceration. *See e.g.,* PSOF ¶¶ 102, 107-109, 114-116, 119-122. Defendant's rationale in this regard was that the death penalty generated "severe negative reaction in most Western nations" and believed that these changes "would take the wind out of the sails" of opposition to the AHB while still allowing for the criminalization of political expression and advocacy by LGBTI persons. PSOF ¶ 121.

For their part, co-conspirators Buturo, Langa, and Ssempa worked to generate broad-based public support for the repressive measures in the AHB. Buturo and Langa continued warning the public of the dangers of the "gay agenda" and LGBTI-rights activists' "recruitment" of children into homosexuality. Ssempa led a large demonstration in Jinja, demanding harsher laws on homosexuality and claiming children were being "raped violently by bullies in the

school" as justification for the new law. PSOF ¶ 118. He also began showing the public, and his own congregation, graphic videos that he claimed were gay pornography, stating, "The major argument homosexuals have is that what people do in the privacy of their bedrooms is nobody's business but do you know what they do in their bedrooms?" *Id.* He also railed against human rights organizations for attempting to "convert people to lesbianism." *Id.* These co-conspirators also continued to engage with those who had the power to change Ugandan law and policy, distributing Defendant's written strategies to "influential people here in Uganda," PSOF ¶ 115, emphasizing always the purported need to "protect children from being violated" by "homosexual promoters." PSOF ¶ 136.

At the same time, Defendant's co-conspirators sought to silence LGBTI-related advocacy even though the AHB and its "Promotion of Homosexuality" provision had not been enacted. At a Ugandan Human Rights Commission meeting attended by Ssempa and Langa, Bahati sought to remove Plaintiff's staff from the event. PSOF ¶ 112. From his Massachusetts base, Defendant also discussed with Langa, Ssempa, Tuhaise, and Buturo, the need to remove the dean of a Ugandan law school, and one of Plaintiff's co-founders, from her post for "organiz[ing] several conferences at which she has passionately defended homosexuality." PSOF ¶ 106. Defendant, Langa, and Ssempa discussed investigating a group that announced that it would seek "to improve the situation for homosexuals in Uganda" and "promote the full and equal inclusion of gays and lesbians." PSOF ¶ 124. At one point, Langa indicated in an email to Defendant that he would see that Plaintiff is investigated to determine their official registration status. PSOF ¶ 173. Ssempa interrupted a live broadcast of a TV talk show featuring Plaintiff's staff member discussing LGBTI rights to accuse him of promoting homosexuality and recruiting others into homosexuality using funds from abroad. PSOF ¶ 168.

Defendant, Langa, Ssempa, and Buturo were assisted in their efforts by a new entrant to the conspiracy, Simon Lokodo. In 2011, Buturo was forced to leave his post as Minister of Ethics and Integrity when he lost his bid for re-election, and Lokodo took his place. PSOF ¶ 137. Lokodo then assisted in the effort to deprive the LGBTI community its fundamental rights, including the rights to freedom of expression and association with even more zeal. In 2012 alone,

- Lokodo closed two workshops involving Plaintiff and its members and sought to arrest and prosecute workshop participants, accusing the LGBTI-rights advocates at the workshops of "recruiting" young people into homosexuality. Lokodo specifically collaborated with Ssempa with respect to closing one of the workshops and justifying the closure afterwards. PSOF ¶¶ 139-142, 150-153.

- Lokodo sought to stop the operations of Plaintiff and its member organizations by threatening to de-register them and by investigating them for "supporting homosexuality under the guise of fighting for human rights" and "recruiting" youth into homosexuality, upon learning of their efforts to prevent the passage of the AHB. Defendant advised the conspirators on how to strengthen these efforts. PSOF ¶ 155-156.

- Lokodo sought to investigate a health clinic that recently had been established by Plaintiff's member organization to provide HIV/AIDS and other medical treatment for LGBTI people on the grounds that it was "promot[ing] homosexuality." PSOF ¶ 160. Later, when the Ministry of Health announced the establishment of LGBTI-specific health clinics, Lokodo expressed his strong disagreement, stating, "We shall not tolerate these clinics…[and] shall arrest these people in these clinics and send them for treatment as culprits." PSOF ¶ 178.

Bahati built on Lokodo's argument that the AHB should be passed to "stop the promotion, recruitment, funding and same sex marriages," implying that the LGBTI-rights workshops Lokodo had shut down were used to conduct same-sex marriages. PSOF ¶ 157. The same justification regarding same-sex marriage led the police to raid the Ugandan LGBTI community's first Pride Parade in 2012 and detain several LGBTI persons. PSOF ¶ 161. Langa had warned of Pride parades and the need for the AHB to stop them since Defendant's visit to Uganda in 2009. Following the parade, Defendant, from his Massachusetts base, contacted Ssempa, Langa, and Tuhaise, asking them if they were aware of the Pride event. PSOF ¶ 162.

Tuhaise responded that he was not aware of the event but that these "things will continue until we get a law passed by Parliament to stop them." *Id.* Later that year, Defendant reiterated to the group the importance for the AHB in suppressing advocacy – *i.e*. that it was necessary in order to stop LGBTI persons from "flaunt[ing] their sins in 'pride' parades through the city streets." PSOF ¶ 167.

At other times, Defendant's Massachusetts-based emails included other members of Parliament – such as Benson Obua, a close colleague of Bahati. PSOF ¶ 123, 176. In 2013, when it looked as though the AHB would not pass, Defendant advised this group, including Langa, Ssempa, Buturo, Bahati, Tuhaise, Obua and other members of Parliament, to consider using the Russian Anti-Propaganda Law as a model. Defendant advised that it would have an easier time passing. PSOF ¶ 176. Buturo agreed they should look into the possibility and instructed Bahati to get a copy of the law. *Id.* He also advised another member of parliament to arrange for Lokodo to attend a convening in Russia to help build an international front between the two countries against the gay agenda. *Id.*

The combined efforts on the part of all the co-conspirators facilitated the eventual passage of the AHB in December 2013. Obua, with whom the co-conspirators had been in direct contact regarding their persecutory strategies, PSOF ¶ 123, 176, sought to focus the attention of the bill on the "Promotion of Homosexuality" provision. PSOF ¶ 180. The bill was subsequently enacted as the Anti-Homosexuality Act (AHA) in February 2014. The AHA was passed just one day after Parliament passed its "bedfellow" law, the Anti-Pornography Act, affirming the strategy employed by the co-conspirators for more than a decade of arguing that "[p]ornography breeds homosexuality," such that, with a crackdown on pornography, "[t]he days of homosexuals are over." PSOF ¶ 79, 180, 126.

Following the enactment of these laws, Lokodo continued his efforts to deny fundamental rights to the LGBTI community, by employing the "Promotion of Homosexuality" provision of the AHA, as well as the Anti-Pornography Act. In May 2014, Lokodo sent a letter to the Minister of Internal Affairs, requesting a special investigation of the Refugee Law Project ("RLP"), a non-governmental organization that housed the coordination for a coalition of human rights groups, including Plaintiff. PSOF ¶ 190. The coalition was founded to prevent the AHB from becoming law. *Id*. Lokodo accused RLP of homosexual recruitment and promotion. *Id*. Lokodo also continued his attack on health services for LGBTI persons by affirming his role in the raid of the Makerere University Walter Reed Project, a U.S.-funded medical research facility in Kampala that conducted HIV research and provided services to LGBTI people, allegedly for "recruiting homosexuals." PSOF ¶ 191. Lokodo accused all of these organizations of "hiding and pretending to be providing humanitarian assistance and research, yet they are promoting homosexuality." PSOF ¶ 192.

During this time, Defendant continued to advise his co-conspirators about these matters from his Massachusetts base. He warned the group in 2014, "[y]ou may think the battle is over because you have the anti-homosexuality law (in your minds a powerful defensive bulwark), but for them [LGBTI persons] this is only the beginning of the next phase of their war to conquer you." PSOF ¶ 196.

The Ugandan Constitutional Court annulled the AHA in August 2014. PSOF ¶ 201. However, this ruling was based on procedural irregularities in connection with the law's passage, rather than a finding that the law substantively violated any fundamental rights. *Id*. Notwithstanding the annulment, the conspiracy continued its assault on the LGBTI community. Ssempa continued to seek Defendant's assistance to respond to "homosexualist lies concerning

the facts of Uganda." PSOF ¶ 202. Ssempa, Lokodo, and Langa, then focused on pursuing their agenda through resort to the Anti-Pornography Law, which is still in effect. Ssempa was appointed to work with Lokodo on a Pornography Control Committee. PSOF ¶ 207. Langa's Family Life Network and Lokodo's Ministry of Ethics and Integrity co-organized a workshop on "pornography." PSOF ¶ 204.

C. "We Have No Room Here for Homosexuals and Lesbians": Persecution's Harmful Impact on Plaintiff and the Ugandan LGBTI Community.

Plaintiff emerged as a new human rights organization in 2004 into an environment that had been poisoned by the Defendant and his co-conspirators. PSOF ¶ 37. Plaintiff's work drew the wrath of Defendant's cohort in Uganda early on, as Plaintiff's efforts to become more visible and begin a public dialogue was met with outrage – and repercussion. PSOF ¶ 38, 47-48. The more Plaintiff advocated for a safer, healthier existence, the more the conspirators met them with violent rhetoric and repression. PSOF ¶ 44- 45; some of Plaintiff's staff had to leave the country for a period until the situation calmed enough to return. PSOF ¶ 50. And when a court ruled in favor of Plaintiff's founding director, holding that "homosexuality" was not a license to violate their rights (as the government had claimed), Defendant and his co-conspirators took their plan to the next level. PSOF ¶ ¶ 82-98

The co-conspirators' narrative of gays as super-predators reverberated in Parliament and achieved the desired effect – animating the core strategic element of this attack in the criminalization of LGBTI people's rights of political expression and association through the AHB. One parliamentarian was outraged that LGBTI activists had dared to hold a press conference in the aftermath of the March 2009 anti-homosexuality seminar. PSOF ¶ 84. Defendant himself at one point emphasized that silencing Plaintiff was a key goal of the

conspirators' efforts, offering strategic advice to his co-conspirators about legislation (modeled on the Russian Anti-Propaganda Law) that would have the effect of stopping the "destructive propaganda efforts of groups like SMUG." PSOF ¶ 174.

But the conspirators did not wait for the AHB to become law in their effort to silence and shut down Plaintiff – as evidenced by the raid of Plaintiff's workshops and meetings in 2012. Lokodo, a government minister, personally showed up to a workshop organized for Plaintiff and its member organizations in order to shut it down. PSOF ¶ ¶ 139-142. Afterward, he equated workshop participants with terrorists who should not be permitted to associate. *Id.* After the raid of a workshop in June of the same year, he addressed the media and said that in Uganda, "we have no room for homosexuals and lesbians." PSOF ¶ ¶ 150-153. He then proceeded to announce his intention to "bring them to book" and close down organizations engaged in promoting "homosexuality." The raids took a heavy toll on Plaintiff's own staff and work, impeding their ongoing work and necessitating renewed security planning and precautions. *Id*. and PSOF ¶ 156.

The conspiracy's main tactics of stigmatizing and dehumanizing rhetoric and propaganda that was often reported and in some cases amplified in the media have also taken a heavy toll on Plaintiff, its member organizations, and staff. When Plaintiff and its member organizations held a press conference in which they launched their "Let Us Live in Peace" campaign, seeking to counter the rise of widespread virulent rhetoric about the LGBTI community, Ssempa and Buturo declared war. In response to the press conference, the identities of LGBTI rights activists were posted online with the label of "homosexual promoters," including their names, photographs, and contact information. PSOF ¶ ¶ 44-45. This intentional, explosive outing was a harbinger of the future "reporting" (*i.e.*, dangerous outings) that emerged in subsequent years.

The Ugandan tabloid media played a critical role in furthering this persecution, using the hostile rhetoric targeted at LGBTI people to further stoke public antipathy against them. In the immediate wake of Defendant's 2009 strategic intervention in Uganda, a Ugandan tabloid, the *Red Pepper*, proceeded to publish a series of issues outing LGBTI activists and community members, including some of Plaintiff's staff, and accusing LGBTI people of "recruiting" children in schools. PSOF ¶ 100.

In October 2010, the *Rolling Stone* tabloid similarly published the names, photographs, and identifying information of LGBTI individuals and activists, including Plaintiff's staff. This publication, however, included a headline exclaiming, "HANG THEM; THEY ARE AFTER OUR KIDS!!" PSOF ¶ 127. The tabloid compiled false allegations, inflammatory statements regarding the "recruiting" and targeting of children, and included a quotation from a church leader who insisted that the only way that Uganda could win the "war" against homosexuality was to start publicly killing gay people. *Id.* The paper also quoted Ssempa as stating that the "war has just started." *Id.*

Following the enactment of the 2014 Anti-Homosexuality Act, the *Red Pepper* initiated another outing binge paralleling its 2009 series. On February 25, 2014, the day after the AHA was signed into law, it published an issue with the headline, "EXPOSED! Uganda's 200 Top Homos Named," including names, photographs, addresses, and other personal information of LGBTI community members, including activists working for and connected to SMUG. Such tabloid outings occurred over the course of days. PSOF ¶ 185-187. The media outings and sensationalist and voyeuristic tabloid reporting exposed LGBTI community members and activists to harassment and death threats, forced many into hiding and at times prevented them

from working, and impeded the essential work of organizations devoted to the protection of LGBTI rights. *Id.*

The co-conspirators also worked to make sure that Plaintiff had nowhere to turn to challenge the public, discriminatory messaging that was threatening the LGBTI community. Media that was supportive or even neutral with respect to the LGBTI community were punished. As discussed above, Buturo was outraged when one radio program hosted Plaintiff's founding director on his show and sought the suspension and fine of the radio program personnel. PSOF ¶¶ 47-48. He similarly worked in 2010 to block the screening of a documentary about LGBTI rights. PSOF ¶ 133.

At the same time that state actors were punishing association and expression by LGBTI Ugandans or others who might give them a platform, the LGBTI community has been struggling to ensure access to health care, which was one of the main reasons Plaintiff was founded as an umbrella organization in 2004. PSOF ¶ 37. Around the time of its founding, in November 2004, Buturo was reported as warning UNAIDS and the Uganda AIDS Commission not to include LGBTI people in their HIV/AIDS initiatives or mechanisms because homosexual conduct was illegal in Uganda. PSOF ¶ 38. At a 2007 rally in response to SMUG's "Let Us Live in Peace Campaign" organized by Ssempa, and attended by Buturo, Ssempa similarly stated 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." PSOF ¶ 45.

Non-governmental organizations who sought to fill this gap in the provision of life-saving health services, faced repression. In May 2012, Plaintiff assisted its member organization, Icebreakers Uganda, in opening an LGBTI-focused health clinic in Kampala to provide testing,

counseling, and treatment for HIV/AIDS and other sexually transmitted infections. PSOF ¶ 160. In response, Lokodo publicly threatened the clinic, claiming that "if we find out that it's related to promoting the culture which doesn't conform to our morals as a country, we shall instantly ban and close it . . . we shall not allow any social gathering, association, infrastructure or any activities that exist to promote homosexuality." *Id.* The clinic was forced to operate discretely and without advertising its location, which hampered its service delivery. After the AHA was enacted, the clinic suspended its operations and removed its supplies and equipment from the location. Staff of the clinic had to find other health care providers willing to discretely treat their patients. PSOF ¶ 188.

While the AHA was effect, in April 2014, Ugandan police raided the Makerere University Walter Reed Project, a medical research facility in Kampala that conducted HIV research and provided key health services to LGBTI people. PSOF ¶ 191. One of the clinic's employees was arrested, and accused of "recruiting homosexuals." The clinic's operations were temporarily suspended for the safety of both staff and clients. *Id.* When the clinic reopened, it had cut back on its services for men who have sex with men. *Id*.

The government used the existence of the AHA to target an organization that had played a key role in coalitional efforts to defeat the AHA. The Refugee Law Project ("RLP") is a non-governmental organization devoted to providing legal aid to asylum speakers and refugees. PSOF ¶ 190. RLP played host to the coordination of civil society organizations, including LGBTI organizations, and in particular Plaintiff, who joined together to counteract the efforts toward the AHA. *Id*. The Minister of Relief, Disaster Preparedness and Refugees informed RLP that it was required to suspend its activities and services during the investigation into whether it was "promoting homosexuality" in refugee settlements. *Id*. Lokodo subsequently notified the

Minister of Internal Affairs that RLP was in violation of the AHA and required special investigation for "recruiting and promoting out young people for anti-social activities and promoting unnatural relationships." *Id.* The targeting of RLP sent a chilling message to civil society organizations supporting LGBTI activists and organizations. The suspension and investigation of the key member of the coalition impaired the ability of the organizations to work together. *Id.*

LGBTI Ugandans have also been subjected to unlawful arrest, detention, and abuse in police custody. In June 2008, at the HIV/AIDS Implementers Meeting in Kampala, LGBTI and HIV/AIDS activists staged a peaceful demonstration in which they distributed leaflets and held up placards seeking attention to HIV vulnerability among LGBTI persons, and protesting the government's commitment that it would refuse to provide funds for HIV programs geared toward men who have sex with men. PSOF ¶ 56. Despite the fact that they had been invited to the meeting, the police arrested three activists, including Pepe Onziema of SMUG, on the grounds that that homosexuality was illegal. *Id.* The activists were held at the police station for two days, and while in detention, officers targeted Onziema, a transgender male, forcibly stripping him naked and touching his genitals. *Id.* Onziema's arrest and abuse preceded three subsequent traumatic encounters with police within the next year. *Id.* As previously described, in 2008, a Ugandan court entered judgment in favor of Victor Mukasa, SMUG's founding director, for the 2005 police raid of his home, seizure of documents and electronic files, and arresting and ill-treatment of his guest. PSOF ¶ 58.

In October 2013, in the wake of the reintroduction of the AHB, Witness X[7] and his partner were arrested after private intimate photographs of his partner with another man were

[7] This witness has been designated "Confidential" pursuant to the terms of the Protective Order entered in this case. Order Regarding Confidentiality of Certain Discovery Material, Dkt. 106.

stolen and published in the *Red Pepper* tabloid. PSOF ¶ 177. While detained, Witness X was beaten by authorities and subjected to invasive and humiliating anal examinations and HIV testing without his consent. *Id.* In January 2014, within weeks of the passage of the AHB, police arrested Kim Mukisa – who had been previously thrown out of his home based on allegations that he was a homosexual and been beaten by local council authorities and neighbors – and Jackson Rihanna Mukasa, a transgender woman. The two were illegally held in prolonged police custody, and were subjected to abusive treatment while detained. PSOF ¶ 182. They were subjected to HIV tests without their consent, and Mukasa was also subjected to an invasive and degrading anal examination. Moreover, while in detention, they were publicly paraded before the media as homosexuals," *id.,*-- treatment that has been a recurrent form of abuse by Ugandan police, and one that touches upon the media's significant and pervasive role in the ongoing persecution of LGBTI Ugandans.

These practices continue to this day, as evidenced by the recent arrest of Plaintiff's Executive Director, Frank Mugisha, and Programme Director, Pepe Onziema. On August 4, 2016, police violently raided a fashion show that was held as part of the LGBTI Pride celebrations in Uganda and arrested Mugisha and Onziema. PSOF ¶¶ 210-211. They were verbally insulted and mocked, and their photographs were taken by police and others at the station. *Id.* Onziema was beaten by police and hit in the head several times, and forced to strip. *Id.* Apparently unsatisfied with this level of police abuse, Lokodo demanded to have the activists re-arrested after they had already been released. PSOF ¶ 211.He advised Plaintiff's representatives that if they continued with plans for a Pride Parade, he would enlist the police and people from the community to stop it. *Id.* Fearing violence and arrests, Plaintiff and its colleagues made the decision to cancel the parade. *Id.*

ARGUMENT

I. LEGAL STANDARD

Summary judgment is only appropriate when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A genuine issue is one where a "rational fact finder," viewing the evidence in the light most favorable or "flattering" to the non-moving party, could resolve the issue in favor of the non-moving party. *Fecho v. Eli Lilly & Co.*, 914 F. Supp. 2d 130, 143 (D. Mass. 2012) (citing *Am. Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers*, 536 F.3d 68, 75 (1st Cir. 2008)). If the non-moving party demonstrates the existence of a genuine issue of material fact beyond mere speculation or "conclusory allegations," summary judgment is improper. *Cryer v. Mass. Dep't of Correction*, 763 F. Supp. 2d 237, 242 (D. Mass. 2011).

The ultimate burden of persuasion born by the moving party at the summary judgment stage is a "stringent one." *In re Relafen Antitrust Litig.*, 360 F. Supp. 2d 166, 177 (D. Mass. 2005) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 330, 331 n.2 (1986)). For the moving party to succeed, it must demonstrate that the non-moving party lacks evidence to support its position at trial. *Golden Star, Inc. v. Mass. Mut. Life Ins. Co.*, 22 F. Supp. 3d 72, 77 (D. Mass. 2014) (citing *Rogers v. Fair*, 902 F.2d 140, 143 (1st Cir. 1990)).

As noted below, Defendant raises a number of pure questions of law that were conclusively decided by this Court in its ruling denying Defendant's motion to dismiss. Under the doctrine of law of the case, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Naser Jewelers, Inc. v. City of Concord*, 538 F.3d 17, 20 (1st Cir. 2008) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). The doctrine extends to interlocutory orders – such as a ruling on a motion to dismiss – that address a question of law, as opposed to the sufficiency of allegations. *See Baetge-Hall v.*

American Overseas Marine Corp., 624 F. Supp .2d 148 (D. Mass. 2009) (holding that ruling at motion to dismiss stage that retaliatory discharge claim was not preempted precluded, under law of the case doctrine, defendant's subsequent preemption argument on motion for summary judgment).

This Court can overturn the law of the case only if Defendant can show that his assertions meet the "limited exceptions exist [sic] to the law of the case doctrine," including a "material change in controlling law" or "newly discovered evidence." *Id*. (quoting *Naser Jewelers,* 538 F.3d at 20). Defendant cannot satisfy these exacting requirements. As set forth below, Defendant can show no material change in controlling law, and, since Plaintiff's evidence "tracks the unverified facts in the complaint[,] the proffered evidence is not new." *Cardoso v. City of Brockton*, Civil Action No. 12–10892–DJC, 2015 WL 1539949, at *5 (D. Mass. Jan. 14, 2015).

II. THE RECORD EVIDENCE FORECLOSES SUMMARY JUDGMENT ON PLAINTIFF'S ATS CLAIMS

A. **This Court Has Subject-Matter Jurisdiction over Plaintiff's Claims of the Crime Against Humanity of Persecution, as it Constitutes a *Jus Cogens* Crime that Is Clearly Defined and Widely Accepted, and Plaintiff Has Sufficient Evidence to Preclude Summary Judgment on this Issue.**

1. The Norm against the Crime Against Humanity of Persecution, Including on the Basis of Sexual Orientation and Gender Identity, is Clearly Defined and Widely Accepted.

This Court has already correctly held that, "Widespread, systematic persecution of LGBTI people constitutes a crime against humanity that unquestionably violates international norms," and thus meets the ATS' jurisdictional requirement of a clearly defined and widely accepted norm set forth in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). MTD Decision at 20. Defendant offers no basis for his request that this Court revisit its binding ruling, which was based on a comprehensive review of customary international law. To avoid repeating the

extensive argument Plaintiff made on this issue in opposing the motion to dismiss, reference is respectfully made to the discussion of persecution set out in its Opposition to Defendant's Motion to Dismiss, dkt. 38, at 19-42.[8] Plaintiff will address Defendant's scattershot arguments touching upon this question by supplementing as follows:

a. Persecution Constitutes a Crime Against Humanity.

Defendant again suggests – in spite of this Court's prior ruling to the contrary – that persecution is not "egregious" enough to merit recognition under the ATS. Def. Br. at 161. Yet, the International Criminal Tribunal for the Former Yugoslavia has described persecution as "one of the most vicious of all crimes against humanity" because it "nourishes its roots in the negation of the principle of equality of human beings" and is "one step away from genocide." *Prosecutor v. Kupreškić,* Case No. IT-95-16-T, Judgment, ¶ 751 (Jan. 14, 2000) ("*Kupreškić* Trial Judgment").[9]

The core principles of persecution – that it involves "systematically trampling upon the fundamental rights of the victim group," *Kupreškić* Trial Judgment, ¶ 751, and is a serious offense in its own right – were established by the International Military Tribunal at Nuremberg ("IMT"). In the negotiating history of the London Charter, Justice Robert H. Jackson made clear that the tribunal's jurisdiction would include persecution involving the "destruction of the rights

[8] It is worth noting that since the Court's 2013 ruling, the African Commission on Human and People's Rights, the regional body responsible for monitoring the implementation of the African Charter on Human and People's Rights by African States, joined the ranks of other regional human rights entities in recognizing that sexual orientation and gender identity fall within the protections of the anti-discrimination and equal protection provisions of the Charter. *See* African Commission on Human and Peoples' Rights, *Res. 275: Resolution on the Protection Against Violence and Other Human Rights Violations Against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity,* May 12, 2014, *available at* http://www.achpr.org/sessions/55th/resolutions/275.

[9] Judgments of the International Criminal Tribunal for the Former Yugoslavia are available at: http://www.icty.org/. Judgments of the International Criminal Tribunal for Rwanda are available at: http://unictr.unmict.org/. Judgments and decisions of the International Criminal Court are available at: https://www.icc-cpi.int/.

of minorities."[10] The Charter of the IMT includes persecution, "whether or not in violation of domestic law of the country where perpetrated." London Charter, art. 6(c). Trials conducted by the IMT and subsequent Nuremberg tribunals addressed cases of persecution involving a range of underlying acts, including acts that would not have been criminal absent the discriminatory intent and the widespread or systematic nature of the attack in which they took place.

For example, in *United States v. Altstoetter et al,* ("*Justice Case"*), Law No. 10. 1946-1949, Vol. III (1951), Opinion and Judgment, at 1063-64, 1114, the court addressed "lesser forms of racial persecution" such as exclusion from certain professions, economic deprivations, restrictions on rights to marry, and other discriminatory laws; it explained that, while some acts may seem "to be a small matter compared to the extermination of Jews by the millions under other procedures," they nevertheless formed part of a plan for persecution "not only by murder and imprisonment but by depriving [Jews] of the means of livelihood and of equal rights in the courts of law." *See also United States v. Weizsaecker, et al,* ("*Ministries Case*"), Law No. 10. 1946-1949, Vol. XIV (1949), Opinion and Judgment, at 602-5 (finding "judicial persecution" through perverting the "ordinary and commonly recognized rights to fair trial" for Jews and "other enemies and opponents of national socialism"); *Trial of Hans Albin Rauter*, ("*Rauter Trial"*) 14 U.N. WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS, 89, 93 (1949) (the accused issued orders subjecting Jews to discriminatory treatment, including prohibiting them from taking part in public gatherings, using public places for amusement, recreation, or information). The ICTY's recent pronouncement underscores the profound harm and seriousness of persecution involving the "[exclusion of] a person from society on discriminatory grounds," *Kupreškić* Trial Judgment, ¶ 621, in and of itself.

[10] Robert H. Jackson, Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, United States of America, Department of State, London, 1949, p. 330.

b. Persecution on the Basis of Sexual Orientation and Gender Identity Constitutes a Crime Against Humanity.

In holding that LGBTI persons are entitled to protection from persecution, this Court concluded that "[t]he history and current existence of discrimination against LGBTI people is precisely what qualifies them as a distinct targeted group eligible for protection under international law." MTD Decision at 29. Rejecting that binding holding, Defendant again espouses a regressive and circular understanding of law, whereby the existence of discrimination against LGBTI people in some parts of the world justifies withholding from them protections of international law – thereby allowing further discrimination, like a regressive ratchet. Def. Br. at 71-74. As evidence of existing discrimination that Defendant argues militates against recognizing a norm prohibiting persecution, Defendant's 2012 brief highlighted the discriminatory trend in Russia:

> As of 2012 "[t]he **tendency in Russia is toward limiting freedom of speech and freedom to gather**, targeting any group that somehow stands up for its rights." St. Petersburg has recently become the fourth city in Russia to pass a law criminalizing homosexual "propaganda." "The law is part of **a wider government initiative**," "as **politicians** and Orthodox Church **push for laws to apply nationwide**." "**Gay pride parades are regularly banned in Russia and violently broken up by police**."

Def. MTD, dkt. 33, at 33 (internal citations omitted) (emphasis and internal quotes in original).

Subsequently, in 2013, Defendant took credit for this "tendency" in Russia. PSOF ¶ 18. In 2013, the Russian Duma passed the Anti-Propaganda Law, which made the discrimination described above the law of the land. *Id.* Defendant proudly proclaimed that criminalization of advocacy was one of the "few specific policies" he advocated during his tour of Russia and boasted about his role in its enactment.[11] *Id.* Under Defendant's perverse logic, therefore, his

[11] Subsequent to Defendant's 2012 brief, which seemingly trumpeted the passage of the Russian law, he admitted: "[h]ere in the United States it would not be possible to pass such a law…." *Id.* That did not stop Defendant from mockinf Plaintiff for daring to "complain bitterly" that the Ugandan legislation he sought to

success in legislating repression in one country should insulate him from liability for advancing repression in another. Yet, as this Court already observed, courts do not identify legal norms in a given case with reference to non-compliance elsewhere. MTD Decision at 28; *see also 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.").[12]

The only additions to Defendant's circular argument that persecution of the LGBTI community is permissible because the LGBTI community is persecuted are misused fragments – rendered out of context – from the writings of Professor M. Cherif Bassiouni, an international law expert whom Defendant himself describes as "perhaps *the* leading publicist" on international criminal law. Def. Br. at 72. Professor Bassiouni was designated by Plaintiff as an expert on this legal question and opined in connection with this case that:

> [1] "persecution is a long-recognized crime against humanity, and is thus equally recognized as an international law violation that is clearly defined and widely accepted;" and [2] that the "identification of human beings based upon their sexual orientation or gender identity for discriminatory purposes with consequences of criminal prosecution and incarceration or other deprivation of fundamental rights, falls within the meaning of 'persecution' of that group…"

Declaration of Mark Sullivan, dated August 8, 2016 ("Sullivan Decl."), ¶210, Ex. 209 (Bassiouni

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advance "would render its work and mere existence illegal." D. MTD, dkt. 33, at 32. Defendant chided Plaintiff for seeking to protect its own rights to expression and association and those of the broader community in Uganda against his attempts to strip away those rights. He advised Plaintiff that "[t]he fact that much of the rest of the world does not cherish the First Amendment freedoms of speech and expression that are fundamental to United States citizens can hardly come as a surprise to SMUG." D. MTD, dkt. 33, at 32-33.

[12] Segregation now does not compel segregation forever, and courts maintain the obligation to reject judicial sanction of discrimination. *See Brown v. Board of Ed*, 347 U.S. 483 (1954); *see also 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."); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) ("The nature of injustice is that we may not always see it in our own times…. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.")

Expert Report) at 14.[13]

Bassiouni observed that "sexual orientation and gender identity is considered a group status" such that "members of this group are protected from persecution based on this status." *Id.* at 10. He further stressed that "singling out this group and withdrawing legal rights and protections from them [*sic*], subjecting them to criminal prosecution and imprisonment based on their status or identity constitutes physical and psychological harm brought upon them." *Id*. So, to be clear: the preeminent international criminal law scholar in the world fully agrees with Plaintiff's position – and the Court's earlier conclusion – that persecution on the basis of sexual orientation and gender identity is a violation of the law of nations, akin to other group-based persecutions such as that based on race, religion, and gender.

Indeed, the proposition Defendant labors to contest is so uncontroversial that even his own expert agrees with it. Former U.S. Ambassador Grover Rees testified that: 1) he agrees "wholeheartedly" that "human rights are universal and 'apply equally to every human being, regardless of sexual orientation and gender identity,'" Sullivan Decl. ¶ 209, Ex. 208 (Rees Expert Report) at 3; and 2) the recognition of persecution on the basis of sexual orientation is a "fairly common practice" in refugee and asylum law, Sullivan Decl. ¶ 212, Ex. 211 (Rees Deposition Excerpt) at 56:19-57:23; and 3) infliction of harm on someone because of their status of being "homosexual" is the "kind of discrimination that could rise to the level of persecution. *Id*. at

[13] Defendant acknowledged that Professor Bassiouni has been designated by Plaintiff as an expert witness in this case and indicated he will object to the Court's consideration of his report or testimony on legal issues though he failed to provide a basis for such an objection or support for it. Def. Br. at 72 n. 8. The Restatement (Third) of Foreign Relations Law anticipates that while "the determination or interpretation of international law" is a question of law and is "appropriate for judicial notice… without pleading or proof," courts may consider "expert testimony" in resolving questions of international law. Rest. (Third) Foreign Relations Law § 113. Courts "tend to reject challenges to [receiving expert testimony on questions of international law] based on the argument that international law must be treated like domestic law for this purpose." *Id*., cmt. c. Moreover, Defendant obviously cannot have it both ways at this point. To the extent that Defendant has placed at issue Professor Bassiouni's writings and opinions that touch upon issues addressed in his expert report or deposition testimony or about which opposing counsel had an opportunity to question him, it is fair and proper for this Court to consider his report and testimony should it deem it useful to do so.

84:9-17. Ambassador Rees also acknowledged that even laws prohibiting same-sex sex, which he maintained were not *per se* contrary to international law, could rise to the level of persecution if the intent behind their passage was to criminalize status. *See id*. at 82:7-90:8.

In the face of this conclusive authority, Defendant cites a few isolated snippets of Professor Bassiouni's encyclopedic body of writing in a futile effort to undermine the Court's prior ruling and Professor Bassiouni's unambiguous expert report. For example, Defendant references Professor Bassiouni's observation that it would be beneficial, in a prophylactic sense, to explicitly include sexual orientation as a protected identity in the context of treaties regarding crimes against humanity – a project Professor Bassiouni has championed for years. Def. Br. at 72-73. Yet, as Professor Bassiouni thoroughly explained during his deposition in response to the line of argument Defendant presses here, a positivist's desire to eliminate any doubt through an explicit reference in a treaty to a particular basis for persecution does not undermine the existing proscription on persecution on that basis under customary international law. *See*, *e.g*., Sullivan Decl. ¶ 211, Ex. 210 (Bassiouni Deposition Excerpt) at 144:7-145:8.

Professor Bassiouni's conclusion is consistent with the opinions from international tribunals such as those cited by this Court in its ruling on the Motion to Dismiss 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." MTD Decision at 27 (quoting *Prosecutor v. Tadić,* Case No. IT-95-1-T, Judgment, ¶ 711 (May 7, 1997) ("*Tadić* Trial Judgment")); *see also Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, Judgment ¶ 636 (Mar. 31, 2003) ("It is the perpetrator who defines the victim group while the targeted victims have no influence on the definition of their status."). It is also consistent with the observation of a Military Tribunal at Nuremberg that persecution was not, in essence, limited to

the bases listed in its governing document:

> It makes little difference whether the subject of mass hate be a political party, race, religion, class, or another nation. The technique is the same, the results are identical, and the hate thus engendered inevitably brings on resistance and in the end ruin upon those who start and participate in it.

Ministries Case, at 470.

Against the weight of the authority cited in this Court's own ruling, supplemented by the authorities cited above and in Plaintiff's brief in opposition to Defendant's Motion to Dismiss, dkt. 38, Defendant again asks this Court to resolve the ambiguity he wrongly claims exists *in favor* of discrimination, and in this particular case, in favor of permitting "one of the most vicious of crimes against humanity" against a disfavored group. Defendant's request is untenable.[14]

c. The Persecution Carried Out in this Case Falls Well within the Customary International Law Norm.

Defendant devotes many pages to misguided factual assertions and erroneous legal arguments in order to assert that the specific persecution underlying Plaintiff's claim does not rise to the level of a crime against humanity. In no way do these assertions and arguments show the absence of a genuine issue such that summary judgment would be proper.

First, Defendant invokes *Sosa* to suggest that, even if there is a norm against persecution on the basis of sexual orientation or gender identity, each specific action Defendant himself took

[14] Defendant offers a redundant and misleading argument based on the "Offenses Clause" of Article 1, Section 8, clause 10 of the United States Constitution that he drew from a law review article. Def. Br. at 80-84. The argument is redundant as it simply points back to the requirements of *Sosa* and its "constitutional underpinnings." It is misleading because, as Defendant well knows, Plaintiff does not seek to hold Defendant accountable for a novel or new offense that has never been recognized by an "international tribunal or as an offense against the law of nations." Def. Br. at 80. Plaintiff seeks to hold Defendant accountable for an offense considered so serious that it has been included in the founding document of every single international criminal tribunal established since Nuremberg, with distinct and well-settled elements as evidenced by the jurisprudence of those tribunals. *See* Pl. Opp to D. MTD, dkt. 38, at 21-34.

must, in and of itself, violate a specific, universal, and obligatory norm of international law. Def. Br. at 69-70, 74. Defendant then offers a selective, white-washed, and acontextual listing of some of his activities in Uganda to argue that he did not violate any "conceivable international law norm" pursuant to *Sosa.* Def. Br. at 69-70. However, Defendant misstates the law, and his purported chronology of his actions is not only the subject of a genuine dispute, but is overwhelmed by the evidence of his participation in a persecutory scheme to deprive the LGBTI community in Uganda of fundamental rights. *See infra* Section II(B).

To the extent that Defendant is suggesting that every possible way persecution can be carried out must have been previously codified or recognized, such a position is without legal basis and in fact defies principles of criminal law. As Professor Bassiouni explains,

> The forms of persecution and the types of harm are not specified in these statutes, no more than they are in any national legislation which criminalizes the infliction of harmful conduct by one person against another. The reasons for the persecution, the motives of those engaged in it, or the means employed, are not defined in international criminal law nor in national criminal legislation, because the jurisprudence of courts is relied upon to recognize or identify the means employed that are designed to achieve the intended or anticipated harmful results that ensue. Indeed, there is no legislation that describes all the means likely to be conjured by nefarious human imagination to produce harm to others.

Sullivan Decl. ¶210, Ex. 209 (Bassiouni Expert Report) ¶ 20. The ICTY has likewise acknowledged the basic principle that "[p]ersecution can take numerous forms, so long as the common element of discrimination in regard to the enjoyment of a basic or fundamental right is present, and persecution does not necessarily require a physical element." *Tadić* Trial Judgment, ¶ 707.[15]

[15] The Court in *Sosa* held that "a single illegal detention of less than a day" did not rise to the level of the international law norm against arbitrary detention that it would deem cognizable under the Alien Tort Statute. *Sosa*, 542 U.S. at 737. The Court did *not* hold that each single act in furtherance of the offense (*e.g.*, any meetings that may have occurred between agents of the U.S. Drug Enforcement Agency discussing how to apprehend Alvarez-Machain, or their meetings, emails, or phone calls with the foreign nationals they contracted to capture him and bring him to the United States, or arrangements for his transport via private plane to Texas) had to separately and independently violate a norm of customary international law. *Id.* Such acts go to Defendant's *accessory liability*

Second, Defendant suggests that Plaintiff's claims arise from persecution "in the abstract." Def. Br. at 161-163. As a factual matter, Defendant's assertion ignores that the severity of the persecution in this case is comprised of underlying acts depriving Plaintiff of fundamental rights in the context of a widespread or systematic attack against the LGBTI population in Uganda. *See infra* Section II(A)(2). As a legal matter, this Court has already rejected this understanding of persecution, finding that:

> [T]he crime of persecution "encompasses a variety of acts, including, *inter alia,* those of a physical, economic or judicial nature, that violate an individual's right to the equal enjoyment of his basic rights." In determining what constitutes a basic right, international courts have looked to the Universal Declaration of Human Rights ["UDHR"] and the International Covenant on Civil and Political Rights ["ICCPR"].

MTD Decision at 25 (quoting *Tadić* Trial Judgment, ¶ 710 and citing *id*. at 703; *Kupreškić* Trial Judgment, ¶ 621). There is no reason to revisit this definition.

International criminal tribunals have repeatedly held that underlying acts of persecution may be of "varying severity, from killing to a limitation on the type of professions open to the targeted group." *Tadić* Trial Judgment, ¶ 709; *see also Kupreškić* Trial Judgment, ¶ 568; *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgment, ¶¶ 227, 233 (Mar. 3, 2000). The acts individually need not constitute a crime under international law, *Prosecutor v. Brdjanin*, Case No. IT-99-36-1-A, Judgment, ¶ 294 (Apr. 3, 2007) ("*Brdjanin* Appeal Judgment"), nor need they violate national laws, *Kupreškić* Trial Judgment, ¶ 614. Restrictions on taking part in public gatherings, or using public places for amusement, recreation and exchanging information have been found to constitute persecution, *Trial of Hans Albin Rauter*, *supra* at 89, 93, as have exclusions from certain professions, economic deprivations, restrictions on rights to marry, and

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(conspiracy, joint criminal enterprise, aiding and abetting) once the underlying ATS norm has been established. *See* Section II(B), *infra*.

the passing of discriminatory laws, *Justice Case, supra* at 1063-64, 1114; the violation of the right to human dignity, *Prosecutor v. Nahimana, et al*., Case No. ICTR-99-52-A, Judgment, ¶¶ 986-87 (Nov. 28, 2007) ("*Nahimana* Appeal Judgment"); the denial of the rights to employment, freedom of movement, proper judicial process and proper medical care, *Brdjanin*, Appeal Judgment, ¶ 297; and acts of harassment, humiliation, and psychological abuse. *Prosecutor v. Kvocka, et al*., Case No. IT-98-30/1-A, Judgment, ¶ 323 (Feb. 28, 2005).

Finally, Defendant's assertion that the jurisdictional limitation on the International Criminal Court – *i.e*. that persecution be committed in connection with another offense set out in the Rome statute – merely repeats the erroneous argument in his motion to dismiss, *see* dkt. 33 at 44-45, and so Plaintiff respectfully refers the Court to its brief in opposition to that motion on this point, dkt. 38 at 25-29. Additionally, the ICTY has explicitly rejected that argument, holding that the ICC's limiting principle is not consonant with customary international law. *Kupreškić* Trial Judgment, ¶ 580. Plaintiff would also note again that the Rome Statute's definition in art. 7(2)(g) of what "persecution means" is simply evidence of the content and specificity of the core norm, which tracks that of other definitions in international law.[16]

Given the status of persecution as a crime against humanity, the social interest protected

[16] Defendant also attempts to invoke Professor Bassiouni as support for this proposition, excerpting a portion of a paragraph from one of his books but omits relevant passages appearing immediately before and after that quote. Def. Br. at 163. The paragraph that immediately preceded the quote cited by Defendant discussed the fact that, while persecution *per se* is not commonly found in national legal systems, the same harms are often prohibited:

> "Persecution" is not a crime *per se* in most of the world's legal systems. In some countries, criminal conduct could include policies and practices of a discriminatory nature that cause a specific harm to a given person in violation of the law. This may include incitation to violence, or legal and administrative measures designed to deprive a person of certain legal rights or causing the person physical or material harm. However, whenever physical or material injury occurs, it is usually a crime.

M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (2014), p. 405. The Defendant also omitted the sentence following the portion of the paragraph he quoted: "For these reasons, persecution is often *the most analyzed specific act in the jurisprudence of the international and mixed-model tribunals*." *Id.* (emphasis added). This passage, taken in its entirety, does not support Defendant's argument.

by the prohibition, and the seriousness of the harm of the offense as noted by successive tribunals, federal courts must not "avert their gaze" from a claim so critical for the protection of individuals. *Sosa,* 542 U.S. at 732.

2. The Record Evidence Demonstrates Widespread *and* Systematic Persecution of Plaintiff and the LGBTI Community in Uganda.

To demonstrate the crime against humanity of persecution, there must be an "intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity" which is committed as "part of a widespread or systematic attack directed against a civilian population." MTD Decision at 22. In its ruling on the Motion to Dismiss, this Court found that:

> Plaintiff has stated a claim for persecution that amounts to a crime against humanity, based on a systematic and widespread campaign of persecution against LGBTI people in Uganda. The allegations feature Defendant's active involvement in well orchestrated initiatives by legislative and executive branch officials and powerful private parties in Uganda, including elements of the media, to intimidate LGBTI people and to deprive them of their fundamental human rights to freedom of expression, life, liberty, and property.

MTD Decision at 30-31. The record evidence fully bears out these allegations.

As the Court noted, to constitute a crime against humanity, the widespread or systematic attack may "be non violent in nature, like imposing a system of apartheid . . . or exerting pressure on the population to act in a particular manner." MTD Decision at 30 (quoting *Prosecutor v. Akayesu,* Case No. ICTR- 96-4-T, Judgment, ¶ 581 (Sept. 2, 1998)). The attack on a civilian population must be widespread *or* systematic; it need not be both. *Prosecutor v. Kordić/Čerkez*, Case No. IT-95-14-2-T, Judgment, ¶ 178 (Feb. 26, 2001) ("*Kordić/Čerkez* Trial Judgment"). In this case, however, as shown below, it is both widespread and systematic.

a. The Record Evidence Demonstrates a Widespread Attack against the LGBTI Population in Uganda.

For an attack to be considered "widespread," an aggregation of a few crimes can suffice; indeed, a single act may qualify as widespread attack if it is linked to other such attacks. *See Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1156 (E.D. Cal. 2004); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 275 (E.D.N.Y. 2007); *Tadić* Trial Judgment ¶ 248 n. 311. An attack may also be widespread if it reflects the "cumulative effect of a series of inhumane acts." *Kordić/Čerkez* Trial Judgment, ¶ 179.

Defendant acknowledges that there are *at least* approximately 415,000 LGBTI persons in Uganda. D-MFR ¶ 193. Def. Br. at 70, 164. In a period of just seven years from the time Defendant helped his co-conspirators "launch their movement" in 2002, PSOF ¶ 23, the attack against this population began and escalated exponentially – from the *status quo ante* of a harsh and discriminatory, though largely unenforced, law criminalizing same-sex sex, PSOF ¶ 21, to a multi-pronged, rights-stripping attack on the social, political, and economic lives of LGBTI people. *See e.g.,* PSOF ¶¶39-40, 42, 45. The introduction of the AHB in 2009 represented a critical stage in the evolution of the persecution. PSOF ¶¶ 84-98. Violations against the LGBTI community increased and were consistent with the language and stigmatizing signal of the bill, including the provision that barred advocacy. PSOF ¶100. The enactment of the AHA in 2014, with its right-depriving provisions, constituted an act of persecution in its own right – but, as all state-sanctioned discrimination does, *see Brown v. Board of Education*, 347 U.S. 483 (1954), it propelled further persecution. PSOF ¶¶ 180-192.

In this period, LGBTI Ugandans, including Plaintiff, experienced violations of their fundamental rights to, *inter alia,* association and expression, *see* UDHR art. 20, 19; ICCPR art.

22, 19, non-discriminatory access to life-saving health care, *see* UDHR art. 25; ICCPR art. 6,[17] privacy, UDHR art. 12; ICCPR art. 17, and to be free from arbitrary arrest and detention, *see* UDHR art. 9; ICCPR art. 9, and cruel, inhuman, or degrading treatment, *see* UDHR art. 5; ICCPR art. 7. More fundamentally, as catalogued throughout this brief, the attacks on these rights and this community also constitute severe deprivations of LGBTI persons' rights to equality and non-discrimination. *See* UDHR arts. 1, 7; ICCPR art. 26.[18] Even a single act can constitute persecution if committed with discriminatory intent and as part of a widespread or systematic attack against a civilian population. *Kupreškić* Trial Judgment, ¶ 624. As set out below, Plaintiff and the LGBTI community have suffered numerous acts of persecution that have occurred in the context of a focused, targeted attack on this population.

The persecution conspiracy – for which Defendant served as one of the chief strategists and which was executed by his co-conspirators, *see infra* Section II(B) – effectuated these rights deprivations with the intent to strip LGBTI Ugandans' of their fundamental rights and knowledge that the persecutory efforts were taking place in the context of a widespread and systematic attack on Uganda's LGBTI population. The deprivation of rights addressed in the following section exemplify the nature of this attack, as well as the conspirators' knowledge of this attack and the role their actions played in furthering the attack. *See Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1156 (E.D. Cal. 2004); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96-8386, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. Feb. 28, 2002); *see also* Antonio Cassese *et al*.,

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[17] *See* Office of the United Nations High Commissioner for Human Rights and Joint United Nations Programme on HIV/AIDS, International Guidelines on HIV/AIDS and Human Rights, at 80-81 (2006), *available at* http://www.ohchr.org/Documents/Publications/HIVAIDSGuidelinesen.pdf (explaining the rights to life, under ICCPR Article 6, and standard of living adequate for the health and well-being, under UDHR Article 25, are among the "key human rights principles which are essential to effective State responses to HIV").

[18] Through a selective rendering of the record, Defendant appears to suggest that the situation for LGBTI persons in Uganda has improved. Def. Br. at 38-41. However, the record evidence establishes that the LGBTI community continues to face threats and attacks, including the arrest of SMUG Director Frank Mugisha and Programme Director Pepe Onziema four days before the filing of this brief, on August 4, 2016. PSOF ¶¶ 210-211.

International Criminal Law: Cases & Commentary 154, Oxford University Press (2011) ("A perpetrator need only commit a single specific crime to be charged with a crime against humanity, but must do so in the context of a widespread or systematic attack and with an awareness of the link between his act and the larger attack.").

i. Severe and discriminatory deprivations of fundamental rights to freedoms of association and expression.

As in the *Trial of Hans Albin Rauter*, *supra,* where a military tribunal found that the accused issued orders subjecting Jews to discriminatory treatment, including prohibiting them from taking part in public gatherings or using public places for amusement, recreation, or exchanging information, LGBTI persons in Uganda have been subjected to deprivations of their fundamental rights of association and expression, impeding their ability to participate in civil and political life since 2004.

The most recent such attack occurred in the days leading up to the filing of this brief, when Plaintiff's Executive Director and Programme Director were arrested when the police raided a Pride event in Kampala on August 4, 2016. PSOF ¶¶ 210-211. After the arrests of "the leaders," those in attendance at the event were detained at the venue by police, and some were photographed and assaulted. *Id.* The organizers of the Pride events, including Plaintiff, were forced to cancel subsequent events as a result of threats made by the Minister of Ethics and Integrity (Defendant's co-conspirator Simon Lokodo) suggesting the use of violent means to stop them. *Id.*

This is the latest in a long line of attacks on LGBTI persons for engaging in acts of free expression, associating together, and trying to formalize their associations, PSOF ¶¶ 36, 124, 155, 205; for appearing on radio and TV shows, PSOF ¶¶ 47, 168; for leading LGBTI organizations, PSOF ¶¶ 40, 210-211; for speaking at press conferences, PSOF ¶¶ 45, 84; for

holding private human rights workshops and meetings, PSOF ¶¶ 139-143, 150-154, 175; for organizing parades, PSOF 161, 210-211; for attending government-sponsored events PSOF ¶ 112; for having office spaces where their membership can meet and access human rights and health materials, PSOF ¶¶ 188, 160; for creating and seeking to access basic services like healthcare and legal representation, PSOF ¶¶ 160, 190-192; and for showing documentaries about their struggles, PSOF ¶ 133. These attacks not only impeded the efforts of LGBTI persons to associate, for example by causing them to fear meeting with another and venues to deny them space to hold meetings, PSOF ¶¶ 143, 154, 156, 188, but also at times caused those who were known to lead LGBTI organizations to flee the country or go into hiding, PSOF ¶ 50. The introduction of the AHB signaled that not only would such meetings and political expression not be allowed, but such meetings, associations, or speech would subject individuals involved to criminal prosecution and up to seven years imprisonment. PSOF ¶¶ 180-188.

The discriminatory intent behind these acts is demonstrated by statements of Defendant's co-conspirators who ordered or carried them out.[19] For example, Defendant's co-conspirator James Nsaba Buturo, spoke of "cataloguing" LGBTI persons who attempted to exercise their rights to association and expression for "perpetuating the vice of homosexuality" and called on LGBTI persons to self-deport. PSOF ¶ 48. Co-conspirator Simon Lokodo, excoriated LGBTI persons for "authenticating their presence in this country," declared that the LGBTI community would not be allowed to have "any social gathering, association, infrastructure or any activities that exist to promote homosexuality," and decried LGBTI persons seeking health treatment and LGBTI associations offering such treatment as "culprits." PSOF ¶¶ 142, 160, 178.

Discriminatory intent is also evidenced by the statements of Defendant and his co-

[19] The statements of Defendant's co-conspirators are admissible under Federal Rule of Evidence 801(d)(2)(E). Defendant's participation in the conspiracy is supported by ample record evidence. *See infra* Section II(B).

conspirators who helped devise the strategy underlying these attacks. *See infra* II(B). Defendant's own admissions reflect his belief that, for example, LGBTI persons should be prevented from "us[ing] the organs of government to advance their philosophy as normal and healthy" and LGBTI pride parades should be prohibited. PSOF ¶¶ 18-19, 149. Notably, statements such as these contradict Defendant's supposed belief (as reflected in his 56.1 statement) that he has no desire to suppress LGBTI-related advocacy. Similarly, co-conspirator Stephen Langa, stated publicly: "Providing literature, writing books about [homosexuality], standing up and saying it is OK – you should be arrested." PSOF ¶ 110. Co-conspirator Martin Ssempa described the raids of LGBTI-held human rights workshops as "entirely justified" because "[c]laiming that homosexuality and prostitution is a crime whereas their meetings are legal disregards the law of 'conspiracy to commit a crime whether a felony or misdemeanor.'" PSOF ¶ 145.

As discussed more below, *see infra* Section II.B., the parliamentary discussions concerning the AHB, and involving co-conspirators Buturo and David Bahati, are replete with explicit evidence of the discriminatory intent to target of LGBTI persons' exercise of their rights to association and expression.

ii. Severe deprivations of right to non-discriminatory access to life-saving health care

LGBTI persons have also faced rampant discrimination in access to life-saving health care, including HIV/AIDS education, testing, and treatment. The desperate need of the LGBTI community in Uganda for HIV/AIDS prevention and treatment services was among the problems SMUG was founded to help address. PSOF ¶ 37. Yet, as Plaintiff and its members increased their efforts to support the LGBTI community's access to health care, they faced increasing attacks. As described above, merely expressing objections to the exclusion of the LGBTI

community from HIV/AIDS programs subjected a SMUG officer to arbitrary arrest and detention. PSOF ¶ 56. When one of Plaintiff's member organizations created a clinic to provide health services to LGBTI persons who could not access them elsewhere due to discrimination, the clinic faced investigation and threats of closure. PSOF ¶ 160. Thereafter, the clinic's location had to be hidden, and it could not serve as many persons as had been intended. *Id.* When other clinics began serving LGBTI persons (in part due to the successful advocacy efforts of SMUG), the clinics were investigated, and at least one was raided, leading to the arrest of someone who worked there. PSOF ¶¶ 191-192.

As with the other categories of violations, the discriminatory intent behind these acts is demonstrated by statements of Defendant's co-conspirators who ordered or carried them out. For instance, Lokodo ordered and in some instances participated in the investigations and raid of health clinics catering to LGBTI persons. Speaking of the clinic operated by Plaintiff's member organization, Lokodo declared, "If we find out that [the clinic is] related to promoting the culture which doesn't conform to our morals as a country, we shall instantly ban and close it." PSOF ¶ 160. In response to a more recent announcement by the Health Ministry that it would set up LGBTI-specific health centers, Lokodo declared, "We shall not tolerate these clinics…We shall arrest these people in these clinics and send them for treatment as culprits." PSOF ¶ 178.

Later, when Ugandan police raided the Makerere University Walter Reed Project, which provided health services to LGBTI persons, Lokodo stated, "I am waiting for the outcome of the ongoing investigations. We shall just suspend and close the operations of these organisations. We can't allow them to continue promoting bad morals." PSOF ¶ 192. The conspiracy's support of these efforts is evidenced by Buturo's warning to UNAIDS, the United Nations agency addressing HIV and AIDS, and the Uganda AIDS Commission against including LGBTI

members and LGBTI sexual health subject matter in HIV/AIDS initiatives, PSOF ¶ 38, and Ssempa's declaration at a public rally that "Homosexuals 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." PSOF ¶ 45.

iii. Severe and discriminatory deprivations of rights to be free from arbitrary arrests and detention and cruel, inhuman, or degrading treatment

LGBTI persons, including those associated with Plaintiff, have been arbitrarily arrested and detained, and subjected to cruel, inhuman, or degrading treatment while in detention facilities, in violation of their fundamental rights. For example, following the August 4, 2016 arrest and detention of Plaintiff's officers described above, Plaintiff's Programme Director Pepe Onziema, a transgender man, was forcibly stripped, assaulted, and subjected to verbal abuse. PSOF ¶¶ 210-211. As a result, he suffers from trauma and multiple injuries. *Id.*

This was not the first arrest for Onziema. He was arrested in 2008 for peacefully protesting the exclusion of LGBTI persons from Uganda's HIV/AIDS policies and programs at an event even though the event's hosts made no complaint. PSOF ¶ 56. While detained, police officers mocked Onziema and forcibly removed his clothing. *Id*. An officer also touched Onziema's genitals "for confirmation [of his gender]." *Id.* During the following year, Onziema was arbitrarily stopped and harassed multiple times by police officers would expressly reference "homosexuality" and Onziema's work for Plaintiff. *Id.*

Onziema's treatment exemplifies a larger, concerning pattern. For example, in late 2013, Witness X[20] and his partner were arrested after private pictures of the partner with another man were stolen and published in a tabloid. PSOF ¶ 177. In detention, Witness X was beaten and

[20] This witness has been designated "Confidential" pursuant to the terms of the Protective Order entered in this case. Order Regarding Confidentiality of Certain Discovery Material, Dkt. 106.

subjected to an invasive, humiliating, and degrading anal examination as well as HIV testing without his consent. *Id.* Similarly, in early 2014, after the AHA had been passed by Parliament, Jackson Rihanna Mukasa, a transwoman, and Kim Mukisa were arrested by the police on allegations of being homosexual. PSOF ¶ 182. The two were held for seven days without being brought before a judge, in violation of Ugandan law. *Id*. While in detention, both were paraded before the media as "homosexuals" and subjected to HIV tests without their consent. *Id*. Jackson Mukasa was further subjected to a highly invasive, humiliating, and degrading anal examination used by Ugandan authorities ostensibly to obtain evidence of same-sex sexual activity. *Id*. They remained in pre-trial detention for approximately four months, and the case against them was eventually dismissed. *Id*.

The discriminatory intent motivating these acts is demonstrated by statements of the police officers who carried out these abuses, as they consistently referred to the individuals described above as "homosexuals." PSOF ¶¶ 56, 182. While these specific violations may not be directly attributable to Defendant and his co-conspirators, the conspirators' acts and statements – including that homosexuality itself is a "crime," PSOF ¶ 45 (Ssempa), or "should be criminalized," PSOF ¶ 149 (Defendant), such that "[e]ven if you are not in the act, you should be arrested," PSOF ¶ 110; and equating homosexuality with the crime of pedophilia, PSOF ¶ 70, (Defendant and Buturo), and "violent rape," PSOF ¶ 118 (Ssempa), among others – were carried out in the context of these publicized and degrading attacks against LGBTI persons.

iv. Severe and discriminatory deprivation of the right to privacy

The media has played a significant role in facilitating and enabling the persecution of the LGBTI community. In the years following Defendant's first visit to Uganda, Ugandan tabloids began to engage in "outings," *i.e*., featuring the names, photos, and/or identifying information

about LGBTI persons, in particular LGBTI advocates, under sensationalistic and dehumanizing headlines. PSOF ¶ 45-46. These outings have often been coupled with purported reports of LGBTI persons "recruiting" children into homosexuality. One Ugandan tabloid, *Rolling Stone*, went so far as to put the headline "HANG THEM; THEY ARE AFTER OUR KIDS!!" over the photos and names of LGBTI activists, including Plaintiff's staff and members. PSOF ¶ 127-132. *Rolling Stone* also published articles blaming homosexuality for the escalation of sexually transmitted diseases and the downfall of schools. *Id.* A Ugandan court found that the publication had violated the right to human dignity and privacy of those outed. *Id.*

While the "outings" and sensationalist reporting had occurred over the years following 2002, an increase was noted when the AHB was introduced in Parliament and then again subsequent to the enactment of the AHA. PSOF ¶ ¶ 100, As a result of these outings, LGBTI persons have faced harassment, threats, evictions, and harm to their mental health and reputation. PSOF ¶ ¶ 184-187.

b. The Record Evidence Demonstrates the Attack Is Also Systematic, Occurring Pursuant to "Well Orchestrated Initiatives."

As the Court noted, systematic attacks are those that "may be regarded as part of an overall policy or consistent pattern of inhumanity," rather than "isolated or sporadic acts of cruelty or wickedness." MTD Decision at 29 (quoting *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1156 (E.D. Cal. 2004)). 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* Trial Judgment, at ¶ 94.

The systematic nature of persecutory events described above have been driven, directed, facilitated, and encouraged by powerful state actors, using their positions of power and influence, working in tandem with influential private actors, and supported by elements of the media.

Underlying their efforts are Defendant's strategies to dehumanize LGBTI people by equating them with pedophiles and attributing mass atrocities to the LGBTI community, PSOF ¶¶ 70-73, criminalize their status, PSOF ¶ 149, and criminalize any association or expression in support of equal treatment of LGBTI people, PSOF ¶¶ 18, 73, 149. These strategies have manifested themselves in Ugandan law and the practice of various state institutions, and facilitated by the media, where Defendant's co-conspirators have censored LGBTI expression and which has served to carry forward, in the most explicit terms, the dehumanization of LGBTI persons.

As of 2002, the only legislation in Uganda concerning homosexuality was a penal code provision criminalizing same-sex sexual conduct that had been rarely enforced and under which no one had ever been convicted. PSOF ¶ 21. Between 2002 and 2009, advocates noted a trend toward "legislative overkill" that began with express exclusion of LGBTI people from national HIV/AIDS policies and programs in 2004, PSOF ¶ 38, and the passage of a constitutional amendment banning same-sex marriage in 2005, PSOF ¶ 39, but was soon followed in 2006 by a comprehensive non-discrimination law, the Equal Opportunities Act, that was specifically crafted to permit discrimination on the basis of sexual orientation and gender identity. PSOF ¶ 42. Defendant's co-conspirator, then a state minister, Buturo emphasized the need to ensure that discrimination on the basis of sexual orientation or gender identity would be permissible under the law. *Id.* Another minister expressed:

> [T]]he homosexuals and the like have managed to forge their way through in other countries by identifying with minorities. If it is not properly put in the clause, they can easily find their way through fighting discrimination. They can claim that since they are part of the minority, they can fight against marginalization.

Id. The Equal Opportunities Act created a commission to "monitor, evaluate and ensure that policies, laws, plans, programmes, activities, practices, traditions, cultures, usages and customs"

of all governmental bodies as well as private businesses, non-governmental organizations, and social and cultural communities are "compliant with equal opportunities and affirmative action" in favor of marginalized groups. *Id.* Thus, a law aimed at eliminating inequality in all sectors of society, instead permitted discrimination and the further stigmatization of a vulnerable, marginalized group. This particular legislative initiative tracked Defendant's strategies articulated in his writings and reflected in his efforts in Eastern Europe successful in preventing the passage of laws that would prohibit discrimination on the basis of sexual orientation and gender identity, on the ground that such laws serve as, in Defendant's words, "the seed that contains the entire tree of the homosexual agenda, with all of its poisonous fruit." PSOF ¶ 20.

The stigmatization and criminalization of LGBTI status, expression, and association culminated in the Anti-Homosexuality Bill introduced in Parliament in 2009, shortly following Defendant's visit to Uganda. PSOF ¶ 84. Beginning in April 2009, soon after Defendant's meeting with members of the Ugandan Parliament, parliamentary debates were replete with stigmatizing, dehumanizing, and threatening language about the need to target the LGBTI community, with a particular focus on the "activists." PSOF ¶ 122. For example, Buturo assured members of Parliament that, "Having known that the current law on homosexuality is weak, the Government will instead proceed to enact a more comprehensive one, which will treat as illegal, among other things, the promotion of homosexuality and membership to homosexual groups." PSOF ¶ 86. Echoing Defendant, Buturo also raised the specter of the danger to children and purported attempts "to turn them into homosexuals," and declared that homosexuality would "spell the end of human civilisation as we know it today." PSOF ¶ 88. During these discussions, one state minister declared: "We must exterminate homosexuals before they exterminate society." PSOF ¶ 91.

In the midst of these parliamentary discussions, Defendant's co-conspirator Martin Ssempa, with Defendant's assistance, drafted the text of the AHB, which was then introduced in Parliament by co-conspirator and member of Parliament David Bahati. PSOF ¶ 98. The AHB set forth, *inter alia*: the death penalty for certain offenses such as a second offense of consensual same-sex sex between adults; the offense of "promotion of homosexuality," which applied both to individuals, who could be sentenced up to seven years in prison, and organizations, which would have their registration (required under Ugandan law) canceled; and the offense of failure to report someone suspected of violating any of the provisions of the act, which carried a prison sentence of up to three years. PSOF ¶¶ 95, 103, P. Resp. to D-MFR 82-88.

Defendant and his co-conspirators repeatedly stated – from the time the bill was introduced until its passaged – that the AHB was designed to criminalize LGBTI status and advocacy for equal treatment for LGBTI persons:

- Defendant explained that he endorsed the AHB because of the importance of "legal power to prevent sex activists from advocating their lifestyles to children in public schools or to flaunt their sins in 'pride' parades through the city streets" and advising that "Homosexuality would still be criminalized, but the primary enforcement effort would target the recruiters and activists." PSOF ¶ 122.

- Bahati described the AHB as "a defining bill for our country, our generation. You are either anti-homosexual or you're for homosexuals, because there is no middle point. Anybody who does not believe that homosexuality is a crime is a sympathizer." PSOF ¶ 110.

- Langa stated: "Providing literature, writing books about it, standing up and saying it is OK – you should be arrested. Even if you are not in the act, you should be arrested. Anybody who tries to promote it should be arrested. That's why we need a stronger law." PSOF ¶ 110.

- Ssempa expressed that the bill would "hinder and silence advocacy" of LGBT rights and that "our greatest weapon on the bill is the aspect of recruitment and promotion." PSOF ¶ 93.

- Buturo explained that "Having known that the current law on homosexuality is weak, the [] Government will instead proceed to enact a more comprehensive one, which

will treat as illegal, among other things, the promotion of homosexuality and membership to homosexual groups." PSOF ¶ 86.

- Co-conspirator Charles Tuhaise, a legal researcher in the Ugandan Parliament, declared that events like the first Pride parade in Uganda "will continue until we get a law passed by Parliament to stop them" PSOF ¶ 162

In the years following the introduction of the AHB, but before it became law, the law's "promotion of homosexuality" provision, targeting LGBTI association, assembly, and expression was implemented by co-conspirator Lokodo, through his targeting, investigations, and raids of LGBTI associations and workshops, as Minister of Ethics and Integrity. PSOF ¶ ¶ 139-142, 150-152. While carrying out these rights violations, Lokodo declared, "[W]e shall not allow any social gathering, association, infrastructure or any activities that exist to promote homosexuality." PSOF ¶ 160.

The AHB was enacted into law four years later on December 20, 2013, as the Anti-Homosexuality Act. The AHA did not include the death penalty, but it criminalized – with harsh penalties – the "promotion of homosexuality" (including by organizations) and "aid[ing], abet[ting], counsel[ing] or procur[ing] another to engage in acts of homosexuality." PSOF ¶ 196. As such, the AHA barred, *inter alia*, speech, advocacy, and association in connection with LGBTI issues, and the provision of certain counseling and health services to the LGBTI persons to the extent that such services led to the revelation of the person's sexual orientation or transgender status. PSOF ¶ 196. LGBTI organizations and those organizations through which LGBTI persons accessed legal and health services immediately suffered the implementation and effects of the law. PSOF ¶ ¶ 185-192. Lokodo justified the attacks on these organizations by declaring them to be in violation of the AHA, and specifically, "not compatible with our laws" for "promoting homosexuality." PSOF ¶ 192.

While in August 2014, Uganda's Constitutional Court annulled the AHA due to a lack of quorum in Parliament during its passage, in violation of parliamentary procedure, the law has had lasting effects on various state institutions and practices. As seen in the most recent attack on Uganda's LGBTI community a few days ago, Lokodo continues to implement the now-defunct promotion of homosexuality provision. PSOF ¶¶ 210-211. But the existence of the AHA also led state institutions to view the long existing, but rarely enforced, penal code provision criminalizing same-sex sexual acts as encompassing status and activity beyond same sex conduct. For instance, in September 2015, the media reported that while the Ugandan President stated that he would not re-enact the AHA (with its provisions punishing status and advocacy), he explained it was because Uganda did not "need more laws," since, referring to Section 145 of the penal code criminalizing same-sex sex, "[t]his other law will work." PSOF ¶ 206. Similarly, in February 2015, the Uganda Registration Service Bureau denied Plaintiff's application to register as an organization on the ground that Plaintiff "is formed to advocate for the rights and well being of lesbian and gay among others, which persons are engaged in activities labeled criminal acts under section 145 of the Penal Code." PSOF ¶ 205.

Also telling has been a shift in the way Ugandan courts have viewed LGBTI persons' exercise of fundamental rights. Years prior to the passage of the Anti-Homosexuality Act, then-Plaintiff officer Victor Mukasa sued the government for an unlawful raid of his house, seizure of his documents, and arrest and mistreatment of his guest. PSOF ¶ 40. The Ugandan High Court ruled in favor of Mukasa in 2008, stating that the case is "about abuse of the applicants' human rights," and "not about homosexuality," as the government had argued. PSOF ¶ 58. Similarly, when Plaintiff's officers and an officer of one of its member organization sued a Ugandan tabloid, *Rolling Stone*, for publication of a front-page story about them that was headlined "Hang

Them," the court in 2011 ruled in their favor, finding their rights to human dignity and privacy had been violated. PSOF ¶ 130-131. The court rejected the tabloid's argument that the penal code provision criminalizing same-sex sexual conduct "renders every person who is gay a criminal" on the ground that the penal code provision is limited to same-sex sexual conduct. Id. By contrast, for instance, after the AHA came into effect, the court issued a judgment in a case brought by Plaintiff's officers against Lokodo for the raid of one of their workshops came, accepting Lokodo's characterization of the workshop as "promoting homosexuality" and "an unlawful exercise of the right to association and assembly." PSOF ¶ 199. Departing from the logic in the *Mukasa* and *Rolling Stone* judgments that the penal code prohibition was limited to sexual acts, the court in this case reasoned that that human rights training on LGBTI rights constitutes "promotion or incitement" to engage in prohibited same-sex practices. *Id*.

Defendant's co-conspirators have also had a heavy hand with respect to the media's treatment of LGBTI people and issues. As Minister of Information and Broadcasting and later Minister of Ethics and Integrity, Buturo complained that "homosexuals are working through the electronic and print media." PSOF ¶ 48. Buturo was involved in intimidating media outlets who dared to have LGBTI persons appear on their programs and sought to prevent LGBTI persons from holding press conferences so that they could not share their messages of equality and non-discrimination through the media. PSOF ¶¶ 47-48. At the same time, Ssempa, as one the "one of the leading media figures in the nation," PSOF ¶ 2 , used his platform to further stigmatize and propel the persecution of the LGBTI community. Ssempa also featured in an "exclusive" interview in the *Rolling Stone* issue described above, in which he vowed, "We shall fight on until we rescue our country from the hands of evil… This war has just started." PSOF ¶ 127.

* * *

The full factual record described above is sufficient to permit a reasonable juror to find the crime against humanity of persecution occurring in Uganda. In addition, the findings of Plaintiff's two remaining experts help to elucidate the severity and extent of harm caused by the intentionally persecutory acts described above.

Dr. Jennifer Leaning, a public health expert at Harvard University, analyzed the situation of the LGBTI community in Uganda using the United Nations' Framework Analysis for Atrocity Crimes ("Framework Analysis"),[21] a tool used by the United Nations Office of the Special Adviser on the Prevention of Genocide to identify atrocities.[22] Sullivan Decl. ¶ 207, Ex. 206 (Leaning Expert Report). Assessing the range of risk factors and indicators required by the Framework Analysis, Dr. Leaning found that "those who identify as LGBTI have become so stigmatized as unholy and immoral that they constitute a virtual fault line of their own." *Id.* at 18. She further noted that the persistent, official characterization of LGBTI people as "threatening religious doctrine and belief, violating traditional African norms of family and child rearing, and destroying the health and decorum of a sound society… has created an inflamed atmosphere in which the expanding discrimination and restrictions or removal of legal rights is taking place." *Id.* at 29. Dr. Leaning also explained that while the Framework Analysis restricts the assessment of the risk of genocide to the groups identified in the Genocide Convention (race, religion, nationality, ethnicity), she observed that an alarming number of indicators that would be

[21] "Atrocity crimes" refers to genocide, crimes against humanity and war crimes. Sullivan Decl. ¶ 207, Ex. 206 (Leaning Expert Report) at 3..

[22] To assess the vulnerability of a given community to atrocity crimes, the UN Framework Analysis considers, *inter alia,* motives or incentives to commit atrocities against certain groups, records of serious human rights violations, the inability of state structures to protect against such violations, and the capacity of such structures to commit atrocities, among other factors. Dr. Leaning found that the history of governmental policies excluding individuals from economic, social, and political life based on their group identity makes Uganda particularly vulnerable to atrocity crimes, in particular crimes against humanity. *Id*.

analyzed for genocide were present with respect to the LGBTI population in Uganda. *Id*. at n. 10.

Dr. Ilan Meyer, a Professor at UCLA and a public health expert on the question of how "minority stress" results from "social disadvantage related to structural stigma, prejudice, and discrimination" against a minority group, found that with a backdrop characterized by homophobia and where same-sex acts were already illegal, "the Anti-Homosexuality Bill and later the AHA sent a clear message of rejection that dehumanized LGBT people by making their very identity as LGBT a 'spoiled identity.'" Sullivan Decl. ¶ 208, Ex. 207 (Ilan Meyer Expert Report) at 53.

As Dr. Meyer explained, "social disadvantage related to structural stigma, prejudice, and discrimination" against a minority group results in exposure to a "unique risk for diseases that are caused by stress." *Id.* at 16. Those include "psychological distress, mental health problems, suicide, and lowered psychological and social well-being." *Id.* at 28. These negative health outcomes are compounded by structural or institutional stigma – in the form of discriminatory laws, policies, and practices by government and private institutions – that restrict opportunities for sexual minorities to access health care and other psychosocial support and prevent them from meeting together to help each other cope with stigma-induced stress. *Id.* at 29-30.

Requiring LGBT people to hide their identity, "is a social stressor for many reasons, including the psychological damage from not being able to express oneself genuinely, the cognitive burden on the person having to lie and conceal his or her identity, and the tangible limitations on affiliation and support." *Id.* at 45-46. Dr. Meyer observed that "[i]t is a particularly injurious aspect of Uganda's social and political environment that not only are LGBT individuals targeted, but also their association and ability to access support is disturbed (and was explicitly

criminalized by the Anti-Homosexuality Bill)." *Id.* at 47. Such policies and practices, "can have devastating effects on the community as a whole as resources that are aimed at providing support become themselves associated with danger of exposure and violence." *Id.*

B. Plaintiff Has Sufficient Evidence to Preclude Summary Judgment on Defendant's Liability.

Plaintiff asserts that: (i) Defendant participated in a conspiracy or joint criminal enterprise to carry out the crime against humanity of persecution; and (ii) Defendant aided and abetted the crime against humanity of persecution.[23] As shown below, courts have long held that the ATS recognizes causes of action involving these theories of liability.

As a threshold matter, Defendant argues in serial fashion that SMUG has no knowledge regarding his conduct, citing as support excerpts from the depositions of SMUG personnel. *See, e.g.,* Def. Br. at 102. According to Defendant, the lack of personal knowledge on the part of certain deponents regarding his conduct (including non-public conduct) means that Plaintiff's claims must be dismissed. Defendant's theory is devoid of legal basis. Liability under theories of conspiracy, joint criminal enterprise, or aiding and abetting (as with almost any other tort) does not require that proof be based on the plaintiff's personal knowledge of all relevant conduct of the defendant. *See Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157 (1970) (agreeing that although plaintiff had no knowledge of an agreement between the alleged conspirators, "the sequence of events created a substantial enough possibility of a conspiracy to allow her to proceed to trial, especially given the fact that the noncircumstantial evidence of the conspiracy could only come from adverse witnesses"). Critically, Defendant's argument entirely ignores the relevant evidence, which often comes in the form of his own private oral and written statements

[23] The Court has already ruled that non-state actors may be held liable for the crime against humanity of persecution. MTD Decision at 35-36 n. 5.

(of which he has personal knowledge, even if Plaintiff's personnel do not). It also ignores often private statements of his co-conspirators, admissible under Federal Rule of Evidence 801(d)(2)(D), (of which he has personal knowledge, even if Plaintiff's personnel do not).

Putting aside the irrelevant question of whether Plaintiff's personnel had pre-discovery knowledge of all relevant conduct by Defendant, it is axiomatic that any competent evidence relating to (i) the commission of the crime against humanity of persecution and (ii) Defendant's liability for that crime, including that the actions of Defendant or his accomplices caused Plaintiff harm, should be considered.[24] Despite Defendant's unsupported assertions to the contrary, the record is replete with evidence establishing Defendant's liability for the crime against humanity of persecution of Uganda's LGBTI community. At a minimum, it creates a genuine issue in that regard

1. The Record Evidence Demonstrates Defendant's Liability under Theories of Conspiracy or Joint Criminal Enterprise Liability.

As set forth below, conspiracy, and its analog in international law, joint criminal enterprise ("JCE"), are both accepted principles of liability for ATS claims. Defendant argues that the Court must look to international law under which there is no basis for conspiratorial liability. Def. Br. at 75-80. However, this mode of liability is well established in international law.[25]

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[24] In his brief, Defendant argues separately that there is a lack of admissible evidence as to causation. Def. Br. at 141-144. However, causation is an element of tort liability, and thus, should be examined under Plaintiff's theories of liability. *See*, *e.g.*, *Mosier v. Stonefield Josephson, Inc.*, 815 F.3d 1161, 1167-68 (9th Cir. 2016) ("Causation is an essential element of an aiding and abetting claim, i.e., plaintiff must show that the aider and abettor provided assistance that was a substantial factor in causing the harm suffered." (internal emphasis omitted)); *U.S. v. Ashley*, 606 F.3d 135, 143 (4th Cir. 2010) ("*Pinkerton* [conspiracy] liability, like aiding and abetting liability, rests on notions of agency and causation."); *see also* Def. Br. at 142 (relying on the discussion of aiding and abetting liability in *Liu Bo Shan v. China Constr. Bank Corp.*, 421 Fed. App'x. 89, 94-95 (2d Cir. 2011) to support Defendant's assertion that causation is an element of tort liability)).

[25] Federal courts appear split on whether federal common law principles or principles derived from international law govern liability for violation of an international law norm under the ATS. *Compare Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (applying international law) *with, e.g.,*

The Nuremberg Charter provided that "leaders, 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." Article 6 of the Nuremberg Charter (emphasis added). Statutes and decisions of present-day international tribunals also establish liability for those who participate in formulating and executing a common plan. Surveying international jurisprudence, treaties and conventions, and the law of individual states, the Appeals Chamber of the ICTY concluded that liability for common criminal purpose or design is a well-established rule of customary international law. *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment ¶¶ 185-226 (July 15, 1999) ("*Tadić* Appeal Judgment"). The ICTY explained that this form of liability covers "those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons." *Id.* ¶ 190.

Similarly, the Rome Statute for the International Criminal Court provides for criminal liability if a person:

> …In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) be made in the knowledge of the intention of the group to commit the crime.

Rome Statute, Art. 25(3)(d); *see also Aziz v. Alcolac*, *Inc.*, 658 F.3d 388, 401 n. 13 (4th Cir. 2011) (explaining that Article 25(3)(d) of the Rome Statute "defin[es] the elements of conspiratorial liability"); *The Prosecutor v. Lubanga Dyilo*, ICC, Decision on the Confirmation

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Cabello v. Fernandez-Larios, 402 F.3d 1148, 1156-60 (11th Cir. 2005) (applying federal common law). However, since applying either body of law here would establish Defendant's liability, the Court need not address the split.

of Charges, Case No. ICC-01-04-01-06-803, ¶ 334-37, 29 January 2007, PTC I ("*Lubanga* PTC Decision") (describing Art. 25(3)(d) as a form of accessory liability "akin to the concept of joint criminal enterprise or the common purpose doctrine adopted by the jurisprudence of the ICTY")[26]; *Tadić* Appeal Judgment ¶¶ 222-23 (finding JCE reflected in Art. 25(3)(d) of the Rome Statute).

Given this international law consensus, U.S. courts have recognized that JCE in is the "analog" to conspiracy in domestic law, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 260 (2d Cir. 2009) (*citing Hamdan v. Rumsfeld*, 548 U.S. 557, 611 n.40 (2006)), and recognized this form of liability under the ATS, *see Abecassis v. Wyatt*, 704 F. Supp. 2d 623, 652 n. 20 (S.D. Tex. 2010); *Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 490 (D. Md. 2009); *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). *Cf. Warfaa v. Ali*, 33 F. Supp. 3d 653, 666 (E.D. Va. 2014) (recognizing JCE liability for TVPA claim).

Defendant incorrectly argues that the Supreme Court's decision in *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006), and a series of lower court decisions, foreclose conspiracy or JCE as a mode of liability under the ATS. *See* Def. Br. at 75-80. This argument is incorrect. As the Second Circuit has explained, *Hamdan* found that "the inchoate crime of conspiracy (which requires an agreement and overt acts, but no completed deed)" allows for liability only as to conspiracies to commit genocide or to wage aggressive war, but that the inchoate crime of conspiracy is distinct from "conspiracy as a theory of accessorial liability for completed

[26] The ICC's Trial Chamber later confirmed that the Pre-Trial Chamber in *Lubanga* recognized Article 25(3)(d) as a form of accessory liability. *The Prosecutor v. Lubanga Dyilo*, ICC, Judgment, Case No. ICC-01-04-01-06-2842, ¶¶ 921 n. 2602, 977, 999, 14 March 2012, (Trial Chamber I). In *Mbarushimana*, the ICC issued a warrant on this ground upon finding reasonable grounds to believe that defendant jointly with others adopted and implemented a common plan of conducting widespread and systematic attacks against a civilian population. *The Prosecutor v. Callixte Mbarushimana*, ICC, Decision on the Prosecutor's Application for a Warrant of Arrest, Case No.ICC-01-04-01-10, ¶¶ 28, 30, 38-39, 44, September 2010, (PTC I) ("*Mbarushimana* PTC Decision").

offenses." *Talisman*, 582 F.3d at 260.[27]

The Eleventh Circuit articulated the elements of conspiratorial liability in the context of the ATS as follows:

> (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 1159.

a. The Record Evidence Is Sufficient to Find an Agreement among the Co-Conspirators.

An agreement for the purposes of conspiracy liability "may be found when 'the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.'" *Evergreen Partnering Group, Inc. v. Pactiv. Corp*., 720 F.3d 33, 43 (1st Cir. 2013) (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984)). Proof of a tacit or unwritten agreement may be "either by direct or circumstantial evidence of defendants' conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.*at 43 (quoting *Monsanto Co. v. Spray-Right Serv. Corp*, 465

[27] As noted above, the *Talisman* court accepted JCE as the international law analog to common law conspiracy, but because the plaintiffs could not prove the requisite *mens rea*, the court did not reach the issue of whether JCE liability was available under the ATS. *Id*. *See also Mastafa v. Chevron Corp*., 770 F.3d 170, 181 (2d Cir. 2014) ("[w]hether there is conspiracy liability under customary international law and hence under the ATS remains an open question in this Circuit"). Moreover, to the extent that *Talisman* and *In re S. African Apartheid Litig.* relied on the ICC's interpretation of the Rome Statute to find a lack of sufficient international consensus on JCE liability for it to form the basis of a cause of action under the ATS, *see* 617 F. Supp. 2d 228, 263 (S.D.N.Y. 2009) ("the ICC has repeatedly declined to apply a broad notion of conspiratorial liability under customary international law"), these decisions pre-dated the ICC's issuance of a warrant in *Mbarushimana* on the basis of JCE liability. *See Mbarushimana* PTC Decision ¶¶ 28, 30, 38-39, 44. *Abecassis v. Wyatt* actually assumes an ATS conspiracy claim is cognizable but dismissed the claim on adequacy of the factual allegations supporting it. 704 F. Supp. 2d 623, 655-56 (S.D. Tex. 2010) ("The absence of any such allegations [that defendant acted with the purpose of assisting terrorist attacks] defeats aiding and abetting and conspiracy liability under the ATS."). And finally, *United States v. Ali* addresses only conspiracy as a stand-alone crime and has no bearing on the availability of conspiracy as a mode of liability under the ATS. 718 F.3d 929, 935, 942 (D.C. Cir. 2013).

U.S. 752, 764 (1984)); s*ee also Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157 (1970) ("the sequence of events created a substantial enough possibility of a conspiracy to allow her to proceed to trial"); *Pangburn v. Culbertson*, 200 F.3d 65 (2d Cir. 1999) ("[C]onspiracies are by their very nature secretive operations, and may have to be proven by circumstantial, rather than direct, evidence.") (internal quotation marks omitted).

Defendant developed a strategy for the systematic persecution of LGBTI persons to be employed in various countries and conspired with others to implement it. That strategy included: (1) increasing the stigmatization and dehumanization of LGBTI people by, for example, falsely attributing to them mass atrocities and pedophilia, thereby compelling their persecution, *see*, *e.g.*, PSOF ¶¶ 71-72; and (2) legalizing the persecution of LGBTI persons, including by criminalizing the "public advocacy" for equality for LGBTI persons. *See*, *e.g.*, PSOF ¶ 149. In fact, Defendant's books, *Activist Handbook* and *Redeeming the Rainbow*, articulated this strategy, including describing the "gay movement" as a "highly organized army of social engineers with a single purpose" and as "most dangerous social and political movement of our time." PSOF ¶¶ 13, 19. The books also speak to "emphasiz[ing] the issue of homosexual recruitment of children," and instituting criminal laws that prevent LGBTI people from "us[ing] the organs of government to advance their philosophy as normal and healthy." *Id*. In addition to Uganda, Lively implemented this strategy in Eastern Europe. PSOF ¶¶ 11-12, 16-18, 20.

In Uganda, and consistent with this blueprint, Defendant worked with Langa, Ssempa, Buturo, Lokodo, Bahati, and Tuhaise to bring about the widespread and systematic persecution of the LGBTI community by depriving LGBTI Ugandans of their rights to association, assembly, and expression, including the right to advocate their human rights. PSOF ¶ 2. The conspiracy in Uganda began in 2002, when Defendant brought his program there, and it was adopted by Langa

and Ssempa, as reflected in their joint appearances. PSOF ¶¶ 23-32. Sharing a collective strategy, they laid the groundwork for public acceptance of, and indeed created a demand for, systematic state action against associations and assemblies of LGBTI people. *See id*. In 2004, Buturo began to implement the strategy as well – at times in express consultation with Ssempa – by using his position as a state minister to target LGBTI associations, assemblies, and individuals. *See* D-MF ¶¶ 30, 42-43; PSOF ¶¶ 2(e), 36, 45, 48, 51. Together, Defendant, Langa, Ssempa, and Buturo used state institutions to achieve their goal of depriving LGBTI individuals of their rights, as Defendant had done in Eastern Europe. Buturo first worked with legislators in Parliament to ensure that an anti-discrimination law did not protect LGBTI persons. PSOF ¶ 42. Then, by 2009, Tuhaise and Bahati joined the efforts and used their positions in the Parliament to give legal cover to the persecutory actions taken by Buturo and other state actors. PSOF ¶¶ 64, 82(c), 122, 138, 162, 166 (Tuhaise); 67, 95, 98, 103, 106, 110, 153, 181 (Bahati). In 2011, when Buturo lost his position as a state minister, his replacement, Lokodo carried forward the efforts to prevent the LGBTI community from exercising fundamental rights through raids of Plaintiff's workshops and efforts to stop the operations of Plaintiff and its member organizations. PSOF ¶¶ 137, 140-42, 150-153, 155-56, 160, 178, 190, 192, 211.

The co-conspirators' agreement to act together toward the widespread or systematic persecution of LGBTI Ugandans is evidenced by their meetings during which they devised plans and their public appearances, through which (in part) they executed their plans. PSOF ¶¶ 23-32, 45, 67-74, 82, 92, 98, 106, 112. The agreement is also demonstrated by the co-conspirators' communications, apprising each of other of their efforts, and providing each other advice, resource materials, encouragement, and approval. *See*, *e.g*., PSOF ¶¶ 43, 52, 60, 79, 83, 93-97,

109, 111, 115, 116, 134, 145, 147, 157-58, 165, 167. Indeed, the conspirators retrospectively lavished praise on each other for the success of their enterprise. *See*, *e.g.*, PSOF ¶¶ 75, 77.[28]

The co-conspirators' agreement is also evidenced by their collaborations in drafting and revising the AHB before its introduction in Parliament, and in devising and executing strategies to facilitate its passage. *See*, *e.g.*, PSOF ¶¶ 93-96, 104, 121, 174. *All* conspirators stated that the primary purpose of the AHB was to systematically deprive LGBTI persons of their rights to association, assembly, and advocacy. *See* PSOF ¶¶ 122, 167 (Defendant explaining that he endorsed the AHB because of the importance of "legal power to prevent sex activists from advocating their lifestyles to children in public schools or to flaunt their sins in 'pride' parades through the city streets" and advising that "Homosexuality would still be criminalized, but the primary enforcement effort would target the recruiters and activists"); PSOF ¶¶ 93, 119 (Ssempa expressing that the bill would "hinder and silence advocacy" of LGBTI rights and declaring that "our greatest weapon on the bill is the aspect of recruitment and promotion"); PSOF ¶¶ 110, 136 (Langa); PSOF ¶¶ 48, 86 (Buturo); PSOF ¶¶ 82(c), 162 (Tuhaise); PSOF ¶¶ 110, 164 (Bahati); PSOF ¶¶ 160, 192 (Lokodo).

The co-conspirators further acted jointly, prior to the passage of the AHB, to deprive LGBTI Ugandans of the rights to association, assembly, and expression (including the ability to advocate for their rights). Various co-conspirators worked together, for instance, to remove Plaintiff's staff from a human rights gathering to which they were all invited, PSOF ¶ 112; in seeking to remove the dean of a Ugandan law school (also a co-founder of Plaintiff) for speaking

[28] Although Defendant suggests that each act must be itself unlawful, *see* Def. Br. at 145, 149, the preparatory acts of conspirators in furtherance of an unlawful agreement are sufficient for conspiracy liability to attach. *See Boyle v. Barnstable Police Dep't*, 818 F. Supp. 2d 284, 316 (D. Mass. 2011).

publicly in support of LGBTI rights, PSOF ¶ 123;[29] to investigate LGBTI associations, PSOF ¶ 124; and to raid a workshop organized by Plaintiff, PSOF ¶¶141, 145.

Following the script Defendant set out in writings and presentations during his meetings in Uganda in 2002 and 2009, the co-conspirators justified their persecutory efforts by framing advocacy for LGBTI rights as "promotion of homosexuality" and "propaganda." *See*, *e.g.*, PSOF ¶¶ 45, 48, 86, 95(c), 98, 149, 174. The co-conspirators claimed that LGBTI advocacy groups were involved in "recruitment," namely of children, into homosexuality, essentially equating the LGBTI community with perpetrators of sexual assault of children. *See*, *e.g.*, PSOF ¶¶ 19, 76 (Defendant speaking widely about his book *Seven Steps to Recruit-Proof Your Child* and later advising to "emphasize the issue of homosexual recruitment of children" because "the protection of children trumps any argument for 'gays' as societal victims"); PSOF ¶¶ 30(b), 168 (Ssempa); PSOF ¶ 88 (Buturo); PSOF ¶¶ 140, 160, 190, 192 (Lokodo); and PSOF ¶¶ 98, 164 (Bahati).[30]

The co-conspirators repeatedly used nearly identical language regarding the LGBTI community – particularly in challenging claims that equality for LGBTI persons is a fundamental human right – which serves as additional evidence of their common scheme. For example,

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[29] Defendant was personally involved in this effort. In 2010, Tuhaise wrote to Langa, copying Lively, Ssempa, Buturo, Bahati, and Benson Obua, another member of the Ugandan parliament, complaining that the dean of a law school in Uganda had been able to keep her job even though she had "organized several conferences at which she has passionately defended homosexuality." Defendant advised the group:

> She should not be allowed to remain in this post. As the Scripture warns, Bad [sic] company corrupts good morals, and the people she is training in her views will be Uganda's future leaders. This is one of the ways that the "gays" transformed America – by corrupting the leaders. If you don't stop her now, while you have the power of public opinion at its height, you will never be able to do it.

Defendant suggested a "behind-the-scenes" campaign to have her fired or 'promoted' into a less influential position. PSOF ¶ 123.

[30] Defendant's assertions that the concepts of "promotion of homosexuality" and "recruitment" were unrelated to him are belied by his own citations to statements of his co-conspirators after they began working with him. *Compare* Def. Br. 147-48 *with* PSOF ¶¶ 45-51. To the extent others in Uganda parroted those same justifications for the persecution of the LGBTI community after 2002, they simply demonstrate the significant impact and "success" of Defendant's efforts. PSOF ¶¶ 78

echoing Defendant's *Riga Declaration*, which asserts that "the human rights of religious and moral people to protect family values is far superior to any claimed human right of those who practice homosexuality and other sexual deviance, PSOF ¶ 11, Langa testified to Parliament that it should not listen to gays who say the AHB will violate their human rights on the ground that homosexuality has never been a human right, PSOF ¶ 136. Both Defendant and Ssempa described the AHB as a model for all of Africa. PSOF ¶¶ 81, 98. Defendant, Langa, Buturo, and Bahati all decried foreign interference in support of LGBTI rights in Uganda, including in connection with the AHB, PSOF ¶¶ 88, 106, 164, 174, and claimed that they were trying to help "victims of homosexuality" because they "love" them, D-MF ¶ 5; PSOF ¶¶ 90, 106. Moreover, Langa sought resource materials from Defendant to argue against "homosexuals who come in the guise of human rights," PSOF ¶ 79, while Lokodo justified banning LGBTI organizations by declaring that they were "supporting homosexuality under the guise of fighting for human rights," PSOF ¶ 155; *see also*, *e.g.*, PSOF ¶¶ 52, 59 (Defendant and Ssempa suggesting that the judge in the *Mukasa* case was bribed by gays); PSOF ¶¶ 38, 45 (Buturo and Ssempa warning against the inclusion of LGBTI persons in the country's HIV/AIDS initiatives since homosexuality is a crime).

Finally, Defendant's efforts to formalize his relationship with his Ugandan partners through his organizations seeking to combat homosexuality globally confirm the existence of their conspiratorial relationship. PSOF ¶ 43 (Defendant describing Langa as "our new WOW [Watchmen on the Walls] coordinator in Uganda"); PSOF ¶ 14 (describing Defendant's plans to establish a Defend the Family affiliate in Uganda). *See Libertad v. Welch*, 53 F.3d 428, 448 (1st Cir. 1995) ("Rescue America's press release claiming, if not boasting of, its "affiliation" with the PLRT, and naming Welch as a "regional director," is highly competent evidence that the two

groups are connected in a somewhat formal sense, and that they share common leaders or organizers – in other words, that they function as a continuing unit.").

b. The Record Evidence Shows Defendant Participated in the Conspiracy Knowing of at Least One of the Goals of the Conspiracy and Intending to Help Accomplish It.

The *mens rea* for conspiracy liability – as reflected in the second element articulated by the *Cabello* court – requires knowledge of the conspiracy's unlawful objective and an intent to help accomplish it. 402 F.3d at 1158. The *mens rea* for JCE liability is similar: "a criminal intention to participate in a common criminal design." *Talisman,* 582 F.3d at 260 (quoting *Tadić* Appeal Judgment, ¶ 206).

Defendant admitted that he went to Uganda in 2009 to help his co-conspirators and their partners in Uganda have an "easier time" strengthening their laws against LGBTI persons, PSOF ¶ 149; that he went because "he was actually one of the people that helped to start the pro-family movement there and [] they wanted to do some kind of anti-homosexuality law," P. Resp. to D-MFR ¶ 50-52; and that "the primary enforcement effort" of any anti-homosexuality law in Uganda should target LGBTI "activists" in order to stop the "destructive propaganda efforts of groups like SMUG," PSOF ¶¶ 122, 174. Defendant "prayed" that his efforts were like a "nuclear bomb against the 'gay' agenda in Uganda." PSOF ¶ 75.

Defendant has also repeatedly articulated his intent to deprive the LGBTI community, including in Uganda, of fundamental rights. For example,

- Defendant expressed his intent to build international alliances to "stop the homosexual agenda, especially in places it is just getting started." PSOF ¶ 12.
- Defendant authored the *Riga Declaration*, calling on the international community to "immediately abandon" initiatives to recognize the human rights of LGBTI people, and *Redeeming the Rainbow*, in which he recommended criminal laws that prevent LGBTI people from "us[ing] the organs of government to advance their philosophy as normal and healthy." PSOF ¶¶ 11, 19.

- Defendant campaigned in several cities in Russia[31] in an effort to urge leaders to "criminalize the public advocacy of homosexuality," claiming "homosexuality is destructive to individuals and to society" and that the "easiest way to discourage 'gay pride' parades and other homosexual advocacy is to make such activity illegal in the interest of public health and morality." PSOF ¶¶ 18. He described the resulting Russian Anti-Propaganda law as "the very important and frankly necessary step of criminalizing homosexual propaganda to protect the society from being 'homosexualized.'" *Id*. In 2013, because his Ugandan co-conspirators were having difficulty in getting the AHB passed, Defendant recommended that they consider passing legislation similar to the Russian Anti-Propaganda Law. PSOF ¶ 174.

- In response to questions about his efforts in Uganda, Defendant stated outright:

> Well, you know, *I am against advocacy.* And actually I take the position that *homosexuality should be criminalized* […] so that you have a public policy basis to prevent the advocacy that I think should be prohibited – and that is gay pride parades and public school advocacy and promotion of homosexuality to school children. That kind of thing…. As an attorney, also, the problem is, if you have, at least in the US, Canada's got a little different legal context, but in the US you can't have unequal treatment of like groups. You couldn't do that in the United States for example… PSOF ¶ 149. (emphasis added).

c. The Record Evidence Shows One or More of the Acts of Persecution Were Committed by Someone Who Was a Member of the Conspiracy and Committed in Furtherance of the Conspiracy.

Under *Cabello*, as Defendant concedes, *see* Def. Br. at 78 n. 13, a defendant may be held liable for the substantive offenses of his co-conspirators if those offenses were reasonably foreseeable and committed in furtherance of the conspiracy. *See id*. ("A jury could reasonably conclude that, at the very least, it was foreseeable to Fernández that Cabello would be tortured and killed by his co-conspirators at Copiapó."). Similarly, JCE liability attaches 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

[31] Evidence of Defendant's deliberate work to systematically deprive LGBTI persons of their fundamental rights elsewhere constitute other acts admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident" under Fed. R. Evid. 404(b)(2) and can serve to demonstrate Defendant's intent behind his work in Uganda.

foreseeable consequence of the effecting of that common purpose." *Tadić* Appeal Judgment ¶ 204; *see also id.* ¶ 206.[32]

In the Ugandan persecutory conspiracy, it was the Ministry of Ethics and Integrity, through Buturo, and later, Lokodo, that carried out the violations of Plaintiff's rights and those of its member organizations and others in Uganda's LGBTI community. *See* D-MF ¶¶ 30, 42-43; PSOF ¶¶ 2(e), 36, 45, 48, 51, 137, 140-42, 150-153, 155-56, 160, 178, 190, 192, 211. Defendant had meetings and ongoing communications with this Ministry, PSOF ¶¶ 67, and Buturo and Lokodo's persecutory efforts, in effect, implemented the "Promotion of Homosexuality" provision of the AHB – the provision specifically drafted and discussed by Defendant and his co-conspirators as the primary focus of the bill, *see supra* – before and after it became law. Thus, Buturo and Lokodo's violations were not only reasonably foreseeable consequences of the conspiracy, they were the very result the conspiracy sought to achieve, and Defendant may be held liable for them.[33]

Even if Defendant did not know all members of the conspiracy, as one of its principal strategists, Defendant knew "of the existence of the larger conspiracy and of the necessity for the other participants." *See Ungar v. Islamic Republic of Iran*, 211 F. Supp. 2d 91, 100 (D.D.C. 2002). Defendant knew of the necessity of other participants to carry out his multi-pronged

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[32] The ICC recognized that the ICTY's jurisprudence on JCE liability is reflected in Article 25(3)(d) of the Rome Statute. *See Lubanga* PTC Decision ¶ 334-37.

[33] There is record evidence of Lokodo's participation in the conspiracy even if he did not meet with Defendant directly. *See* PSOF ¶¶ 141-45 (Ssempa supporting and justifying Lokodo's raid of Plaintiff's workshop); PSOF ¶ 176(d) (Buturo conveying the conspiracy's strategy of "international coalition building" to Lokodo); PSOF ¶¶ 157-58 (Defendant advising Langa on how to use Lokodo's investigation of LGBTI organizations to affirm the conspiracy's messaging about foreign interference in Uganda); PSOF ¶¶ 79, 155 (Lokodo and Ssempa using the exact same language to describe the purported nefariousness of the LGBTI community in the "guise of human rights"). There is also evidence of Langa and Ssempa working directly with Lokodo on the conspiracy's efforts to censor pornography, which they viewed as the "tool" LGBTI activists used "to introduced homosexuality" into society. PSOF ¶¶ 82(a), 204, 207.

strategies: using the media and other influential fora to exploit the public's fears and dehumanize the LGBTI community so that its persecution becomes not only acceptable but required; using enforcement arms of the government to actively stop associations and assemblies of and advocacy by LGBTI persons; and using the legislative process to legalize persecution of the LGBTI community. The conspirators' mutually reinforcing efforts are best illustrated by Defendant's description of why he traveled to Uganda in 2009: to "educate the leaders of the society so that when the law came out that they have an easier time [] being able to implement it." PSOF ¶ 78. *See Ungar*, 211 F. Supp. 2d at 100 ("[C]ourts focus on whether the parties share a common goal, the degree of interdependence between the alleged participants, and any overlap between participants among the various operations alleged to comprise a single conspiracy.")

Defendant's knowledge of the necessity for other participants to implement his persecutory strategies in Uganda is further evidenced by: Defendant's naming of Langa as his Ugandan coordinator for his international anti-LGBTI organization, PSOF ¶ 43; his efforts to "equip" his co-conspirators in Uganda with resources, PSOF ¶ 76; his belief that he was working with "one of the leading media figures in the nation," PSOF ¶ 76; and his attempts to influence the Anti-Homosexuality Act through his co-conspirators, which included actors inside the Ugandan Parliament, PSOF ¶ 2(c)-(d). Moreover, Defendant knew of the efforts his co-conspirators were making in furtherance of the conspiracy in real time and offered them advice along the way in order to achieve the conspiracy's ultimate goal. *See supra*.

2. The Record Evidence Demonstrates Defendant's Liability under A Theory of Aiding and Abetting Liability Pursuant to Federal Common Law Or International Law.

As the Court already ruled, to establish aiding and abetting liability, Plaintiff must show Defendant "provided practical assistance to the principal which has a substantial effect on the

perpetration of the crime." MTD Decision at 33 (internal quotations omitted). Noting that the "circuits are currently divided as to whether a plaintiff must show that a defendant acted only with knowledge of the criminal enterprise or that his explicit purpose was to facilitate the criminal activity," the Court determined it was unnecessary to resolve this issue because Plaintiff had sufficiently pleaded the "purpose" standard drawn from international law. *Id.* As discussed below, under either *mens rea* standard – knowledge or purpose – there is ample evidence to permit a reasonable juror to conclude Defendant is liable for the crime against humanity of persecution as a matter of aiding and abetting. And there is more than ample evidence to establish a genuine issue, precluding the granting of summary judgment.

a. The Record Evidence Shows Actus Reus: Defendant Provided Practical Assistance That Had a Substantial Effect on the Perpetration of the Crime Against Humanity of Persecution.

The *actus reus* for aiding and abetting "is established by 'practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.'" *Doe v. Exxon Mobil Corp.*, Civil No. 01–1357(RCL), 2015 WL 5042118, *9 (D.D.C. July 6, 2015) (quoting *Prosecutor v. Šainović*, Case No. IT–05–87–A, Judgment, ¶ 1649 (Jan. 23, 2014)).[34] Aiding and abetting liability does not require that defendant's conduct be a "'condition precedent' to the primary crime." *Id.* (citations omitted); *Prosecutor v. Blaškić*, Case No. IT–95–14–A, Judgment, ¶ 48 (July 29, 2004)); *see also Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, (March 24, 2016) (finding liability for one who prompts another person to commit an offence, which while "substantially contributing to the conduct of another person committing

[34] Defendant cites *Liu Bo Shan* for the proposition that "encouragement" alone is insufficient to establish "practical assistance" that "has a substantial effect" on the perpetration of a crime. Def. Br. at 156. In contrast to this case, there, the plaintiff had only alleged that the defendant bank's actions "created a veneer of legitimacy to justify the police's arrest and detention of Liu"; the allegations failed to provide a link between the encouragement and the torture that was the basis of the plaintiff's ATS claim. *See Liu Bo Shan v. China Construction Bank Corp.*, 421 Fed. App'x 89, 94 (2d Cir. 2011). But this argument is irrelevant because the record evidence shows more than "encouragement."

the crime," need not be a but-for cause); *Prosecutor v. Furundžija*, Case No. IT-95-17/1/T, Judgment, ¶ 219 (Dec. 10, 1998) (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); *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 257-58 (S.D.N.Y. 2009) ("[A]ssistance having a substantial effect need not constitute an indispensable element, that is, a *conditio sine qua non* for the acts of the principal. An accessory may be found liable even if the crimes could have been carried out through different means or with the assistance of another." (internal quotations omitted)).

There is abundant evidence that Defendant provided practical assistance, encouragement and more to his co-conspirators, which had a very significant effect, making summary judgment entirely unwarranted. For example, Defendant instructed the co-conspirators to use his theories about the "dangers" of the LGBTI community to create public demand and demand within government institutions for the systematic persecution of LGBTI Ugandans. *See*, *e.g.*, PSOF ¶71. Defendant provided talking points, *see*, *e.g.*, PSOF ¶¶ 69-73, and literature vilifying the LGBTI community, PSOF ¶¶ 7, 8, 13, 19, 30(b), 52, 60, 82(a), 102, 106, 115, 117. He provided guidance about responding to legislative and judicial efforts to recognize LGBTI Ugandans' right to equal protection under the law. *See* PSOF ¶ 52. He proposed changes to draft legislation designed to deprive LGBTI Ugandans of their fundamental rights, and strategies to facilitate the passage of that legislation. *See*, *e.g.*, PSOF ¶¶ 93-96, 104, 121, 174. He further suggested specific tactics to deprive LGBTI persons of their rights, even before the AHA was passed. *See*, *e.g.*, PSOF ¶ 123, 158.

The impact of Defendant's efforts was substantial to say the least, according to Defendant's own self-aggrandizing statements. Defendant proudly proclaimed that he was

instrumental in launching and developing Uganda's anti-gay movement. *See* PSOF ¶ 149. Indeed, Defendant boasted that his efforts had the effect of a "nuclear bomb." PSOF ¶ 75. Beyond the Defendant's statements, which themselves preclude the granting of summary judgment, the evidence shows that his strategies were carried out in Uganda by his associates to deprive the LGBTI community of its rights. Specifically, Defendant's speeches and writing supported the carving out of protections for LGBTI persons in an anti-discrimination bill, *see*, *e.g.*, PSOF ¶ 20; he helped shift the language Ugandan society used to characterize LGBTI persons, *see* PSOF ¶ 78; and his directions concerning the language of anti-LGBTI legislation and how to ensure its passage were closely followed. *See*, *e.g.*, PSOF ¶¶ 68, 103, 122.

Relying on *Aziz* 658 F.3d at 401, and *In re South African Apartheid Litig.*, 617 F. Supp. 2d at 257, Defendant argues that "expressing opinions to citizens and government officials cannot constitute aiding and abetting," nor can being "friendly with people Plaintiff deems enemies of the human race." Def. Br. at 156. Not only does Defendant grossly mischaracterize the nature of his actionable conduct, the authority cited does not support this argument. 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." 658 F.3d at 401, 390. Similarly, in *In re South African Apartheid Litig*, the court distinguished between "the sale of raw materials or the provision of loans" to a government from "[t]he provision of goods specifically designed to kill, to inflict pain, or to cause other injuries resulting from violations of customary international law," the latter of which would "bear a closer causal connection to the principal crime." 617 F. Supp. 2d at 258. Thus, these cases are entirely inapposite.

b. The Record Evidence Shows Mens Rea: Defendant Knowingly (And Purposefully) Assisted in the Perpetration of the Crime Against Humanity of Persecution.

In its decision denying Defendant's motion to dismiss, this Court considered international law to determine the elements of aiding and abetting liability. Between the time this Court's opinion was issued and the time that Defendant's motion for summary judgment was filed, new cases were decided by U.S. courts and international tribunals that strengthen the case for Defendant's liability.

In *Doe v. Drummond Co., Inc.*, the Eleventh Circuit affirmed that aiding and abetting liability for ATS claims requires only "knowing substantial assistance to the person or persons who committed the wrongful act." 782 F.3d 576, 608 (11th Cir. 2015). Similarly, in *Doe v. Exxon Mobil Corp.*, the D.C. district court rejected the assertion that international law requires a *mens rea* of "purpose," holding instead that "the defendant know the intent of the principal perpetrator," but need not "know every detail of the crime that was eventually committed." 2015 WL 5042118, at *10, *10 n.3 (internal quotations omitted) (citing ICTY decisions).

Recent cases by the ICTY and the ICC have also clarified the international law standard for the *mens rea* for aiding and abetting. The recent ICTY decision in *Karadzic* explained that the aider and abetter "need not share [the principal's] specific intent," but only "have intended the facilitation of that crime." *Karadzic* ¶ 576. Similarly, in *Prosecutor v. Charles Blé Goudé*, the ICC examined Article 25(3)(c) of the Rome Statute and concluded that the form of responsibility is that the person "provides assistance to the commission of a crime and that, in engaging in this conduct, he or she *intends to facilitate* the commission of the crime." Case No. ICC-02/11-2/11, Decision on the confirmation of charges against Charles Blé Goudé, ¶ 167 (December 11, 2014) (emphasis added).

The ICC decision in the *Charles Blé Goudé* is particularly significant with respect to Defendant's arguments. Defendant contends that the Court should follow the standards set by *Aziz,* 658 F.3d at 399–400 and *Talisman,* 582 F.3d at 255. *See* Def. Br. at 157. Both cases rely on interpretations of the Rome Statute. *See Aziz,* 658 F.3d at 400; *Talisman,* 582 F.3d at 259. *Talisman* in turn relied on Judge Katzmann's concurring opinion in *Khulumani v. Barclay Nat. Bank*, 504 F.3d 254, 276 (2nd Cir. 2007), who at the time noted that he was drawing on the Rome Statute that had yet to be construed by the ICC. 504 F.3d at 275-76. However, in *Charles Blé Goudé*, decided after *Talisman* and *Aziz*, the ICC explicitly held that the aider and abettor "intends to facilitate the commission of the crime." *Charles Blé Goudé*, ¶ 167. Thus, there is no longer any basis in international law for requiring an aider and abettor to share the specific intent of the perpetrator.

Recent decisions by U.S. courts confirm this reading of international law. In *Doe I v. Nestle USA, Inc.*, the Ninth Circuit (without deciding whether international law required "knowledge" or "purpose") found the plaintiffs' complaint against a cocoa company for aiding and abetting child slavery to meet a "purpose" standard:

> Reading the allegations in the light most favorable to the plaintiffs, one is led to the inference that the defendants placed increased revenues before basic human welfare, and intended to pursue all options available to reduce their cost for purchasing cocoa. Driven by the goal to reduce costs in any way possible, the defendants allegedly supported the use of child slavery, the cheapest form of labor available. These allegations explain how the use of child slavery benefitted the defendants and furthered their operational goals in the Ivory Coast, and therefore, the allegations support the inference that the defendants acted with the purpose to facilitate child slavery.

766 F.3d 1013, 1024 (9th Cir. 2014). The court further distinguished the facts before it from those in in *Talisman* and *Aziz*, where "the purpose standard was not satisfied because the defendants had nothing to gain from the violations of international law, and in *Talisman*, the

violations actually ran counter to the defendants' interest." *Id*. In other words, the Ninth Circuit confirmed the ICC's understanding of the "purpose" standard in *Charles Blé Goudé* and *Karadzic* – that the aider and abetter need not share the specific intent of the perpetrator, but need only intend to facilitate the commission of the crime – is the "purpose" standard recognized by the Second and Fourth Circuits. Defendant's reliance on *In re Chiquita Brands Int'l, Inc.*, Def. Br. 157, further affirms this understanding of the "purpose" standard under international law. 792 F. Supp. 2d 1301, 1343 (S.D. Fla. 2011) (explaining that the evidence must show that the defendant "acted with the purpose or intent to assist in [an international-law] violation").

The record evidence establishes that Defendant provided his assistance to those who have carried out the persecution of Uganda's LGBTI community with the knowledge and intent that his assistance would facilitate persecution – and he recognized and praised the success of their collective project to deprive LGBTI community of rights. *See supra* Section II.B.1. Thus, unlike in *Talisman* and *Aziz*, Def. Br. at 157, Defendant had something to gain from the systematic persecution of LGBTI Ugandans. *See Doe I v. Nestle*, 766 F.3d at 1024. Defendant went to Uganda in order to fulfill his mission to "counter the effect of the international 'gay' agenda on the U.S." PSOF ¶ 3. Defendant's interest was thus furthered by the success of persecutory efforts in Uganda. Further in *Talisman*, the court noted that "intent must often be demonstrated by the circumstances," but with regard to the plaintiffs' claim of persecution, the plaintiffs did not suggest "that Talisman was a partisan in regional, religious, or ethnic hostilities, or that Talisman acted with the purpose to assist persecution." *Talisman*, 582 F.3d at 263-64. By contrast, Defendant was clearly partisan; he only provided his assistance in Uganda to carry out a "a nuclear bomb" against the "gay agenda." PSOF ¶ 75.

Finally, the other cases cited by Defendant are distinguishable as well. In *Liu Bo Shan,* at most the plaintiff's allegations supported the inference that that the defendant bank intended only to "prevent[] [the plaintiff] from exposing illegal activities at the Bank" and had "knowledge of certain mistreatment" at the hands of the police but did not act with the purpose of facilitating his torture. 421 Fed. App'x at 94. Similarly, in *Abecassis v. Wyatt,* plaintiffs' allegations merely showed the defendants' intent to violate an economic sanctions regime, not facilitate terrorist attacks, the basis of the plaintiffs' claims. 704 F. Supp. 2d 623, 655 (S.D. Tex. 2010).[35]

C. Plaintiff Has Sufficient Evidence to Preclude Summary Judgment on Whether Plaintiff's ATS Claims Displace the Presumption against Extraterritoriality.

The Court already considered and rejected Defendant's argument that there is no ATS jurisdiction under *Kiobel* if the tort occurs abroad. *See* MTD Decision at 37-45 (discussing *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013)). There is no reason to upset that ruling – which governs as the law of the case – since the First Circuit has not yet considered the question of jurisdiction under *Kiobel*, the majority of circuit courts to do so have issued decisions in line with the Court's, and the Court's ruling is correct under any of the circuits' views of *Kiobel*'s "touch and concern" analysis.

1. The Record Evidence Meets the Court's "Touch and Concern" Analysis under *Kiobel*

The Court identified two sets of allegations that would survive *Kiobel* as a matter of law – (1) citizenship and (2) engaging in tortious conduct in the United States. MTD Decision at 40, 43. Plaintiff has produced ample evidence substantiating these legally sufficient allegations.

[35] Defendant's reference to *In re Chiquita*, Def. Br. 157, is inapposite. The court was referencing the requirement that crimes against humanity claims involve the targeting of civilians, *In re Chiquita,* 792 F. Supp. 2d at 1349, a basic element of all crimes against humanity claims. The court was not addressing an element of aiding and abetting.

First, the evidence demonstrates, and Defendant does not dispute, that he is a United States citizen and a resident of Springfield, Massachusetts. PSOF ¶ 4. Defendant has also asserted that in his activities in Uganda, he was acting on behalf of Abiding Truth Ministries. *See*, *e.g.*, Def.'s Answer, dkt. 83, at ¶¶ 7, 36. Defendant is the president and founder of Abiding Truth Ministries, an organization incorporated in California and registered in Massachusetts. PSOF ¶ 5.

Second, the evidence demonstrates that Defendant contributed to (and to a large extent, directed) the persecution conspiracy primarily from his residence in the United States. P. Resp. to D-MFR ¶¶ 130-131. In the United States, Defendant developed his strategies for the persecution of LGBTI people elsewhere around the world, including Uganda, in order to "counter the effect of the international 'gay' agenda on the U.S." PSOF ¶ 3. Defendant set forth his persecutory strategies through writings published in the United States, PSOF ¶¶ 7-8, 19, and on websites to which he contributed primarily from the United States, PSOF ¶ 5, 135.

Between his trips to Uganda in 2002 and 2009, from his base in Springfield, Defendant advised his associates in Uganda on strategies for responding to the efforts of LGBTI rights advocates, including Plaintiff, for equal recognition under the law. PSOF ¶¶ 52; P. Resp. to D-MFR ¶¶ 22-24. Defendant sent copies of his writings to his co-conspirators in Uganda, advising them to implement the strategies captured in those writings in furtherance of the widespread and systematic persecution of the LGBTI community. PSOF ¶¶ 52, 60, 195. He directed them to learn from his efforts in Eastern Europe, including Russia, where he had been implementing his strategies to prohibit non-discrimination on the basis of sexual orientation and gender identity and to criminalize advocacy for LGBT rights. PSOF ¶¶ 11, 18, 43, 52, 61. Defendant also assisted, from the U.S., in the planning of a series of 2009 meetings in Uganda where he would help his associates have an "easier time" implementing an anti-homosexuality law, among other

things, and as a part of that planning, invited others in the United States to join him in Uganda. PSOF ¶¶ 53-55, 60, 63-65, 78. Following his 2009 visit to Uganda, Defendant's assistance from the United States to his Ugandan co-conspirators re-doubled.

Critically, Defendant was frequently in contact with his co-conspirators regarding the drafting of the AHB introduced in Parliament shortly after his 2009 visit. Defendant provided suggestions via emails sent from the United States regarding the AHB's provisions. PSOF ¶¶ 93-96, 120-22, 166. He sent emails from the United States with strategic advice to facilitate the passage of the AHB. PSOF ¶¶ 2(d), 104, 107-08, 115, 119. He offered written advice in emails from the United States on how the AHB, when enacted, should be enforced, PSOF ¶ 119, 122, and on responding to media inquiries regarding the AHB, PSOF ¶ 109. Defendant distributed his official endorsement of the AHB from the United States and to others in the United States, PSOF ¶¶ 113-14, 117, and solicited the support of other anti-LGBTI activists in the United States, PSOF ¶¶ 113.

Beyond his assistance relating to the AHB, Defendant also communicated with his Ugandan associates, again through his domestic email account, concerning the suppression of LGBTI Ugandans' rights to association, assembly, and expression. PSOF ¶¶ 102, 123-24, 157, 162, 195-96, 198, 202. In fact, Defendant identified for his co-conspirators specific LGBTI Ugandans who were exercising these rights in the United States. PSOF ¶ 194. Defendant also supplied his associates with moral support and encouragement, as well as legal advice when his associates faced resistance to their persecutory efforts, through communications from the United States. PSOF ¶¶ 77, 111, 134, 147. Some of Defendant's meetings with his Ugandan associates also took place in the United States. PSOF ¶ 197.[36]

[36] One of his Ugandan associates, Martin Ssempa, is a U.S. citizen.

2. Recent ATS Decisions Interpreting *Kiobel* Affirm the Court's "Touch and Concern" Analysis

Circuit court decisions since the Court ruled on Defendant's motion to dismiss have confirmed the Court's *Kiobel* analysis – and rejected Defendant's categorical location-of-tort reading of the presumption against extraterritoriality. The Fourth, Eleventh, and Ninth Circuits have all ruled that *Kiobel* requires a fact-based analysis in which the U.S. citizenship of the defendant is a relevant factor. *See Doe v. Drummond Co., Inc.*, 782 F.3d 576, 595-98 (11th Cir. 2015) (stating that "the jurisdictional inquiry requires looking to the plaintiffs' specific claim to determine what contacts with or connections to the United States are relevant; thus, the inquiry may indeed extend to the place of decision-making" and finding "that the citizenship or corporate status of the defendants can guide us in our navigation of the touch and concern inquiry"); *Mujica v. AirScan Inc.*, 771 F.3d 580, 594 & n.9 (9th Cir. 2014) (noting that citizenship may be "one factor that, in conjunction with other factors, can establish a sufficient connection between an ATS claim and the territory of the United States to satisfy *Kiobel*"); *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 530-31 (4th Cir. 2014) (applying a "fact-based analysis" and finding jurisdiction based on allegations of defendant's U.S. citizenship, contract in the United States, and tacit approval and cover-up of the conspiracy from the United States); *see also Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1028 (9th Cir. 2014) (permitting plaintiffs to amend their complaint "to allege that *some* of the activity underlying their ATS claim took place in the United States" (emphasis added)).[37] Indeed, those courts cited this

[37] A recent district court decision from the Ninth Circuit is particularly instructive. In *Salim v. Mitchell*, the court found facts sufficient to survive *Kiobel* where: (1) the defendants were U.S. citizens; (2) they ran a company in Washington to assist with the CIA's enhanced interrogation programs that caused harm to plaintiffs; (3) they devised and supervised the program from the U.S.; and (4) executed contracts in regards to the program in the U.S. No. CV-15-0286-JLQ, 2016 WL 1717185, at *8 (E.D. Wa. Apr. 28, 2016).

Court's analysis with approval in their decisions. *See Doe v. Drummond*, 782 F.3d at 599, n.32; *Mujica*, 771 F.3d at 595; *Al Shimari*, 758 F.3d at 530.

Notwithstanding the weight of this authority, Defendant asks that the Court adopt Justice Alito's concurring opinion in *Kiobel* (garnering only two votes), which had urged the Court to bar an ATS claim "unless the domestic conduct is sufficient to violate an international law norm." Def's Br. at 52; *see Kiobel*, 133 S. Ct. at 1670.[38] However, as the Fourth Circuit explained in rejecting this approach, the "consider[ation of] only the domestic tortious conduct of the defendants…is far more circumscribed than the majority opinion's requirement" to apply the touch and concern test. *Al Shimari*, 758 F.3d at 527. While the Second Circuit has taken the minority view and adopted Justice Alito's test, *see Mastafa v. Chevron Corp.*, 770 F.3d 170, 187 (2d Cir. 2014), even under this incorrect interpretation of *Kiobel*, Plaintiff's claim would survive.

Under the Second Circuit approach, Defendant's conduct is analogous to that in *Mastafa* and *Balintulo v. Ford Motor Co.*, 796 F.3d 160 (2d Cir. 2015), where the court found sufficient conduct to meet the touch and concern test, but dismissed claims for failing to meet the Second Circuit's *mens rea* standard for aiding and abetting liability. In *Mastafa*, the plaintiffs sufficiently alleged the domestic conduct of the bank and oil company defendants for human rights abuses under Iraq's Saddam Hussein, through the purchasing and financing of oil transactions from within the United States and the facilitation of illegal payments and financing arrangements through a U.S.-based bank account; the court rejected the ATS claim on the ground that the defendants' only purpose was to violate a sanctions regime against Iraq, not facilitate human rights abuses. *Id*. at 190-91. Similarly, in *Balintulo*, the court found sufficient domestic conduct in IBM's development of hardware and software to create the South African apartheid

[38] Justice Alito described the *Kiobel* majority's analysis of what conduct is precluded by the presumption against extraterritoriality as a "narrow approach," and articulated a "broader standard" that would foreclose ATS claims that the majority approach would presumably accept. *Kiobel*, 133 S. Ct. at 1670 (Alito, J., concurring).

government's identity system, while also finding that the plaintiffs did not allege sufficient *mens rea*. 796 F.3d at 169-70.

As in *Mastafa* and *Balintulo*, the record evidence establishes that Defendant provided assistance that is sufficient to meet even the Second Circuit's reading of the *Kiobel* presumption; but unlike those situations, Defendant offered his assistance with the purpose of facilitating crimes against humanity, which is sufficient to establish accomplice liability in the Second Circuit. *See supra* Section II(B)(2).

The other cases upon which Defendant relies are inapposite. In both *Drummond*, which, as explained above, adopted this Court's correct *Kiobel* analysis, and *Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185 (11th Cir. 2014), the Eleventh Circuit found that the plaintiffs' allegations as to defendants' conduct in the U.S. – making "funding and policy decisions" – were only "in general terms," and thus insufficient. *Doe v. Drummond*, 782 F.3d at 598 (discussing allegations before it and the court in *Cardona*, 760 F.3d at 1189–91).[39] The court in *Drummond* specifically noted that those generalities were unlike the allegations in this case, which demonstrated greater "connections" to the United States. *Doe v. Drummond*, 782 F.3d at 598-99 & n.32.

Finally, Defendant's reliance on the Supreme Court's recent decision in *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016), is a mystery. *RJR Nabisco* focused on the situs of injury because Section 1964(c) of the RICO statute permits civil suits specifically for "[a]ny person *injured in his business or property* by reason of a violation of section 1962." 136 S.Ct. at 2106 (emphasis added). Unlike RICO's section 1962, which the Court affirmed clearly encompassed foreign enterprises, section 1964(c) only permits recovery for a domestic injury. *Id*.

[39] To the extent *Cardona* may have suggested a location-of-the-tort analysis, *Drummond* criticized *Cardona* for "impos[ing] jurisdictional constraints that are not required by the [Supreme] Court's holding in *Kiobel*." 782 F.3d at 582-83.

By contrast, the ATS does not discuss injury. *See* 28 U.S.C. § 1350 ("The district courts shall have original jurisdiction of 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."). *RJR Nabisco* never suggests that *Kiobel* requires that ATS claims cause domestic injury. *See RJR Nabisco*, 136 S. Ct. at 2101 ("Because 'all the relevant conduct' regarding those violations 'took place outside the United States,' we did not need to determine, as we did in *Morrision*, the statute's 'focus.'" (quoting *Kiobel*, 133 S. Ct. at 1670)). Indeed, none of the four separate opinions in *Kiobel* suggests that the ATS requires "domestic injury." *See* 133 S. Ct. at 1669 ("[W]here the *claims* touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." (emphasis added)); *id.* at 1669 (Kennedy, J. concurring); *id.* at 1670 (Alito, J., concurring); *id.* at 1671 (Breyer, J., concurring).[40]

D. Plaintiff Has Sufficient Evidence to Preclude Summary Judgment on Non-Economic And Economic Damages.

Defendant's contention that there is no genuine issue of material fact regarding damages widely misses the mark. First, it rests on the categorically incorrect premise that Plaintiff must establish economic damages to prevail on its ATS claim. In fact, non-economic damages are routinely awarded in ATS cases to compensate for the violations of fundamental rights. Even if Defendant were correct about economic harm, however, Plaintiffs have presented sufficient evidence relating to economic damages.

1. The Record Evidence Demonstrates a Range of Non-Economic Damages, All of which Preclude Judgment as a Matter of Law.

There is no authority supporting Defendant's bald assertion that economic losses are necessary to an ATS claim. Def. Br. at 130-32. To the contrary, numerous plaintiffs have

[40] The Defendant quotes language that includes the word "injury" from the part of *Kiobel*'s majority opinion that seeks to determine whether the presumption against extraterritoriality applies to claims under the ATS; not how to apply the presumption. *See* Def's Br. at 55-56 (citing *Kiobel*, 133 S. Ct. at 1665-66, 1668).

brought suit under the ATS for violations of fundamental rights and received awards of compensatory and punitive damages in the absence of economic harm. For example, this Court awarded compensatory and punitive damages in an ATS action against a former Guatemalan Minister of Defense for the summary execution, disappearance, torture, arbitrary detention, and cruel, inhuman, or degrading treatment of the plaintiffs' relatives. *Xuncax v. Gramajo*, 886 F. Supp. 162, 197-202 (D. Mass. 1995) (Woodlock, J.) In *Cabello v. Fernandez–Larios*, 402 F.3d 1148, 1152 (11th Cir. 2005), the court affirmed a jury award of compensatory and punitive damages for claims of extrajudicial killing, torture, and crimes against humanity brought under the ATS and the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note.[41] *See also Filartiga v. Pena–Irala*, 577 F. Supp. 860, 863–64 (E.D.N.Y. 1984) (awarding punitive damages to the family of victim, tortured to death by Paraguayan officials; court also awarded compensatory damages for emotional pain and suffering, loss of companionship and disruption of family life); *Mushikiwabo v. Barayagwiza*, No. 94 Civ. 3627, 1996 WL 164496, at *2 (S.D.N.Y. Apr. 9, 1996) (awarding compensatory and punitive damages to each plaintiff based on extrajudicial killings of relatives during massacres in Rwanda, including for pain and suffering); *Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litigation)*, 978 F.2d 493, 496, n.4, 503 (9th Cir. 1992) (awarding compensatory and punitive damages for torture and extrajudicial killing).

Critically, the task of estimating damages from non-pecuniary injuries is best suited for the jury, thus making it inappropriate to be decided as a legal matter on summary judgment. "The task of estimating money damages, especially intangible, *noneconomic loss*, constitutes a core jury function." *Davignon v. Clemmey*, 322 F.3d 1, 11 (1st Cir. 2003) (emphasis added); *see also Trull v. Volkswagon of America, Inc*., 320 F.3d 1, 9 (1st Cir. 2002) ("Translating legal damage

[41] Crimes against humanity are not *per se* actionable under the TVPA.

into money damages is a matter peculiarly within a jury's ken, especially in cases involving intangible, non-economic losses."); *Hilao v. Estate of Marcos*, 103 F.3d 789, 791, 793, 795 (9th Cir. 1996) (holding that with respect to plaintiffs' claims under the Alien Tort Claims Act, evidence was for jury on issue of damages for pain and suffering for human rights abuses).

The authorities Defendant cites, Def. Br. at 130-31, are completely inapplicable as they address commercial claims that require an economic injury. *See Young v. Wells Fargo Bank, N.A.*, 109 F. Supp. 3d 387(D. Mass. 2015) (breach of contract claim requires damages, but mental and emotional distress claims are generally not cognizable, and "injury" under the Massachusetts Consumer Protection Act, means "economic injury in the traditional sense"); *Amorim Holding Financeria, S.G.P.S., S.A.,v. C.P. Baker & Co., Ltd.* 53 F. Supp. 3d 279 (D. Mass. 2009) (suit for violations of Massachusetts Securities Act, breach of fiduciary duty, unfair and deceptive trade practices, fraud, negligent misrepresentation arising from investment dealings); *AVX Corp. v. Cabot,* 600 F. Supp. 2d 286 (D. Mass. 2009) (case concerning exclusive supplier agreement and violations of the Sherman Act); *Cash Energy, Inc. v. Weiner*, No. 95-1800, 1996 U.S. App. LEXIS 5820, at *3 (1st Cir. Mar. 29, 1996) (claim involving alleged diminution of property's market value, remediation costs, and other costs arising out of alleged groundwater contamination; grant of summary judgment upheld because of failure to isolate harm caused by defendants); *Draft-Line Corp. v. Hon Co.*, 983 F.2d 1046 (1st Cir. 1993) (suit alleging termination of dealership); *Boston Prop. Exchange Transfer Co. v. Iantosca*, 720 F.3d 1(1st Cir. 2013) (suit alleging financial misconduct in which plaintiff failed to show he suffered economic harm).

Defendant also cites cases brought under the ATS that do not even relate to his argument that a plaintiff is required to show economic damages. *See* Def. Br. at 131 (citing *Flores v.*

Southern Peru Copper Corp., 414 F.3d 233, 242 (2d Cir. 2003) and *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 582 F.3d 244, 255 (2d Cir. 2009)). The other cases cited by Defendant involved claims tort that were either dismissed for failing to cite norms that meet the *Sosa* standard, *see Jogi v. Piland,* 131 F. Supp. 2d 1024, 1027 (C.D. Ill. 2001) and *Bieregu v. Ashcroft*, 259 F. Supp. 2d 342 (D.N.J. 2003), or on the basis of the political question doctrine. S*ee Iwanowa v. Ford Motor Co.,* 67 F. Supp. 2d 424 (D.N.J. 1999). None of them suggest that a claim under the ATS requires a showing of economic damages. Finally, Defendant cites *Doe I v. Nestle USA, Inc*. 776 F.3d 1013, 1022 (9th Cir. 2014), for the proposition that this Court should look to domestic law for such things as "damage computation." Def. Br. at 132. However, *Nestle* says nothing about a requirement of economic damages in order to sustain an ATS claim. Of course, Plaintiff has demonstrated in great detail through record evidence that it suffered non-economic harm as a result of the severe deprivation of its fundamental rights, a point the Defendant does not contest. *See* PSOF ¶¶ 100, 103, 127, 139-43, 150-53, 155, 161, 170, 180, 184-85, 187-88, 209-11.

2. The Record Evidence Demonstrates Economic Damages.

Even if it were the law that ATS claims could only be based on economic harm (which it is not), summary judgment would not be appropriate because there is sufficient evidence in the record showing that Plaintiff has suffered economic loss. The evidence demonstrates that Defendant's tortious actions caused economic damage because Plaintiff had to utilize resources to protect itself from persecution by, *inter alia*, seeking redress for individual violations it suffered, adopting additional security measures and relocating its operations, and using resources to counteract the persecution through public education. *See* PSOF ¶¶ 101, 144, 189, 205, 208. Indeed, the economic damages Plaintiff suffered are well documented in the discovery provided to the Defendant, and broken down by category for the Defendant to understand.

Early in the discovery period, Plaintiff provided Defendant with a breakdown of the categories of economic damages it was seeking, and later identified the specific documents upon which damages computations would be based (which documents had already been produced to Defendant). P. Resp. to D-MFR ¶¶ 180-191. Subsequently, Plaintiff provided to Defendant specific damages amounts in the categories it had previously identified along with a list of the Bates-numbered documents from which the figures had been drawn. *Id*. This supplemental response, Plaintiff's Fifth Supplemental Response, provided the method used for computing the damages ("the method for measuring the damages consists of identifying from SMUG's records those expenditures that relate to the above-mentioned categories"), as well as the Bates numbers to identify the documents that were used as sources in the calculations. *Id*. The Bates numbers were also broken down by calendar year. *Id*. The Fifth Supplemental Response also included, as an exhibit, a two-page spreadsheet that presented the calculations by calendar year for each category and subcategory of damages. *Id*. Plaintiff served the Fifth Supplemental Response on Defendant on November 6, 2015. *Id*.

While the Fifth Supplemental Response was sufficient to establish the basis for Plaintiff's claimed economic damages, the Defendant was then provided with an even more detailed explanation in Plaintiff's Sixth Supplemental Response, served on February 19, 2016. *Id*. Annexed to the Sixth Supplemental Response was another exhibit that expanded upon the two-page spreadsheet from the Fifth Supplemental Response by providing a more detailed itemized accounting with cross references to each Bates-numbered source document. *Id*. This document provided Defendant with not only a calendar year breakdown for each category of damages, but also with detail on how each source document was referenced to produce the final calculations. *Id*.

III. THE RECORD EVIDENCE FORECLOSES SUMMARY JUDGMENT ON PLAINTIFF'S STATE LAW CLAIMS

A. Plaintiff Has Sufficient Evidence to Preclude Summary Judgment on Its Civil Conspiracy And Negligence Claims.

1. The Record Evidence Demonstrates Defendant's Liability for Civil Conspiracy under Massachusetts Law.

Massachusetts law allows a tort for a stand-alone form of civil conspiracy, defined as occurring "when the conspirators, acting in unison, exercise a peculiar power of coercion over the plaintiff[s] that they would not have had if they had acted alone." *Limone v. United States,* 497 F. Supp. 2d 143, 224 (D. Mass. 2007). As discussed in Section B, there is more than sufficient evidence precluding summary judgment on Plaintiff's civil conspiracy claim.

Defendant repeats his argument from his motion to dismiss, that this cause of action applies "principally to remedy direct economic coercion." Def. Br. at 166. This Court rejected this argument and held that "nothing in the case law suggests that a plaintiff is limited to pleading purely economic coercion. Participation in the kind of widespread, systematic campaign alleged in the Amended Complaint appears to fall within the possible boundaries of this cause of action." MTD Decision at 76. Defendant offers no reason to revisit this holding and indeed there would be no basis in law to revisit it.

Defendant then tries to suggest that there is no evidence that Defendant acted in unison with others to exercise a peculiar power of coercion that was "directed specifically at, and peculiarly focused against the plaintiff."[42] Def. Br. at 167 (internal quotations omitted). When Defendant suggested this in his motion to dismiss, this Court explained that:

[42] In doing so, Defendant also ignores cases recognizing that such claims may be brought even when the peculiar power of coercion was not directly targeted at a 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. 2012),

> This contention flies in the face of the allegations of the Amended Complaint, which charges that Defendant and his co-conspirators took actions that deliberately singled out Plaintiff and its members for persecution. If the Amended Complaint is accepted, the public in general was never the target; Plaintiff and the LGBTI community in Uganda were.

MTD Decision at 76-77.

Defendant attempts this argument again – this time by strategically cherry-picking a single question and answer to deliberately obscure the testimony of Plaintiff's 30(b)(6) deponent:

> Q: Has Scott Lively coerced SMUG to do anything?
> [SMUG Counsel]: Objection to form.
> A: No

Def. Br. at 166. However, the surrounding testimony was as follows:

> Q. Lively has not coerced or forced SMUG to do anything, has he?
> A. I beg your pardon.
> Q. Lively hasn't forced or coerced SMUG to take any particular action, has he? [Plaintiff Counsel]: Objection to form.
> A. I don't understand the question.
> Q. Do you understand what it means to coerce someone to do something?
> (Pause.)
> Q. Or to force someone to do something they don't want to do?
> A. Yes, I understand.
> Q. So Scott Lively hasn't coerced or forced SMUG to do anything, has he?
> [Plaintiff Counsel]: Objection to form.
> (Pause.)
> A. I feel the way you're asking the question does not give me the opportunity to answer it accurately
> Q. Well, is your answer yes or no? Either Scott Lively did coerce SMUG to do something or he didn't.
> (Pause.)
> A. Please repeat the question.
> Q. Has Scott Lively coerced SMUG to do anything?
> [Plaintiff Counsel]: Objection to form.
> A. No.

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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 the combined power of coercion, not on the grounds that the coercion was not specifically directed at the plaintiff. *Id*. *at* *76.

Q. Are any of the things that Scott Lively said or did in Uganda directed towards SMUG specifically or towards the LGBTI community in general?
[Plaintiff Counsel]: Objection to form.
A. Yes.
Q. Yes, what? Scott Lively did something directed to SMUG specifically?
A. That was not your question.
Q. Okay. Did any of the things Scott Lively said or did in Uganda –
[Defendant Counsel]: Strike that.
Q. Were any of the things Scott Lively said or did in Uganda directed towards SMUG specifically?
[Plaintiff Counsel]: Objection to form.
(Pause.)
A. I believe so, yes

(Sullivan Decl. Ex. 27 at 373:18-375:23 (emphasis added)).

Defendant's attempt to distort Plaintiff's testimony to fit his purpose is misguided as a matter of fact and law. First, Plaintiff's witness testified that he believed that Defendant said and did things in Uganda that were directed toward Plaintiff specifically and the LGBTI community in general. Second, this form of conspiracy is designed to address situations "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,* 497 F. Supp. 2d at 224. Moreover, Defendant's attempt to use Plaintiff's testimony to suggest there was no coercion by Defendant acting singly is a gross oversimplification of this tort. By its very nature, it is not a tort that can be carried out by a defendant acting alone. Whether or not Defendant by himself coerced Plaintiff is irrelevant to the conspiracy charge. The issue is whether Defendant and his co-conspirators, "acting in unison, exercise[d] a peculiar power of coercion over the plaintiff that they would not have had if they had acted alone." *Limone,* 497 F. Supp. 2d at 224.

In addition, even setting aside Plaintiff's 30(b)(6) testimony – and Defendant's consistently misguided view that Plaintiff's claims can be proven only by evidence from Plaintiff's representatives themselves – the record is overflowing with evidence that Defendant

acted in unison with others to exercise a peculiar power of coercion over the Plaintiff and the LGBTI community in Uganda. *See* supra Section II.A.2. Further, even though not required to establish a civil conspiracy claim, the record evidence demonstrates that Defendant acted with his co-conspirators to target Plaintiff specifically. Plaintiff and its member organizations are a visible advocacy group that has held press conferences and campaigns that have incurred the wrath of high-profile anti-gay leaders, like Stephen Langa and Martin Ssempa, and government officials, like James Buturo and Simon Lokodo. *See, e.g.,* PSOF ¶¶ 1, 2, 36, 44-45, 48, 139-42. The Plaintiff's staff members have been individually targeted for arrests, for unlawful searches, and in the media. PSOF ¶¶ 56, 127, 129, 170, 185, 187, 210-11. In a conference in which he advocated for a law to suppress homosexuality, Stephen Langa referred specifically to a case involving Plaintiff's staff member. PSOF ¶ 82. Defendant specifically pointed to Plaintiff by name in correspondence with his co-conspirators as the target of their efforts to strengthen the laws. PSOF ¶ 174 ("propaganda efforts of *groups like SMUG*" (emphasis added)). He worked to bring about a law that would subject Plaintiff's staff to five to seven years in prison for working in an organization dedicated to LGBTI equality. PSOF ¶ 103. He corresponded with his co-conspirators about Plaintiff's first Pride celebration in 2012, to which Charles Tuhaise responded, "These things will keep happening until we get a law." PSOF ¶ 162. His other co-conspirators have also referred to Plaintiff by name, demonstrating their particularized concern in silencing Plaintiff's advocacy efforts. PSOF ¶¶ 48, 92.

2. There Is Sufficient Record Evidence to Preclude Summary Judgment on Plaintiff's Massachusetts-Law Negligence Claim.

Negligence under Massachusetts law requires a showing of: (1) 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). Massachusetts courts have

held that a person who takes action ordinarily owes a duty to act reasonably to anyone who may be affected by the person's act. *Id*. 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).

Defendant's *mens rea* as to his efforts with co-conspirators with regard to the situation of LGBTI people in Uganda and a stronger law on homosexuality are disputed material issues. Defendant's assertions that he did not intend to persecute the LGBTI community in Uganda, Lively Decl. ¶¶ 33, 34, 36, are directly contradicted by voluminous evidence as set out in Plaintiff's response to Defendant's Statement of Material Facts and in Plaintiff's Statement of Omitted Facts. *See also supra* Section B. If taken at his word, however, he acted with extreme and gross negligence.

B. The Court Has Diversity Jurisdiction Over Plaintiff's State Law Claims for Civil Conspiracy and Negligence, and Those Claims Are Not Barred by the Statute Of Limitations or on Extraterritoriality Grounds.

Defendant argues that Plaintiff's state law claims for civil conspiracy (Count IV) and negligence (Count V) (the "State Law Claims") fail because: Plaintiff did not establish economic damages and thus the Court lacks diversity jurisdiction, Def. Br. at 171-72; because they are time barred, Def. Br. at 171; and because the harm occurred extraterritorially, Def. Br. at 57. As demonstrated below, none of those arguments have merit.

1. There Is No Basis for Granting Summary Judgment on Plaintiff's State Law Claims for Failure to Establish Damages and This Court Has Diversity Jurisdiction.

a. Defendant's Damages Arguments Are Unavailing.

As with Plaintiff's ATS claims, Defendant argues that Plaintiff's claims for conspiracy and negligence require dismissal as a matter of law for failure to show damages. The argument

as it relates to Plaintiff's State Law Claims suffers the same fundamental flaws as in the context of the ATS claims. First, Defendant erroneously assumes that the State Law Claims require a showing of pecuniary harm. Unsurprisingly, Defendant offers no support for that conclusion. Second, Defendant erroneously asserts that Plaintiff failed to demonstrate economic harm. *See* Def. Br. at 132-33.

Contrary to Defendant's argument, civil conspiracy claims under Massachusetts law may be premised on non-economic damages.[43] Indeed, the principal case Defendant cites in support of his argument was based on a long line of civil conspiracy cases that involved non-economic damages. *See id.* at 132 (citing *Advanced Micro Devices, Inc. v. Feldstein*, 951 F. Supp. 2d 212, 221 (D. Mass. 2013) (noting that a civil conspiracy generally only requires proof of "damages")). The court in *Advanced Micro Devices* cites *Grant v. John Hancock Mutual Life Insurance Co.,* 183 F. Supp. 2d 344 (D. Mass. 2002), where the plaintiff brought a civil conspiracy action alleging deprivation of his constitutional rights, including the right to travel, but did not allege economic damages. The court took no issue with a conspiracy claim seeking non-economic damages, finding that the plaintiff had pled the requirement of "an overt act that results in damages," while citing the same language regarding the necessity for damages that *Advanced Micro Devices* cited (and upon which Defendant relies). *Id*. at 359.

Grant in turn cities *Earle v. Benoit*, 850 F.2d 836, 844 (1st Cir. 1988), in which the plaintiff alleged a civil conspiracy existed to deprive him of his constitutional rights. The district court entered a directed verdict in favor of the defendant state troopers after finding there was no agreement between the troopers. *Id*. at 836. In reviewing the decision, the First Circuit found there had been sufficient evidence for a reasonable jury to have inferred a conspiratorial

[43] If Defendant is contending that Plaintiff has not established non-economic damages, such assertion would be fanciful given the facts (disputed or not) regarding the harm SMUG has suffered to its fundamental rights. *See supra* Section II.D.1.

agreement existed, but found that the erroneous directed verdict was harmless error. *Id*. at 845. The fact that the First Circuit took no issue with non-economic damages being sought based on a deprivation of constitutional rights, however, demonstrates that a civil conspiracy claim may be sustained on the basis of non-economic damages.

Defendant cites other authorities that are equally unavailing. In *Therrien v. Hamilton*, 849 F. Supp. 110, 114 (D. Mass. 1994) (Ponsor, J.), this Court granted judgment on a state law civil conspiracy claim because proof of an "essential element of the charge of civil conspiracy [was] missing: unlawful action, and an agreement among parties to inflict a wrong against another." The case makes no suggestion that claims for conspiracy, nor First Amendment violations, require monetary harm as a general matter. In *Clarmont v. Fallon*, No. 2001-1512, 2003 WL 21321190 (Mass. May 15, 2003), the plaintiff sought money damages on a variety of claims including conspiracy. While the court denied the defendant's motion for summary judgment based on the assertion that plaintiff had not adequately proved damages, *id.* at *10, nothing in the decision suggests that for civil conspiracy a plaintiff most prove an economic injury, *id*. at *15. To the contrary, the injury discussed by the court was a denial of due process. *Id*.[44]

It also is well established that negligence claims may seek non-economic damages. In *Smith v. Kmart Corp*., 177 F.3d 19 (1st Cir. 1999), a husband and wife brought an action seeking pain-and-suffering damages after the wife was struck by an ice cooler in the defendant's store. *Id*. at 22. The court defined "pain and suffering" damages to include any damages for loss of enjoyment of life that a plaintiff is reasonably certain to suffer in the future, taking into account each plaintiff's past interests and way of life. *Id*.; *see also Rodriguez v. Senor Frog's de la Isla,*

[44] The remaining authority cited by Defendant, *Shawsheen River Estates Associates Ltd. P'ship v. Herman*, No. 95-1557, 1995 WL 809834, *4-5 (Mass. Apr. 11, 1995), involved a motion for preliminary injunction. The only reference to "damages" is in a general description of the elements of civil conspiracy.

Inc., 642 F.3d 28, 31 (1st Cir. 2011) (awarding plaintiff pain and suffering damages in context of negligence claim, which constituted bulk of damages award).

Defendant's argument that economic damages are required to sustain negligence claims relies on a series of cases that do nothing more than recite the elements of a negligence claim; none hold or suggest that the damages must be based on economic loss. In the lead case relied on by Defendant to support the proposition that negligence requires economic loss, the court determined, "we begin—and end—with the question of whether the plaintiff has adduced sufficient evidence to show the breach of some legally cognizable duty." *Geshke v. Crocs, Inc.*, 740 F.3d 74, 77 (1st Cir. 2014). The case was dismissed finding an absence of a legal duty – not based on a lack of economic harm.

In any event, as addressed above, Plaintiff has adequately demonstrated the existence of economic damages, rendering Defendant's arguments regarding non-economic harm in the context of negligence and conspiracy claims inapplicable. *See supra* Section II.D.2.

b. Defendant's Arguments Regarding Diversity Jurisdiction Fail.

Defendant argues incorrectly that this Court lacks diversity jurisdiction over the State Law Claims because Plaintiff has not presented adequate evidence of its damages. As demonstrated in Section II.D, *supra*, however, Defendant's contentions regarding Plaintiff's damages are incorrect. Indeed, as addressed, beyond the extensive non-economic damages Plaintiff has suffered, Plaintiff has submitted ample evidence of its economic damages.

Moreover, the cases Defendant cites do not support his claim that there is no diversity jurisdiction based solely on the assertion that Plaintiff has not established economic damages. *See* Def. Br. at 171. In *CE Design Ltd. v. Am. Econ. Ins. Co*., 755 F.3d 39 (1st Cir. 2014), diversity jurisdiction was vitiated only because the plaintiff had specifically disclaimed damages in excess of $75,000 in a pleading filed in a related matter, which obviously is not the case here.

Furthermore, the sentence that Defendant quoted from that case, *i.e.,* "[t]he burden is on the federal plaintiff to establish that the minimum amount in controversy has been met," is immediately followed by the statement – *omitted* by Defendant – that "[a] plaintiff's good faith allegation of damages meeting the required amount in controversy is usually enough." *Id.* at 41 (citation omitted).

In *St. Paul Mercury Indem. Co. v. Red Cab Co*., 303 U.S. 283, 289 (1938), the Supreme Court held that a court's eventual determination that the damages were less than the jurisdictional amount did not negate the propriety of the plaintiff's original claim for an amount that exceeded the jurisdictional minimum. *See id.* at 288-89. The Court then articulated the jurisdictional amount in controversy test:

> The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction.

Id.

There can be no dispute that Plaintiff has made a good-faith claim to damages in excess of $75,000. Not only has Plaintiff pleaded such damages, it has produced evidence, including documents and calculations, supporting its claimed damages. Indeed, even if Plaintiff ultimately does not recover over $75,000 in this matter, that does not divest the Court of jurisdiction at this stage. *See id.* at 289. Accordingly, because Plaintiff has pleaded and submitted evidence of damages in excess of $75,000 (and the parties are indisputably diverse), this Court has diversity jurisdiction over the State Law Claims.

2. Plaintiff's State Law Claims Are Not Time-barred.

Defendant also argues that Plaintiff's State Law Claims should be dismissed because they are time-barred. As Defendant concedes, under Massachusetts law, the limitations period for civil conspiracy and negligence is three years. Def. Br. at 173 (citing Mass. Gen. Laws Ann. ch. 260, § 2A (West)); *see also* MTD Decision at 71, 77. Since Plaintiff filed its complaint on March 14, 2012, the operative date for purposes of the statute of limitations is March 14, 2009. As the Court already held, the statute of limitations period on Plaintiff's civil conspiracy and negligence claims begins to run at the time the plaintiff is injured or when he discovers or reasonably should have discovered the cause of the injury.[45] MTD Decision at 71-72, 77-78 (citing cases). *See also 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).

Defendant argues that Plaintiff's claims are barred because Plaintiff's corporate representative testified that Plaintiff's personnel were at the March 2009 conference where Defendant spoke and that, based on his speech at that conference, Plaintiff believed that Defendant was persecuting Plaintiff. Def. Br. at 174 (citing Onziema Dep. Tr. at 372:15-373:14). However, the fact that Plaintiff was aware of Defendant's anti-LGBTI speech at the March 2009 conference does not mean that it was aware of the conspiracy to deprive Plaintiff of its fundamental rights, the degree of Defendant's involvement in that conspiracy at that moment, the nature of Plaintiff's injuries as a result of that conspiracy, or the causal connection between Defendant's actions and Plaintiff's injuries – *i.e.*, the requirements of a legal claim. Put simply, the fact that Plaintiff was aware of Defendant's anti-LGBTI speeches and believed that such

[45] Defendant once again argues that the Court should adopt the "first overt act" accrual standard, Def. Br. at 173-74, an argument the Court explicitly and decisively rejected in its order denying his motion to dismiss, MTD Decision at 71 ("Defendant argues that the limitations period begins to run with the first overt act. However, this accrual rule only applies to federal and state statutory civil rights claims, which are not asserted here.") (citing *Pagliuca v. City of Boston*, 626 N.E.2d 625, 627-28 (Mass. 1994)).

speech would cause it some manner of injury does not entail a conclusion that it understood that Defendant was causing it a legal injury.

In fact, Defendant's role in the conspiracy and the specific nature of his damaging actions did not become clear to Plaintiff until well after the March 2009 conference. For example, the AHB, which contained a number of provisions that would deprive Plaintiff of fundamental rights to expression and association, was not introduced in Parliament by Member of Parliament David Bahati until April 29, 2009. PSOF ¶¶ 98.

Furthermore, as the Court noted in its order denying Defendant's motion to dismiss, Plaintiff "has also alleged several harmful incidents that occurred . . . after March 2009." MTD Decision at 73. For example, "the deliberately intimidating, mass disclosures of the identities of LGBTI peoples," and "raids targeted at Plaintiff and its activities, all occurred after March 2009." MTD Decision at 73. The record evidence confirms this timeline. PSOF ¶¶ 100, 106, 127-29, 139-42, 150-54, 168, 170, 187, 210-11. Moreover, Defendant's communications with his co-conspirators regarding, *inter alia*, the AHB did not occur until after March 2009. P. Resp. to D-MFR ¶¶ 77-78; PSOF ¶ 92. As such, those post-March 2009 harmful incidents are clearly not barred by the statute of limitations.

3. Plaintiff's State Law Claims Are Not Barred by a Presumption Against Extraterritorial Application.

Defendant argues that "the presumption against extraterritorial application of the ATS . . . applies with equal (if not greater) force to Plaintiff's state law claims." Def. Br. at 57. The argument is fatally flawed because any presumption against extraterritoriality applies only to *statutory* claims – and thus has no relevance to Plaintiff's *common-law* claims for civil conspiracy and negligence. The principle is well established since interpretation of the common law does not hinge on legislative intent – the core inquiry in evaluating extraterritorial

application of statutory claims. *See, e.g., Kansas v. Colorado*, 206 U.S. 46, 96 (1907) ("The common law . . . do[es] not rest for their authority upon any express and positive declaration of the will of the legislature."); *see also Jeffrey A. Meyer*, Extraterritorial Common Law: Does the Common Law Apply Abroad?, 102 GEO. L.J. 301, 304 ("Because the presumption against extraterritoriality is wholly a creature of statutory interpretation, the presumption—like any other rule of statutory application—has no application to the common law.")

The eleven cases in putative support of his argument that "the presumption . . . applies to state law claims," *all* apply the presumption to claims brought pursuant to *statutes*. Def. Br. at 58-59.[46] Defendant cites no authority, let alone authority showing a "well-recognized principle in federal and state courts," that the presumption against extraterritorial application is applicable to state *common-law* claims. *See id*. at 59.

Similarly inapt is Defendant's observation that "within the ATS context, numerous courts have applied the presumption against extraterritoriality to bar state law claims brought in conjunction with ATS claims, whether statutory or common law." *Id.* at 57. Defendant cites

[46] Defendant cites *Doricient v. American Airlines, Inc*., No. 91-12084, 1993 WL 437670, at *8 (D. Mass. Oct. 19, 1993) (applying presumption to Massachusetts's Civil Rights *Statute*); *Hadfield v. A.W. Chesterton Co*., No. 20084382, 2009 WL 3085921, at *1-2 (Mass. Super. Sept. 15, 2009) (applying the presumption to the Massachusetts Wage *Act*); *Taylor v. Eastern Connection Operating, Inc*., 988 N.E.2d 408, 413 n. 9 (Mass. 2013) (assuming without deciding that "there is a presumption against the application of Massachusetts *statutes* outside the United States") (emphasis added); *Howarth v. Lombard*, 56 N.E. 888, 889 (Mass. 1900) ("It is familiar law that *statutes* do not extend, *ex proprior vigore*, beyond the boundaries of the state in which they are enacted.") (emphasis added); *Hirst v. Skywest, Inc*., No. 15-2036, 2016 WL 2986978, at *8 (N.D. Ill. May 24, 2016) ("the long-standing rule of construction in Illinois is that a *statute* is without extraterritorial effect unless . . . .") (internal citations omitted) (emphasis added); *Abel v. Planning & Zoning Comm'n*, 998 A.2d 1149, 1157 (Conn. 2010) ("Many state courts have applied this principle [of extraterritoriality] to state *statutes*") (emphasis added); *Judkins v. Saint Joseph's College of Maine*, 483 F. Supp. 2d 60, 65 (D. Me. 2007) ("There is a well-established presumption against the extraterritorial application of a state's *statutes*.") (emphasis added); *Mitchell v. Abercrombie & Fitch*, No. 04-306, 2005 WL 1159412, at *2 (S.D. Ohio May 17, 2005) ("Generally, s*tatutes* are presumed not to have an extraterritorial effect unless the legislature clearly manifests contrary legislative intent.") (emphasis added); *Rathje v. Scotia Prince Cruises, Ltd*., No. 01-123, 2001 WL 1636961, at *9 (D. Me. Dec. 20, 2001) ("[S]tate *statutes* are presumed not to have extraterritorial reach.") (emphasis added); *Union Underwear Co. v. Barnhart*, 50 S.W.3d 188, 190 (Ky. 2001) ("[W]e presume that the *statute* is meant to apply only within the territorial boundaries of the Commonwealth.") (emphasis added); *Sandberg v. McDonald*, 248 U.S. 185, 195 (1918) ("*Legislation* is presumptively territorial . . . ") (emphasis added).

three cases that purportedly support this observation: *Romero v. Drummond Co., Inc*., 552 F.3d 1303, 1318 (11th Cir. 2008); *Roe I v. Bridgestone Corp*., 492 F. Supp. 2d 988, 1024 (S.D. Ind. 2007); and *In re: Chiquita Brands Int'l, Inc. Alien Tort Statute & Shareholder Derivative Litig*., 792 F. Supp. 2d 1301, 1355 (S.D. Fla. 2011).

Defendant's reliance on *Romero* is inapposite because it is a choice of law case, not an extraterritoriality case. 552 F.3d at 1318. After choosing Alabama law over Colombia law, the court dismissed the plaintiff's tort claims because "Alabama law does not apply to injuries that occurred out of state," and plaintiff's state tort claims indisputably occurred in Colombia. *Id*. The case says nothing about presumptions against applying common law abroad, as it is specific to Alabama rules of decision.[47]

Defendant's reliance on *Roe I v. Bridgestone Corp.* and *In re Chiquita Brands* is also misplaced. In *Roe*, the court dismissed state tort claims because the Plaintiff failed to state a claim under rule 12(b)(6). *Roe*, 492 F. Supp. 2d at 1024. In *Chiquita*, the court did not reach a choice of law analysis, holding that the four states in question lacked prescriptive jurisdiction for their tort law to apply abroad. The court emphasized also that the case involved "wholly foreign conduct by foreign tortfeasors against foreign victims." *Chiquita Brands*, 792 F. Supp. 2d at 1355. Thus, neither case supports Defendant's argument that the presumption against extraterritoriality requires the dismissal of Plaintiff's State Law Claims.

[47] Obviously, Alabama's choice of law doctrine has no application here, especially given that Massachusetts and Alabama apply different choice of law rules. *See e.g*., *Cosme v. Whitin Mach. Works, Inc*. 632 N.E.2d 832 (Mass. 1994) (Massachusetts "consider[s] choice-of-law issues by assessing various choice-influencing considerations, including those provided in the Restatement (Second) of Conflict of Laws (1971), and those suggested by various commentators.") (internal citations omitted); *Precision Gear Co. v. Cont'l Motors, Inc*., 135 So. 3d 953 (Ala. 2013) (Alabama "follows the traditional conflict-of-law principle[ ] of . . . *lex loci delicti* . . . . Under the principle . . . an Alabama court will determine the substantive rights of an injured party according to the law of the state where the injury occurred.") (internal citations omitted).

IV. PLAINTIFF POSSESSES BOTH ORGANIZATIONAL AND ASSOCIATIONAL STANDING.

This Court has already held that Plaintiff has both organizational "standing to seek monetary and equitable relief for Defendant's actions that have caused direct damage to it [and] associational standing to bring claims on behalf of both its members and the LGBTI community for injunctive relief." MTD Decision at 46. Defendant offers no sufficient legal or factual basis to revisit that decision.

Article III standing is established through the demonstration of (1) an injury in fact, which is (2) fairly traceable to the defendant's misconduct, and which can be (3) redressed by the favorable ruling of the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiff makes the required showing to demonstrate standing at this stage, through ample record evidence substantiating extensive organizational injuries because Plaintiff itself is a victim of persecution and because it was forced to divert resources in response to persecutory attacks against Uganda's LGBTI community. Both types of injuries are traceable to Defendant's role in the persecution at issue. *See supra* Section II(B). Plaintiff's injuries – economic and non-economic – are plainly redressable, including through a declaration of the illegal nature of Defendant's conduct and an injunction against its continuation, in addition to monetary damages. *See supra* Section II(D). With regard to its associational standing, Plaintiff refers to the range of facts demonstrating the harms that its members and the Ugandan LGBTI community at large have suffered as a result of Defendant's and his co-conspirators' repressive campaign.

A. Plaintiff Has Organizational Standing.

Organizations may file suit to obtain compensation for the injuries that they sustain to their organizational status. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 377 n.19 (1982); *Mass. Delivery Assoc. v. Coakley*, 671 F.3d 33, 44

n.7 (1st Cir. 2012). The substantial record evidence of Plaintiff's injuries maintains the Court's finding that Plaintiff can establish organizational standing.

1. The Evidence Demonstrates an "Injury in Fact."

Defendant asserts that Plaintiff cannot establish injury in fact because it has not put forward evidence of costs and has failed to quantify the harms that it has suffered. Def. Br. at 122. This is legally and factually incorrect. It is legally incorrect because to demonstrate "concrete and particularized" harms that are "actual or imminent," *Lujan* 504 U.S. at 560, the injury must be "*de facto*[,] that is, it must actually exist," but it does not necessarily need to be tangible; "intangible injuries can nevertheless be concrete." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548-49 (2016) (internal quotations omitted). Defendant's argument is factually incorrect because Plaintiff has adequately proven non-economic damages and economic damages at this stage in the litigation. *See supra* Section II(D).

Plaintiff has ample evidence substantiating the two forms of harm this Court found would show that as an organization it has suffered an injury in fact: (1) the harm that it has suffered by virtue of its status as a victim of persecution; and (2) the harm it has suffered by having to redirect significant resources toward efforts to counter the persecution caused by Defendant, hindering its capacity to carry out its core organizational objectives. *See* MTD ruling at 47.

a. Plaintiff Has Suffered as a Victim of Persecution.

As recognized by the Court, Plaintiff's injury in fact results in part from the fact that it has suffered from the persecution targeting Uganda's LGBTI community. MTD Decision at 47. First, Plaintiff's rights to free expression have been violated, including, for, a time, being criminalized under the AHA. *See, e.g.*, PSOF ¶ 184; *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, 287 (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").

Second, Plaintiff's meetings devoted to the provision of education, training, and advocacy for the promotion and protection of LGBTI rights have been forcefully raided and disbanded. PSOF ¶¶ 140-41, 150-52. *Compare Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003) (allowing 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). Likewise, Plaintiff, through its staff, has been both targeted and punished for speaking out against the persecution of the LGBTI community in Uganda, including through arbitrary arrests and detention, surveillance, assaults, outings, intimidation, and harassment. *See, e.g.*, PSOF ¶¶ 45, 50, 56, 100, 127, 170, 185, 187-88, 210-11. *Compare 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).

As a result, Plaintiff has been forced to divert resources to protect itself, including resources expended to seek redress for the targeting of its staff members, to implement urgent security measures, and to relocate its operations. *See, e.g.*, PSOF ¶ 41, 101, 143-44, 170, 185. *Compare Estate of Rodriquez*, 256 F. Supp. 2d at 1259 (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).

Finally, as a target of persecution, Plaintiff has also suffered harm to its reputation and stigmatic harm in Uganda, which has hindered its ability to conduct advocacy and education and outreach efforts. PSOF ¶ 209. *See Southern Mut. Help Ass'n, Inc. v. Califano*, 574 F.2d 518, 524 (S.D. Cal. 1977) (explaining that an injury to the reputation of an organization can serve as a basis for standing is well-established) (citing *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 139 (1951)).

Defendant's assertion that organizations cannot be persecuted, Def. Br. at 160-62, was already considered and rejected by the Court, *see* Def.'s MTD at 40-42, is contradicted by the record evidence, and is contrary to law. *See*, *e.g.*, *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 of genocide or war crimes); 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"). *Accord Hassan v. City of New York*, 804 F.3d 277, 289-91 (3d Cir. 2015) (finding

standing for plaintiffs, including organizational plaintiffs, for discriminatory surveillance of the Muslim community).

Chowdhury v. WorldTel Bangladesh Holding, Ltd., on which Defendant relies, Def. Br. at 160-61, is inapposite. The court held that a corporation cannot be subject to torture, which necessarily requires a human body. 588 F. Supp. 2d 375, 387 (E.D.N.Y. 2008). Defendant offers no support for the argument that because an organization is not subject to torture it cannot be persecuted through the denial of basic rights of assembly, association, and expression.

b. Plaintiff's Ability to Pursue its Core Objectives Has Been Significantly Hindered.

The above harms, flowing from persecution, are sufficient to demonstrate injury in fact. In addition, as the Court already found, Plaintiff's injury in fact is also demonstrated by its diversion of substantial resources to efforts to counteract the persecution of the Ugandan LGBTI community, directly hampering its ability to fulfill its own organizational objectives. MTD Decision at 47. While Plaintiff was founded primarily to advocate for the inclusion of LGBTI people in Uganda's national HIV/AIDS prevention and treatment strategies, PSOF ¶ 37, in the face of persecution, it has been forced to divert resources toward public education, advocacy, and media campaigns that aim to counter the messages of the persecutory campaign, defeat the Anti-Homosexuality Bill (and later Anti-Homosexuality Act), and seek legal redress for persecutory acts, hampering its ability to carry out its core organizational objectives in the process. PSOF ¶¶ 44, 105, 144, 189, 208. *See Havens Realty*, 455 U.S. at 379 (Where an organizational plaintiff has been forced to "devote significant resources to identify and counteract" the defendant's discriminatory practices, thus "perceptibly impair[ing]" the organization's ability to carry out its objectives, "there can be no question that the organization has suffered injury in fact."); *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2346 (2014) (recognizing the harm caused by an

organization's obligation to divert time and resources); *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).

The record evidence also demonstrates that Plaintiff has had to divert key resources in support of its member organizations as they have been targeted, some of which facilitate services such as assistance to LGBTI individuals who have been denied access to essential services, forcibly evicted, forced to go into hiding, or faced arbitrary arrests and detention. *See, e.g.*, PSOF ¶¶ 160, 171, 188.

2. The Evidence Demonstrates Plaintiff's Injuries Are Fairly Traceable to Defendant's Role in Persecution.

As the Court emphasized, Defendant's actions do not need to be the final step in the causal chain of injury; rather, Plaintiff need only show that Defendant was an indirect cause of its injuries through his "determinative or coercive" influence upon the actions of others. MTD Decision at 48 (citing *Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgmt. Council*, 589 F.3d 458, 467 (1st Cir. 2009)); *see also Vill. of Arlington Heights v. Metropolitan Housing Dev't Corp.*, 429 U.S. 252, 261 (1977) (injuries need only be "*fairly* traceable to the defendant's acts or omissions" and may be the indirect cause of the plaintiff's injuries) (emphasis added); *Toll Bros., Inc. v. Twp. Of Readington*, 555 F.3d 131, 142 (3d Cir. 2009) ("[A]n indirect causal relationship will suffice [for the traceability analysis] so long as there is a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant." (internal quotations omitted)).

Accordingly, the Court explained that demonstrating Defendant's status as a central architect and actor in the campaign to persecute LGBTI Ugandans was sufficient to satisfy the traceability analysis. MTD Decision at 49. Thus, Plaintiff refers to a range of specific facts demonstrating that Defendant was a principal strategist at the heart of the persecutory campaign in Uganda, and that while some acts of persecution may not be immediately traceable to him, his significant and sustained involvement nevertheless establishes a sufficient role in causing Plaintiff's injuries. *See supra* Section II(B); *see also* MTD ruling at 49 ("While some of the actions that Plaintiff describes in the Amended Complaint may not be directly traceable to Defendant, Defendant may nevertheless be held liable, as the previous discussion notes, for his conduct as an aider and abettor.")

3. The Record Evidence Demonstrates that Plaintiff's Injuries are Redressable.

Plaintiff seeks both damages (economic and noneconomic) and equitable relief for the injuries that it has suffered as an organization. Plaintiff must show only that a favorable ruling by the Court could potentially lessen its injury, not that such a ruling would completely alleviate all harm. MTD Decision at 49 (citing *Lujan*, 504 U.S. at 561); *see also Katz v. Pershing*, LLC, 672 F.3d 64, 72 (1st Cir. 2012) (redressability is not a zero-sum proposition – "it is a matter of degree."). Plaintiff has identified evidence demonstrating that it has suffered organizational injuries as a victim of persecution and that it has had to divert resources to counter the persecution of Uganda's LGBTI community, consequentially suffering monetary damages. *See supra* Section II(D)(2); *see also* MTD Decision at 49 ("To a substantial extent the injuries to Plaintiff as an organization are quantifiable and may be remedied by an award of monetary damages."). A damages award would clearly redress these injuries.

With regard to equitable relief, Plaintiff seeks a ruling declaring that Defendant's acts violate the law of nations and that enjoins Defendant "from undertaking further actions, and from plotting and conspiring with others, to persecute Plaintiff and the LGBTI community in Uganda on the basis of their sexual orientation and gender identity, and strip away and/or severely deprive Plaintiff and LGBTI community in Uganda of fundamental rights." P. Resp. to D-MFR ¶¶ 170-76. Defendant reprises an argument previously rejected by the Court that anti-LGBTI initiatives in Uganda are beyond his control and, thus, injunctive relief will be ineffective. *See* Def. Br. at 125; MTD Decision at 56. However, the evidence affirms the Court's prior characterizations that "Defendant played a crucial role in developing strategies to deny basic rights to Plaintiff's members over the last decade," *see supra* Section II(B), and that "Defendant will be called upon to help devise new strategies to deny the rights of Plaintiff's members," *See* PSOF.[48] Injunctive relief would thus serve at least to remove a critical source of support for the ongoing persecution. *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. 497, 524-26 (2007) (damage to Massachusetts coastline redressable by nominally decreasing U.S. greenhouse gases, despite foreign countries representing the predominant cause of harm); *see also Antilles Cement Corp. v. Fortuño*, 670 F.3d 310, 318 (1st Cir. 2012) (plaintiff

[48] Even if Defendant's claim that he has no intention to return to Uganda, Def. Br. at 128, is taken as true, it does nothing to negate the threat of his further collusion to persecute, as much of his persecutory activity has been effectuated from the United States. *See, e.g.*, PSOF ¶¶ 3, 52-55, 60, 63-65, 93-96, 104, 107-09, 113-14, 117, 120-22, 135; P. Resp. to D-MFR ¶¶ 29, 31, 33-37; P. Resp. to D-MFR ¶¶ 130-31; P. Resp. to D-MFR ¶¶ 132-148.

"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").

Defendant argues more generally that the Court has no power to issue an injunction without running afoul of the First Amendment. Def. Br. at 128. This argument conflates a question on the merits (asserted First Amendment protections) with the standing inquiry (would the injury be redressable). And, in any event, as explained below, *infra* Section VI, Plaintiff challenges Defendant's conduct in advancing a persecutory campaign to deprive LGBTI persons of their fundamental rights, which is not protected by the First Amendment. Accordingly, if liability is not based on protected speech, an order enjoining Defendant from engaging in unprotected conduct would not implicate the First Amendment.

B. Plaintiff Has Associational Standing.

This Court has already ruled that Plaintiff has separate grounds for associational standing to bring claims on behalf of both its members and the LGBTI community for injunctive relief, MTD Decision at 46, and that Plaintiff meets the Article III requirements for standing as representative of its members, MTD Decision at 55. Specifically, the Court recognized, and Defendant does not contest, that "[t]he analysis for injury and causation in this context is virtually the same as the analysis applicable to determine an organization's entitlement to bring a suit in its own right." MTD Decision at 55.

Defendant, however, re-contests the redressability element, asserting that Plaintiff's claims require proof of damages because they sound in tort. Def. Br. at 128-29. The Court has already determined that Plaintiff has associational standing to bring claims for injunctive relief because "the claim here – persecution – is a group-based claim, [and] it is well-suited to be brought by a representative association like Plaintiff…." MTD Decision at 55. Further, it is well established that tort claims do not preclude associational standing. *See*, *e.g.*, *Libertad v. Welch*,

53 F.3d 428, 440 (1st Cir. 1995) (granting associational standing to maintain a § 1985(3) claim); *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 114 (2d Cir. 2008) (confirming associational standing for seeking of injunctive relief under the Alien Tort Statute); *Pa. Psychiatric Soc'y v. Green Spring Health Servs.*, 280 F.3d 278, 282 (3rd Cir. 2002) (finding associational standing would be appropriate where organization sought equitable relief for various tort and contract claims so long as the claims could be "established with sample testimony").

V. THE ACT OF STATE DOCTRINE DOES NOT BAR PLAINTIFF'S CLAIMS.

The act of state doctrine does not apply to Plaintiff's claims. First, Plaintiff asks the Court to render a judgment as to the illegal conduct of an individual U.S. citizen, not to invalidate a sovereign act of the Ugandan government. The narrow act of state doctrine is simply not implicated even if, in the course of finding Defendant liable for persecution, the Court finds occasion to criticize a foreign government's legislative enactments – as legions of decisions in U.S. courts granting political asylum or *non-refoulement* protections to refugees amply demonstrate. Second, even if the doctrine could apply, Plaintiff's claims include violations of *jus cogens* norms, which are exempt from the application of the doctrine.

A. Because Plaintiff's Claims Would Not Require This Court to *Invalidate* an Official Act by a Foreign Sovereign, the Act of State Doctrine is Inapplicable.

The Supreme Court made quite clear – in a case relied upon by Defendant – that it is "not an act of state case" when a plaintiff is "not trying to undo or disregard the government action, but only to obtain damages from private parties who had procured it." *W.S. Kirkpatrick & Co., Inc. v. Envt'l Tectonics Corp., Int'l*, 493 U.S. 400, 407-08 (1990). The Court distinguished between situations that seek to invalidate or declare ineffective foreign laws or acts – which would implicate the act of state doctrine – and situations where a foreign state's actions would be

"impugned" though not invalidated – which would not. *Id.* at 407. Indeed, the Court's description of cases upon which Defendant principally relies makes clear that the question is whether a court is asked to declare a foreign act "ineffective." *See id*. at 405-07 (describing *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, (1964), in which "upholding the defendant's claim to the funds would have required a holding that Cuba's expropriation of goods located in Havana was *null and void*"; *Oetjen v. Central Leather Co.,* 246 U.S. 297 (1918) and *Ricaud v. Am. Metal Co*., 246 U.S. 304 (1918), where "denying title to the party who claimed through purchase from Mexico would have required declaring that government's prior seizure of the property, within its own territory, *legally ineffective*" (emphasis added)). Specifically, the Court explained that *Underhill v. Hernandez,* 168 U.S. 250 (1897) "stand[s] for the proposition that a seizure by a state cannot be complained of elsewhere – in the sense of being sought to be declared *ineffective* elsewhere." *Id*. at 407 (emphasis in original). Because Plaintiff does not ask this Court to render a judgment invalidating any Ugandan laws, Defendant's act of state defense fails as a matter of law.

Defendant's argument also fails as a matter of fact. His assertion that Plaintiff's claim "hinges entirely" upon the process surrounding the passage and enactment of the Anti-Homosexuality Bill by the Ugandan government, Def. Br. at 63, mischaracterizes the claims in this case and evinces a fundamental misunderstanding of the act of state doctrine. First, Defendant's involvement in the drafting and passage of the AHB is evidence of his participation in a conspiracy to persecute the Ugandan LGBTI community and his acts that aided and abetted their systematic persecution. *See supra* Section II(B). The AHB is also evidence of the systematic nature of the attack against Uganda's LGBTI population. *See supra* Section II(A)(2)(b). But the bill is not the only evidence, and not the only harm. *See* PSOF ¶¶ 45, 50,

56, 100, 127, 139-141, 150-52, 170, 185, 187-88, 209-11. Second, Plaintiff's claim would not require this Court to invalidate, or render ineffective, the Anti-Homosexuality Act (which in any event has already been invalidated by a Ugandan court for procedural reasons). *See* PSOF ¶ 201. Adjudicating Plaintiff's claims in its favor would actually have the Court recognize the effectiveness of the law (in legalizing persecution) at the time of its enactment. *See Sharon v. Time, Inc.,* 599 F. Supp. 538, 546 (S.D.N.Y. 1984) ("[t]he issue in this litigation is not whether such acts are valid, but whether they occurred").

This holds true for conduct by Defendant's co-conspirators as well, be they current or former Ugandan government officials who used, or are using, their access to state resources to carry out the persecutory campaign. *See* PSOF ¶¶ 36, 123, 133, 139-141, 150-52, 211. In *Doe v. Exxon Mobil Corp*., upon which Defendant relies, the court held that the act of state doctrine did not apply to the plaintiffs' ATS claims because "the *validity* of the Indonesian soldiers' conduct as a matter of Indonesian law is not at issue in this case…Plaintiffs' claims only seek to 'obtain damages from private parties who procured' the soldiers' conduct." 69 F. Supp. 3d 75, 88 (D.D.C. 2014) (quoting *Kirkpatrick*, 493 U.S. at 407).

Other authorities cited by Defendant are also inapplicable for the same reason – *i.e.* they involved asking a U.S. court to invalidate governmental action. *See Konowaloff v. Metro. Museum of Art*, 702 F.3d 140 (2d Cir. 2012) (involving a dispute over art expropriated by the Soviet Government); *Glen v. Club Mediterranee*, S.A., 450 F.3d 1251, 1254 (11th Cir. 2006) (validity of Cuban government's act of expropriation was "directly at issue" in the litigation); *Braka v. Bancomer, S.N.C.*, 762 F.2d 222 (2d Cir. 1985) (claim would have required judicial review of the taking of property by a foreign government within its own territory); *Empresa Cuban Exportadora De Azucar y Sus Derivados v. Lamborn & Co., Inc.,* 652 F.2d 231 (2d Cir.

1981) (the taking of a property in Cuba was a "classic" act of state); *Soc'y of Lloyd's v. Siemon-Netto*, 457 F.3d 94 (D.C. Cir. 2006), (claim seeking to block enforcement of an English Court judgment).[49] Plaintiff does not ask this Court to invalidate any law or official act in Uganda, nor could it; Plaintiff asks this Court to undertake the unremarkable task of adjudicating the liability of a U.S. actor for his unlawful conduct.

Kirkpatrick made clear that courts cannot avoid their constitutional duty to decide cases and controversies if, in the course of rendering judgment against a private defendant, the court's decision is critical of the effects of a foreign sovereign's actions. Indeed, courts issue hundreds of decisions every year offering non-citizens relief under the asylum provisions of the Immigration and Naturalization Act and *the non-refoulement* provisions of the Convention Against Torture because conditions and laws in foreign countries are persecutory or dangerous to a litigant. If Defendant's understanding of the act of state doctrine were correct, these well-established laws – and the relief courts routinely provide under them – would be invalid and the entire architecture of international refugee law would be null and void.

B. Plaintiff's Claims Include Violations of *Jus Cogens* Norms, Which Are Exempt from the Act of State Doctrine.

Even if Plaintiff's claim for persecution as a crime against humanity would require the Court to "undo or invalidate" a foreign act, which it does not, the act of state doctrine does not apply where the acts are barred by controlling international legal principles. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). As the Supreme Court explained in *Sabbatino*:

[49] One case cited by Defendant, *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.,* 461 F.2d 1261 (9th Cir. 1972), was overruled by the Supreme Court's ruling in *Kirkpatrick*. *See In re Vitamin C Antitrust Litig.,* 810 F. Supp. 2d 522, 548 and n. 30-31 (E.D.N.Y. 2011). The court in *Occidental* relied on *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), in finding that the act of state doctrine applied. However, the Supreme Court in *Kirkpatrick* said *American Banana* "was not an act of state case" because the plaintiff there "was not trying to undo or disregard the governmental action, but only to obtain damages from private parties who had procured it." *Kirkpatrick*, 493 U.S. 407.

> It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.

Id. at 428 (1964). In holding that the crime against humanity of persecution of LGBTI people is a violation of customary international law, *see* MTD Decision at 20-31, this Court has already determined the high degree of consensus concerning this crime.

Crimes against humanity also rise to the level of *jus cogens*. *See* Pl. Opp. to D. MTD, dkt. 38 at 24-25; *see also Sarei v. Rio Tinto, PLC,* 487 F.3d 1193, 1202 (9th Cir. 2007); *United States v. Yousef*, 327 F.3d 56, 105 & n. 40 (2d Cir. 2003); Bassiouni Dep., Ex. 210 at 58:5-60:18; M. Cherif Bassiouni, International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*, Law & Contemporary Problems, 59:63-74 (1997). Courts have repeatedly held that *jus cogens* norms are exempted from the act of state doctrine since they constitute norms "from which no derogation is permitted." *Sarei,* 487 F.3d at 1209-10. *See also Siderman de Blake v. Republic of Argentina,* 965 F.2d 699, 714, 718 (9th Cir. 1992); *Warfaa v. Ali*, 33 F. Supp. 3d 653, 661-62 (E.D. Va. 2014) (holding that, because plaintiff's claims were "premised on alleged acts that violate *jus cogens* norms, the act of state doctrine is inapplicable"); *Garcia v. Chapman*, 911 F. Supp. 2d 1222, 1242 (S.D. Fla. 2012) (*jus cogens* norms "are afforded the highest status under international law" and "are exempt from the act of state doctrine").

VI. DEFENDANT'S PARTICIPATION IN THE PERSECUTION CONSPIRACY AND AIDING AND ABETTING THE PERSECUTION OF THE UGANDAN LGBTI COMMUNITY IS NOT IMMUNIZED BY THE FIRST AMENDMENT.

Defendant's thirty-page disquisition on the First Amendment is misguided, disingenuous, and ironic given that Defendant, among other things, helped draft and pass a law that subjected Plaintiff's staff to *five to seven years in prison* for the exercise of their rights to freedom of

expression and association. PSOF ¶ 96(a) (recommending five years imprisonment for "promotion of homosexuality"); PSOF ¶ 184 (enacting of AHA); PSOF ¶ 122 (identifying "activists" as primary focus of law); PSOF ¶ 123 (suggesting a law school dean be removed from her post because she was supportive of LGBTI rights). More than once, Defendant has acknowledged that the Ugandan law he assisted with and the rights-stripping laws he has worked to bring about elsewhere would not be legal in the United States. PSOF ¶ 18(iv), 149.

In arguing that Plaintiff seeks to "pursue tort liability based on [Defendant's] speech," Def. Br. at 96, Defendant offers the same self-serving and mistaken analysis he offered in his motion to dismiss. As this Court already explained, the basis of Defendant's liability is not any "pro-family" statements demeaning LGBTI people or likening the movement for LGBTI rights to Nazi atrocities – as odious, retrograde, and factually fantastical as those views plainly are. Rather, those statements are cited in this case (as they would be in any conspiracy case without implicating the First Amendment) as direct evidence of Defendant's persecutory and discriminatory intent and the invidious purpose motivating his overt acts. And, because numerous crimes – including conspiracy and aiding-and-abetting crimes – are actually effectuated by verbal agreements, other statements stand as proof of his agreement to engage in the crime of persecution with his accomplices.

This is not an incitement case. The substantive basis for Defendant's liability, as Plaintiff has detailed herein, is the extensive evidence in the record demonstrating that Defendant prospectively planned the "criminalization of peaceful activity and even the status of being gay and lesbian," MTD Decision at 62, coached his reliant co-conspirators throughout the implementation of this crime, and then retrospectively praised and boasted about the success of their collective effort. *See supra* Section II(B). As this Court already held, such conduct (even if

effectuated through a verbal agreement) enjoys no First Amendment protection. This evidence of a conspiratorial agreement also quickly disposes of Defendant's argument that he is being persecuted on the basis of mere association.

Finally, as this Court already ruled, any First Amendment protection in connection with petitioning foreign governments – whether grounded in *Noerr-Pennington* doctrine or in the Petition Clause – does not immunize petitioning foreign governments to undertake unlawful acts. And even if it did as a matter of law, the facts demonstrate the persecutory conspiracy consisted of far more than pursuit of passage of the AHB.

A. The Basis for Defendant's Liability Turns on His Plan, Agreement, and Other Conspiratorial Acts, Not on Any General Advocacy.

Contrary to Defendant's stubborn insistence, Plaintiff does not seek to hold Defendant liable based on his abstract advocacy, opinions, or statements regarding the purported inhumanity of LGBTI people, nor does Plaintiff advance a theory of incitement. Indeed, while Defendant's assertions about First Amendment virtues are ironic given that he seeks to suppress the freedom of expression and association of LGBTI people and their supporters, they are ultimately not relevant to the actual, asserted basis of liability in this case, or the Court's explication of the claims in its MTD Decision.

Defendant's analysis is also misleading as a matter of fact. Throughout his entire brief, Defendant offers a cynically incomplete and misrepresented account of the record – focusing exclusively on his assertedly innocent "religiously motivated beliefs" regarding the mere "sin" of homosexuality (itself contradicted by voluminous evidence that he regards this "sin" as *sui generis*, akin to Nazi atrocities), while studiously ignoring voluminous record evidence regarding his project to criminalize LGBTI status and advocacy, and otherwise deprive LGBTI individuals of fundamental rights.

1. Defendant's Opinions and Statements Are Evidence of Intent and Existence of an Unlawful Agreement, Not Grounds for Liability.

Plaintiff does not dispute that Defendant's religious beliefs and views and expressions about homosexuality are protected by the First Amendment. But, as this Court already recognized, those statements are not the basis of liability in this case. Rather, they serve as relevant circumstantial evidence of Defendant's discriminatory intentions in leading the conspiracy and Defendant's motive for participating in the conspiracy as extensively as he did. As this Court held, MTD Decision at 58-62, speech used for such purposes does not implicate the First Amendment. *See Wisconsin v. Mitchell*, 508 U.S. 476, 489-90 (1993) ("First Amendment does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.") (citing *Haupt v. United States*, 330 U.S. 631 (1947) (substance of conversations admissible to show defendant's motive to commit crime)); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251-252 (1989) (content of defendant's otherwise protected speech relevant and admissible to prove Title VII discrimination claim).

To be clear, in this case, a jury must evaluate Defendant's statements demonstrating how deeply he despises the LGBTI community – not because contempt for other human beings is itself unlawful, but because the statements underscore his motivation to: (i) teach, coach, and inspire his co-conspirators about the purported homosexual threat so that they engaged in the conspiracy in such a sustained way; and (ii) ensure that damage to the LGBTI community in Uganda would be significant and durable – and is far more than the mere expression of "pro family" values he claims to espouse.

Likewise, such evidence (*e.g.*, connecting LGBTI people to rape and pedophilia and likening the LGBTI rights movement to Nazis and other genocidal movements) contradicts Defendant's fanciful assertion that his only engagement with the AHA and AHB were driven by

a desire to ease the punishments contained in draft bills. *See* Def. Br. at 21-22. In fact, the more likely explanation (given his emails stating as much) is that he urged softening for strategic reasons, while his deep contempt for LGBTI people caused him to press for the other severe deprivations of fundamental rights contained in the law. PSOF ¶ 107 (advising that liberalizing the AHB would "make it more palatable to the international community"); PSOF ¶ 121 (recommending that removing the death penalty from the AHB "would take the wind out of the sails" of opposition to the bill); PSOF ¶ 174 (explaining that shifting strategy would "accomplish the objective of stopping foreign interference in Uganda, and the destructive propaganda efforts of groups like SMUG"). The statements also serve to undermine Defendant's litigation driven assertion that he stands against criminalizing advocacy in support of LGBTI rights. At the very least, there is a genuine issue on this point. *See* P. Response to D-MFR ¶¶ 8-9.

The jury would also need to understand Defendant's strategy of repression, which he articulates in speeches, meetings, and writings, and which he aggressively pursued in European countries. They need this understanding not because privately held strategic aspirations would be themselves unlawful, but because this evidence helps explain: (i) the co-conspirators' understanding of and intent behind the ultimate goals of the conspiracy; and (ii) the contours of the persecutory plan pursued by the conspiracy. Apparently, Defendant lacks confidence in this Court's understanding and assurance that jury instructions will ensure that protected speech does not become the source of Defendant's ultimate liability. *See* MTD Decision at 63-64 (citing cases).

In addition, Defendant's communications with his co-conspirators, in meetings and by email, do not receive First Amendment protection because they are central evidence going to the existence of a plan and agreement. It is axiomatic that unlawful agreements can be established

through speech. MTD Decision at 60 ("It is well established that speech that constitutes criminal aiding and abetting is not protected by the First Amendment") (citing cases). In light of this elementary proposition of law, supported by a range of cases cited by this Court, Defendant's belabored attempt to parse *Giboney v. Empire Storage & Ice Co*, 336 U.S. 490 (1949), on its facts is pointless. Plaintiff does not argue that *Giboney* itself is the basis of liability, such that factual distinctions might undermine the basis of Plaintiff's claim. *Giboney* – one of a number of cases cited by the Court – simply reiterates the basic point that crimes can be committed through the use of words. *See Nat'l Org for Women v. Operation Rescue*, 37 F.3d 646, 656 (D.C. Cir. 1994); *Brown v. Hartlage*, 456 U.S. 45, 55 (1982) ("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 . . . . [And], a solicitation, even though it may have an impact in the political arena, remains in essence an invitation to engage in an illegal exchange for private profit, and may properly be prohibited."); *Osborne v. Ohio*, 495 U.S. 103, 110 (1990); *New York v. Ferber*, 458 U.S. 747, 761-62 (1982); *see also United States v. Barnett*, 667 F.2d 835, 842-43 (9th Cir. 1982) ("The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose. Crimes including that of aiding and abetting, frequently involved the use of speech as part of the criminal transaction."); *United States v. Bell*, 414 F.3d 474, 482 n. 8 (3d Cir. 2005) (same).

This basic principle does not lose any force where the conspiracy or aiding and abetting involves the deprivation of fundamental rights. Indeed, despite Defendant's suggestion that the principles invoked here are somehow exotic or exclusively international, they find a strong domestic analog in 42 U.S.C. § 1985(3), also known as the Ku Klux Klan Act of 1871. The

Reconstruction Congress passed the law to prohibit – in both civil and criminal fora – conspiracies motivated by class-based animus to deprive persons ("either directly or indirectly") of access to civil rights ("equal protection of the laws, or of equal privileges and immunities under the laws") – *i.e.*, to protect minority groups from conspiracies to limit their access to rights of association, assembly, voting, or speech. *See Griffin v. Breckinridge*, 403 U.S. 88, 102-103 (1971); *Uphoff Figueroa v. Alejandro*, 597 F.3d 423, 432 (1st Cir. 2010) (elements of a claim are (1) unlawful agreement, (2) conspiratorial purpose, (3) overt act in furtherance of conspiracy, and (4) injury, including deprivation of a constitutionally protected right); *see also Hardyman v. Collins*, 183 F.2d 308 (9th Cir. 1950) (finding that private conspiracy to disrupt political club's meetings was actionable under § 1985(3)), rev'd on other grounds, *Collins v. Hardyman*, 341 U.S. 651 (1951) (imposing requirement that the alleged conspiracy involve a state actor).

Thus, a litigant would prove a domestic law conspiracy under § 1985(3) to deprive a protected class of fundamental rights in the same way Plaintiff will prove conspiracy to commit persecution against the Ugandan LGBTI community – and in neither case would such proof violate the First Amendment. Under either form of conspiracy, an "unlawful agreement" can be proven by "explicit agreement" or a "tacit understanding to carry out the prohibited conduct," which can be inferred through circumstantial evidence. *See Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 792 (2d Cir. 2007); *compare Hampton v. Hanrahan*, 600 F.2d 600, 621-622 (7th Cir. 1979) (unlawful agreement under § 1985(3) inferred from presence of multiple police officers during shooting of Black racial justice activist), rev'd in part on other grounds, 446 U.S. 754 (1980) *with Indianapolis Minority Contrs. Association v. Wiley*, 187 F.3d 743, 754-55 (7th Cir. 1999) (no evidence showing how, when, or with whom defendant conspired).

The intent element is the same in both instances as well, and can include circumstantial evidence of speech or political opinion. This is why the defendant in *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), was found liable under 42 U.S.C. § 1985(3) for a conspiracy to deprive women of their fundamental constitutional right to access abortion services, even though defendant's conduct included what would otherwise be protected speech and assembly, because that conduct proved defendant's discriminatory intent. Likewise, in *Wells v. Rhodes*, 928 F.Supp.2d 920, 931 (S.D. Ohio 2013), the court found the requisite discriminatory intent to support liability under § 1985(3), where defendants' conspiracy to burn a cross on plaintiffs' lawn deprived plaintiffs of their right to property. *See also Startzell v. City of Philadelphia*, No. 05-5287, 2006 U.S. Dist. LEXIS 34128, *11-12 (E.D. Pa. May 26, 2006) (plaintiffs plausibly proved discriminatory intent of conspiracy to deprive plaintiffs of right to protest or assemble at gay pride event); *Azar v. Conley*, 456 F.2d 1382, 1388-89 (6th Cir. 1972) (while § 1985(3) does not give rise to direct cause of action for slander, "slanderous remarks might constitute an integral part of the [clause (3)] conspiracy.").

2. Evidence in the Record Supports Liability for an Unlawful Conspiracy.

The Court explained already that while abstract advocacy is constitutionally protected, Defendant will have no protection if a reasonable juror could believe that he and his co-conspirators crossed the line into "management of actual crimes" such as "repression of free expression through intimidation" and "criminalization of peaceful activity and even the status of being gay or lesbian." MTD Decision at 62. The evidence in the record in this case (but studiously ignored or misrepresented by Defendant) demonstrates just such management of a crime: (1) Defendant's avowed goal was to ensure that LGBTI activists would not be able to engage in their fundamental right to engage in advocacy in support of equal treatment for LGBTI persons, PSOF ¶ 9, 18, 73, 149, 174; (2) Defendant worked closely with "influential leaders" to

develop a law to target LGBTI status and criminalize LGBTI advocacy, and in support of those efforts: (a) a key part of Defendant's 2009 visit was to assist political leaders in Uganda to "be[] able to implement it," PSOF ¶ 78; (b) co-conspirator Ssempa solicited assistance in developing "a strong detterent [sic] law against homosexuality in Uganda" and with trying to "hinder and silence advocacy of this issue," PSOF ¶ 93; (c) the 2009 AHB included a provision that penalized the offense of "promotion of homosexuality" for which Defendant recommended a five-year prison sentence, PSOF ¶ 96; (d) Defendant continued to advise co-conspirators on strategies to ensure the passage and viability of the AHB and in that context he sometimes urged moderation on the death penalty provision "to make it more palatable to the international community," PSOF ¶ 107, but otherwise supported all the other repressive aspects of the bill, and strategically communicated that, even without the death penalty, "homosexuality would still be criminalized, but the primary enforcement effort would target the recruiters and activists," PSOF ¶ 122; and (3) Defendant advised and strategized with his co-conspirators to implement the provision of the AHB criminalizing LGBTI rights advocacy before it became law, PSOF ¶ 121-22.

For these reasons, Defendant's argument that he is being punished for "guilt by association" makes no sense. And, even worse, Defendant does not grasp the irony that the *real status-based classification* at issue is the one that terrorizes LGBTI Ugandans simply for associating with other LGBTI Ugandans or engaging in LGBTI-related advocacy. Unlike those vulnerable individuals, Defendant's liability is based not on his expression, status, or legitimate associations, but on his membership in the conspiracy and the taking of overt acts.[50]

[50] Defendant's heavy reliance on *United States v. Spock*, 416 F.2d 165 (1st Cir. 1965), is inapposite and simply articulates the line between political advocacy and overt conspiratorial acts this Court has already considered and drawn. *Spock* is essentially an incitement case – not unlike the early WWI incitement cases eventually repudiated by the Supreme Court – in which Spock only generally advocated for others to consider breaking the law

B. Because the Asserted First Amendment Underpinnings of the *Noerr-Pennington* Doctrine Do Not Extend to Petitioning Foreign Governments, or to Undertake Unlawful Acts, Defendant Is Not Entitled to Immunity.

Defendant attempts to resuscitate his argument about *Noerr-Pennington* immunity, which was already rejected by the court, MTD Decision at 63, with citations to innumerable cases; yet the volume of citations cannot obscure the fatal logical flaw in Defendant's reasoning. First, Defendant cites numerous cases that have extended the doctrine outside the Sherman Act (antitrust) context, though the overwhelming majority of those cases involve analogous business torts and none arise in the First Circuit. *See* Def. Br. at 113-114 n. 23. Then, Defendant explains that the rationale for this extension has been recognition that the doctrine is grounded in the First Amendment right to petition. *See id*. at 114-15. But, if *Noerr-Pennington* is grounded in an individual's First Amendment right to petition her own government and because, as this Court already correctly observed, there is no First Amendment right to petition a foreign government, MTD Decision at 62-63, it inexorably follows that *Noerr-Pennington* does not immunize Defendant's conspiracy with Ugandan officials (as it lies outside the Sherman Act).

Put another way, all of the cases cited by Defendant explaining that *Noerr-Pennington* is grounded in the First Amendment involve situations in which individuals were petitioning *domestic* governments – where the right to petition pertains. At the same time, all of the cases Defendant cites in support of his blithely asserted claim that the doctrine applies abroad, involve the Sherman Act, not non-antitrust activity. *See* Def. Br. 116. There is no intersection – and

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by resisting the draft and where, therefore, he lacked the specific intent necessary to demonstrate a conspiracy to break the law. *Id*. at 176-77. *Compare United States v. Debs*, 249 U.S. 211 (1919) (upholding currently discredited and unviable prosecution for "obstructing the draft" where Eugene Debs merely praised draft resisters). Because Plaintiff presents substantial evidence (i) regarding the existence of a conspiracy that includes Defendant; (ii) demonstrating that all of the conspirators' goals included depriving LGBTI individuals of their fundamental rights to speech, association, nondiscrimination, and bodily integrity; and (iii) the conspirators took overt acts in furtherance of the conspiracy, *see supra* Section II(B)(1), *Spock* adds nothing to this discussion.

could be none – that would protect Defendant's right to petition on non-antitrust grounds abroad. Defendant either misapprehends this obvious logical gap or has dishonestly presented the law.[51]

Second, as this Court has already held, even if the right to petition extended extraterritorially, which it surely does not, it cannot immunize petitioning a foreign government to pursue unlawful ends. MTD Decision at 63 (citing cases). As already explained, the record evidence does not support Defendant's fanciful, self-serving notion that his conspiracy with government officials was limited only to "liberaliz[ing] the already criminal punishments for homosexual conduct and focus[ing] on counseling and education rather than incarceration." Def. Br. at 117. In fact, he set in motion the plan to criminalize LGBTI status and advocacy, coached the government officials over several years throughout the way, and claimed success for achieving the end product – an environment where the LGBTI community was deprived of their fundamental rights. Indeed, he warned his co-conspirators not to remain complacent around their victory in passing the AHB, because that would only usher in the "next phase of their war to conquer you," PSOF ¶ 196, a war that would require continuing repression of LGBTI activism.

[51] In support of this possibility, Defendant again deliberately omits a critical portion of his block quote of *Coastal States Mktg, Inc. v. Hunt*, 694 F.2d 1358, 1366-67 (5th Cir. 1983). What obviously limits the proposition that *Noerr-Pennington* applies abroad is this premise: "The Sherman Act, as interpreted by *Noerr,* simply does not penalize as an antitrust violation the petitioning of a government agency." *Id*.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court deny Defendant's motion for summary judgment and allow this case to proceed to trial.

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Respectfully submitted,

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