UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
SPRINGFIELD DIVISION

SEXUAL MINORITIES UGANDA,	:	**CIVIL ACTION**
	:	
Plaintiff,	:	**3:12-CV-30051-KPN**
	:	
v.	:	**JUDGE MICHAEL A. PONSOR**
	:	
SCOTT LIVELY,	:	
	:	**ORAL ARGUMENT REQUESTED**
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT SCOTT LIVELY'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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INTRODUCTION

"*[T]he [Alien Tort Statute] is not a blanket delegation of lawmaking to the democratically unaccountable international community of custom creators*." [1]

In this action brought under the Alien Tort Statute, Sexual Minorities Uganda ("SMUG"), an alien organization, launches a direct assault on the supremacy and portability of the United States Constitution, seeking to render the bedrock protections of the First Amendment subservient to the inchoate and amorphous dictates of "international law." SMUG asks this United States Court to punish one of its citizens, Mr. Lively, for "crimes against humanity" under an international treaty that **the United States has expressly rejected**. Moreover, what SMUG cavalierly and conclusorily labels as "crimes against humanity" – the most heinous of crimes – is actually nothing more than civil, non-violent political discourse in the public square on a subject of great public concern, which occupies the highest rung of First Amendment protections.

SMUG does not and cannot allege that Mr. Lively has ever incited anyone to imminent violence. The six specific acts of "persecution" that SMUG alleges in its forty-seven (47) page Complaint were, according to SMUG's own allegations, committed by **other** individuals not before this Court. SMUG alleges no plausible connection between Mr. Lively and the actual perpetrators of those alleged violent acts, and, indeed, **Mr. Lively's name is not mentioned a single time** within the many pages of the Complaint that describe those six events. While SMUG tries to turn those six events allegedly perpetrated by other people into a "widespread and systematic attack against a civilian population," SMUG does not tell this Court that, according to its own chairman, it has already "received justice" in Ugandan courts, where SMUG and its constituents have been awarded damages against police, damages against tabloid publications

[1] *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1016 (7th Cir. 2011) (emphasis added).

and permanent injunctions against incitements to violence. SMUG also does not tell the Court that David Kato – the murdered Ugandan activist whom SMUG makes the centerpiece of this lawsuit – was killed not by an enraged homophobe incited by Mr. Lively's protected speech, but by a homosexual prostitute upset over a failed business transaction. Neither does SMUG tell the Court that the confessed perpetrator of this horrible crime was tried and convicted in Ugandan courts, and is now serving a **thirty-year** prison sentence. And, finally, SMUG does not tell the Court that, far from inciting violence, Mr. Lively has consistently condemned acts of violence and calls to violence in the strongest possible terms, and has praised the Ugandan courts for imparting justice.

Rather than clogging up a United States Court with a frivolous lawsuit designed only to shut down peaceful public discourse, SMUG should continue to seek and receive justice in its home country, against the individuals who actually perpetrate crimes. SMUG has no cause of action against Mr. Lively. This lawsuit should be dismissed.

BACKGROUND FACTS

A. SMUG AND ITS CLAIMS.

SMUG claims that it is an alien "umbrella organization" "which represents the interests of its constituent organizations" in "advocating on behalf of" and "support[ing]" "sexual minority groups in Uganda," including lesbians, homosexuals, bisexuals, transgender and intersex persons. (Complaint, dkt. 1, p. 1, ¶ 1; p. 6, ¶ 16).[2] SMUG attempts to state a claim for the "tort" of "crime against humanity of persecution" against Mr. Lively, **a private United**

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[2] SMUG's Complaint contains many paragraph numbering errors, such as double numbers (*e.g.*, ¶ 24 and ¶ 24 on page 9), skipped numbers (*e.g.*, no ¶¶ 119-120 on page 38), and restarting and repetition of number sequences resulting in numerous paragraphs with the same numbers (*e.g.*, after ¶ 141 on page 35, the numbering starts again with ¶ 104 on page 36; after ¶ 131 on page 40, the numbering starts again with ¶ 119). To facilitate the Court's review, Mr. Lively will cite to the page number first, followed by the paragraph number).

States citizen, and invokes the Court's subject-matter jurisdiction through the Alien Tort Statute, 28 U.S.C. § 1350. (Dkt. 1, p. 1, ¶ 2; pp. 5-6, ¶ 13; p. 7, ¶ 18).[3]

The "persecution" claimed by SMUG is both to itself, as an organization, and to its "individual staff members" and "individual members of SMUG's constituent organizations." (Dkt. 1, p. 6, ¶ 17). SMUG therefore purports to bring this international tort action not only on its own behalf, but also in a representative capacity, supposedly on behalf of its individual employees and members of constituent organizations. (*Id.*) SMUG seeks primarily money damages, including "compensatory damages," "punitive and exemplary damages," and "reasonable attorneys' fees and costs." (*Id.* at p. 47, Prayer for Relief (a), (b) and (c)). In a fourth Prayer for Relief, SMUG also purports to seek "a declaratory judgment holding that [Mr. Lively's] conduct was in violation of the law of nations." (*Id.* at Prayer for Relief (d)).

B. THE PERSECUTION ALLEGED BY SMUG.

SMUG claims that it and its individual employees and members were persecuted "on the basis of their gender and/or sexual orientation and gender identity." (Dkt. 1, p.1, ¶ 1). SMUG alleges six instances of alleged persecution, **all of which took place entirely outside the sovereign borders of the United States, specifically in Uganda**. (Dkt. 1, pp. 36-43, ¶¶ 104-132). The six alleged incidents of persecution are:

(1) a February 2012 "raid" of a "conference on LGBTI issues" **in Kampala, Uganda**, allegedly **perpetrated by the Ugandan "Minister of Ethics**, Simon Lokodo, **accompanied by the police**," during which "conference materials [were] seized," and as a result of which the

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[3] **The only "tort" which SMUG seeks to assert against Mr. Lively in this action is "persecution."** (Dkt. 1, pp. 1-2, 6, ¶¶ 1, 3, 17). Although SMUG purports to assert three separate "Claims for Relief," they are just different facets of the same underlying tort of persecution, specifically: "Individual Responsibility" ("First Claim"), "Joint Criminal Enterprise," ("Second Claim") and "Conspiracy" ("Third Claim"). (Dkt. 1, pp. 44-46, ¶¶ 140-154).

conference organizer "had to flee the hotel to avoid the unlawful arrest and feared for her safety." (Dkt. 1, pp. 36-37, ¶¶ 104-112) (emphasis added);

(2) a June 2008 "arrest" of three "LGBTI rights activists," **in Kampala, Uganda**, allegedly **perpetrated by Ugandan police**, which allegedly detained the activists "for two days," and during which one activist was "forcibly" unclothed and "touched" **by a Ugandan "officer."** (Dkt. 1, p. 10, ¶ 27; pp. 37-38, ¶¶ 113-118) (emphasis added);

(3) an August-September 2007 "crack-down on media [and] advocacy" **in Uganda**, during which **three Ugandan citizens** – "Deputy Attorney General Fred Ruhindi," "Minister of Ethics and Integrity [James] BUTURO, and pastor "Martin SSEMPA" – advocated for tougher Ugandan laws against homosexual advocacy, as a result of which a radio station manager was suspended **by the Ugandan government, a Ugandan publication** "published names and photos of LGBTI activists," and "a number of activists … were forced to leave the country or go into hiding." (Dkt. 1, pp. 38-40, ¶¶ 121-129);

(4) a July 2005 "raid" of "the home of Victor Mukasa, a transgender activist and founding member of [SMUG]," allegedly **perpetrated by "local Ugandan authorities" in Uganda**, during which Mukasa's house guest, Yvonne Oyo, was arrested **by the "authorities"** and taken to the police station, where she was allegedly forced "to strip naked," "touched and fondled" and then "released the same day." (Dkt. 1, p. 40-41, ¶¶ 130-131, 119-120). SMUG advises elsewhere in its Complaint that Mukasa and Oyo **successfully sued the police in Ugandan courts**, and **were "awarded damages"** by the "High Court of Uganda," which reaffirmed their rights under the Ugandan Constitution. (*Id.*, p. 10, ¶ 28);

(5) "frequent and sensationalistic outings of LGBTI persons" **in Uganda** by a "**Uganda tabloid**, the *Red Pepper*," and another "**Ugandan tabloid** … the *Rolling Stone*," which

allegedly ran several articles in 2007 and 2009 seeking to "out" and "shame" homosexuals, and issuing "explicit call[s] to violence." (Dkt. 1, pp. 41-43, ¶¶ 121-130). SMUG alleges that three individuals "outed" by these publications "received death threats," and that one of them, David Kato, subsequently "was killed in his home." (*Id.* at pp. 42-43, ¶¶ 128-130). What SMUG leaves out of its Complaint, however, is that: **(a) a homosexual prostitute has confessed to killing David Kato, not because Kato was "outed" as a homosexual, but because "Mr Kato agreed to pay him for sex, but refused to hand over any money after the act"; (b) the perpetrator was sentenced by Ugandan courts to thirty years in prison; and (c) the perpetrator is now in prison for his crime**.[4] (*See e.g.*, *Killer of David Kato receives 30 year prison sentence*, Pink News,[5] November 10, 2011) (emphasis added) (available at http://www.pinknews.co.uk/2011/11/10/killer-of-david-kato-receives-30-year-prison-sentence/, last visited June 18, 2012).[6] Moreover, for all of Mr. Lively's writings and Internet postings that SMUG selectively quotes in its Complaint narrative, it somehow overlooked this part:

> Ugandan homosexual activist David Cato (sic) was recently beaten to death with a hammer in his home. **It was a terrible crime deserving of our strongest condemnation**. I extend my sincere condolences to his family and friends.

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[4] Because, conveniently for SMUG, these facts are outside the four corners of its Complaint, they are relevant here only to put SMUG's allegations into perspective.

[5] Pink News calls itself "Europe's largest gay news service," and describes itself as follows: "Pink News covers religion, politics, entertainment, finance, and community news for the gay, lesbian, bisexual and transgendered community in the UK and worldwide. Founded to produce broadsheet quality journalism for the LGBT community, we cover politics to theology in an intelligent manner." (*Id.*)

[6] *See also*, *Male prostitute killed Uganda gay activist: police*, Agence France-Presse (AFP), February 3, 2011 (reporting that "**A Ugandan gay rights activist was killed after reneging on an agreement to pay for sex**," and that "According to the suspect ... he negotiated with the deceased to be paid money as he was being used as a sexual partner, but that the promise was never fulfilled") (emphasis added) (available http://www.google.com/hostednews/afp/article/ALeqM5ihVH6Ahnbnhdo3CqrEDT3mCBknKg?docId=CNG.9057dbf4f3db02f92ea39216b26eb623.8a1, last visited June 18, 2012).

Dr. Lively Comments on Uganda Murder, Defend the Family International, January 28, 2011 (available at http://www.defendthefamily.com/pfrc/newsarchives.php?id=5842336, last visited June 20, 2012) (emphasis added);

(6) "discrimination **by private actors** in housing, employment, health and education," allegedly occurring **in Uganda** as a result of "legal proscriptions" "criminalization of homosexuality," and "discriminatory policies and practices." (Dkt. 1, p. 43, ¶ 131) (emphasis added).

C. THE ALLEGED "CONSPIRACY" BY MR. LIVELY.

SMUG does **not** allege that any of the six alleged acts of persecution were in fact perpetrated by Mr. Lively. (Dkt. 1, pp. 36-43, ¶¶ 104-132). SMUG does **not** allege that Mr. Lively himself participated in any way in any of the six incidents, or that he was even **in** Uganda at the time they occurred. (*Id.*) SMUG also does **not** allege that Mr. Lively expressly solicited or encouraged any of the actors to do what they did. (*Id.*) SMUG does **not** allege, for example, that Mr. Lively asked the Ugandan police to conduct the alleged 2012 "raid," nor the alleged 2008 "arrests," nor the alleged 2005 home invasion. (*Id.*) SMUG does **not** allege that Mr. Lively solicited or encouraged the "Ugandan tabloids" to "out" anybody. (*Id.*) And SMUG does **not** allege that Mr. Lively knew or ever communicated with the homosexual prostitute who admittedly killed David Kato, much less that Mr. Lively solicited or encouraged the murder. (*Id.*) Indeed, **Mr. Lively's name does not appear a single time in the eight pages of the Complaint that detail the alleged acts of persecution**. (*Id.*)

Nevertheless, SMUG seeks to hold Mr. Lively, and Mr. Lively alone, liable for these six alleged "crimes against humanity," not because of anything Mr. Lively has **done**, but because of what Mr. Lively has **said** about homosexuality and the homosexual rights movement, either in

various books and writings, or **during visits to Uganda** in 2002 and 2009. SMUG claims early in the Complaint that it is not seeking to punish Mr. Lively's "anti-gay speech or writings," and "seeks only to challenge LIVELY's **conduct** through his involvement in a conspiracy to [persecute] people … on the basis of their identity." (Dkt. 1, pp. 4-5, ¶ 9) (capitalization in original; bold emphasis added). However, in the section of the Complaint where it purports to set out Mr. Lively's alleged involvement in the so-called "Conspiracy/Joint Criminal Enterprise to Commit Persecution" (*id*. at pp. 12-22, ¶¶ 33-71), **SMUG alleges only speech by Mr. Lively**, including that: "he **espoused** and **promoted** his theories [and] strategies" (*id*. at p. 12, ¶ 35); "he **spoke** at length" (*id*. at p. 13, ¶ 36); he "**addressed students**" and "**led a [church] service**" (*id*., at p. 13, ¶ 39); "he offered a number of practical **suggestions**" to members of the Kampala City Council (*id*. at p. 13, ¶ 40); he "**spok[e]** to others about [his] book and [made] copies broadly available in Uganda," (*id*. at p. 14, ¶ 42); and he "**published**" a handbook in which he "**describes** the gay movement." (*Id*. at pp. 14-15, ¶ 44-45) (emphasis added throughout).

The crux of the so-called "conspiracy," according to SMUG, is that Mr. Lively **espoused** and **promoted** two principal views about homosexuals or homosexuality to various government members and private citizens in Uganda, through his books and writings and orally at various meetings and conferences he held in Uganda in 2002 and 2009. (Dkt. 1, pp. 12-22, ¶¶ 33-71). Those two opinions are: (1) that advocacy undertaken by homosexual rights advocates should be made illegal through the passage of laws; and (2) that "gay sexual identity" leads to "child sexual violence." (*Id*. at pp. 16-22, ¶¶ 49-71).[7] SMUG does not like or agree with either of these two alleged opinions, and thinks they are "utterly baseless and without merit." (*Id*. at pp. 17-18, ¶¶ 52, 55).

[7] Mr. Lively recognizes that, for purposes of this Motion to Dismiss, the Court must accept SMUG's **factual** allegations as true. Therefore, Mr. Lively will not, for present purposes only, endeavor to show just how untruthful and deceptive are SMUG's mischaracterizations of his opinions.

SMUG alleges that four “co-conspirators” (two private citizens, one government official and one member of the Ugandan Parliament), were inspired by Mr. Lively’s opinions, and made “overt acts” in conformity with those opinions, including the introduction of a bill in the Ugandan Parliament that would criminalize advocacy on homosexual issues and impose the death penalty for certain aggravated offenses involving homosexuality. (Dkt. 1, p. 4, ¶ 7; p. 17, ¶ 52; pp. 22-36, ¶¶ 72-141; p. 46, ¶ 153). **That bill has languished in the Ugandan Parliament for over three years, and was never enacted into law**. (*Id*. at p. 17, p. 52).

SMUG also alleges that “[b]y repeatedly characterizing the LGBTI community as rapists and murderers and child abusers – not to mention possessing the genocidal tendencies of the Nazis and Rwandan conspirators – LIVELY deliberately invited, induced and encouraged a proportional response from Ugandans – *i.e.*, severe repression, arrest and certainly even violence.” (*Id*., at p. 22, ¶ 70). Essentially, according to SMUG, Mr. Lively is responsible for the six “crimes against humanity” because his **opinions** and **rhetoric** “served to create a climate of hostility and prejudice against LGBTI persons in Uganda” in which those acts of persecution could take place. (*Id*. at p. 43, ¶ 131).

Importantly, in its forty-seven (47) page Complaint, SMUG does not identify a single specific quote or statement **from Mr. Lively** which it claims constituted a call to violence, let alone **imminent** violence, against anyone. SMUG does identify various statements **from other third parties** whom SMUG has not sued, and claims that these statements are calls for violence, including “we must exterminate homosexuals,” (dkt. 1, p. 3, ¶ 6); and “HANG THEM.” (*Id*. at p. 42, ¶ 126) (capitalization in original). But SMUG does not attribute these alleged calls for violence to Mr. Lively in any way, other than to say that they were made by supposedly like-

minded individuals operating within a "climate" of hate that Mr. Lively himself helped to fashion with his two opinions. (*Id*. at p. 43, ¶ 131).

Moreover, SMUG again fails to tell the Court that it **successfully sued the tabloid that published these statements in Ugandan courts, and obtained both money damages and a permanent injunction, which apparently forced the tabloid to shut down**. (*See e.g.*, *Uganda court orders anti-gay paper to shut: rights group*, Reuters, November 1, 2010) (available at http://www.reuters.com/article/2010/11/01/us-uganda-homosexuality-idUSTRE6A04XT20101101, last visited June 20, 2012).[8] "The decision was described as a 'landmark ruling' by gay rights activists," and "**the ruling went beyond these applicants and extended to all media**." (*See*, *Uganda bars media from outing gays*, BBC News, January 3, 2011) (emphasis added) (available at http://www.bbc.co.uk/news/world-africa-12107596, last visited June 20, 2012). Frank Mugisha, SMUG's chairman, declared that SMUG had received justice in Uganda's courts:

> Frank Mugisha, chairman of the Sexual Minorities Uganda (SMU), said his group had petitioned the high court to order Rolling Stone to stop work because it was exposing innocent people to discrimination, ridicule, intimidation and possible violence. 'I feel enormous relief and happiness because **we have received justice** at long last. Rolling Stone won't be on the streets anymore,' Mugisha said.

(*Uganda court orders anti-gay paper to shut: rights group*, Reuters, November 1, 2010) (emphasis added).

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[8] *See also*, *Ugandan paper ordered to stop printing list of gay people*, The Guardian, November 1, 2010 (available at http://www.guardian.co.uk/world/2010/nov/01/uganda-paper-gay-list, last visited June 20, 2012) (quoting Frank Mugisha, chairman of SMUG, as stating that "**[j]ustice has been served**") (emphasis added); *Ugandans win damages over anti-gay newspaper article*, The Guardian, January 3, 2011 (available at http://www.guardian.co.uk/world/2011/jan/03/uganda-court-damages-gay, last visited June 20, 2012) (reporting that the Ugandan "High court says Rolling Stone article violated **constitutional rights** to privacy and safety," and quoting a spokesperson as stating that "**The ruling firmly establishes the principle that constitutionally protected rights belong to all Ugandans, whatever their perceived sexuality**") (emphasis added).

And, of course, SMUG does not tell the Court that Mr. Lively himself condemned the calls to violence in the strongest possible terms, and praised the Ugandan court for punishing them:

> The Ugandan newspaper which 'outed' the Ugandan homosexual activists under a banner saying 'Hang Them,' clearly WAS an incitement to violence and **I join the rest of the civilized world in condemning it. The Ugandan court was right in declaring it illegal.**

Dr. Lively Comments on Uganda Murder, Defend the Family International, January 28, 2011 (available at http://www.defendthefamily.com/pfrc/newsarchives.php?id=5842336, last visited June 20, 2012) (bold emphasis added; capitalization in original).

Although it has "received justice" in Ugandan courts, SMUG now files this suit against Mr. Lively in a United States court. Even if it had standing to bring this action, which it does not, and even if the Court had subject-matter jurisdiction over the alleged acts of persecution in Uganda, which it does not, on these facts SMUG has utterly failed to state any cause of action or cognizable claim for relief against Mr. Lively. SMUG's Complaint should therefore be dismissed, with prejudice.

SUMMARY OF ARGUMENT

After briefly discussing the pleading standard established by the Supreme Court (section I), this memorandum demonstrates that there are at least **nine** independent grounds that require the dismissal of this lawsuit.

Section II demonstrates that, as a United States citizen, Mr. Lively did not check his First Amendment rights at the airport on his way to Uganda. The United States Constitution reigns supreme over any "international law," and protects Mr. Lively anywhere in the world. The speech or "conduct" alleged by SMUG is nothing more than non-violent political speech and public discourse on matters of great public importance, and therefore cannot be punished.

Section III demonstrates that this Court lacks subject-matter jurisdiction because SMUG has failed to establish that the specific tort it alleges, namely "persecution" on the basis of sexual "orientation" or transgender "identity," is universally accepted and clearly defined under international law. The Rome Statute under which SMUG purports to sue is a treaty that has been expressly rejected by the United States. Even if the treaty were a customary binding international norm, which it is not, SMUG cannot establish that "persecution" based on sexual "orientation" or transgender "identity" is universally proscribed in a clearly defined way by the law of nations. A large number of nations view homosexuality as conduct and criminalize or "discriminate" against it. None of the major international human rights instruments prohibit discrimination or "persecution" based upon the grounds alleged by SMUG.

Section IV demonstrates that SMUG's claim for "persecution" fails to state a cause of action against Mr. Lively. Mr. Lively's non-violent political speech cannot constitute "persecution." Moreover, SMUG is an organization, not a human being with human rights, so it cannot be "persecuted." And Mr. Lively is a private citizen, not a state actor, so he cannot be a "persecutor." Finally, SMUG does not allege that Mr. Lively himself committed any specific acts of persecution, and, in any event, SMUG has failed to alleged an essential element of the tort.

Section V demonstrates that SMUG has failed to state a claim for aiding and abetting persecution. SMUG has failed to allege any conduct that constitutes aiding and abetting, and its conclusory, naked assertions fail to show the required criminal intent.

Section VI demonstrates that the Court does not have subject-matter jurisdiction over SMUG's conspiracy claim, because conspiracy liability is not universally recognized and clearly defined under international law. In addition, SMUG has failed to state a cause of action for conspiracy, because its allegations do not show the required criminal intent.

Section VII demonstrates that SMUG's claim for joint criminal enterprise should be dismissed for the same reasons as its conspiracy claim.

Section VIII demonstrates that SMUG lacks associational standing to bring this case in a representative capacity on behalf of its members. SMUG's representative-capacity claims for money damages sounding in tort are barred as a matter of law because they require individualized participation or proof. SMUG's representative-capacity claim for declaratory relief is likewise barred, because it too requires individualized participation or proof, and, in any event, the claim is not redressable. SMUG also lacks associational standing because it has not alleged sufficient causation to satisfy the traceability prong of Article III standing. Finally, SMUG lacks associational standing because it has not alleged authority to bring this action.

Section IX demonstrates that SMUG lacks standing to bring this action on its own behalf. SMUG has failed to allege a concrete injury to itself, and, even if it were sufficiently injured, SMUG has failed to allege sufficient causation to satisfy the traceability requirement.

Finally, Section X demonstrates that this Court lacks subject-matter jurisdiction over this action because the Alien Tort Statute does not reach Mr. Lively's alleged conduct outside the sovereign territory of the United States. SMUG has a heavy burden of rebutting a strong presumption against extraterritorial application of an act of Congress. SMUG cannot overcome that presumption here because nothing in the text, context, structure or legislative history of the Alien Tort Statue provides clear evidence of an affirmative intent by Congress to encroach upon the sovereign jurisdiction of other nations. This very issue is currently being considered by the United States Supreme Court, and, in the meantime, this Court is not bound by the decisions of other courts that have merely assumed or exercised extraterritorial jurisdiction *sub silentio*.

For each of these reasons, SMUG's Complaint should be dismissed with prejudice.

LAW AND ARGUMENT

I. THE STANDARD FOR DISMISSAL.

To survive a motion to dismiss, SMUG is required to provide in its Complaint a short and plain statement of the claims that show it is entitled to relief. Fed. R. Civ. P. 8(a)(2). This statement must be more than mere "labels and conclusions." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Although, at this stage of the proceedings, the Court must construe the complaint in the light most favorable to SMUG, and accept all factual allegations as true, the Court is not required to accept as true mere legal conclusions. *Id*. at 555.

Accordingly, Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). SMUG must allege "enough facts to state a claim to relief that is plausible on its face," *Twombly*, 550 U.S. at 555, but "a claim has facial plausibility [only] when the plaintiff pleads factual content that allows the court to draw the reasonable inference that **the defendant** is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (emphasis added).

In *Iqbal*, the Supreme Court examined a complaint against then-Attorney General John Ashcroft alleging that plaintiff was subjected to torture and that Mr. Ashcroft was the "principal architect of this invidious policy." *Iqbal*, 556 U.S. at 680. While plaintiff was fairly specific in his accusations and assertions, the Court nonetheless held that they were "bare assertions" and "nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim." *Id.* at 681 (*quoting Twombly*, 550 U.S. at 555). The Court, while recognizing that all factual elements must be read in the light most favorable to plaintiff, held that "**[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice**." *Id*. at 678 (emphasis added). The Court further noted:

> Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but **it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions**. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But **where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief**.'

Id. at 678-79 (emphasis added) (*quoting* Fed. R. Civ. P. 8(a)(2)) (internal citations omitted). Thus, if a complaint contains only conclusions, it must be dismissed as failing to state a claim upon which relief can be granted. *Id*. Furthermore, even if the facts are well-pleaded, if they only show a "mere possibility of misconduct," the claim should be dismissed under Civil Rule 12(b)(6). *Id.*

SMUG's Complaint fails to meet this pleading standard and should be dismissed.

II. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR RELIEF BECAUSE MR. LIVELY'S SPEECH AND "CONDUCT" ARE PROTECTED BY THE FIRST AMENDMENT.

SMUG's lawsuit is a brazen and direct assault on Mr. Lively's First Amendment rights.[9] As a United States citizen, Mr. Lively has a fundamental right to engage in non-violent political speech, not only in the United States but throughout the entire world. The First Amendment trumps "international law," and not the other way around, as SMUG would prefer. Mr. Lively's civil political discourse is thus immune from SMUG's lawsuit, even if (and especially because) it offends SMUG. This lawsuit should therefore be dismissed.

[9] This discussion assumes, for the sake of argument only, that SMUG has standing to bring this lawsuit and this Court has subject-matter jurisdiction over its claims. Neither premise is true. As demonstrated in sections VII and IX *infra*, SMUG lacks standing to bring this lawsuit, either in a representative capacity, or on its own behalf. Moreover, even if SMUG had standing, sections III, VI, VII and X, *infra*, demonstrate that the Court lacks subject matter jurisdiction over SMUG's claims. Accordingly, SMUG's Complaint should be dismissed, with prejudice.

A. AS A UNITED STATES CITIZEN, MR. LIVELY HAS A FUNDAMENTAL RIGHT UNDER THE FIRST AMENDMENT TO ENGAGE IN NON-VIOLENT POLITICAL SPEECH ANYWHERE IN THE WORLD.

Well over one century ago, the Supreme Court held that "[t]he guaranties [the Constitution] affords … apply only to citizens and others within the United States, **or who are brought there for trial for alleged offenses committed elsewhere**." *Ross v. McIntyre*, 140 U.S. 453, 464 (1891) (emphasis added) (citing *Cook v. U. S.*, 138 U. S. 157, 181 (1891)). Subsequently, in *Reid v. Covert*, 354 U.S. 1 (1957), the Supreme Court reaffirmed this principle and extended it to cover even citizens tried by an extension of United States courts in a foreign jurisdiction:

> [W]e reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. **When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land**. This is not a novel concept. To the contrary, **it is as old as government**. It was recognized long before Paul successfully invoked his right as a Roman citizen to be tried in strict accordance with Roman law.

Id. at 5-6 (emphasis added).

This bedrock principle is fully recognized by the Restatement (Third) of Foreign Relations Law § 721 (1987), which states that, "[t]he Constitution governs the exercise of authority by the United States government over United States citizens outside United States territory, for example on the high seas, and even on foreign soil." *Id.* at cmt. b (emphasis added). More specifically, the Restatement recognizes that:

> The **freedoms of speech**, press, religion, and assembly, and the right not to be subject to an establishment of religion, **are protected against infringement in the exercise of foreign relations power** as in domestic affairs.

Id. at cmt. d (emphasis added).

Accordingly, it is beyond cavil that Mr. Lively did not check his First Amendment rights at the airport before departing for Uganda, so that they could be lost in transit and wind up somewhere with the lost luggage. Since this Court[10] could not punish Mr. Lively for the non-violent speech or "conduct" alleged by SMUG if it had occurred in the United States, the Court cannot punish that same speech or "conduct" because it took place in Uganda.[11]

B. THE FIRST AMENDMENT TRUMPS "INTERNATIONAL LAW" AND IS NOT SUBSERVIENT TO IT.

An equally firm and non-negotiable first principle is that Mr. Lively's First Amendment rights trump anything contrary in the amorphous and shifting world of "international law." "**No agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution**." *Reid*, 354 U.S. at 16 (emphasis added) (emphasis added).

> It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights--let alone **alien to our entire constitutional history and tradition--to … permit[] the United States to exercise power under an international agreement without observing constitutional prohibitions**.

Id. at 17 (emphasis added) ("This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty"). The Restatement also recognizes this principle:

> A rule of **international law** or a provision of an international agreement of the United States **will not be given effect as law in the United States if it is inconsistent with the United States Constitution**.

Restatement (Third) of Foreign Relations Law § 115(3) (1987) (emphasis added).

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[10] This lawsuit does not raise the issue of whether a Ugandan court could exercise any jurisdiction or control over Mr. Lively's speech or "conduct."

[11] On the contrary, the extraterritorial nature of Mr. Lively's speech or "conduct" presents a separate and insurmountable obstacle to SMUG's Complaint because it deprives this Court of subject-matter jurisdiction. (*See* section X, *infra*).

Thus, whatever the First Congress intended when it enacted the Alien Tort Statute in 1789, it could not have meant to render the First Amendment subservient to the dictates of "international law," because any "**law repugnant to the constitution is void**." *Marbury v. Madison*, 5 U.S. 137, 180 (1803) (emphasis added). "**[T]he [Alien Tort Statute] is not a blanket delegation of lawmaking to the democratically unaccountable international community of custom creators**." *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1016 (7th Cir. 2011) (emphasis added).

The supremacy of the Constitution, coupled with its portability, mean that SMUG cannot hold Mr. Lively liable in this Court for any speech or "conduct" in Uganda which allegedly violated "international law," if that speech or "conduct" is constitutionally protected in the United States. Because Mr. Lively's non-violent political speech or "conduct" is fully protected in the United States, SMUG's lawsuit must be dismissed as a matter of law.

C. MR. LIVELY'S NON-VIOLENT POLITICAL SPEECH OR "CONDUCT" IS PROTECTED BY THE FIRST AMENDMENT.

SMUG's forty-seven (47) page Complaint against Mr. Lively can be fairly distilled down into two charges. SMUG is claiming that Mr. Lively committed "crimes against humanity" in violation of "international law," because he: (1) shared his purported **opinion** that all who engage in homosexual conduct are "evil" "genocidal," "rapists and murders" and have a "predilection for child sexual violence"; and (2) advocated, lobbied and otherwise tried to influence two members of the Ugandan government (and other private citizens) that they should propose and pursue laws that "criminalize advocacy undertaken by [homosexual] rights advocates." (Dkt. 1, pp. 16-22, ¶¶ 49-71). Even if these allegations were true (and they could not be further from truth), such speech or "conduct" is fully protected by the First Amendment.

1. Mr. Lively's Opinions and Non-Violent Political Speech Regarding Homosexuals and Homosexuality are Fully Protected.

"The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Snyder v. Phelps*, 131 S. Ct. 1207, 1215, __ U.S. __ (2011) (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964). "That is because 'speech concerning public affairs is more than self-expression; it is the essence of self-government.'" *Id.* at 1215 (quoting *Garrison v. Louisiana,* 379 U.S. 64, 74–75 (1964)). "Accordingly, '**speech on public issues occupies the highest rung of the hierarchy of First Amendment values**, and is entitled to special protection.'" *Id.* (emphasis added) (quoting *Connick v. Myers,* 461 U.S. 138, 145 (1983).

Clearly, SMUG is deeply offended by Mr. Lively's speech and opinions. This, however, does not give it a cause of action against a United States citizen in a United States court. Even assuming that SMUG's allegations are true, "citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Boos v. Barry*, 485 U.S. 312, 322 (1988) (quoting *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 56 (1988)) (internal quotes omitted).

In *Snyder*, the Supreme Court afforded immunity from private suit to a religious group that opposed homosexuality in the military, and that held highly offensive signs and chanted equally offensive slurs outside a military funeral, including: "Fag Troops," "Semper Fi Fags," "God Hates Fags," "Fags Doom Nations," "Not Blessed Just Cursed," "You're Going to Hell," and "God Hates You." 131 S. Ct. at 1216-17. The Supreme Court agreed that this message was "particularly hurtful" and caused "incalculable grief." *Id.* at 1217-18. Nevertheless, the Court concluded that the speech was protected by the First Amendment and not actionable by the aggrieved parties in a United States court, because it was public discourse on a matter of public

concern. *Id*. at 1219. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id*. (quoting *Texas v. Johnson,* 491 U.S. 397, 414 (1989)). "Indeed, **the point of all speech protection** is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Id*. (emphasis added) (quoting *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 574 (1995)).

Even if SMUG's allegations about Mr. Lively's speech were true, SMUG's tort claim against Mr. Lively would fail for the same reason the claim failed in *Snyder*. SMUG's chief complaint against Mr. Lively – that he "repeatedly characterized the [homosexual population] as rapists and murderers and child abusers[,] not to mention possessing the genocidal tendencies of the Nazis and Rwandan conspirators" (dkt. 1, p. 23, ¶ 70) – is qualitatively no different than the protected statements in *Snyder*, that homosexuals "doom nations," or that homosexuals are "cursed," or that homosexuals are "going to hell."

SMUG complains that Mr. Lively's words are powerful, and that they influenced other people to do bad things. The Supreme Court agrees that, "**[s]peech is powerful**. **It can stir people to action** … and—as it did here—inflict great pain. [But] we cannot react to that pain **by punishing the speaker**." *Snyder*, 131 S. Ct. at 1220 (emphasis added). Rather than ask this Court to "punish the speaker," SMUG should sue the actual criminal(s) who commit(s) or incite(s) imminent violence against its members in Ugandan courts, **just as it has successfully done on repeated occasions to date**. "As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Snyder*, 131 S. Ct. at 1220. "**That choice requires that we shield [Mr. Lively] from tort liability**." *Id*. (emphasis added).

2. SMUG has not Alleged any Actionable Conduct.

SMUG apparently senses that its Complaint is on a collision course with the Constitution, and thus at least pays lip service to First Amendment principles by claiming that it "seeks only to challenge [Mr. Lively's] **conduct** through his involvement in a conspiracy to severely deprive people of their fundamental rights," and "not … his anti-gay speech or writings." (Dkt. 1, p. 4, ¶ 9) (emphasis added). However, when SMUG attempts to describe Mr. Lively's so-called conspiratorial "conduct," all it can allege is, well, **speech**. (*Id.*, at pp. 12-22, ¶¶ 33-71). "Just as putting a 'Horse' sign around a cow's neck does not make a bovine equine," *Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 224 (3d Cir. 2003), so labeling speech as "conduct" or "conspiracy" does not render that speech actionable. *Iqbal* "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." 556 U.S. at 678. SMUG's allegations of "conspiratorial conduct" are "bare assertions" and "nothing more than a 'formulaic recitation of the elements' of a [tort] claim." *Id.* at 681 (*quoting Twombly*, 550 U.S. at 555).

Here, the "conspiracy" alleged by SMUG is that (1) Mr. Lively saturated the public discourse on homosexuality in Uganda with his **opinions** about homosexuality and homosexuals in a manner that offended SMUG, and (2) Mr. Lively then worked with two other private Ugandan citizens to lobby and influence two members of the Ugandan government **to introduce legislation** which allegedly "would render [SMUG's] work and mere existence illegal." (Dkt. 1, pp. 16-22, ¶¶ 49-71). Aside from the fact that the legislation in question was never enacted, Mr. Lively has a protected right to petition government to enact legislation, regardless of whether SMUG likes his proposals or even his motives.

"**[L]iability cannot be imposed for damage caused by inducing legislative, administrative, or judicial action**." *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839

F.2d 155, 160 (3d Cir. 1988) (emphasis added). "In numerous cases, the courts have rejected claims seeking damages for injuries allegedly caused by the defendants' actions directed to influencing government action." *Id.* (collecting cases). This is because "all persons, **regardless of motive**, are **guaranteed by the First Amendment the right to seek to influence the government or its officials to adopt a new policy, and they cannot be required to compensate another for loss occasioned by a change in policy should they be successful**." *Sierra Club v. Butz*, 349 F. Supp. 934, 938 (N.D. Cal. 1972) (emphasis added) (applying *Eastern R.R. Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961)). Accordingly, Mr. Lively cannot be liable for any "conspiracy" with members of the government to introduce or enact legislation, not only because the legislation complained of was never enacted, but because he was exercising a protected First Amendment right.

Aside from disseminating his opinions and attempting to influence legislation, SMUG does not charge Mr. Lively with any speech or "conduct" that incited **imminent** violence against anyone. Sure, SMUG recites in a conclusory and "threadbare" fashion that Mr. Lively "invited, induced and encouraged a proportional response from Ugandans – *i.e.*, severe repression, arrest and certainly even violence." (Dkt. 1, p. 22, ¶ 70). SMUG's allegation contains the seeds of its own destruction, because, in the same paragraph, SMUG reveals just **how** Mr. Lively supposedly made these incitements. (*Id.*) It was **not** by explicitly calling for any violence, let alone **imminent** violence, against homosexuals, but merely by allegedly "repeatedly characterizing the [homosexual population] as rapists and murders and child abusers – not to mention possessing [] genocidal tendencies." (*Id.*) A protected opinion does not lose its protection merely because it is "repeated."

SMUG does not seem to appreciate that there is a world of difference between these two entirely hypothetical statements:

"Homosexuals are rapists and murderers and child abusers with genocidal tendencies."	"Homosexuals are rapists and murderers and child abusers with genocidal tendencies, **and you need to meet me at SMUG's headquarters today at 5.00 p.m. so that we can hurt them**."

While SMUG has alleged plenty of the type of statements such as the one on the left, it has alleged **none** such as the one on the right, certainly not by Mr. Lively. As such, SMUG has not alleged the type of incitement to **imminent** violence by Mr. Lively that would suffice to pierce his First Amendment privilege. "[M]ere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment." *N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969)) (italics in original). Neither do "**threats of vilification or social ostracism**," which are likewise "**constitutionally protected and beyond the reach of a damages award**." *Claiborne*, 458 U.S. at 926 (emphasis added). Only "advocacy [which] is directed to inciting or producing **imminent** lawless action **and** is **likely** to incite or produce such action" is unprotected. *Id.* at 928 (citing *Brandenburg*, 395 U.S. at 447). But "the mere abstract teaching ... of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Id.* (citing *Noto v. United States*, 367 U.S. 290, 297–298 (1961)). Speech that "amount[s] to nothing more than advocacy of illegal action **at some indefinite future time**," cannot be punished. *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (state could not punish speaker who exclaimed to police that "we'll take the f----- street **later**," because lawless action being advocated for "later" was not imminent) (emphasis added).

In *Claiborne*, the Supreme Court held that "strong language" and "emotionally charged rhetoric" that arguably advocated racial violence was nonetheless protected, even though violence ultimately resulted, because "the acts of violence … occurred **weeks or months** after the … speech," and thus it was not imminent. 458 U.S. at 928 (emphasis added). Here, even if SMUG's allegations about Mr. Lively's speech were true, they could not even establish that Mr. Lively advocated any violence, much less "**imminent**" violence. And, if SMUG could establish that Mr. Lively's speech advocated violence in the abstract, which it cannot, that would clearly be insufficient to state a cause of action under *Brandenburg*, *Claiborne* and *Hess*.

To be sure, SMUG does allege that **other** individuals and organizations, whom it has not brought before this Court, have made statements that incite violence, such as the "HANG THEM" tabloid headline. But SMUG does not allege that **Mr. Lively** made such statements, or that he asked those third parties to make them. In fact, the very website articles that SMUG cites in its Complaint demonstrate that Mr. Lively strongly **condemned** such statements. SMUG's litigation attention should therefore be focused on those third parties, not Mr. Lively. Indeed, SMUG has succeeded in obtaining both money damages and injunctions against such publications in Ugandan courts. SMUG has no cause action in this Court.

In sum, the First Amendment traveled with Mr. Lively to Uganda, and trumps any contrary provision in "international law" upon which SMUG seeks to premise liability. Because Mr. Lively's non-violent political speech is firmly and fundamentally protected, SMUG cannot state a cause of action and its Complaint should be dismissed.

III. THIS COURT LACKS SUBJECT-MATTER JURISDICTION BECAUSE SMUG HAS NOT ALLEGED CONDUCT IN VIOLATION OF UNIVERSALLY ACCEPTED AND CLEARLY DEFINED INTERNATIONAL LEGAL NORMS.

"There is no federal subject-matter jurisdiction under the Alien Tort [Statute] unless the complaint adequately pleads a violation of the law of nations (or treaty of the United States)." *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995). But not every violation of **any** international law or norm comes under the subject-matter jurisdiction afforded by the Alien Tort Statute. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004). Only those international norms that are "specific, universal and obligatory" come under the purview of the Alien Tort Statute. *Id*. ("[a]ctionable violations of international law must be of a norm that is specific, **universal**, and obligatory") (emphasis added) (quoting *In re Estate of Marcos Human Rights Litigation,* 25 F.3d 1467, 1475 (9th Cir. 1994)). Lower courts are not free to continually recognize new international torts cognizable under the Alien Tort Statute on a whim; instead, courts must engage in "vigilant doorkeeping" to maintain only a "narrow class" of actionable torts. *Sosa*, 542 U.S. at 729.

Accordingly, "***Sosa*** **requires that this Court recognize only forms of liability that have been universally accepted by the community of developed nations**." *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 263 (S.D.N.Y. 2009) (emphasis added). Moreover, "[i]t is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of **express international accords**, that a wrong generally recognized becomes an international law violation within the meaning of the statute." *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980) (emphasis added). Thus, even if every nation of the world were to adopt a **domestic** prohibition against certain conduct, it would still only constitute an **international** norm where it affects "the relationship between states or between an individual and a foreign state." *Id.*; *see also*, *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 249

(2d Cir. 2003) ("Even if certain conduct is universally proscribed by States in their domestic law, that fact is not necessarily significant or relevant for purposes of customary international law").

A. SMUG CANNOT ESTABLISH THAT THE TORT OF PERSECUTION IS UNIVERSALLY ACCEPTED AND CLEARLY DEFINED, BECAUSE THE ROME STATUTE IS A TREATY, NOT A NORM, AND WAS EXPRESSLY REJECTED BY THE UNITED STATES.

The **only** source of international law SMUG points to for its contention that the tort of persecution is "universally proscribed and clearly defined" is the Rome Statute of the International Criminal Court. (Dkt. 1, p. 2, ¶ 3). However, "[t]he Rome Statute, which created the International Criminal Court ("ICC"), **is properly viewed in the nature of a treaty and not as customary international law**." *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 35 (D.C. Cir. 2011) (emphasis added). The D.C. Circuit in *Exxon Mobil* found that, by its own terms, **the Rome Statute did not represent international law norms, and as such could not support a claim under the Alien Tort Statute**. *Id*. The D.C. Circuit further held that, even if the Rome Statute were sufficient as a source of international law norms, the reservation surrounding its ratification, indeed the fact that **the United States still refuses to ratify the treaty**, prevents its contents from attaining the status of universally recognized, binding international law, as required for Alien Tort Statute jurisdiction. *Id.* at 35-36.[12]

Indeed, the United States has not just **delayed** ratification of the Rome Statute, but **actually rejected it and withdrew its signature from the treaty**. *Id*. at 36, n. 22. This outright rejection of the Rome Statute is conclusive evidence that the United States, a major world power, does not recognize it as a universally binding international norm. *Id*. Neither should this Court.

[12] That other courts simply assumed that the Rome Statute constituted or embodied customary international law without squarely analyzing the question, and without even acknowledging its express rejection by the United States, is of little significance. *See, e.g., Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009) (quoting Rome Statute regarding the standard for liability for aiding and abetting).

Moreover, by withdrawing its signature and expressly rejecting this treaty, the intention of the United States government was to render its citizens beyond its reach. SMUG is now attempting an end-run around that protection, by seeking to subject a United States citizen to the requirements of the very treaty that his government rejected, and in a United States court to boot. This Court should not countenance SMUG's subversion.

The D.C. Circuit's rejection of the Rome Statute as a basis for establishing subject-matter jurisdiction under the Alien Tort Statute is consistent with the Second Circuit's holding in *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co*., 517 F.3d 104 (2d Cir. 2008). In *Vietnam Ass'n*, the Second Circuit held that the Geneva Protocol was not binding international law, even though it specifically sanctioned the conduct in question, because of the "nature and scope of the reservations to ratification." *Id.* at 118. In that case, the United States had ultimately ratified the treaty but, because of the initial reservations, the court nevertheless found that "it would be an impermissible stretch to find that the 1925 Geneva Protocol had acquired the status of binding customary international law during the Vietnam conflict." *Id.*

If mere reservations prior to eventual ratification are sufficient to remove an international "norm" from the purview of the Alien Tort Statute (at least for issues arising at the time of the reservations), then the failure to ratify a treaty should doubly suffice, and the express rejection of a treaty (through the purposeful withdrawal of the United States' signature) should triply suffice. SMUG cannot invoke the Court's subject-matter jurisdiction by reference to the Rome Statute, and thus its Complaint should be dismissed.

B. SMUG CANNOT ESTABLISH THAT PERSECUTION BASED ON SEXUAL ORIENTATION AND TRANSGENDER IDENTITY IS UNIVERSALLY ACCEPTED AND CLEARLY DEFINED.

Even if the Rome Statute were universally accepted and clearly defined to come within the subject-matter jurisdiction conferred by the Alien Tort Statute, which it is not, that would not

be the end of the inquiry, and SMUG's case would still have to be dismissed for lack of jurisdiction. This is because, as this District has recognized,

> A precept of "international law" cannot be recognized as such unless and until that recognition is universal. And **the requirement of universality goes not only to recognition of the norm in the abstract sense, but to agreement upon its content as well**.

Xuncax v. Gramajo, 886 F. Supp. 162, 187 (D. Mass. 1995) (Woodlock, J.) (emphasis added). Thus, SMUG must show universal recognition not only of the Rome Statute in general, but also of the specific provision on which it relies, that is Article 7(1)(h)'s proscription of persecution, **and the specific interpretation and application which SMUG advances**. *Id*.

Consistent with the Supreme Court's eventual admonition in *Sosa*, this District in *Xuncax* required plaintiffs in an Alien Tort Statute case to demonstrate that:

> 1) **no state condone[s] the act** in question **and** there is a **recognizable 'universal' consensus of prohibition** against it; 2) there are **sufficient criteria** to determine whether a given action amounts to the prohibited act and thus violates the norm; [and] 3) the prohibition against it is non-derogable and therefore **binding at all times upon all actors**.

886 F. Supp. at 184 (emphasis added).

Even if this Court were to accept the Rome Statute as a universally binding international norm notwithstanding the United States' express rejection of it, then SMUG would still flunk the jurisdictional test because it could not get past the first element in *Xuncax*. As shown below, there is no "recognizable universal consensus of prohibition against" persecution, meaning denial of "fundamental rights," based upon the grounds alleged by SMUG (*i.e.*, "sexual orientation" or "[trans]gender identity").

"Universal consensus" in this case is not only a jurisdictional concern mandated by *Sosa* and followed in *Xuncax*. The plain text of the Rome Statute itself provides that the crime of "persecution" includes only those actions against a group or collectivity based on "political,

racial, national, ethnic, cultural, religious, gender as defined in paragraph 3**, or other grounds that are universally recognized as impermissible under international law**." Rome Statute of the International Criminal Court, Art. 7(1)(h) (emphasis added) (available at http://untreaty.un.org/cod/icc/statute/romefra.htm, last visited June 20, 2012). Therefore, to the extent that the alleged persecution is not on any of the specific grounds enumerated in the text, it is only actionable if premised on a ground "universally recognized as impermissible under international law." *Id.*

The chief ground upon which SMUG claims persecution is "sexual orientation." (Dkt. 1, p. 1, ¶ 1; p. 44, ¶¶ 136, 141; p. 45, ¶¶ 142, 145; p. 46, ¶¶ 148, 151, 152). However, "sexual orientation" is plainly not one of the grounds enumerated in the Rome Statute. SMUG cannot establish that "persecution" based upon "sexual orientation" is "universally recognized as impermissible under international law," because a large number of nations treat homosexuality as conduct, not an "identity," and ban, restrict or otherwise "discriminate" against homosexual conduct. The following findings by scholars and human rights organizations conclusively demonstrate that "persecution" of homosexual conduct (or "sexual orientation") is **not** universally proscribed in the international community, and therefore cannot serve as a basis for an action premised on "persecution":

- "[D]iscrimination on the basis of sexual orientation still persists throughout most of the developing world. Gay, lesbian, bisexual, or transgender (GLBT) relations are **criminalized in over eighty-two nations**, and **the penalty for being gay often includes public humiliation, hard labor, confinement, torture, harassment, blackmail, spurious trials with no right to appeal or death**."[13]

[13] Pratima Narayan, *Somewhere over the Rainbow. . . International Human Rights Protections for Sexual Minorities in the New Millennium*, 24 B.U. Int'l L.J. 313, 314 (2006) (emphasis added).

- "[A]t least **fifty-five countries across the world still criminalize homosexuality**, and **only a handful of countries have adopted legislation designed to prevent sexual orientation discrimination**."[14]

- According to a 2009 study by The International Lesbian, Gay, Bisexual, Trans and Intersex Association, "**no less than 80 countries around the world consider homosexuality illegal**."[15]

- According to the 2012 World Report of Human Rights Watch, which calls itself "one of the world's leading independent organizations dedicated to defending and protecting human rights:"[16]

  - In the **European Union**, "homophobic and transphobic biases persist in public opinion, **policies, and laws**."[17]

  - "**U[nited] S[tates]** law offers **no protection against discrimination based on sexual orientation or gender identity**."[18]

- The 2011 World Report by the same organization reported that in the **European Union**, "Germany and other EU states blocked efforts to upgrade EU anti-discrimination laws to prohibit discrimination on grounds of … sexual orientation. **National obstacles to ending discrimination against lesbian, gay, bisexual, and transgender people also remained**, including in the Netherlands."[19]

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[14] Debra L. DeLaet, *Don't Ask, Don't Tell: Where Is the Protection Against Sexual Orientation Discrimination in International Human Rights Law?*, 7 Law & Sexuality 31, 33 (1997) (emphasis added).

[15] *Daniel* Ottosson, *State-sponsored homophobia: a world survey of laws criminalising same-sex sexual acts between consenting adults*, International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA), Brussels, May 2009, p. 5 (available at http://ilga.org/historic/Statehomophobia/ILGA_State_Sponsored_Homophobia_2009.pdf, last visited June 20, 2012).

[16] *World Report 2012*, Human Rights Watch, at Preface (available at http://www.hrw.org/sites/default/files/reports/wr2012.pdf, last visited June 20, 2012).

[17] *Id*. at 444 (emphasis added).

[18] *Id*. at 662-63 (emphasis added).

[19] *World Report 2011*, Human Rights Watch, p. 424 (emphasis added) (available at http://www.hrw.org/sites/default/files/reports/wr2011.pdf, last visited June 20, 2012).

Moreover, SMUG complains bitterly that the bill contemplated by the Ugandan Parliament, **if it is ever passed**, will criminalize its advocacy, and thus "would render [its] work and mere existence illegal." (Dkt. 1, p. 17, ¶ 52). Setting aside the fact that SMUG's complaint is not ripe and should be addressed to the Ugandan Parliament, not Mr. Lively or this Court, the criminalization of advocacy on homosexual issues is by no means peculiar to Uganda, and is not universally condemned by the international community, or even the so-called "civilized" world:

- As of 1997, only a few years before SMUG alleges that Mr. Lively's "criminal" conduct began in Uganda, "**many states restrict gay, lesbian, and bisexual persons' freedom of speech and expression**. Notably, these restrictions are in place in 'democracies' as well as 'nondemocracies.' For example, **it is illegal in both Great Britain and Austria 'to publicly advocate, promote or encourage homosexuality.'** As these examples indicate, **sexual orientation discrimination is prevalent throughout most of the world**."[20]

- As of 2011, "**[O]fficial discrimination** against lesbian, gay, bisexual, and transgender people in China **limits them from realizing fundamental rights of expression and association**."[21]

- 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."[22] St. Petersburg has recently become the fourth city in Russia to pass a law criminalizing homosexual "propaganda."[23] "The law is part of **a wider government initiative**," "as **politicians** and Orthodox Church **push for laws to apply nationwide**."[24] "**Gay pride parades are regularly banned in Russia and violently broken up by police**."[25]

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[20] DeLaet, *supra* note 14, at 33.

[21] *World Report 2011*, *supra* note 19, at p. 307.

[22] *St. Petersburg bans 'homosexual propaganda'*, The Guardian, March 12, 2012 (emphasis added) (available at http://www.guardian.co.uk/world/2012/mar/12/st-petersburg-bans-homosexual-propaganda, last visited June 20, 2012); *see also*, Michael Schwirtz, "Anti-Gay Law Stirs Fears in Russia", (available at http://www.nytimes.com/2012/03/01/world/asia/anti-gay-law-stirs-fears-in-russia.html, last visited June 20, 2012).

[23] *Id*.

[24] *Id*. (emphasis added).

[25] *Id*. (emphasis added).

The 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. "However dearly our country holds First Amendment rights, [the Court] must conclude that **a violation of the First Amendment right of free speech does not rise to the level of such universally recognized rights and so does not constitute a 'law of nations.'**" *Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986) (dismissing Alien Tort Statute claim for lack of subject-matter jurisdiction) (emphasis added) (quoted with approval in, *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994)). *See also*, *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1298 (S.D. Fla. 2003) ("abridgement of rights … like the freedom of speech, has been found not to constitute a violation of the law of nations") (dismissing Alien Tort Statute claim for lack of subject-matter jurisdiction because plaintiffs could not establish that First Amendment-type rights are universally recognized around the world) (citing *Guinto*, 654 F. Supp. at 280), *aff'd in part, vacated in part on other grounds*, 416 F.3d 1242 (11th Cir. 2005).

Since "sexual orientation" does not enjoy universally-recognized "fundamental rights" in much of the world, it is not surprising that international treaties, human rights documents and legal norms do not at all, much less "universally," proscribe or condemn even the outright criminalization of homosexual conduct, much less mere public or private speech against it. This fact is also borne out in scholarly surveys of international law on this subject:

- "**[N]one of these documents ["international human rights instruments"] explicitly outlaws discrimination on the basis of sexual orientation**. Sexual minorities continue to fear the overwhelming threats of **state-sanctioned persecution**, and stronger international protections for gays and lesbians are necessary to achieve **even the most fundamental human rights**."[26]

[26] Narayan, *supra* note 13, at 315 (emphasis added).

- "[T]he Universal Declaration of Human Rights … the International Covenant on Economic, Social and Cultural Rights… the International Covenant on Civil and Political Rights … most of the human rights documents adopted in the post-World War II era, including the 1951 Convention on the Prevention and Punishment of the Crime of Genocide, the 1951 Convention Relating to the Status of Refugees, and various regional human rights instruments, … **notably missing from the language in these human rights documents are clauses that specifically identify sexual orientation as an inappropriate basis for discrimination.**"[27]

In addition to "sexual orientation," SMUG also claims persecution on the grounds of "gender" and "gender identity." (Dkt. 1, p. 1, ¶ 1; p. 44, ¶¶ 136, 141; p. 45, ¶¶ 142, 145; p. 46, ¶¶ 148, 151, 152). By these terms, SMUG cannot possibly mean that its members were persecuted because they were naturally male or female. There is not even one allegation in SMUG's forty-seven page (47) Complaint that could suggest that Mr. Lively (or any of his so-called "co-conspirators," or any of the alleged perpetrators of the six acts of persecution) harbors animus towards men because they were born men, or towards women because they were born women. The only animus alleged is towards "lesbian, gay, bisexual, transgender and intersex people." (Dkt. 1, p. 1, ¶ 1). Thus, to the extent SMUG intended to use "gender" or "gender identity" in the traditional sense of those terms, to claim persecution based on natural male or female status, that would be precisely the type of "[t]hreadbare recital[] of the elements of a cause of action, supported by mere conclusory statements, [that] do[es] not suffice." *Iqbal*, 556 U.S. at 678.[28]

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[27] DeLaet, *supra* note 14, at 31-32 (emphasis added).

[28] SMUG also cannot claim traditional gender discrimination for two other reasons. First, SMUG is an organization, so it is neither male nor female, and does not have a "gender identity." Therefore, SMUG cannot state a claim for gender identity persecution on its own behalf. (*See* section IV(B), *infra*). Second, SMUG cannot state a claim for traditional "gender identity" persecution in a representative capacity, on behalf of its members, because such claim would fail the second prong of the *Hunt* test for associational standing. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) (association has standing to bring representative claims only when "the interests it seeks to protect are germane to the organization's purpose"). (*See* section VIII, *infra*). Here, SMUG has not alleged that its purpose is to advocate for, or support, men or women against traditional gender discrimination or "persecution." (Dkt. 1, p. 1, ¶ 1; p. 6, ¶ 16). It has alleged only that its purpose and mission is to "advocat[e] on behalf of lesbian, gay, bisexual, transgender, and intersex" people. *Id*. Therefore, SMUG cannot bring a claim for persecution based upon traditional "gender identity" in either an individual or representative capacity.

What SMUG obviously alleges is **not** persecution based on traditional gender identity, but rather persecution based on the "**trans**gender" or "intersex" "identity." However, those two grounds, like "sexual orientation," are not among the impermissible grounds enumerated in the Rome Statute. Art. 7(1)(h). The Statute expressly defines the term "gender" as "the two sexes, male and female," and provides that it "does not indicate any meaning different from [that]." *Id.* at Art. 7(3). Moreover, like "sexual orientation," SMUG cannot establish that discrimination based upon "transgender" or "intersex" "identity" is "universally recognized as impermissible under international law." As shown by the studies above, a great many nations do not recognize such "identities" and therefore do not afford them "fundamental rights." Even more specifically:

- According to a 2009 study by The International Lesbian, Gay, Bisexual, Trans and Intersex Association, **only sixteen countries in the entire world** prohibit "discrimination in employment based on gender identity."[29]
- According to a 2012 study by Human Rights Watch, "[a]t least **sixteen EU countries, including the Netherlands**," have laws "**requiring transgender people to undergo sex reassignment surgery and irreversible sterilization** to legally change their gender."[30]

In sum, "[t]here is no particular or universal understanding of the civil and political rights covered by [SMUG's] claim." *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 467 (S.D.N.Y. 2006), *aff'd in part, rev'd in part on other grounds,* 621 F.3d 111, 190 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011) (concluding that court lacked subject-matter jurisdiction over claims of denial of "life, liberty, security and association" under the Alien Tort Statute, because rights were not sufficiently specific and not universally recognized). SMUG cannot articulate any universally recognized international norms that Mr. Lively allegedly violated. As such, SMUG's Complaint should be dismissed, with prejudice.

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[29] Ottosson, *supra* note 15, p. 51.

[30] *World Report 2012*, *supra* note 16, at p. 444.

IV. PLAINTIFF'S CLAIM FOR PERSECUTION FAILS TO STATE A CAUSE OF ACTION.

Even if SMUG had standing, the Court had subject-matter jurisdiction, and the First Amendment was not immovably in SMUG's way, none of which is true, SMUG has still failed to state a cause of action for persecution, because: (A) Mr. Lively's protected political speech is not "persecution"; (B) SMUG is an organization, not an individual, and cannot be "persecuted"; (C) SMUG has failed to allege an essential element of persecution; (D) Mr. Lively is a private individual, not a state actor, and cannot be a "persecutor"; and (E) SMUG has not alleged that Mr. Lively himself committed any acts of persecution.

The only "tort" which SMUG seeks to assert against Mr. Lively under the Alien Tort Statute is "persecution." (Dkt. 1, pp. 1-2, 6, ¶¶ 1, 3, 17). Although SMUG purports to assert three separate "Claims for Relief," they are just different facets of the same underlying tort of persecution, specifically: "Individual Responsibility" ("First Claim"), "Joint Criminal Enterprise," ("Second Claim") and "Conspiracy" ("Third Claim"). (*Id*. at pp. 44-46, ¶¶ 140-154). Indeed, SMUG titles and qualifies **each** of these three "Claims" as claims for "Crimes Against Humanity of Persecution." (*Id*. at claim subtitles.) As demonstrated below, however, SMUG cannot state a claim for persecution, and accordingly all three of its "Claims" – and its entire case – must be dismissed.

A. MR. LIVELY'S PROTECTED POLITICAL SPEECH IS NOT "PERSECUTION."

"[T]he [Alien Tort Statute] 'applies only to **shockingly egregious** violations of universally recognized principles of international law.'" *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999) (emphasis added) (quoting *Zapata v. Quinn,* 707 F.2d 691, 692 (2d Cir. 1983)). SMUG purports to charge Mr. Lively with the "crime against humanity of persecution," but "a crime against humanity … is reserved for **the most egregious violations of**

international law, such as genocide and slavery." *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1300 (S.D. Fla. 2003) (emphasis added), *aff'd in part, vacated in part on other grounds, remanded sub nom. Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005). "Most [Alien Tort Statute] cases have determined liability for 'crimes against humanity' **only for the most heinous of crimes**, such as **murder and extermination, slavery, ethnic cleansing, and torture**, which are undertaken as part of a widespread or systematic attack against a civilian population." *Villeda Aldana*, 305 F. Supp. 2d at 1300 (emphasis added).

SMUG asks this United States Court to punish a United States citizen because he allegedly did two things, both of which are wholly protected by the First Amendment as core political speech: (1) allegedly shared his **opinion** that all who engage in homosexual conduct are "evil" and have a "predilection for child sexual violence"; and (2) advocated, lobbied and otherwise tried to influence two members of the Ugandan government (and other private citizens) that they should propose and pursue laws that "criminalize advocacy undertaken by [homosexual] rights advocates." (Dkt. 1, pp. 16-22, ¶¶ 49-71). Even if SMUG's allegations were true (and they could not be farther from truth), Mr. Lively's protected political speech cannot possibly constitute a "crime against humanity," "even by the wildest stretch of imagination." *Zapata v. Quinn*, 707 F.2d 691, 692 (2d Cir. 1983) (affirming dismissal of Alien Tort Statute claims, and awarding double costs as sanctions for bringing a frivolous lawsuit).

SMUG may vehemently disagree with Mr. Lively's opinions on homosexuality and homosexual conduct. SMUG may find those opinions offensive or hurtful. But SMUG has no right to invoke the jurisdiction of this Court against one of its citizens because SMUG was offended or insulted by Mr. Lively's speech and advocacy, and certainly not under the guise of a

"crime against humanity," reserved "only for the most heinous of crimes." *Villeda Aldana*, 305 F. Supp. 2d at 1300.

Mr. Lively in no way endorses or approves of any violence that may have been perpetrated against anyone. He has strongly condemned the killing of David Kato, even after it was revealed that Mr. Kato was killed by a homosexual prostitute over a prostitution deal gone bad. (*See* p. 5, *supra*). Mr. Lively has also strongly condemned those who have incited others to imminent violence, and has praised Ugandan courts for punishing such incitements. (*See* p. 10, *supra*). While he has certainly criticized, sometimes with strong words, those who push for the normalization of homosexual conduct, Mr. Lively has never incited others to imminent violence, and SMUG does not allege otherwise.

SMUG has not alleged any direct connection between Mr. Lively and the alleged perpetrators of the six acts of "persecution" in its Complaint, other than to claim that Mr. Lively's opinions created a "climate of hostility and prejudice" against homosexuals. (Dkt. 1, p. 43, ¶ 131). These allegations fall far short of the standard necessary to overcome the high wall of protection afforded for pure speech under the First Amendment. "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing **imminent lawless action** *and* is **likely** to incite or produce such action." *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969) (per curiam) (emphasis added). SMUG's allegations do not remotely meet this high standard here.

Moreover, whether the "climate" is hostile or not, the fact of the matter remains that whenever SMUG or its constituents have gone to court in Uganda to seek redress for unlawful arrests, acts of violence or even incitements to imminent violence, they have prevailed, their

rights under Ugandan law were affirmed, they won damages against the police, they have put offending tabloids out of business with damage awards, and they have obtained permanent injunctions against future incitements by other publications. (*See* pp. 4-5, 9, *supra*). SMUG's own chairman declared that "**we have received justice**." (*See* p. 9, *supra*). The homosexual prostitute who confessed to killing Mr. Kato is now rotting in jail. (*See* p. 5, *supra*). The "anti-homosexuality" bill of which SMUG complains has never been enacted into law. (*See* p. 8, *supra*).

This is hardly the "intentional and severe deprivation of fundamental rights" and the "widespread or systematic attack against a civilian population" that SMUG alleges in a conclusory, "threadbare" fashion just to recite the elements of persecution, the "most heinous of crimes." (Dkt. 1, p.44, ¶¶ 135-138). And it certainly is not "persecution" **by Mr. Lively**, whom SMUG alleges to have done nothing other than speak. Mr. Lively hopes that SMUG and its constituents are never subjected to violence, but if they are, they should continue to pursue the **real** perpetrators of such crimes **in Ugandan courts**, as they have repeatedly and successfully done thus far. SMUG should not clog up United States courts with meritless lawsuits against United States citizens who are doing nothing more than exercising their fundamental right to non-violent political discourse, just to make it more costly for them to exercise those fundamental rights.

SMUG's Complaint should be dismissed, with prejudice.

B. SMUG CANNOT STATE A CLAIM FOR PERSECUTION IN ITS OWN RIGHT, BECAUSE IT IS AN ORGANIZATION, NOT AN INDIVIDUAL.

In its "First Claim for Relief," SMUG attempts to assert a claim of persecution not only in a representative capacity, but also on its own behalf. (Dkt. 1, pp. 44-46, ¶¶ 140-154). However, to the extent it is even a "tort," persecution can only be claimed by natural persons, not

organizations. SMUG defines "[p]ersecution as a crime against **humanity**" (*Id.* at p. 2, ¶ 3) (emphasis added), and repeatedly and exclusively refers to it as such in the Complaint. SMUG, however, is obviously not a human being, so it cannot claim to be the victim of a "crime against **humanity**."

SMUG also defines persecution as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of [] identity" (*id.*), and claims that it was itself "deprived of these rights **on the basis of gender and/or sexual orientation and gender identity**." (*Id.* at p. 44, ¶ 138; *see also id.* at pp. 44-46, ¶¶ 141-142, 145, 148, 151, 152). However, because it is not a human being, SMUG cannot have a "gender," so it cannot have a "gender identity." Equally obvious, because SMUG is not a human being, it cannot have sexual relations, and thus it cannot have a "sexual orientation" or "sexual identity." Even SMUG apparently recognizes these irrefutable facts, because, notwithstanding its allegations that it has been persecuted, it ultimately admits in its Complaint that "[t]he prohibition on persecution protects **individuals** on the basis of their identity." (*Id.* at p. 2, ¶ 3) (emphasis added). Since SMUG also admits that it is an "umbrella **organization**," and not an individual (*id.* at p. 1, ¶ 1) (emphasis added), there is no dispute that SMUG has no standing to claim persecution on its own behalf.

Beyond unassailable logic, SMUG's inability to claim persecution as an organization is confirmed by the dictates of international law:

> The contemporary international law of human rights has developed largely since the Second World War. **It is concerned with natural persons only**, and **it applies to all human beings**, not to aliens alone. It reflects general acceptance that every **individual** should have rights in his or her society which the state should recognize, respect, and ensure.

Restatement (Third) of Foreign Relations Law VII, Introductory Note (1987) (emphasis added).

The Restatement specifically defines "Human Rights" as the "freedoms, immunities, and benefits which, according to widely accepted contemporary values, every **human being** should enjoy in the society in which he or she lives." Restatement (Third) of Foreign Relations Law § 701 cmt. a (1987) (emphasis added). And, while subsections (1) and (2) of § 703 of the Restatement provide that **States** may pursue certain remedies, the last subsection, (3), provides: "An **individual** victim of a violation of a human rights agreement may pursue any remedy provided by that agreement or by other applicable international agreements." Restatement § 703 (emphasis added). SMUG is neither a "state," nor an "individual." Nowhere are corporations, organizations or associations granted a similar right or remedy. (*Id.*)

The Second Circuit has recently reinforced the principle that only states and individuals have rights (and liabilities) in the international human rights arena. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 118 (2d Cir. 2010) *reh'g denied,* 642 F.3d 268 (2d Cir. 2011) and *cert. granted,* 132 S. Ct. 472 (U.S. 2011) ("The singular achievement of international law since the Second World War has come in the area of human rights, where the subjects of customary international law – *i.e.*, those with international **rights**, duties, and liabilities – now include not merely *states,* but also *individuals*") (bold emphasis added; italics in original). In *Kiobel*, the Second Circuit affirmed the dismissal of human rights abuse claims brought under the Alien Tort Statute against corporate defendants, concluding that organizations are neither states nor individuals, and thus cannot violate international law. *Id*. at 148-149. While that court was focused on whether organizations could be **defendants** under the Alien Tort Statute, the reasoning for its decision – that only states and individuals have "**rights**, duties and liabilities" in

the international human rights arena – means that organizations also cannot be **plaintiffs** (in their own right), because they do not have "**human** rights." *Id*. at 118 (emphasis added).[31]

Even more on point, in *Chowdhury v. WorldTel Bangladesh Holding, Ltd.*, 588 F. Supp. 2d 375 (E.D.N.Y. 2008), two alien corporations sought to bring various tort claims against a United States citizen and others under the Alien Tort Statute. *Id*. at 378-79. The corporations alleged that one of their officers had been tortured and subjected to cruel, inhuman or degrading treatment. *Id*. at 378. The corporations pleaded the same claims as the individual officer, and sought to recover in their own right for damages they claimed to have incurred in connection with the ill treatment of their officer. *Id*. The court allowed some of the **individual** plaintiff's claims to proceed, but **dismissed with prejudice all of the claims brought by the corporation**:

> there is no viable theory under the [Alien Tort Statute] upon which the corporate plaintiffs here can recover. **Corporations are not tortured; they are not subject to cruel, inhuman or degrading treatment**. … There is no domestic law norm that would recognize such a claim, let alone an international law norm.

Id. at 387 (emphasis added).

If an organization cannot be tortured or subjected to cruel, inhuman or degrading treatment, then it cannot be persecuted either. Accordingly, SMUG has failed to state a claim for persecution in its own right, and its Complaint should be dismissed.

C. SMUG HAS FAILED TO PLEAD AN ESSENTIAL ELEMENT OF PERSECUTION.

Even if SMUG could be "persecuted" as an organization, which it cannot be, SMUG still has not stated a claim for persecution, either representatively or in its own right, because it has failed to plead an essential element. SMUG purports to bring its claims of persecution under the

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[31] As detailed in Mr. Lively's Motion to Stay Proceedings, the *Kiobel* case is currently pending at the Supreme Court. (Dkts. 14, 17). The question of organizational rights and liabilities under international law is just one of several issues which will be examined by the High Court, and which has the potential to significantly impact or alter the course of this litigation. This Court denied Mr. Lively's Motion to Stay. (Endorsed Order, June 1, 2012).

Rome Statute of the International Criminal Court. (Dkt. 1, p. 2, ¶ 3).[32] The Rome Statute provides that:

> ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> (a) Murder;
>
> (b) Extermination;
>
> (c) Enslavement;
>
> (d) Deportation or forcible transfer of population;
>
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
>
> (f) Torture;
>
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
>
> (h) **Persecution** against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, **in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court**;
>
> (i) Enforced disappearance of persons;
>
> (j) The crime of apartheid;
>
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Rome Statute, Art. 7(1) (emphasis added) (available at http://untreaty.un.org/cod/icc/statute/romefra.htm, last visited June 20, 2012). “Persecution” is defined as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.” *Id.*, at Art. 7(2)(g).

[32] This discussion assumes, for the sake of argument only, that the Rome Statute is universally recognized and thus an actionable international norm under the Alien Tort Statute. This is, in fact, not the case, as demonstrated in section III(A), *supra*.

The International Criminal Court, responsible for enforcing the Rome Statute, has cautioned:

> Since article 7 pertains to international criminal law, its provisions, consistent with article 22, **must be strictly construed**, taking into account that crimes against humanity as defined in article 7 are among **the most serious crimes of concern to the international community** as a whole.

Rome Statute: Elements of Crimes, p. 5, Art. 7, Crimes Against Humanity, Introduction #1, (emphasis added) (published by the International Criminal Court and available at http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf, last visited June 20, 2012).

By the plain terms of the Rome Statute, one cannot commit "persecution" in the abstract. Art. 7(1)(h). To be liable for "persecution," the persecutor must also commit "**any act referred to in this paragraph or any crime within the jurisdiction of the Court**." *Id*. (emphasis added). This is also made clear in the *Elements of Crimes* manual of the International Criminal Court, which provides six separate elements for the crime of "Persecution," the fourth of which is that "[t]he conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court." *Rome Statute: Elements of Crimes*, p. 11, Art. 7(1)(h), Crime Against Humanity of Persecution: Elements (emphasis added).

Thus, if it could state a claim for "persecution" against Mr. Lively, SMUG would have to allege not only that sexual minorities constituted a protected class and that Mr. Lively severely and intentionally deprived that protected class of fundamental rights, but also that he committed one of the other enumerated acts in Article 7(1), or one of the other three general crimes within the jurisdiction of the International Criminal Court (*i.e.*, genocide, war crimes or aggression).

Id.[33] SMUG clearly fails to make such allegations, nor could it do so in good faith. SMUG does not allege, for example, that Mr. Lively committed genocide or war crimes. SMUG also doesn't allege that Mr. Lively tortured, murdered, enslaved, raped or imprisoned anyone.

SMUG does allege that a handful of "activists" were arrested and **quickly** released (and that some of them obtained vindication and damages from Ugandan courts). SMUG also alleges that one activist, David Kato, "was killed in his home," although it does not reveal that the confessed perpetrator was a homosexual prostitute, and that his confessed motive was a botched sex-for-money transaction. Be that as it may, in neither instance does SMUG allege that Mr. Lively himself committed these acts, nor that he encouraged or assisted the alleged perpetrators. SMUG's spurious "aiding and abetting" and "conspiracy" allegations can be fairly read, at most, to claim that Mr. Lively lobbied the Ugandan government to enact certain laws which SMUG considers discriminatory.[34] Nothing in SMUG's Complaint, however, can be interpreted to allege that Mr. Lively conspired with or aided **the perpetrators** of the alleged acts of persecution.

Accordingly, SMUG has failed to plead an essential element of "persecution," and, therefore, its Complaint should be dismissed.[35]

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[33] In addition to "crimes against humanity," the other three potential crimes within the jurisdiction of the International Criminal Court are genocide, war crimes and aggression. Rome Statute, Art. 5(1)(a), (c), (d). The crime of aggression has not yet been fully defined or adopted, and thus it is inapplicable. *Id.* at Art. 5(2). In any event, the definition proposed by the International Criminal Court would limit its application to military invasions. *See, e.g.*, *Explained: the crime of aggression at the International Criminal Court*, AEGIS Trust (available at http://www.aegistrust.org/International-Justice/explained-the-crime-of-aggression-at-the-international-criminal-court.html, last visited June 20, 2012).

[34] SMUG's "aiding and abetting," "conspiracy" and "joint criminal enterprise" claims themselves fail to state causes of action, as demonstrated in section V, section VI and section VII, respectively, *infra*.

[35] SMUG also fails to state a claim for persecution under the Rome Statute for another, independent reason: SMUG has failed to allege persecution based upon one of the enumerated impermissible grounds in Article 7(1)(h), and SMUG cannot establish that the grounds which it has alleged "are universally recognized as impermissible under international law," as required by that treaty. This fatal defect is examined fully in section III(B), *supra*.

D. SMUG CANNOT STATE A CLAIM FOR PERSECUTION BECAUSE MR. LIVELY IS NOT A STATE ACTOR.

In its "First Claim for Relief" ("Individual Responsibility" for "Persecution"), SMUG attempts to assert both a direct liability claim against Mr. Lively for allegedly committing persecution himself (dkt. 1, p. 44, ¶ 141), as well as a secondary liability claim for "aiding and abetting" others to persecute. (*Id*. at p. 45, ¶ 142). SMUG's direct liability claim is barred because Mr. Lively is a private citizen, not a state actor, and thus he cannot commit "persecution." (*Id*. at p. 7, ¶¶ 18-19).[36]

In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 & n. 20 (2004), the Supreme Court emphasized that "the determination [of] whether a norm is sufficiently definite to support a cause of action [under the Alien Tort Statute]" includes the "related consideration [of] whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a **private** actor." *Id*. (emphasis added). Pre- and post-*Sosa* courts have held that **crimes against humanity are not actionable against non-state actors**.

"The general rule is that international law only binds state actors." *Estate of Rodriquez v. Drummond Co., Inc.*, 256 F. Supp. 2d 1250, 1260-61 (N.D. Ala. 2003). However, the Restatement (Third) of Foreign Relations Law recognizes that, in certain limited circumstances, "[i]ndividuals may be held liable for offenses against international law, **such as piracy, war crimes, or genocide**." Restatement (Third) of Foreign Relations Law II, Introductory Note (1987) (emphasis added). As such, "there exists a 'handful of crimes to which the law of nations attributes individual responsibility.'" *Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995) (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J. concurring)). "[B]ut **no court has found more in that 'handful' than war crimes, crimes**

[36] The insufficiency of SMUG's other claim, for aiding and abetting persecution, is demonstrated in section V, *infra*.

committed in pursuit of genocide, slave trading, aircraft hijacking, and piracy." *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 120 (D.D.C. 2003) (emphasis added) (citing *Kadic,* 70 F.3d at 240).

Thus, "courts interpreting the [Alien Tort Statute] have found that certain forms of conduct – **piracy, the slave trade, slavery and forced labor, aircraft hijacking, genocide, and war crimes** – violate the law of nations 'whether undertaken by those acting under the auspices of a state or only as private individuals.'" *Estate of Rodriquez*, 256 F. Supp. 2d at 1260-61 (emphasis added) (allowing claims of extrajudicial killing to proceed against non-state actor under Alien Tort Statute only because killings were adequately alleged to be part of war crimes) (quoting *Kadic,* 70 F.3d at 239). In *Kadic*, the Second Circuit found that genocide and war crimes were within the "handful of crimes" actionable against non-state actors under the Alien Tort Statute, as were torture and summary execution **when committed in the course of genocide or war crimes**. 70 F.3d at 241-244. The Second Circuit permitted claims of torture and killing against a non-state actor, but only because they were adequately alleged to have been committed in the course of genocide or war crimes. *Id*. at 244.

Other courts have routinely dismissed claims against non-state actors under the Alien Tort Statute which do not fall within the limited "handful of [recognized] crimes," including, specifically, crimes against humanity. *See e.g.*, *Islamic Salvation Front*, 257 F. Supp. 2d at 120 (granting summary judgment on claim for crimes against humanity under Alien Tort Statute, because only plaintiff's airplane hijacking claim "can be found on that short list" of international torts actionable against non-state actors); *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 251-52 (S.D.N.Y. 2009) (dismissing direct liability claims under Alien Tort Statute, because "[a]lthough the establishment of state-sponsored apartheid and the commission of inhumane acts

needed to sustain such a system is indisputably a tort under customary international law, the international legal system has not thus far definitively established liability for non-state actors who follow or even further state-sponsored racial oppression") ("this Court declines to recognize a tort of apartheid by a non-state actor").

In *Beanal v. Freeport-McMoRan, Inc.*, the court dismissed an Alien Tort Statute claim for crimes against humanity brought against a private actor, concluding that "[c]ertain conduct … only violates the law of nations if committed by a state actor." 969 F. Supp. 362, 371 (E.D. La. 1997) *aff'd, Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999). "[Plaintiff] **must allege state action in order to state a claim under § 1350 for non-genocide related human rights violations abuses**." *Id*. at 373 (emphasis added). "**State action is required to state a claim for violation of the international law of human rights**." *Id*. at 380 (emphasis added).

The same outcome must obtain here. SMUG attempts to bring a direct liability claim for the crime against humanity of persecution against Mr. Lively, who SMUG concedes is a private citizen, not a state actor. (Dkt. 1, p. 7, ¶ 18). Because neither crimes against humanity in general, nor persecution in particular, is on the "short list" of the "handful of crimes" actionable against non-state actors under international law, SMUG's direct liability claims against Mr. Lively should be dismissed.[37]

[37] Even if SMUG is able to show that some nations or some courts have recognized direct liability claims for persecution against non-state actors, in light of the authorities above SMUG certainly cannot meet its burden of showing that such causes of action are "universally recognized" in the international community. As such, the Court lacks subject-matter jurisdiction over SMUG's claim (*see*, section III, *supra*), which is another, independent reason requiring dismissal.

E. SMUG HAS NOT ALLEGED THAT MR. LIVELY HIMSELF COMMITTED ANY ACTS OF PERSECUTION.

Finally, SMUG's direct liability claim of persecution against Mr. Lively fails for still another, more basic reason: SMUG has failed to allege that Mr. Lively has committed any acts of persecution **himself**. SMUG's allegations that Mr. Lively aided and abetted or conspired with others to persecute SMUG are relevant, if at all, only to those secondary liability claims. They do not support SMUG's direct liability claim.

In *Liu Bo Shan v. China Const. Bank Corp.*, 421 F. App'x 89 (2d Cir. 2011), the Second Circuit affirmed the dismissal of a direct liability claim of torture and inhuman treatment under the Alien Tort Statute. *Id*. at 92. Like SMUG does here, Plaintiff in *Liu* alleged that the police committed various acts of unlawful unrest, torture and inhuman treatment. *Id*. Also like SMUG, Plaintiff in *Liu* did not sue the police, but sued a Bank, and it alleged that the Bank provided the police with the false information leading to his unlawful arrest and eventual torture. *Id*. Also like SMUG, Plaintiff in *Liu* alleged inhuman treatment only by the police, not by the Bank. *Id*. Said the Second Circuit: "[l]ike the district court, we conclude that these allegations are insufficient to support a reasonable inference of direct liability by the Bank for conduct—torture, cruel treatment, and prolonged arbitrary detention—that the amended complaint repeatedly asserts was committed by the Chinese government police." *Id*.

SMUG has sued Mr. Lively for "persecution," but does not allege that he, himself, committed any of the six acts of persecution alleged in its Complaint. Indeed, **Mr. Lively's name does not appear even once in SMUG's detailed recitation of those six acts**. (Dkt. 1, pp. 36-44, ¶¶ 104-132). SMUG's direct-liability claim of persecution against Mr. Lively therefore must fail.

In sum, SMUG has failed to state a claim for persecution, and that is the only tort SMUG has sought to bring in this action. Without a cognizable tort upon which to premise its three "Claims for Relief," SMUG has no cause of action, so its entire Complaint must be dismissed, with prejudice.

V. PLAINTIFF'S CLAIM FOR AIDING AND ABETTING PERSECUTION FAILS TO STATE A CLAIM BECAUSE PLAINTIFF HAS NOT ALLEGED THE REQUIRED ELEMENTS.

In light of the foregoing arguments and authorities, SMUG may be tempted to abandon its **direct** liability claim for conspiracy against Mr. Lively, and shift the focus to its **secondary** liability claim, stated in the same count. Here, SMUG purports to assert a claim for purposefully "aid[ing], abet[ing], or otherwise assist[ing] in the commission or attempted commission of the crime [of persecution], including by providing the means for its commission." (Dkt. 1, p. 45, ¶ 142). However, this claim fares no better than the direct liability claim, and it should also be dismissed, for two reasons: (A) SMUG has failed to allege any conduct that constitutes aiding and abetting of persecution; and (B) SMUG's merely conclusory allegations fail to demonstrate the requisite intent.

The Supreme Court declared in *Ashcroft v. Iqbal* that "the pleading standard . . . demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). SMUG's allegations about Mr. Lively's speech (or alleged "conduct") can be condensed into two points: (1) that he advocated for the criminalization of homosexual advocacy (dkt. 1, p. 16 ¶ 49), and (2) that he conflated homosexual identity with a propensity to commit violent acts. (*Id.*). SMUG's claim suggests that engaging in the marketplace of ideas itself somehow constitutes the *actus reus* of aiding and abetting and manifests a purposeful *mens rea*. Using this false premise as a foundation, SMUG then summarily concludes that Mr. Lively

has therefore aided and abetted the commission of persecution by third parties. (*Id.* at p. 45, ¶ 142). However, this is a "naked assertion" devoid of "further factual enhancement," which was expressly found insufficient in *Iqbal*. 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Even if true, Mr. Lively's alleged statements are merely opinions he holds and expresses, not conduct furthering persecution or the manifestation of an intent to persecute.

Twombly, as interpreted by *Iqbal*, is particularly pertinent to this case because plaintiffs in *Twombly* alleged a form of secondary liability (conspiracy) that the Supreme Court found inadequate because the allegations were either conclusory or not plausible. *Id.* at 680. In *Iqbal*, the Supreme Court summarized this part of *Twombly* as follows:

> The Court held the plaintiffs' complaint deficient under Rule 8. In doing so it first noted that the plaintiffs' assertion of an unlawful agreement was a "'legal conclusion'" and, as such, was not entitled to the assumption of truth. . . . The Court next addressed the "nub" of the plaintiffs' complaint—the well-pleaded, nonconclusory factual allegation of parallel behavior—to determine whether it gave rise to a "plausible suggestion of conspiracy." Acknowledging that parallel conduct was consistent with an unlawful agreement, the Court nevertheless concluded that it did not plausibly suggest an illicit accord **because it was . . . compatible with . . . lawful, [] free-market behavior**. Because the well-pleaded fact of parallel conduct, accepted as true, did not plausibly suggest an unlawful agreement, the Court held the plaintiffs' complaint must be dismissed.

Id. (internal citations omitted) (emphasis added).

Similarly, here SMUG alleges that Mr. Lively is part of a conspiracy and that he aided and abetted the perpetrators of the alleged persecution. Also like *Twombly* and *Iqbal*, but perhaps to an even greater degree, conclusory and implausible allegations are littered throughout SMUG's Complaint, especially with regard to the claim of aiding and abetting persecution. Given this plethora of cardinal pleading sins, this claim should be dismissed.

A. SMUG FAILS TO ALLEGE ANY CONDUCT THAT CONSTITUTES AIDING AND ABETTING PERSECUTION.

It is well settled that an international norm must be specific, universal, and obligatory, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004). In addition, the standard for *actus reus* is "**practical assistance** to the principal which has a **substantial effect** on the perpetration of the crime." *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009) (emphasis added); *see also Liu Bo Shan v. China Const. Bank Corp.*, 421 F. App'x 89, 94 (2d Cir. 2011) (finding that allegations failed to show practical assistance or substantial effect on the perpetration of the crime). Moreover, to show practical assistance and substantial effect on the commission of the crime, the plaintiff must make "detailed allegations." *In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, 792 F. Supp. 2d 1301, 1347-48 (S.D. Fla. 2011).

Here, SMUG not only fails to make detailed allegations, but also fails to set forth **any** factual allegations that show practical assistance or substantial effect on the perpetration of the six alleged acts of persecution. The closest SMUG comes to showing any assistance to the other members of the alleged conspiracy is the allegation that Mr. Lively shared with Ugandan government officials his views on how to counteract the promotion of homosexuality. (Dkt. 1, p. 19, ¶¶ 58-61). But advocating and lobbying the government on a matter of policy is quintessential protected First Amendment activity, and can by no means constitute "practical assistance" in furtherance of a conspiracy to commit a crime. Nor does the passage (much less mere consideration) of legislation constitute a criminal act. Indeed, SMUG utterly fails to show any connection or interaction whatsoever between Mr. Lively and the alleged perpetrators of the six acts of persecution themselves, much less actual, practical assistance in committing the alleged crimes.

SMUG also alleges broadly that Mr. Lively "provid[ed] the means" for his alleged co-conspirators to commit the offense. (Dkt. 1, p. 45, ¶ 142). But once again, SMUG fails to provide any detail concerning what "means," beyond mere ideas, Mr. Lively supposedly provided to the perpetrators of the alleged persecution. After all, SMUG has not suggested that Mr. Lively handed the hammer to Mr. Kato's homosexual lover. Once again, then, this allegation is nothing but a "naked assertion," and should not be countenanced by this Court. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557).

Similarly, SMUG's allegations fail to demonstrate that Mr. Lively's speech (or alleged "conduct") had a substantial effect on the alleged tort.[38] While SMUG vaguely attempts to connect Mr. Lively's speech to subsequent acts that allegedly constitute persecution (dkt. 1, pp. 8-10, ¶¶ 22-27), SMUG does not provide any detailed, factual allegations showing that Mr. Lively's speech actually caused such substantial effect. And although SMUG attempts to show "but for" causation by conclusory allegations (dkt. 1, pp. 2-3, ¶¶ 4, 6), "such an argument is foreclosed by the requirement that, to be actionable, assistance must be **both** 'practical' **and** have 'a substantial effect on the perpetration of the crime,' which is not this case." *Liu Bo Shan v. China Const. Bank Corp.*, 421 F. App'x 89, 94 (2d Cir. 2011) (quoting *Presbyterian Church,* 582 F.3d at 258) (emphasis added). Given the absence of any detailed, factual allegations demonstrating that Mr. Lively's protected speech (or alleged "conduct") practically assisted or had a substantial effect on the alleged persecution, the claim cannot stand.

Claims for aiding and abetting crimes against humanity must fail unless supported by non-conclusory allegations. *Abecassis v. Wyatt*, 704 F. Supp. 2d 623, 655 (S.D. Tex. 2010). In *Abecassis*, plaintiffs brought claims under the Alien Tort Statute for aiding and abetting crimes

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[38] Even if SMUG could show that Mr. Lively's speech had a substantial effect on his audience, which it cannot, SMUG's claim would nevertheless fail, because Mr. Lively's speech was wholly protected by the First Amendment. (*See* section II, *supra*).

against humanity. *Id.* at 635. Plaintiffs alleged that defendants knew that the kickbacks paid to Saddam Hussein through the Oil for Food Program were funding terrorist attacks in Israel. *Id.* The court dismissed the claims, finding that the underlying allegations were conclusory. *Id.* at 655. Furthermore, the court found that "[t]he complaint does not come close to alleging facts, either direct or circumstantial, that would establish that any of the defendants **intended** to facilitate or encourage terrorist attacks in Israel." *Id.* (emphasis added).

SMUG's complaint suffers from the same fatal flaw. There are simply no facts, direct or circumstantial, tying Mr. Lively's speech (or alleged "conduct") to the individuals who committed the alleged acts of persecution. Rather, SMUG alleges that Mr. Lively aided and abetted the "members" of the supposed conspiracy—Mr. Langa, Mr. Ssempa, Mr. Buturo and Mr. Bahati—simply by sharing his views with them on a matter of public concern. (Dkt. 1, p. 12, ¶ 33). But even if this conclusory allegation were accepted as valid and true, it is undisputed that the alleged acts of persecution **were not committed by any of these men** but by others, whom SMUG has not alleged to have had any ties whatsoever to Mr. Lively. (Dkt. 1, pp. 36-43, ¶¶ 104-132). **Mr. Lively's name is nowhere to be found in the section of the Complaint that details the actual acts of alleged persecution**. (*Id.*)

SMUG's sweeping generalizations that Mr. Lively "deliberately invited, induced and encouraged . . . Ugandans . . . to fight back" with "severe repression, arrest, and . . . even violence" devoid of specifics, is premised on an article by Mr. Lively, which SMUG cites. (Dkt. 1, p. 22, ¶¶ 69-70). In that article, however, Mr. Lively **never called on anyone to use force or violence** against SMUG or anyone else. Scott Lively, *Murdering Uganda*, Defend the Family International (Feb. 5, 2011) (available at http://www.defendthefamily.com/pfrc/newsarchives.php?id=5422609, last visited June 21,

2012). In fact, in that very article, Mr. Lively strongly condemned the murder of SMUG Advocacy Director David Kato, calling it "a horrific crime." *Id.* Additionally, Mr. Lively also pointed out that, contrary to the false narrative fostered by SMUG and its allies, the truth is that Mr. Kato was not murdered because of anything Mr. Lively or other advocates might have said, but by "a live-in male prostitute . . . [who] murdered Kato for failing to pay him as promised." *Id.* Nowhere in this article does Mr. Lively call for or condone violence. *Id.* The "murder" mentioned in the title of his article is what Mr. Lively described as the metaphysical "murder" of a God-fearing nation by those who oppose the rule of law. *Id.* Thus, SMUG's own evidence gives the lie to its claim.

Moreover, **moral support cannot constitute aiding and abetting**. *Liu Bo Shan v. China Const. Bank Corp.*, 421 F. App'x 89, 94 (2nd Cir. 2011) (holding that allegations of "encouragement and support" do not amount to practical assistance and substantial effect); *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1105 (C.D. Cal. 2010) ("**[A]iding and abetting by way of 'moral support' and 'tacit approval and encouragement' is a rare breed (and, in fact, a non-existent breed for purposes of the Alien Tort Statute**)") (emphasis added). As the court in *Nestle* observed, although the phrases "'moral support' or 'tacit encouragement and approval' are often quoted as part of the general aiding and abetting legal standard, [] there are simply **no holdings** that apply that portion of the standard." *Id.* at 1108 (emphasis added). The court further noted that "moral support is far too uncertain and inchoate a rule" to meet *Sosa*'s standard of specificity and universal acceptance among civilized nations to support a claim under the Alien Tort Statute. *Id.* (citation omitted) (quoting *Sosa*, 542 U.S. at 732, 738).

The characterizations of Mr. Lively's protected speech in SMUG's complaint, even if true, amount to nothing more than a claim that Mr. Lively provided moral support and tacit

encouragement to certain Ugandans.[39] (Dkt. 1, p. 22 ¶ 70). Even if true, no court has recognized such allegations as constituting aiding and abetting. This Court should do likewise.

Assistance that is far more direct an concrete than that alleged by SMUG has been found insufficient to establish *actus reus*. "[M]erely 'supplying a violator of the law of nations with funds' as part of a commercial transaction, without more, cannot constitute aiding and abetting a violation of international law." *Nestle,* 748 F. Supp. 2d at 1099 (quoting *In re S. African Apartheid Litig.,* 617 F.Supp.2d 228, 269 (S.D.N.Y. 2009)). A *fortiori*, merely exercising one's First Amendment rights by expressing ideas and opinions to government officials cannot constitute aiding and abetting. *See Aziz v. Alcolac, Inc.*, 658 F.3d 388, 401 (4th Cir. 2011); *Nestle*, 748 F. Supp. 2d at 1099; *In re S. African Apartheid*, 617 F. Supp. 2d at 257 ("It is (or should be) undisputed that simply doing business with a state or individual who violates the law of nations is insufficient to create liability under customary international law. International law does not impose liability for declining to boycott a pariah state or to shun a war criminal.").

In *Aziz*, the plaintiff's sole allegation of intentional conduct was that the defendant had placed a chemical product "into the stream of international commerce with the purpose of facilitating the use of said chemicals in the manufacture of chemical weapons to be used, among other things, against the Kurdish population in northern Iraq." *Id.* (internal quotation marks and citations omitted). The court found that "[s]uch a cursory allegation, however, untethered to any supporting facts, constitutes a legal conclusion that neither binds [the court] nor is 'entitled to the assumption of truth.'" *Id.* (internal citation omitted) (quoting *Iqbal*, 556 U.S. at 678). The court accordingly dismissed the Alien Tort Statute claims. *Aziz*, 658 F.3d at 401.

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[39] Unlike plaintiff's allegations in *Nestle*, SMUG's allegations cannot be understood to state that Mr. Lively approved of the alleged persecution, as explained *supra*.

This Court should likewise decline to accept SMUG's "conclusory allegations, untethered to any supporting facts," and dismiss this claim.

B. SMUG'S CONCLUSORY ALLEGATIONS FAIL TO PLEAD THE REQUISITE INTENT.

Not only has SMUG failed to specifically allege that Mr. Lively committed any act that constitutes aiding and abetting, but it has also failed to set forth any non-conclusory allegations that Mr. Lively acted with the **purpose** of aiding the perpetrators to allegedly persecute **specific victims**. Without meeting these threshold requirements, the aiding and abetting claim fails on the *mens rea* ground alone.

Adhering to *Sosa*'s guiding principle, the *mens rea* standard for secondary liability, including aiding and abetting, requires a demonstration of purpose. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 255 (2nd Cir. 2009) ("The decisive issue in this case is whether accessorial liability can be imposed absent a showing of purpose," a question the court emphatically answered in the negative); *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 400-01 (4th Cir. 2011) (adopting the purpose *mens rea* standard and noting that, although not dispositive, the Supreme Court "chose not to disturb the Second Circuit's specific intent analysis [in *Presbyterian Church*] when it declined" to grant certiorari); *Nestle*, 748 F. Supp. 2d at 1110-11 (citing *Presbyterian Church* and other international sources in adopting the purpose *mens rea* standard); *Abecassis v. Wyatt*, 704 F. Supp. 2d 623, 655 (S.D. Tex. 2010) (applying *Presbyterian Church*) ("[T]he [Alien Tort Statute] will only confer jurisdiction if there are allegations of purposefulness.").[40]

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[40] Even if the Court were to apply the minority standard and assume that the *mens rea* element is satisfied on the basis of mere knowledge of the persecution, SMUG's allegations nevertheless fail as a matter of law, because they do not show that Mr. Lively knew that his speech (or alleged "conduct") would provide practical assistance to, or substantially affect, the perpetrators of the alleged persecution.

To adequately allege secondary liability for crimes against humanity, a plaintiff must allege that the defendant actually **intended** for **specific** harm to occur to **specific** victims. *In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, 792 F. Supp. 2d 1301, 1349 (S.D. Fla. 2011) ("With respect to [defendant]'s secondary liability for the [perpetrator]'s crimes against humanity, Plaintiffs must allege that [defendant] not only intended for the [perpetrator] to torture and kill, but that [defendant] intended for the [perpetrator] to torture and kill civilians"); *Nestle*, 748 F. Supp. 2d at 1111 ("Plaintiffs' allegations fail to raise a plausible inference that Defendants knew or should have known that the **general** provision of money, training, [and] tools . . . helped to further the **specific** wrongful acts committed by the Ivorian farmers") (emphasis added). In addition to showing particularized intent, a plaintiff must use **non-conclusory** allegations to show that intent. *Abecassis*, 704 F. Supp. 2d at 655.

In *Liu Bo Shan v. China Construction Bank Corp.*, plaintiff brought claims under the Alien Tort Statute against defendant for aiding and abetting (1) torture, (2) cruel, inhumane, and degrading treatment, and (3) prolonged arbitrary detention, by alleging that the defendant bank had aided the police in committing these torts. *Liu Bo Shan v. China Const. Bank Corp.*, 421 Fed. App'x 89, 90 (2d Cir. 2011). Specifically, plaintiff "allege[d] that the Bank falsified evidence and induced the police to arrest [plaintiff] in retaliation for his release of [an] audit [of the Bank]." *Id.* at 94. The Second Circuit nevertheless upheld the dismissal of the complaint:

> Notwithstanding Liu's assertions that the Chinese government exercised a "high degree of control" over the Bank and "shared the goal of silencing Liu," . . . the amended complaint fails plausibly to allege that the Bank acted with the **purpose** that Liu be subjected to torture, cruel treatment, or prolonged arbitrary detention by the police. . . . Although "intent must often be demonstrated by the circumstances," **Liu's allegations do not support a reasonable inference that the Bank acted with the purpose to advance violations of customary international law** . . . .

Id. (emphasis added) (internal citations omitted) (quoting *Presbyterian Church*, 582 F.3d at 264).

Much like the plaintiff in *Liu*, SMUG's allegations imply that Mr. Lively's pure speech somehow induced the Ugandan perpetrators to persecute SMUG. (Dkt. 1, p. 22, ¶ 69). However, even with the allegation of a "high degree of control" over the perpetrators, something SMUG failed to allege, the *Liu* plaintiff failed to warrant a plausible inference that the defendant "acted with the purpose to advance violations of customary international law." *Liu*, 421 Fed. App'x at 94. SMUG's reliance on vague and conclusory circumstantial allegations, premised on nothing more than protected speech, are similarly unavailing here. Even if Mr. Lively had encouraged a course of action **generally**, the failure to show an intent that the **specific** acts of persecution be committed against **specific** victims is fatal to SMUG's aiding and abetting claim.

It is one thing to allege purpose in a formulaic allegation with a pro forma label; it is quite another to actually demonstrate purpose by detailed, non-conclusory allegations. *See Iqbal*, 556 U.S. at 678 ("[L]abels and conclusions or a formulaic recitation of the elements of a cause of action will not do") (quoting *Twombly*, 550 U.S. at 555) (internal quotation marks omitted). SMUG's naked allegations of purposive intent fail to include the detailed, non-conclusory elements necessary to support its claim. Accordingly, the claim for aiding and abetting persecution should be dismissed.

VI. PLAINTIFF'S CLAIM FOR CONSPIRACY FAILS BOTH BECAUSE THE COURT LACKS SUBJECT-MATTER JURISDICTION AND BECAUSE SMUG FAILS TO STATE A CAUSE OF ACTION.

In its "Third Claim for Relief," SMUG purports to assert a claim for "Crime Against Humanity of Persecution: Conspiracy." (Dkt. 1, p. 46, ¶¶ 150-154). This claim should be dismissed, both because the Court lacks subject-matter jurisdiction, and because it fails to state a cause of action against Mr. Lively.

A. THE COURT DOES NOT HAVE SUBJECT-MATTER JURISDICTION OVER SMUG'S CONSPIRACY CLAIM BECAUSE CONSPIRACY LIABILITY IS NOT UNIVERSALLY RECOGNIZED AND CLEARLY DEFINED UNDER INTERNATIONAL LAW.

As demonstrated in section III, *supra*, alleged violations of international norms that are not universally accepted and clearly defined do not come within the reach of the Alien Tort Statute, and thus are outside the subject-matter jurisdiction of this Court. Conspiracy is such a violation, and, therefore, SMUG's claim must be dismissed.

Since the Alien Tort Statute is strictly "a jurisdictional statute creating no new causes of action," *Sosa*, 542 U.S. at 724, courts must look to international law to determine not only the **existence** of liability for the challenged conduct, *id*. at 733 ("Alvarez's detention claim must be gauged against the current state of international law"), but also the **scope** of that liability. *Id*. at 732 n.20 ("A related consideration is whether international law extends the **scope** of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual") (emphasis added). "**To find [Alien Tort Statute] jurisdiction over an alleged secondary tort, there must be a sufficient and sufficiently definite international consensus supporting not only the underlying tort but also the form of secondary liability for that tort**." *Abecassis v. Wyatt*, 704 F. Supp. 2d 623, 654 (S.D. Tex. 2010) (applying *Sosa*) (emphasis added).

Because it knows that international law does not recognize conspiracy claims, SMUG may entreat this Court to look to United States federal common law, which is much more hospitable to such claims.[41] However, numerous federal courts applying *Sosa* have properly

[41] Under federal common law, "a defendant who does not directly commit a substantive offense may nevertheless be liable if the commission of the offense by a co-conspirator in furtherance of the conspiracy was reasonably foreseeable to the defendant as a consequence of their criminal agreement." *United States v. Bruno*, 383 F.3d 65, 89 (2d Cir. 2004) (citing *Pinkerton v. United States,* 328 U.S. 640, 646-48 (1946)).

rejected similar requests and looked only to international law, as *Sosa* requires. *See e.g.*, *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 263 ("I again look to customary international law as the source of relevant authority" to determine whether conspiratorial liability may be asserted under the Alien Tort Statute); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 665 n. 64 (S.D.N.Y. 2006) ("this Court continues to believe that international law must supply the substantive law for plaintiffs' [conspiracy] claims") (rejecting request to apply *Pinkerton*), *aff'd*, 582 F.3d 244, 260 (2d Cir. 2009) ("As a matter of first principles, we look to international law to derive the elements for any such cause of action" [for conspiracy]); *Abecassis*, 704 F. Supp. 2d at 654 ("International law, according to [*Sosa*], also defines who may be sued for violating that norm. There is no reason to believe that international law determines whether private – as well as state – actors can be sued but not whether secondary – as well as primary – actors can be sued."). Fidelity to Supreme Court precedent necessitates that this Court likewise look exclusively to international law to determine whether SMUG can assert a claim of conspiracy to persecute under the Alien Tort Statute.

Fortunately, the Supreme Court has made this Court's task of divining the contours of international law on conspiratorial liability relatively easy. In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Supreme Court exhaustively reviewed various sources of international law and held that:

> the only 'conspiracy' crimes that have been recognized by international war crimes tribunals (**whose jurisdiction often extends beyond war crimes proper to crimes against humanity** and crimes against the peace) are **conspiracy to commit genocide and common plan to wage aggressive war** …

Id. at 610 (emphasis added). The Supreme Court quoted with approval other international jurists who "made a persuasive argument that **conspiracy in the truest sense is not known to international law**." *Id.* at 611 (emphasis added) (internal quotes omitted). Finally, the Supreme

Court quoted various United Nations War Crimes Commissions, which "observ[ed] that, although a few individuals were charged with conspiracy under European domestic criminal codes following World War II, the United States Military Tribunals established at that time **did not recognise as a separate offence conspiracy to commit** war crimes or **crimes against humanity**." *Id.* at 611 n.40 (emphasis added) (internal quotes omitted).

As with all Supreme Court precedent, "this Court must [] apply the Supreme Court's assessment of the law of nations." *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 263. Thus, even though *Hamdan* was not decided under the Alien Tort Statute, the Supreme Court's determination that international law forecloses conspiratorial liability for all but two offenses, neither of which is claimed here, is binding. *Id.* Applying *Hamdan* specifically to conspiracy claims brought under the Alien Tort Statute, the court in *S. African Apartheid* held:

> **Jurists from the civil law tradition have long resisted the application of conspiracy to crimes under the law of nations**, as conspiracy is an Anglo–American legal concept. Importantly, the Supreme Court recently stated in *Hamdan v. Rumsfeld* that the law of war provides liability only for 'conspiracy to commit genocide and common plan to wage aggressive war.' While *Hamdan* did not address the [Alien Tort Statute], this Court must nevertheless apply the Supreme Court's assessment of the law of nations. ***Sosa*** **requires that this Court recognize only forms of liability that have been universally accepted by the community of developed nations. Conspiracy does not meet this standard. Therefore, this Court declines to recognize conspiracy as a distinct tort to be applied pursuant to [Alien Tort Statute] jurisdiction**.

Id. at 263 (emphasis added).

The *South African Apartheid* court is by no means unique in its application of the *Hamdan* - *Sosa* principle to reject conspiratorial liability for alleged human rights abuses under the Alien Tort Statute. *See e.g.*, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d at 664-65 ("As of today, therefore, liability under the ATS for participation in a conspiracy may **only attach where the goal of the conspiracy was either to commit genocide or to commit aggressive war** …. As described above, [plaintiffs] contend that [defendant]

joined **a conspiracy to commit a crime against humanity** …. As a result, the defendants' motion for summary judgment on the conspiracy claim is granted") (emphasis added) (applying *Hamdan*), *aff'd*, 582 F.3d 244, 260 (2d Cir. 2009) ("plaintiffs have not established that international law universally recognizes a doctrine of conspiratorial liability") (internal brackets, quotes and alterations omitted).

Here, SMUG seeks to assert a claim of conspiracy not for either of the only two torts allowed under *Hamdan*, but for a different tort, a "crime against humanity," which was specifically dismissed in *South African Apartheid* and *Presbyterian Church of Sudan*. SMUG's claim should meet the same fate.[42]

B. SMUG'S CLAIM FOR CONSPIRACY FAILS TO STATE A CAUSE OF ACTION BECAUSE SMUG FAILS TO ALLEGE THE REQUISITE MENS REA.

Even if the Court could exercise jurisdiction over SMUG's conspiracy claim, which it cannot, the Court would have to dismiss it because it fails to state a cause of action. SMUG has not alleged the *mens rea* required to support a conspiracy claim.

"**A conspiracy claim requires the same proof of *mens rea* as an aiding and abetting claim**." *Liu Bo Shan v. China Const. Bank Corp.*, 421 Fed. App'x 89, 93-94 & n. 6 (2d Cir. 2011) (emphasis added) ("Assuming, without deciding, that [plaintiff] might assert a claim under the [Alien Tort Statute] for conspiracy," and affirming dismissal of such claim for failure to

[42] SMUG will undoubtedly point to *Cabello v. Fernandez-Larios,* 402 F.3d 1148 (11th Cir. 2005) (per curiam), where the Eleventh Circuit recognized conspiracy liability under the Alien Tort Statute for a number of violations of international law including crimes against humanity. *Id.* at 1159. However, *Cabello* was decided before *Hamdan*. Moreover, the Eleventh Circuit ran afoul of the Supreme Court's instruction in *Sosa*, and looked to domestic rather than international law to determine whether conspiracy liability exists. *Id*. For these reasons the Second Circuit expressly rejected *Cabello*, agreeing instead with the lower court in *Presbyterian Church of Sudan*, "that *Sosa* required applying international law." *Presbyterian Church of Sudan*, 582 F.3d at 260 n. 11 (quoting and affirming *Presbyterian Church,* 453 F. Supp. 2d at 665 n. 64) ("the Eleventh Circuit erred … by drawing on domestic law, and not international law"). This court should likewise reject *Cabello*, and follow the Supreme Court's clear teaching in *Hamdan* and *Sosa*.

plead sufficient facts to infer requisite *mens rea*) (citing *Presbyterian Church*, 582 F.3d at 260). As demonstrated in section V, *supra*, SMUG has failed to plead sufficient facts from which the requisite *mens rea* could be inferred, either for aiding or abetting or for conspiracy. SMUG does not allege that Mr. Lively "conspired" with the actual perpetrators of the six alleged acts of persecution, that is, the police who allegedly made unlawful arrests, the tabloids who published incitements to violence, or the homosexual prostitute who confessed to killing David Kato. The facts alleged by SMUG demonstrate that Mr. Lively's so-called "conspiracy" with two members of the Ugandan government and two private citizens was, in reality, protected, non-violent political speech.

Accordingly, SMUG's conspiracy claim fails to state a cause of action and should be dismissed.

VII. PLAINTIFF'S CLAIM FOR JOINT CRIMINAL ENTERPRISE SHOULD BE DISMISSED FOR LACK OF SUBJECT-MATTER JURISDICTION AND FAILURE TO STATE A CAUSE OF ACTION.

In its "Second Claim for Relief," SMUG attempts to state a "claim" against Mr. Lively for participating in a "Joint Criminal Enterprise" to commit persecution. (Dkt. 1, pp. 45, ¶¶ 144-145). This claim also fails.

The Supreme Court has observed that **one** court, "[t]he International Criminal Tribunal for the former Yugoslavia (ICTY), drawing on the Nuremberg precedents, has adopted a 'joint criminal enterprise' theory of liability, but that is **a species of liability for the substantive offense** (akin to aiding and abetting), **not a crime on its own**." *Hamdan v. Rumsfeld*, 548 U.S. 557, 611, n. 40 (2006) (emphasis added) (citing *Prosecutor v. Tadíc,* Judgment, Case No. IT–94–1–A (ICTY App. Chamber, July 15, 1999)). Because it lacks "universal recognition" in international courts, the theory of joint criminal enterprise has been dismissed, along with conspiracy claims, in Alien Tort Statute cases. *See e.g.*, *Presbyterian Church Of Sudan v.*

Talisman Energy, Inc., 582 F.3d 244, 260 (2d Cir. 2009) (affirming dismissal of joint criminal enterprise theory along with conspiracy claims because plaintiff had failed to establish universal recognition, and, in any event, had failed to establish the requisite *mens rea*); *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 263 (S.D.N.Y. 2009) (noting that "the ICTY recognized Joint Criminal Enterprise as a crime derived from customary international law and comparable to conspiracy, [h]owever, the ICC has repeatedly declined to apply a broad notion of conspiratorial liability under customary international law"). Because it lacks universal recognition and is not clearly defined, this Court should also dismiss SMUG's "claim" for joint criminal enterprise for lack of subject matter jurisdiction. (*See* section III, *supra*).

To the extent joint criminal enterprise is universally recognized and clearly defined, which it is not, it "**would require the same proof of *mens rea* as [SMUG's] claims for aiding and abetting**." *Presbyterian Church*, 582 F.3d at 260 (emphasis added). As demonstrated in section V, *supra*, SMUG has not adequately pled the requisite *mens rea* for aiding and abetting persecution or joint criminal enterprise. SMUG's factual allegations reveal, at most, that Mr. Lively engaged in non-violent political discourse and lobbied a government to enact legislation which SMUG does not like. SMUG does not allege that Mr. Lively was in any "joint enterprise" **with the actual perpetrators of the six acts of alleged persecution** in its Complaint, nor could it do so in good faith. SMUG only alleges that Mr. Lively was in a "joint enterprise" with the two members of the Ugandan government he was advising on legislation, and two other private Ugandan citizens. Mr. Lively's (and other citizens') lobbying of legislators is not a "criminal enterprise," but a right guaranteed by the First Amendment (at least for Mr. Lively, who is a United States citizen).

Accordingly, SMUG's "claim" for joint criminal enterprise must meet the same fate as its claim for aiding and abetting. *Presbyterian Church*, 582 F.3d at 260 (affirming dismissal of joint criminal enterprise theory for failure to satisfy same *mens rea* requirement as aiding and abetting); *Shan v. China Const. Bank Corp.*, 09 CIV. 8566 (DLC), 2010 WL 2595095 (S.D.N.Y. June 28, 2010), *aff'd sub nom. Liu Bo Shan v. China Const. Bank Corp.*, 421 Fed. App'x 89 (2d Cir. 2011) (same).

VIII. PLAINTIFF LACKS ASSOCIATIONAL STANDING.

A. SMUG LACKS ASSOCIATIONAL STANDING TO BRING THIS ACTION ON BEHALF OF ITS MEMBERS OR EMPLOYEES, BECAUSE ITS TORT CLAIMS REQUIRE INDIVIDUALIZED PARTICIPATION OR PROOF.

SMUG seeks to assert various **tort** claims against Mr. Lively, not only on its own behalf for alleged harms it allegedly suffered as an organization, but also (and especially) on behalf of "its individual staff-members and member organizations." (Dkt. 1, p. 2, ¶ 4; p. 6, ¶ 17; p. 43, ¶ 134; p. 44, ¶ 136; p. 45, ¶ 143; p. 46, ¶ 149; p. 46, ¶ 154). SMUG seeks to recover **primarily money damages** on its tort theories, as demonstrated by the first three out of the four remedies requested in its Prayer for Relief. (*Id.* at p. 47, Prayer for Relief (a)-(c)) (requesting "compensatory damages," "punitive and exemplary damages," and "attorney's fees and costs"). SMUG's fourth requested relief is for "declaratory judgment holding that Defendant's conduct was in violation of the law of nations." (*Id.* at Prayer for Relief (d)). As shown below, SMUG lacks standing to bring tort claims for either damages or declaratory relief in a representative capacity, because both the claims it asserts and the relief it requests require the participation of, and proof from, its individual members.

1. SMUG's Representative-Capacity Claims for Money Damages Are Barred as a Matter of Well-Settled Law.

"[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) **neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit**." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) (emphasis added). "[W]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought." *Warth v. Seldin*, 422 U.S. 490, 515 (1975) (affirming dismissal of association's representative-capacity claims for money damages, because, "to obtain relief in damages, each member of [the association] who claims injury as a result of respondents' practices must be a party to the suit, and [the association] has no standing to claim damages on his behalf").

In the nearly four decades since *Warth* and *Hunt*, "federal courts have consistently rejected association assertions of standing to seek monetary, as distinguished from injunctive or declaratory, relief on behalf of the organization's members." *Telecomm. Research & Action Ctr. on Behalf of Checknoff v. Allnet Commc'n Serv., Inc.*, 806 F.2d 1093, 1095 (D.C. Cir. 1986) (collecting cases). Indeed, "**no federal court has allowed an association standing to seek monetary relief on behalf of its members**." *United Union of Roofers, Waterproofers, & Allied Trades No. 40 v. Ins. Corp. of Am.*, 919 F.2d 1398, 1400 (9th Cir. 1990) (emphasis added). This is because "claims for monetary relief necessarily involve individualized proof and thus the individual participation of association members, thereby running afoul of the third prong of the *Hunt* test." *Id.*; *see also Nat'l Coal. Gov't of Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 344 (C.D. Cal. 1997) ("**It is generally accepted that associational standing is precluded**

where the organization seeks to obtain damages on behalf of its members") (emphasis added) (citing *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 553-54 (1996)).

SMUG is not the first organizational entity to seek money damages on behalf of its members specifically under the Alien Tort Statute. Several other organizations have asserted such claims, but the result has always been the same: **every single court that has considered them has dismissed them for lack of standing**. *See e.g.*, *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714-15 (2d Cir. 2004) (affirming dismissal of alien association's claims for money damages, medical monitoring and property remediation under the Alien Tort Statute, because "[n]ecessarily, each of [the] individual[] [members] would have to be involved in the proof of his or her claims"); *Nat'l Coal. Gov't of Union of Burma*, 176 F.R.D. at 343-44 (dismissing alien association's claim for money damages under Alien Tort Statute for lack of standing, because damages could only be ascertained through individualized participation and proof); *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 119-20 (D.D.C. 2003) (dismissing alien association's representative claims for damages under the Alien Tort Statute "because individualized proof would be required from each member to determine the correct amount of damages"); *Alperin v. Vatican Bank*, C-99-04941 MMC, 2008 WL 509300, *8 (N.D. Cal. Feb. 21, 2008) (dismissing conversion, unjust enrichment, restitution and other tort claims brought by alien associational plaintiffs under the Alien Tort Statute, because "[a]n associational plaintiff lacks standing to seek monetary relief … because such claims would require individual members to participate in the lawsuit"); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 01 CIV.9882 (DLC), 2005 WL 1060353, *1-2 (S.D.N.Y. May 6, 2005) (dismissing alien

association's claims for money damages under Alien Tort Statute "[g]iven the necessity for individual proof of proximate causation").

In *Islamic Salvation Front*, an alien association sued an Algerian political group and one of its leaders, alleging various tort claims under the Alien Tort Statute, including, as here, persecution and other crimes against humanity. 257 F. Supp. 2d at 117, 119. The association, as does SMUG, sought to recover money damages on behalf of its members. *Id.* at 119-20. The court applied "traditional principles of representational standing," and concluded that:

> [w]hether the [association] has standing to sue depends on whether the claims against [defendant] require individualized proof from each [association] member. **The fact that the [association] seeks money damages is dispositive: it does not have associational standing, because individualized proof would be required from each member to determine the correct amount of damages if [defendant] were found liable**.

Id. (emphasis added). The alien plaintiff in *Islamic Salvation Front* was represented by the same firm representing SMUG in this action, *id*. at 116, therefore SMUG ought to know that its representative-capacity claims for damages are barred.

Similarly, in *Bano*, the Second Circuit affirmed the dismissal of an alien association's claims for money damages under the Alien Tort Statute,[43] concluding that *Hunt*'s third prong for associational standing precludes representative-capacity claims for money damages. *Bano*, 361 F.3d at 714. In so holding, the Second Circuit remarked: "**We know of no Supreme Court or federal court of appeals ruling that an association has standing to pursue damages claims on behalf of its members**." *Id*. (emphasis added).

[43] Although, it is not readily apparent from the Second Circuit's opinion in *Bano* that the various tort claims dismissed therein had been brought under the Alien Tort Statute, that fact is plainly stated in the first sentence of the "Procedural History" section of the district court's opinion being reviewed and affirmed: "On November 15, 1999, plaintiffs filed a class action complaint against defendants asserting claims under the Alien Tort Claims Act, 28 U.S.C. § 1350, for alleged human rights violations arising out of the Bhopal gas Disaster in India on December 2-3, 1984." *Bano v. Union Carbide Corp.*, 99 CIV.11329 JFK, 2003 WL 1344884, *1 (S.D.N.Y. Mar. 18, 2003), *aff'd in part, vacated in part on other grounds,* 361 F.3d 696 (2d Cir. 2004).

These authorities plainly preclude SMUG from seeking money damages (whether "compensatory," or "punitive and exemplary") on behalf of its "individual staff-members and member organizations." As was the case in *Islamic Salvation Front*, *Bano*, *Burma*, *Alperin*, and *Presbyterian Church*, determining both the existence and extent of any damages allegedly incurred by SMUG's "individual staff-members and member organizations" will require their individual participation and proof. Each individual member would have to participate in these proceedings, not only to testify how and to what extent he, she or it was hurt by Mr. Lively's speech, but also to partake in any eventual judgment (or be bound by a no-liability determination). As the above courts have observed, repeatedly, no federal court has **ever** permitted an association to pursue these types of individualized money damages on behalf of its members. This Court should not be the first to stretch the limits of associational standing beyond their breaking point and should, therefore, dismiss with prejudice SMUG's representative-capacity claims for damages.

2. SMUG Lacks Associational Standing to Bring a Representative-Capacity Claim for Declaratory Relief Sounding in Tort, Because the Claim Requires Individualized Participation or Proof.

Unlike claims for money damages, claims for injunctive or declaratory relief have **sometimes** been allowed to be brought by an association in a representative capacity. "This does not mean, however, that an association automatically satisfies the third prong of the *Hunt* test simply by requesting equitable relief rather than damages." *Bano*, 361 F.3d at 714. Indeed, "**plenty of injunction cases have been dismissed because of the need for individualized proof**." *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 314 (1st Cir. 2005) (emphasis added) (collecting cases) (Boudin, C.J. concurring). Thus, the Court must examine not only whether "the relief requested," but also whether "**the claim asserted**" … requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343 (emphasis added). If that inquiry

reveals that "the organization seeks **a purely legal ruling** without requesting that the federal court award individualized relief to its members, the *Hunt* test may be satisfied." *Bano*, 361 F.3d at 714 (emphasis added). On the other hand, "[t]he organization lacks standing to assert claims of injunctive relief on behalf of its members where 'the fact and extent' of the injury that gives rise to the claims for injunctive relief 'would require individualized proof.'" *Id*. (quoting *Warth,* 422 U.S. at 515–16).

Here, SMUG's representative-capacity claim for declaratory relief fails for at least two separate reasons: SMUG does not seek a "purely legal" ruling, and SMUG's claim is brought in tort, which necessarily requires individualized proof.

a. SMUG Does Not Seek a Purely Legal Ruling.

SMUG most certainly does **not** seek "a purely legal ruling" divorced from any individualized relief to its members. *Bano*, 361 F.3d at 714. **SMUG does not even seek any injunctive relief**. (Dkt. 1, p. 47, Prayer for Relief). Instead, SMUG goes out of its way to allege, repeatedly after each of its three "Claims for Relief," that it is seeking **money damages** for its individual member organizations and employees "in an amount to be determined at trial." (Dkt. 1, p. 45, ¶ 143; p. 46, ¶ 149; p. 46, ¶ 154). In fact, while it trumpets the alleged money damages of its members and employees, **SMUG says nothing about equitable relief (declaratory or injunctive) in any of its three "Claims for Relief."** (*Id*. at p-¶ 44-140 to 46-154). And, as discussed above, SMUG devotes the first three requests in its Prayer for Relief to purely money damages, and only the last request to declaratory relief, almost as an afterthought. (*Id*. at p. 47). Evidently, the declaratory relief sought by SMUG is ancillary to its claims for money damages, and not the other way around. (*Id*.)

This is quite different from the typical case in which associational standing is found for equitable claims because plaintiff seeks **only** equitable, or "purely legal" relief. *See e.g.*, *Rowe*, 429 F.3d at 314 ("That **only** injunctive relief is sought here distinguishes this case from damages cases; … [w]here **only** injunctive relief is sought, an association may sometimes be allowed to sue") (emphasis added) (Boudin, C.J. concurring); *Alaska Fish & Wildlife Fed'n v. Dunkle,* 829 F.2d 933, 938 (9th Cir. 1987) (allowing association standing "because the [association] seeks declaratory and prospective relief **rather** than money damages [and thus] its members need not participate directly in the litigation") (emphasis added).

Because SMUG does not seek a "purely legal ruling," it does not have associational standing to bring a declaratory judgment claim on behalf of its members and employees.

b. SMUG's Claim for Declaratory Relief Sounds in Tort and Necessarily Requires Individualized Proof.

SMUG's representative-capacity claim for declaratory relief also fails because "the fact and extent of the injury that gives rise to [its] claim[] for [declaratory] relief would require individualized proof." *Bano*, 361 F.3d at 714. Though equitable in nature, SMUG's claim for declaratory relief is nevertheless **grounded in tort**, just like its claims for money damages. This is because the Alien Tort Statute, the only law under which SMUG sues, provides federal jurisdiction for "any civil action by an alien **for a tort only**." 28 U.S.C. § 1350 (emphasis added). As such, the only claims that SMUG, an alien plaintiff, could assert are tort claims. *Id.* But "**tort claims can only be adjudicated by considering the testimony and other evidence of the people allegedly [injured]**." *Nat'l Coal. Gov't of Union of Burma*, 176 F.R.D. at 344 (emphasis added). "**The [association] is simply not a suitable proxy**." *Id.* (emphasis added) (dismissing representative-capacity claims for injunctive relief brought by association under

Alien Tort Statute for failure to satisfy the third prong of *Hunt*, because injunctive relief claims sounded in tort).

In the "typical" declaratory relief action brought by an association, plaintiff seeks a declaration that a statute or regulation is unlawful or unconstitutional. *Dealer Store Owners Ass'n, Inc. v. Sears, Roebuck & Co.*, CIV05-1256 ADM/JSM, 2006 WL 91335, *5 (D. Minn. Jan. 12, 2006) (dismissing associational declaratory relief claim for lack of standing because it involved individual contract claims, not "the typical associational standing case, where a statute or regulation is being challenged"). While an association may, in some cases, have standing to seek declaratory relief against a statute or regulation which uniformly applies to all its members, it does not have representative standing to seek declaratory relief for its members against tortious conduct, which affects different members in different ways:

> Unlike most prior associational standing cases, this action does not challenge a statute, regulation or ordinance …. Instead, **the Amended Complaint sets forth allegations of tortious conduct** …. As such, **the Amended Complaint requires individual determinations as to whether [defendant] committed various torts** against certain of its members …. Accordingly, **the Complaint does not raise a "pure question of law," which can be considered without the individual participation of [the association]'s members**.

DDFA of S. Florida, Inc. v. Dunkin' Donuts, Inc., 00-7455-CIV, 2002 WL 1187207, *7 (S.D. Fla. May 22, 2002) (emphasis added) (dismissing with prejudice associational claims for lack of standing).

Here, SMUG does not seek a declaration that a statute or regulation is unconstitutional, but that Mr. Lively's allegedly tortious conduct towards its individual members and employees "was in violation of the law of nations." (Dkt. 1, p. 47, Prayer for Relief (d)). In other words, SMUG is not simply seeking a declaration to clarify "the law of nations," and the rights of all people under "the law of nations," but rather a declaration that Mr. Lively's allegedly tortious **conduct** actually violated that law and harmed its individual members. (*Id.*) As such, "the fact

and extent of the injury that gives rise to [its] claim[] for [declaratory] relief" – that is Mr. Lively's allegedly tortious conduct and its effects on SMUG's individual members – "would require individualized proof" in a manner that destroys associational standing under *Hunt*. *Bano*, 361 F.3d at 714. This is because not every alleged member of SMUG alleges to have been injured in the same way, and to the same extent, by Mr. Lively's conduct.

The diverse and highly individualized nature of "the injury that gives rise to [SMUG's] claim[] for [declaratory] relief" is plainly evident on the face of SMUG's Complaint. The six specific acts of "persecution," the singular tort which SMUG seeks to lay at Mr. Lively's feet, and which give rise to SMUG's claim for declaratory relief, involved **different** alleged perpetrators, **different** alleged victims, and **different** alleged conduct, occurring at **different** times, in **different** places. (Dkt. 1, pp. 36-43, ¶¶ 104-132). Not surprisingly, these different variables are alleged to have caused widely different injuries for SMUG's "member organizations and their staff members." (*Id*. at p. 43, ¶ 134). SMUG claims that some of its members were deprived of the right to "equality and non-discrimination," while others were deprived of the right to "expression, association, assembly, and the press," others were subjected to "arbitrary arrest and detention," others were subjected to "torture, and other cruel, inhuman and degrading treatment," and still others had their homes invaded and their honor and reputation "attacked." (*Id*.) If the fact and extent of the alleged injuries that give rise to SMUG's claim for declaratory relief are not sufficiently "individualized" to preclude associational standing under the third prong of *Hunt*, that prong has no meaning.

Because Alien Tort Statute claims necessarily sound in tort, it is not surprising that courts which have examined associational standing for equitable claims (injunctive or declaratory) under this law have dismissed them for lack of standing. *See e.g.*, *Bano*, 361 F.3d at 714-15

(affirming dismissal of associational claims for injunctive relief (as well as money damages) under Alien Tort Statute, because injunctive relief claims grounded in tort require individualized participation or proof); *Nat'l Coal. Gov't of Union of Burma*, 176 F.R.D. at 344 ("even the [association]'s claim for injunctive relief fails to satisfy the third prong of the *Hunt* test [because] all the claims asserted in the First Amended Complaint are tort claims"); *Presbyterian Church of Sudan*, 01 CIV.9882 (DLC), 2005 WL 1060353, *1-2 (holding that association lacked standing to seek either damages or injunctive relief on behalf of its members under the Alien Tort Statute, because the claims required individualized proof) (reversing contrary decision of predecessor judge in the same case, 244 F. Supp. 2d 289 (S.D.N.Y. 2003), because it was erroneously decided and it preceded and contradicted the Second Circuit's dispositive holding in *Bano*).

This Court should hold likewise, and dismiss with prejudice SMUG's representative-capacity claim for declaratory relief.

B. SMUG'S REPRESENTATIVE-CAPACITY CLAIM FOR DECLARATORY JUDGMENT FAILS BECAUSE IT IS NOT REDRESSABLE.

Even if the Court concludes that SMUG's representative-capacity claim for declaratory relief does not required individualized participation or proof, which it should not do, the Court should still dismiss the claim because it is not redressable. The first prong of *Hunt* requires that SMUG's members "have standing to sue in their own right" before SMUG can seek declaratory relief on their behalf. *Hunt*, 432 U.S. at 343. "The standing inquiry is claim-specific: a plaintiff must have standing to bring each and every claim that she asserts." *Katz v. Pershing, LLC*, 672 F.3d 64, 71 (1st Cir. 2012). Moreover, as this Court has acknowledged, "[a] party seeking a declaratory judgment must satisfy the case-or-controversy requirement to the same extent as a party seeking any other form of relief." *Crooker v. Magaw*, 41 F. Supp. 2d 87, 90 (D. Mass. 1999) (Ponsor, J.). Accordingly, to assert a declaratory judgment claim on behalf of its members,

SMUG would have to show that the members have Article III standing to assert this claim themselves. *Id*. This, in turn, would require satisfaction of the familiar standing triad: a concrete injury, fairly traceable to the challenged conduct, which "**likely will be redressed by a favorable decision from the court**." *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996) (emphasis added).

The requirement of showing redressability "applies with undiminished force to actions for declaratory judgment." *Igartua-De La Rosa v. United States*, 417 F.3d 145, 153 (1st Cir. 2005) (Lipez, J. concurring) ("federal courts do not issue advisory opinions"). To establish redressability, SMUG has the burden of showing that it is "likely, **as opposed to merely speculative**, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (emphasis added) (internal quotes omitted) (holding that plaintiff failed to establish redressability because remedy for its alleged injury required action from parties not before the court, over whom the court had no power). "Redressability requires … the '**substantial likelihood**' that the requested relief will remedy the alleged injury in fact." *Bonas v. Town of N. Smithfield*, 265 F.3d 69, 73 n.4 (1st Cir. 2001) (emphasis added) (quoting *Vermont Agency of Natural Res. v. U.S. ex rel. Stevens,* 529 U.S. 765, 771 (2000)).

SMUG cannot meet its burden of satisfying the redressability requirement at this pleading stage, so its representative claim for declaratory judgment must be dismissed. The declaratory judgment sought by SMUG on behalf of its members and employees – "that [Mr. Lively]'s conduct was in violation of the law of nations" – is not "substantially likely" to redress the alleged persecution of which SMUG complains. Neither the alleged "co-conspirators," nor the Ugandan Parliament, nor the Ugandan Police, nor any of the other individuals which SMUG blames for the various acts of alleged "persecution" are before this Court. Even if the Court were

to grant the declaratory relief requested by SMUG **against Mr. Lively, a private American citizen**, it would have no binding effect whatsoever on the sovereign government of Uganda or any of the Ugandan state and private actors alleged to be actively "persecuting" SMUG's constituents. The Ugandan newspapers would remain free to publish what they want (dkt. 1, pp. 41-42, ¶¶ 121-127); the Ugandan police would remain free to arrest and detain whomever they wants (*id*. at pp. 36-40, ¶¶ 104-120); and the Ugandan "private actors" would remain free to "discriminate" against whomever they want "in housing, employment, health and education" (*id*. at p. 43, ¶ 131).

Moreover, no declaratory relief from this Court against Mr. Lively can stop the sovereign Ugandan legislature and government from further considering and eventually enacting the homosexuality bill of which SMUG complains. (*Id*. at p. 11, ¶¶ 31-32). "If a legislative body would be within its rights to ignore the court's decision, and the plaintiff cannot convince the court that it is 'likely, as opposed to merely speculative,' that the legislature will react in the way that he hopes, the redressability requirement has not been met." *Igartua-De La Rosa*, 417 F.3d at 155 (Lipez, J. concurring) (quoting *Lujan*, 504 U.S. at 561).

SMUG may speculate that a declaration that Mr. Lively's speech violated international law may provide some sort of emotional vindication and perhaps deter others in the future, but the Supreme Court has made it clear that neither "deter[ring] the risk of future harm," nor "psychic satisfaction" is "an acceptable Article III remedy," because "such a principle would make the redressability requirement vanish." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106-07 (1998). "**Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court**; that is the very essence of the redressability requirement." *Id*. at 107 (emphasis added).

In sum, without the accompanying claims for money damages, which SMUG is constitutionally barred from seeking on behalf of its members, "the declaratory judgment [against Mr. Lively] is not only worthless to [SMUG], it is seemingly worthless to all the world." *Steel Co.*, 523 U.S. at 106. By itself, the declaratory judgment is not at all likely, much less "substantially likely," to redress the persecution injuries claimed by SMUG. Accordingly, SMUG does not have standing to seek declaratory relief on behalf of its members and employees, so its representative-capacity claim should be dismissed, with prejudice.

C. SMUG LACKS ASSOCIATIONAL STANDING BECAUSE IT CANNOT PLEAD SUFFICIENT CAUSATION.

As shown in the preceding section, to have associational standing SMUG must demonstrate that its individual members meet the three elements of Article III standing, one of which is causation. A complaint must be dismissed where, as here, it fails to plead sufficient facts to show an injury that is fairly traceable to specific conduct by the defendant. *Lujan* 504 U.S. at 560. Such a connection "cannot be overly attenuated." *Donahue v. City of Boston,* 304 F.3d 110, 115 (1st Cir. 2002). Because the opposing party must be the source of the harm, **causation is absent if the injury stems from the independent action of a third party**. *Katz v. Pershing, LLC*, 672 F.3d 64, 71-72 (1st Cir. 2012). "In other words, the 'case or controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon v. E. Kentucky Welfare Rights Org.,* 426 U.S. 26, 41-42 (1976).

An alleged injury is not fairly traceable to mere advocacy by the defendant unless the advocacy is directed to produce or incite **imminent** lawless action and is likely to produce or incite such action. *N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886, 927-28 (1982). As

demonstrated throughout this memorandum, SMUG has utterly failed to plead that Mr. Lively incited anyone to imminent violence.

Notwithstanding SMUG's failure to plead facts showing it suffered actual persecution, SMUG fails to "fairly trace" any conduct by Mr. Lively to the six alleged incidents of "severe deprivation of fundamental rights." Chronologically, the first injury alleged in the Complaint is the 2005 raid by Ugandan police of the home of Victor Mukasa, a founder of SMUG. (Dkt. 1, p. 9, ¶ 24 (second) and p. 40, ¶¶ 130, 131, 119, 120). However, SMUG pleads no facts to show a causal connection between Mr. Lively's 2002 visit, or any subsequent action by Mr. Lively, and the raid. While the *Claiborne* court found "**days or months"** too long to support "imminent" incitement, the police raid alleged here took place **years** after Mr. Lively's first visit to Uganda. Further, the alleged raid was an "independent action of some third party not before the court," meaning the police. SMUG fails to allege that Mr. Lively, or even any alleged "co-conspirator," had a "fairly traceable" causal connection with the police who implemented the alleged raid. Instead, SMUG reveals **another** intervening action by yet **another** independent party, alleging that the raid took place two weeks after the state-owned newspaper ran an article urging action by police. (Dkt. 1, p. 9, ¶ 2-24 (first)). SMUG fails to plead even an attenuated connection between Mr. Lively and the state-owned newspaper that allegedly urged action or the police who carried out the alleged 2005 Mukasa raid.

Similarly, SMUG details a 2008 police arrest of a SMUG staff member and a "founding member" of a purported member organization. (Dkt. 1, pp. 37-38, ¶¶ 113-118). In the lengthy description, SMUG fails to trace any connection between the arrests and Mr. Lively, **who had last visited Uganda six years before**.

Again, SMUG details a police raid on a conference organized by a "member organization" in 2012. (Dkt. 1, pp. 36-37, ¶¶ 104-112). Yet, in the detailed description, SMUG fails to trace any connection between the raid and Mr. Lively, **who had last visited Uganda three years before**. "Causation is absent if the injury stems from the independent action of a third party." *Katz*, 672 F.3d at 71-72. The independent actions of the Ugandan police preclude SMUG from showing the requisite causation and requires dismissal for lack of standing.

Even less concrete and more attenuated are the generalized grievances concerning the media in Uganda. (Dkt. 1, pp. 38-40, ¶¶ 121-129; pp. 41-43, ¶¶ 121-130). SMUG draws the connection between the hostility of the media and its 2007 press conference. (*Id*. at p. 38, ¶ 121). SMUG asserts that it was in direct response to its press conference that **Deputy Attorney General Fred Ruhindi**, who is **not** named as an alleged "co-conspirator," called on agencies "to take appropriate action because homosexuality is an offence under the laws of Uganda." (*Id*. at p. 38, ¶ 122). SMUG alleges statements **by Mr. Buturo and Mr. Ssempa** advocating a different view (*id*. at p. 39, ¶ 123), alleges the suspension of a third party radio station manger **by a government agency** (*id*. at p. 39, ¶ 127), and alleges the publishing of newspaper stories **by a tabloid**. (*Id*. at pp. 40-41, ¶¶ 128-129). SMUG then connects various threats and harassment received by various individuals **to the "outing" in the tabloids** and the Uganda High Court's ruling. (*Id*. at p. 42, ¶¶ 128-129). However, in this detailed discussion of grievances, SMUG fails to plead a plausible causal connection between the conduct of these third parties and **Mr. Lively**. Even if it could, "emotional and persuasive appeals" and "threats of vilification or social ostracism" do not constitute "imminent lawless action" whereby advocacy can be "fairly traced" to an injury. *Claiborne*, 458 U.S. at 926.

At bottom, the undeniable and enormously revealing fact is that Mr. Lively's name does not appear **even once** in the section of the Complaint where SMUG details the actual acts of alleged persecution. (Dkt. 1, pp. 36-43, ¶¶ 104-132). This is not accidental. SMUG cannot plead a fairly traceable causal connection between the injuries claimed by its members and Mr. Lively, and therefore it lacks standing to bring this suit on their behalf. The Complaint should be dismissed.

D. SMUG LACKS ASSOCIATIONAL STANDING BECAUSE IT HAS NOT ALLEGED ASSOCIATIONAL AUTHORITY.

A final and independent reason why SMUG lacks associational standing is its failure to plead that it has been authorized to bring this suit on behalf of its members and employees. "[A]n organization only has associational standing when it has a clear mandate from its membership to take the position asserted in the litigation." *Nat'l Coal. Gov't of Union of Burma*, 176 F.R.D. at 344 n.16. "In other words, [SMUG] cannot have associational standing without an allegation that its members 'have either requested to be represented or consented to be represented' by [SMUG]." *Id*. (quoting *Natural Resources Defense Council, Inc. v. United States EPA,* 507 F.2d 905, 910 (9th Cir.1974); *Associated General Contractors v. Coalition for Economic Equity,* 950 F.2d 1401, 1408–09 (9th Cir.1991)).

SMUG fails to allege anywhere in its Complaint that it has a clear mandate from its members and employees to pursue this litigation on their behalf. This glaring omission is particularly relevant here, because SMUG claims that it is not merely a membership association with individual members, but an "umbrella organization" with "constituent member organizations" which themselves presumably have their own leadership and individual members. (Dkt. 1, p. 1, ¶ 1). In the absence of an allegation from SMUG, these organizations cannot be presumed to have authorized this suit. Thus, even if it could constitutionally bring its tort claims

in a representative capacity, which it cannot, SMUG's Complaint fails because it fails to allege that SMUG has the authority, much less "a clear mandate," to prosecute this case on behalf of anyone else.

In sum, as aptly put by the Ninth Circuit, "[t]here is no escaping the fact that [SMUG] in this case cannot overcome the [standing] hurdle placed before it by Supreme Court precedent." *United Union of Roofers*, 919 F.2d at 1400. The Court should dismiss all of SMUG's representative-capacity claims for lack of standing.

IX. SMUG LACKS STANDING TO BRING THIS ACTION ON ITS OWN BEHALF.

SMUG also attempts to assert in its own right the same claims it asserts on behalf on its members, but they fail for the same reason: lack of standing. "Like any other plaintiff, when an organization brings an action in its own behalf, rather than on behalf of its members, the organization must show that it has standing to assert its claims." *Nat'l Coal. Gov't of Union of Burma*, 176 F.R.D. at 340. "[T]he organization must meet the same standing test that applies to individuals by showing actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision." *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 294 (S.D.N.Y. 2009) (quoting *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d Cir. 1998)) (internal quotes omitted).

SMUG fails the first and second indispensible elements of Article III standing because it has not alleged sufficient facts to demonstrate either a concrete injury or that such injury is fairly traceable to Mr. Lively's conduct. Even if SMUG had pled the requisite injury and traceability, it has failed to plead any legally cognizable claim for recovery, because, as shown above, persecution can only be asserted by individual persons. Accordingly, SMUG's individual capacity claims should be dismissed.

A. SMUG LACKS STANDING BECAUSE IT DOES NOT ALLEGE A CONCRETE INJURY TO ITSELF.

As the First Circuit has recently summarized it,

> The first element of Article III standing is injury in fact. This element is defined as 'an invasion of a legally protected interest which is (a) **concrete and particularized**; and (b) **actual or imminent**, not conjectural or hypothetical.' These are distinct characteristics. Particularity demands that a plaintiff must have personally suffered some harm. The requirement of an actual or imminent injury ensures that the harm has either happened or is sufficiently threatening; it is not enough that the harm might occur at some future time.

Katz, 672 F.3d 64, 71 (1st Cir. 2012) (emphasis added) (quoting *Lujan*, 504 U.S. at 560, 564) (internal citations omitted).

In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the Supreme Court held that an organization suffers an injury in fact if the challenged conduct causes it to divert sufficient resources from its organizational mission to "perceptibly impair" that mission. *Id*. at 379. "Not every diversion of resources to counteract the defendant's conduct, however, establishes an injury in fact." *N.A.A.C.P. v. City of Kyle, Tex.*, 626 F.3d 233, 238 (5th Cir. 2010) (applying *Havens Realty*). "[T]he mere fact that an organization redirects **some** of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization." *Id*. (emphasis added) (quoting *La. ACORN Fair Hous. v. LeBlanc,* 211 F.3d 298, 305 (5th Cir. 2000)).

Thus, in *City of Kyle*, the Fifth Circuit dismissed an organization's Fair Hosing Act claims for lack of standing, because, although the organization alleged, as SMUG does here, that it had to **expend** funds to counteract the conduct which it challenged, the organization could not establish that it actually **diverted** funds from other projects, **to the detriment of those projects and of the organization**:

> Plaintiffs have not identified any specific projects that the [organization] had to put on hold or otherwise curtail in order to respond to the [challenged conduct]. Instead, Plaintiffs have only conjectured that the resources that the [organization] had devoted to the [challenged conduct] could have been spent on other unspecified [organization] activities. **In short, Plaintiffs have not demonstrated that the diversion of resources here concretely and 'perceptibly impaired' the [organization]'s ability to carry out its purpose**. At most, they have established 'simply a setback to the organization's abstract social interests.' Thus, **there is no injury in fact**, and consequently, we must dismiss this case for lack of standing.

626 F.3d at 238-39 (emphasis added) (quoting *Havens Realty*, 455 U.S. at 379) (internal citations omitted).

As in *City of Kyle*, SMUG here has alleged only that it "had to devote a substantial amount of time and resources to assisting LGBTI persons" who have allegedly encountered various acts of "persecution" "by the police," "by landlords," or third parties other than Mr. Lively. (Dkt. 1, p. 43, ¶ 132). **Nowhere does SMUG allege that this expenditure of "time and resources" detracted from other projects or from its mission as an organization**. (*Id.*) As in *City of Kyle*, SMUG therefore alleges only an unspecified **expenditure**, but does not allege any **diversion** of resources, let alone a concrete diversion that was so large and severe as to detract from other projects and concretely hurt the organization. 626 F.3d at 238-39.

On the contrary, a fair reading of the Complaint indicates that SMUG's alleged investment of "time and resources" in "assisting LGBTI persons" to deal with alleged acts of "persecution" by third parties could not have "perceptibly impaired" it mission, because **that's precisely what SMUG's mission is**: "**advocating** on behalf of lesbian, gay, bisexual, transgender, and intersex ('LGBTI') communities, to unify and **support** sexual minority groups in Uganda." (Dkt. 1, p. 6, ¶ 16) (emphasis added). An organization that expends "time and resources" on matters related to its mission does not sustain a cognizable injury in fact to confer Article III standing. *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 295 ("because the purpose of [the organization] is to counteract the harms of apartheid, **efforts spent in that**

pursuit cannot constitute a *detriment* to the group's mission or activities") (italics in original; bold emphasis added).

Two cases which examined organizational expenditures for purposes of standing specifically in the context of the Alien Tort Statute, and in full view of the Supreme Court's holding in *Havens Realty*, further demonstrate that SMUG's allegations on standing cannot stand. In *South African Apartheid Litig.*, a civil rights organization named KSG sought to bring claims of various human rights abuses against certain corporations under the Alien Tort Statute. 617 F. Supp. 2d at 240. Like SMUG, KSG alleged that it was formed "to support" victims of apartheid in South Africa. *Id*. at 293, (*compare* with dkt. 1, p. 6, ¶ 16). Also like SMUG, KSG's "supporting" and "advocacy" mission included "health services and educational programs" for its constituents. *Id*. And just like SMUG has alleged here, KSG alleged that it was required to expend "time and resources" to "counteracting the harms" of defendants' conduct. *Id*. at 295. Applying *Havens Realty*, however, the court dismissed KSG's claims for lack of standing, because KSG "does not allege that the time and resources KSG spent counteracting the harms of apartheid were *diverted* from KSG projects." *Id*. at 295 (italics in original). The court held that because KSG's mission was to support victims of apartheid, "time and resources" spent in supporting victims of apartheid did not injure the organization for purposes of Article III standing. *Id*. The same is true here. SMUG's admitted mission is to "advocate" for and "support" victims of "discrimination and violence based on sexual orientation and/or gender identity" and, like KSG, to provide educational programs and certain health services. (Dkt. 1, p. 6, ¶ 16). As such, the alleged "time and resources" spent by SMUG on these matters do not constitute Article III injury in fact.

The other case that applied *Havens Realty* to organizational claims brought under the Alien Tort Statute concluded that the plaintiff organization did assert sufficient injury to itself, but **only** because it had specifically alleged that it "**diverted** funds from trade union education programs to provide relief to refugee members" suffering various human rights abuses. *Nat'l Coal. Gov't of Union of Burma*, 176 F.R.D. at 342 (emphasis added). Unlike in *Burma*, SMUG alleges neither a diversion of funds nor organizational impairment, and therefore fails to meet the injury in fact element of Article III standing.

Finally, it is unclear whether, in addition to the alleged expenditures of "time and resources," SMUG also claims injury flowing from the proposed "Anti-Homosexuality Bill," which SMUG claims "would render Plaintiff's work and mere existence illegal." (Dkt. 1, p. 17, ¶ 52). To the extent that it does claim such injury, this claim also fails to confer standing, because, aside from being the product of a sovereign legislative body, **the bill has not actually been enacted**. (*Id.*) The bill has been discussed by the sovereign Ugandan legislature for over three years, but has not been passed into law. (*Id.*) No plaintiff has standing to challenge a bill that has not yet become law, because any claimed injury based upon the fear of future enforcement of a yet-to-be-enacted law is purely conjectural and speculative:

> Plaintiffs' contention that they have standing because there is a substantial likelihood of a state enacting [the challenged] legislation is **not a showing that injury is imminent, just (at best) possible or likely**. Under the standing doctrine, more is required; the injury must be impending before the injury in fact requirement is met. It is undisputed that no state has enacted [the challenged] legislation and that the adverse effects plaintiffs contend that [the challenged] legislation might cause … therefore have not occurred. Plaintiffs rely on an expert's analysis concluding that there is a substantial likelihood that at least one state will enact [the] legislation in the next year. The Court must conclude, however, that **the injury plaintiffs seek to avoid is too speculative to satisfy the standing requirements**. Moreover, the harms that may be caused by [the] legislation – if and when such legislation is passed – will depend largely on the specific provisions included in the statute passed.

LPA Inc. v. Chao, 211 F. Supp. 2d 160, 164-65 (D.D.C. 2002) (emphasis added) (dismissing pre-enactment complaint for lack of standing).[44]

Indeed, as this Court has previously acknowledged, even if the bill were to somehow pass after languishing for three years, its enactment alone does not confer standing. "It has been established, however, that fear of possible future application of a federal criminal statute does not confer standing in a declaratory judgment action." *Crooker*, 41 F. Supp. 2d at 91 (Ponsor, J.). "The mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III." *Id*. (citing *Stoianoff v. Montana,* 695 F.2d 1214, 1223 (9th Cir.1983)). If even an enacted criminal statute does not confer automatic standing to challenge it, a pending bill certainly cannot do so.[45] "[C]oncreteness of injury is crucial to exercise of judicial power." *Crooker*, 41 F. Supp. 2d at 92. Accordingly, far from being "concrete and particularized" and "actual or imminent," SMUG's alleged injuries flowing from a bill that has not even been enacted are only "conjectural or hypothetical," and neither "concrete" nor "imminent." *Katz*, 672 F.3d at 71. SMUG's claims should be dismissed for lack of standing.

In sum, SMUG has failed to plead a concrete, particularized and imminent injury, so the claims it attempts to bring on its own behalf should be dismissed for lack of standing.

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[44] Pre-enactment complaints against pending bills are barred not only on standing grounds, but also because they are not ripe. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States,* 523 U.S. 296, 300 (1998). Pre-enactment challenges are not ripe because the bills may not be enacted, or they may be significantly altered prior to enactment in a manner that removes or changes the threatened injury. *See*, *Cares v. Bowen*, 2:08CV00083MCEGGH, 2008 WL 312642, *3-4 (E.D. Cal. Feb. 4, 2008) (dismissing pre-enactment complaints against a pending constitutional amendment, both because plaintiff could not establish injury in fact and because the matter was not ripe for adjudication).

[45] Indeed, if a court lacks authority to entertain a pre-enactment challenge to a proposed law pending in its own jurisdiction, how much more does it lack authority to entertain a pre-enactment challenge to a proposed law pending in a foreign jurisdiction? There can be no redressability under these circumstances.

B. SMUG LACKS STANDING BECAUSE IT DOES NOT ALLEGE TRACEABILITY OF ANY CLAIMED INJURY TO ANY CONDUCT BY MR. LIVELY.

As with the alleged injuries to its individual members, SMUG has failed to allege that the injuries it claims to itself are fairly traceable to any "conduct" by Mr. Lively. As such, SMUG has failed to show that it meets the traceability requirement of standing, and it's Complaint must be dismissed for lack of standing.

SMUG claims that it has had to devote a substantial amount of time and resources to assisting homosexuals who have been "arbitrarily arrested and harassed and/or mistreated **by the police**" and who have been "forcibly evicted from their homes **by landlords**." (Dkt. 1, p. 43, ¶ 132) (emphasis added). Even if these alleged expenditures constitute an "injury in fact," and they do not, SMUG admits that they "result[ed] from the independent action of some third party not before the court," so it cannot establish traceability for standing. *Simon v. E. Kentucky Welfare Rights Org.,* 426 U.S. 26, 41-42 (1976). Entirely missing from the Complaint are any facts alleging a traceable causal connection between **Mr. Lively's** so-called "conduct" and the conduct of identifiable police officers or landlords who allegedly caused the harm.

Further, SMUG admits that the "climate of hostility and prejudice" against LGBTI persons in Uganda is the result of a combination of "legal proscriptions against and criminalization of homosexuality," "discriminatory policies" in government services, "media outings," and statements by "governmental officials and their non-governmental counterparts." (Dkt. 1, p. 43, ¶ 131). A "climate of hostility" is much too generalized and attenuated to serve as a basis for Article III standing, but even if it were adequate, the independent actions of these third parties preclude SMUG from showing a causal connection between **Mr. Lively** and its alleged harm.

SMUG worries that **if** the Anti-Homosexuality Bill, which was introduced three years ago, passes the Ugandan Parliament, then SMUG's "work and mere existence" will become illegal. (Dkt. 1, p. 17, ¶ 52). The bill, however, has languished in the Ugandan Parliament for three years. Even if such generalized worry could be construed as an injury, and it cannot, SMUG cannot possibly show that its supposed injuries from a bill that was never passed were caused by Mr. Lively and not be the independent actions of 435 voting members of the Ugandan Parliament.

In sum, SMUG cannot show the required traceability between the harms it alleges and Mr. Lively's "conduct," so its Complaint should be dismissed for lack of standing.

X. THIS COURT LACKS SUBJECT-MATTER JURISDICTION BECAUSE THE ALIEN TORT STATUTE DOES NOT REACH EXTRATERRITORIAL CONDUCT.

SMUG's sole basis for invoking the subject-matter jurisdiction of this Court is the Alien Tort Statute. (Dkt. 1, p. 1, ¶ 2; pp. 5-6, ¶ 13). However, because the alleged acts of persecution of which SMUG complains took place outside the sovereign territory of the United States, in Uganda, the Alien Tort Statute does not provide jurisdiction over SMUG's claims. There is a well-established, longstanding and exceedingly strong presumption against the extraterritorial application of any statute, and SMUG cannot overcome its heavy burden of demonstrating that the Alien Tort Statute was intended to reach extraterritorial conduct. Although other courts have assumed without deciding that the statute covers extraterritorial acts, none of those decisions are binding on this Court. Accordingly, this Court starts with a clean slate and has a unique opportunity to reaffirm constitutional jurisdictional boundaries and the limited-jurisdiction nature of federal courts. The Court should dismiss SMUG's Complaint for lack of subject-matter jurisdiction.

A. THE SUPREME COURT, THE FIRST CIRCUIT AND THIS DISTRICT ALL RECOGNIZE AND ENFORCE THE LONGSTANDING AND STRONG PRESUMPTION AGAINST EXTRATERRITORIAL APPLICATION OF FEDERAL STATUTES.

"It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)). Where a statute lacks a clear and affirmative congressional intention to reach extraterritorial conduct, the statute has no extraterritorial effect **even if such an effect is otherwise a possible interpretation of the statute**. *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877-883, __ U.S. __ (2010). In *Morrison*, plaintiffs, who were foreign shareholders in the defendant company, brought suit in federal district court for violation of § 10(b) of the Securities and Exchange Act of 1934. *Morrison*, 130 S. Ct. at 2873. The Supreme Court held that the Act did not apply extraterritorially. *Id.* at 2883. The Court reasoned that, absent an affirmative indication within the Act to the contrary, there could be no extraterritorial application. *Id.* at 2884. This was so even though **the defendant committed some domestic acts** relating to the perpetration of the fraud, because the fraud itself was concluded abroad, and thus plaintiff's claims lacked the necessary domestic basis for suit. *Id.*

The presumption against extraterritorial application goes back two centuries. *See e.g.*, *United States v. Palmer*, 16 U.S. 610 (1818) (holding that in the absence of a statutory provision to the contrary, United States courts could not exercise jurisdiction over acts committed in the territorial bounds of a foreign nation). A century later, the Supreme Court again cautioned strongly against presuming that a statute reaches extraterritorial conduct. *United States v. Bowman*, 260 U.S. 94, 102 (1922) ("We cannot suppose that when Congress enacted the statute

… it did not have in mind that a wide field for such [violations] was … beyond the land jurisdiction of the United States, and therefore intended to include them in the section.")

The party asserting federal subject-matter jurisdiction, in this case SMUG, has the burden of proving it. *Able Sales Co., Inc. v. Compania de Azucar de Puerto Rico*, 406 F.3d 56, 61 (1st Cir. 2005); *Bull HN Info. Sys., Inc. v. Hutson*, 229 F.3d 321, 328 (1st Cir. 2000). This District has repeatedly recognized that only the clearest showing of extraterritorial intent will overcome the presumption. *Smith v. Raytheon Co.*, 297 F. Supp. 2d 399, 403 (D. Mass. 2004) (presumption against extraterritoriality can only be overcome with "**clear** evidence of congressional intent") (emphasis added); *Telford v. Iron World Mfg., LLC*, 680 F. Supp. 2d 337, 342 (D. Mass. 2010) (Massachusetts statutes "are presumed **not** to apply extraterritorially unless there is **clear** legislative intent") (emphasis added) (internal quotation marks omitted); *Northland Cranberries, Inc. v. Ocean Spray Cranberries, Inc.*, 382 F. Supp. 2d 221, 227 (D. Mass. 2004) (federal legislation only applies domestically absent "a **clear** expression of congressional intent to the contrary") (emphasis added).

The Supreme Court has counseled that, "in [a] case of doubt" courts must apply a "construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power." *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355-57 (1909) (internal quotation marks omitted), *distinguished by Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 705-06 (1962). The reason for erring on the side of caution is simple: "**All legislation is prima facie territorial**." *Id.* at 357. (emphasis added). Accordingly, proponents of extraterritoriality cannot employ the familiar argument that congressional silence, even in the face of erroneous extraterritorial application by the judiciary, indicates congressional intent to breach the sovereign borders of the United States.

Union Underwear Co., Inc. v. Barnhart, 50 S.W.3d 188, 191 (Ky. 2001) ("It is not [defendant who] has to show lack of extraterritorial application. Rather, it is [plaintiff] who must positively show the legislative intent that the [statute] is to be applied extraterritorially").

In *Carnero v. Boston Scientific Corp.*, the First Circuit identified the relevant sources that could be examined to divine congressional intent on extraterritoriality, but not before cautioning that "the presumption can be overcome **only** if there is an **affirmative** intention of the Congress **clearly** expressed." 433 F.3d 1, 7 (1st Cir. 2006) (emphasis added) (internal quotation marks omitted) (quoting *Arabian Am. Oil Co.*, 499 U.S. at 248). The First Circuit held that evidence of Congressional intent can be found, if at all, in the particular statute's "**text, context, structure, and legislative history**." *Carnero*, 433 F.3d at 7 (citing *Sale v. Haitian Ctrs. Council, Inc.,* 509 U.S. 155, 177 (1993)). Examining those sources, the First Circuit concluded that the Sarbanes-Oxley Act could not be applied extraterritorially, because of the "absence of any indication that Congress contemplated extraterritoriality," and the "indications that Congress [originally] thought the statute was limited to the territorial jurisdiction of the United States." *Id*.

None of the four indicators of congressional intent identified in *Carnero* provide **any** evidence that the first Congress intended the Alien Tort Statute to reach conduct outside of the United States, let alone the type of "clear" and unequivocal evidence that SMUG needs to show in order to overcome the strong presumption against extraterritoriality.

B. NOTHING IN THE TEXT, CONTEXT, STRUCTURE OR LEGISLATIVE HISTORY OF THE ALIEN TORT STATUTE AFFIRMATIVELY AND CLEARLY INDICATES THAT CONGRESS INTENDED EXTRATERRITORIAL APPLICATION.

SMUG cannot point to anything in the text, context, structure or legislative history of the Alien Tort Statute to meet its heavy burden of proving congressional intent for extraterritorial application.

1. The Text of the Alien Tort Statute Does Not Affirmatively and Clearly Evidence Extraterritorial Intent.

The plain text of the Alien Tort Statute fails to lend even a scintilla of proof that it was intended by Congress to apply extraterritorially. The statute provides: "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." 28 U.S.C.A. § 1350 (West).[46]

SMUG may argue that the use of the inclusive term "**any**" (emphasis added) in the reference to "civil action by an alien" impliedly includes any and all claims under the sun, including those founded upon extraterritorial conduct. The Supreme Court, however, has repeatedly and conclusively foreclosed this argument, holding that such general terms, which **could** be interpreted broadly in other contexts, are not sufficient to overcome the strong presumption against extraterritoriality. *See e.g.*, *Foley Bros.,* 336 U.S. at 285 (holding that federal labor statute requiring an eight-hour day provision in "**[e]very** contract made to which the United States ... is a party" did not apply to contracts for work performed in foreign countries because extraterritorial reach cannot be inferred from general terms); *Palmer*, 16 U.S. at 631 (holding that "general words must not only be **limited to cases within the jurisdiction of the state**, but also to those objects to which the legislature intended to apply them," and thus even language applying a statute to "**any** person or persons" cannot overcome the presumption against extraterritorial application) (emphasis added); *Am. Banana Co.*, 213 U.S. at 357 (holding that "[w]ords having universal scope, such as '**every** contract in restraint of trade,' '**every** person who shall monopolize,' etc., **will be taken, as a matter of course, to mean only everyone**

[46] The Alien Tort Statute has received only non-substantive amendments since its enactment in 1789. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 21 (D.C. Cir. 2011) ("[Alien Tort Statute's] content has not been materially amended since its enactment").

subject to such legislation, not all that the legislator subsequently may be able to catch") (emphasis added).[47]

Another equally unavailing argument that SMUG may advance is that inclusion of the word "alien" in the statute somehow demonstrates that any alien can sue for any tort that took place anywhere under the sun. But the statutory language clearly shows that the term "alien" describes only the individual who can bring a claim, **not** the site of the tort. The statute provides a mechanism for "an alien" to bring an action in a United States court, for a tort that took place within the United States. The Supreme Court has also foreclosed this argument, in *Arabian Am. Oil Co.*, in which it held that the use of the term "alien" in an exemption clause of Title VII, even coupled with the broad "jurisdictional terms" of the statute, did not constitute clear evidence of congressional intent to apply Title VII extraterritorially. *Arabian Am. Oil Co.*, 499 U.S. at 248-49, 255. *See also*, *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 76 (D.C. Cir. 2011) ("Nor does the ATS's specific reference to alien plaintiffs establish that the statute applies extraterritorially. That language merely ensures that alien plaintiffs can sue under customary international law for injuries suffered *within the United States*") (Kavanaugh, J., dissenting in part) (italics in original).[48]

That the words "any" or "alien" **could** plausibly be construed more broadly in other contexts is of no moment when contending with the strong presumption against extraterritoriality. The Supreme Court has made clear that **the mere possibility, and even plausibility, that the language of a statute could be read to include extraterritorial**

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[47] Lower courts are, of course, in agreement with the Supreme Court. *See e.g.*, *Barnhart*, 50 S.W. 3d at 191 ("Under the presumption against extraterritorial application, the use of the terms '**any**' or '**all**' to persons covered by the legislation **does not imply that the enacting legislature intended that the legislation be applied extraterritorially**") (emphasis added) (citing 73 Am. Jur. 2d, Statutes, § 359 (1974)).

[48] The majority's decision in *Exxon Mobil* is discussed in detail in section X(c), *infra*.

application does not overcome the presumption against it. *Arabian Am. Oil Co.*, 499 U.S. at 253 (holding that to allow for even "plausible" interpretations in favor of extraterritorial application would negate the presumption against extraterritoriality to the point that there would be little left of it).

SMUG's likely arguments in favor of extraterritoriality based on the statutory text would fall flat even in a vacuum. But when considered in light of the First Circuit's admonition that only a showing of an "affirmative" and "clearly expressed" congressional intent suffices to overcome the strong presumption against extraterritoriality, *Carnero*, 433 F.3d at 7, this Court should have little difficulty dispensing with those arguments. Nothing in the text of 28 U.S.C. §1350 affirmatively, let alone clearly, expresses any congressional intent to reach conduct outside the sovereign borders of the United States.

2. The Context of the Alien Tort Statute Does Not Affirmatively and Clearly Evidence Extraterritorial Intent.

The context in which the Alien Tort Statute was drafted and enacted provides even less support for any notion of extraterritoriality than its text. The statute was enacted by the First Congress "as part of the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789)." *Exxon Mobil Corp.*, 654 F.3d at 20. The Supreme Court has noted that "the jurisdiction [of the Alien Tort Statute] was originally understood to be available to enforce a small number of international norms that a federal court could properly recognize as within the common law enforceable without further statutory authority." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004). The court in *Sosa* explained that "[w]hen § 1350 was enacted, the accepted conception was of the common law as 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.'" *Id.* (quoting *Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co.,* 276 U.S. 518, 533 (1928)). In other words, the

Congress that enacted § 1350 did so in the firm belief that the common law principles that informed the statute were relatively fixed. *Sosa*, 542 U.S. at 725.

Because the Congress that enacted §1350 did so in light of relatively constant common law principles, an examination of the common law causes of action that were brought in the early tenure of the Alien Tort Statute reveals its inherently domestic application and context. The statute was enacted "on the understanding that the common law would provide a cause of action for the modest number of international law violations thought to carry personal liability at the time: offenses against ambassadors, violation of safe conducts, and piracy." *Sosa*, 542 U.S. at 694. Indeed, the conduct that inspired the creation of the Alien Tort Statute was the mistreatment of foreign officials **on U.S. soil**. Jason Jarvis, *A New Paradigm for the Alien Tort Statute Under Extraterritoriality and the Universality Principle*, 30 Pepp. L. Rev. 671, 678 (2003).

SMUG may be tempted to point to the inclusion of piracy in the list of early Alien Tort Statute claims as evidence of extraterritorial application, but such an argument ignores the fact that "jurisdiction over ships and persons on the high seas was considered **domestic** jurisdiction by early United States courts." *Id.* (emphasis added) (citing *State v. Carter*, 27 N.J.L. 499 (N.J. 1859) ("When [a crime is committed] upon our vessels, in whatever solitary corner of the ocean … the vessel and all it contains is still within our jurisdiction … But we have never treated **acts done upon the vessels of other governments** as within our jurisdiction, nor has such ever been done by any civilized government") (emphasis added). As with the other potential arguments in favor of extraterritoriality, the Supreme Court has also conclusively foreclosed this one, when it held that, on the high seas, only the crime of piracy or crimes by United States citizens occurring **on a United States vessel** could be actionable in a United States court under a 1790 law. *Palmer*, 16 U.S. at 610. "The crime of robbery committed by a person who is not a citizen of the U[nited]

States, on the high seas, on board of a ship belonging exclusively to subjects of a foreign state, **is not piracy under the act**, and **is not punishable in the courts of the United States**." *Id.* (emphasis added).

While the *Palmer* Court ruled on a separate act of the First Congress, that law was enacted only one year after the Alien Tort Statute, and thus the Court's interpretation of it reveals the decidedly domestic "context" of the Alien Tort Statute. The inclusion of piracy in the list of actionable torts evidenced **domestic**, not extraterritorial context, because jurisdiction over the high seas did **not** include acts committed by foreigners onboard foreign vessels. It included only piracy as defined by the law of nations and committed by United States citizens, because such piracy was considered domestic in nature.[49]

In sum, nothing in the context of the Alien Tort Statute reveals any intent by the First Congress to extend its reach beyond the United States borders. On the contrary, all evidence indicates that the statute was intended to apply to decidedly domestic torts committed upon aliens on United States soil.

3. The Structure of the Alien Tort Statute Does Not Affirmatively and Clearly Evidence Extraterritorial Intent.

Neither can SMUG find any support (much less affirmative and clear support) for extraterritoriality within the structure of the Alien Tort Statute. The structure of the statute is relatively simple. It was enacted as part of the Judiciary Act of 1789, which, among other things, established the federal judiciary and defined the bounds if its jurisdiction. *Exxon Mobil Corp.*,

[49] Furthermore, the crime of piracy as a violation of the law of nations (the court in *Palmer* dealt with a definition of piracy as codified by Congress) had the effect of causing a "vessel [to lose] her national character … [and] a piracy committed by a foreigner, from on board such a vessel, upon any other vessel whatever, is punishable …." *United States v. Furlong*, 18 U.S. 184, 185 (1820). In other words, pirates were considered subjects of no sovereign, and as such jurisdiction exercised over acts committed by them on the high seas was not extraterritorial because it did not encroach into the jurisdiction of a foreign nation. *Id.*

654 F.3d at 45 ("The Judiciary Act of 1789 ensured that there would be no gap in federal subject-matter jurisdiction with regard to torts in violation of treaties or the law of nations"). *See also*, William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists"*, 19 Hastings Int'l & Comp. L. Rev. 221, 222 (1996) ("the Alien Tort Statute was enacted as the Alien Tort Clause – a provision in Section 9 of the Judiciary Act of 1789"). And, "[w]hile the whole of the Judiciary Act served to confer broad jurisdiction over aliens upon the federal courts, the [Alien Tort Statute] conferred a unique type of jurisdiction: the power of an alien to sue another alien." Jarvis, 30 Pepp. L. Rev. at 676.

Because the Judiciary Act was primarily devoted to defining the bounds of the judiciary, and particularly the bounds of federal subject-matter jurisdiction, its silence with respect to any extraterritorial application of the Alien Tort Clause is even more telling – no such application was ever intended.

4. The Legislative History of the Alien Tort Statute Does Not Affirmatively and Clearly Evidence Extraterritorial Intent.

The final potential indicator of congressional intent with respect to extraterritoriality identified by the First Circuit is legislative intent. *Carnero*, 433 F.3d at 7. Here again, SMUG comes up empty.

Because the Alien Tort Statute was an act of the First Congress, it is no surprise that there is no actual legislative history behind it. Dodge, 19 Hastings Int'l & Comp. L. Rev. at 222. In the absence of any clear legislative intent on a given statute, some courts have looked to the nature of the particular offense prescribed by that statute and the extent to which "other legislative efforts" had attempted to eliminate that same conduct. *United States v. Bredimus*, 234 F. Supp. 2d 639, 649 (N.D. Tex. 2002), *aff'd,* 352 F.3d 200 (5th Cir. 2003). As discussed above, the Alien Tort Statute, as part of the Judiciary Act, was the culmination of a series of legislative efforts

designed to remedy the federal government's inability to deal with **domestic** infractions against the law of nations, specifically harms committed against ambassadors. Jarvis, 30 Pepp. L. Rev. at 677-79.

The first and most significant event that prompted the need for such federal power involved the assault of a French official by a French citizen named Chevalier De Longchamps, **on United States soil**. *Id.* at 677. In response to this event, and "[b]eing bereft of power to succor the enraged international community, Congress merely offered a reward for the miscreant's apprehension and encouraged state authorities to prosecute him." *Id.* This modest effort by Congress to remedy this particular type of harm is strong evidence that the final culmination of the efforts, the Alien Tort Statute, was created for the purpose of conferring federal subject-matter jurisdiction over domestic claims by aliens.[50]

At bottom, SMUG bears the burden of proving extraterritorial intent, and nothing in the text, context, structure or legislative history of the Alien Tort Statute provides **any** evidence, let alone the required affirmative and clear evidence, that the First Congress intended the statute to have extraterritorial effect. Accordingly, this Court must presume that there was no such intent, and should conclude that it has no subject-matter jurisdiction over Mr. Lively's alleged speech and conduct in Uganda.

C. THIS COURT SHOULD NOT FOLLOW THE DECISIONS OF OTHER COURTS THAT HAVE OVERLOOKED OR DISREGARDED THE STRONG PRESUMPTION AGAINST EXTRATERRITORIALITY.

Bereft of any evidence of extraterritorial intent, SMUG's only recourse thus far has been, and will likely continue to be, to seek refuge in the decisions of other courts (not the First Circuit) that have either **assumed** extraterritoriality without actually considering it, or have

[50] In addition to being relevant to the legislative history, the domestic De Longchamps incident provides additional powerful evidence that the "context" of the Alien Tort Statute, the second *Carnero* indicator, is decidedly domestic, not extraterritorial.

disregarded the presumption against extraterritoriality altogether. (*See* SMUG's Opposition to Mr. Lively's Motion to Stay Proceedings, dkt. 18, pp. 7-9) (arguing that other courts have applied the Alien Tort Statute to extraterritorial conduct). However, this Court's analysis of its subject-matter jurisdiction under the Alien Tort Statute begins with a clean slate, for two reasons: (1) the First Circuit has not yet decided whether the statute reaches extraterritorial conduct; and (2) this Court need not follow the decisions of other courts that have overlooked or disregarded the strong presumption against extraterritoriality.

The Supreme Court in *Morrison* held that the presumption against extraterritoriality applies to **all** federal legislation. *Morrison*, 130 S. Ct. at 2873 ("Rather than guess anew in each case, this Court applies the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects"). The *Morrison* Court also clearly dictated that no deference should be given to any case that has wrongly "ignored or discarded the presumption against extraterritoriality." *Id.* at 2887-88; *see also*, *Arabian Am. Oil Co.*, 499 U.S. at 260.

More importantly, to the extent that courts have already applied the Alien Tort Statute extraterritorially, **without expressly considering whether they could do so**, the Supreme Court has held that those decisions are not binding on a subsequent court that eventually decides to expressly consider the issue. *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1448, __ U.S. __ (2011) ("**when questions of jurisdiction have been passed on in prior decisions *sub silentio,* this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us**") (emphasis added) (internal quotation marks omitted) (quoting *United States v. L.A. Tucker Truck Lines, Inc.,* 344 U.S. 33, 38 (1952)).

The Supreme Court has cautioned strongly against blindly relying "on assumptions that have gone unstated and unexamined." *Winn*, 131 S. Ct. at 1449. In fact, the High Court has recently gone even further, holding that the length of time during which courts have misapplied or failed to apply a canon of statutory construction is "immaterial." *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1268, __ U.S. __ (2011). In *Milner*, a canon of statutory construction had been erroneously set-aside, misapplied and even ignored completely for **thirty years**. *Id*. The proponent of that same erroneous position in *Milner*, as SMUG has done in this case, attempted to seize upon that fact, arguing that its position "had been consistently relied upon and followed for thirty years by other lower courts." *Id*. The Supreme Court, however, was not impressed:

> this claim … trips at the starting gate. It would be immaterial even if true, because **we have no warrant to ignore clear statutory language on the ground that other courts have done so**.

Id. (emphasis added) (internal quotation marks omitted). Here too, SMUG "trips at the starting gate" by relying on non-binding Alien Tort Statute decisions which have either silently assumed extraterritorial jurisdiction, or have ignored the strong presumption against extraterritoriality. This Court should not make the same error.

For example, SMUG has previously relied on the D.C. Circuit's holding in *Exxon Mobil*, 654 F.3d 11. (Dkt. 18 at pp. 8-9). SMUG's reliance is misplaced for several reasons. First, decisions of the D.C. Circuit are not binding in the First Circuit. Second, the D.C. Circuit in *Exxon Mobil* was confused about the domestic nature of piracy claims actionable under the Alien Tort Statute, and assumed, mistakenly, that they were extraterritorial. *Id*. at 21. (*See* section X(B)(2), *supra*, for discussion of piracy as a domestic crime). Third, and most importantly, although it gave lip-service to the presumption against extraterritoriality, the court in *Exxon Mobil* ultimately disregarded it, and certainly failed to engage in the text-context-structure-history analysis delineated by the First Circuit in *Carnero*. 654 F.3d at 20. Instead, the D.C.

Circuit relied heavily on **the extent to which other courts have been silent on the issue of extraterritoriality**. *Id.* at 26 ("[g]iven … the Supreme Court's failure to disapprove of such lawsuits in *Sosa…"*). As discussed above, this is exactly the wrong approach, and the Supreme Court has specifically counseled against it.

SMUG has also relied on the Seventh Circuit's decision in *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1025 (7th Cir. 2011), (dkt. 18, p. 8), but *Flomo* is equally unavailing. The *Flomo* court dispensed with the centuries-old presumption against extraterritorial application in one paragraph. 643 F.3d at 1025. Even there, the Seventh Circuit, like the D.C. Circuit in *Exxon Mobil*, relied **not** on evidence of a clear and affirmative congressional intent, but **solely on the extent to which other courts have been silent on the issue of extraterritoriality**. *Id.*, at 1025. Not only is the Seventh Circuit's decision *per se* not binding in the First Circuit, but the decision should be given no deference, because it "relied on [a case] … which ignored or discarded the presumption against extraterritoriality." *Morrison*, 130 S. Ct. at 2887-88.

SMUG's previous reliance on this District's decision in *Xuncax v. Gramajo*, 886 F. Supp. 162, 193 (D. Mass. 1995) (Woodlock, J.) (dkt. 18, p. 9) is also unavailing. First, the court in *Xuncax* did not address the issue of extraterritorial application, but simply **assumed** that the court had "universal" jurisdiction according to the Restatement (Third) of Foreign Relations Law § 404 & cmt. b. *Xuncax*, 886 F. Supp. at 193. However, the black letter of the Restatement does not provide jurisdiction to federal courts carte blanche. Indeed it is powerless to do so, because only Congress may expand, contract or otherwise alter the limits of the federal courts' jurisdiction, within the bounds of Article III of the Constitution. *See Kontrick v. Ryan*, 540 U.S. 443, 452 (2004) (citing to U.S. Const., Art. III, § 1). Instead, the Restatement simply reiterates

the unremarkable proposition that the state legislatures, like Congress, have the power "to **define** and **prescribe** [*i.e.*, legislate] punishment for certain offenses recognized by the community of nations as of universal concern." Restatement (Third) of Foreign Relations Law § 404 (1987) (emphasis added). The relevant question, however, is not whether Congress has the **authority** to make the Alien Tort Statute extraterritorial, but "[w]hether Congress has in fact **exercised** that authority," and that "is a matter of statutory construction." *Arabian Am. Oil Co.*, 499 U.S. at 248 (emphasis added).

Moreover, the district court's decision in *Xuncax* did not consider or apply the presumption against extraterritorial application. Therefore, this court is not bound by a "*sub silentio*" exercise of jurisdiction. *Winn*, 131 S. Ct. at 1448.[51]

Finally, SMUG has also relied on the Supreme Court's decision in *Sosa* as a basis for concluding that extraterritorial application of the Alien Tort Statute is acceptable. (Dkt. 18, p. 8). *Sosa*, however, did not address, much less decide, the issue of extraterritoriality. *Exxon Mobil Corp.*, 654 F.3d at 20 ("**The issue of extraterritoriality, although briefed, was not decided in *Sosa***") (emphasis added). Like other courts, the *Sosa* Court ultimately assumed subject-matter jurisdiction over extraterritorial conduct "*sub silentio*," which is in no way binding on it or other courts that choose to expressly examine the issue. *Winn*, 131 S. Ct. at 1448.

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[51] In addition, the decisions of one judge within this District are not binding on the subsequent decisions of other judges. *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7, __ U.S. __ (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case") (quoting 18 J. Moore et al., Moore's Federal Practice § 134.02[1] [d], p. 134–26 (3d ed.2011)) (internal quotation marks omitted).

However, while it left the extraterritoriality question open in *Sosa*, the Supreme Court now finally appears poised to decide it definitively in *Kiobel v. Royal Dutch Petroleum*, No. 10-1491.[52]

In sum, none of the authorities upon which SMUG relies are binding on this Court or otherwise demonstrate that the First Congress intended for the Alien Tort Statute to apply outside of the United States.

D. SMUG DOES NOT ALLEGE ANY DOMESTIC ACTIONABLE CONDUCT BY MR. LIVELY.

Perhaps because it wishes to hedge its bet, SMUG now appears to be changing tactics, claiming for the first time in its Opposition to Mr. Lively's Motion to Stay that "much of [Mr. Lively's] actionable conduct took place in Springfield, Massachusetts." (Dkt. 18, p. 9). SMUG should re-read its own Complaint. Nowhere does it allege any actionable conduct by Mr. Lively "in Springfield, Massachusetts," or anywhere else outside of Uganda, for that matter. For the purposes of this Motion to Dismiss, SMUG is stuck with the allegations inside the four corners of its Complaint, and cannot now mint a new set of jurisdictional allegations it perhaps wishes it had made to avoid dismissal.

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[52] As detailed in Mr. Lively's Motion to Stay, the Supreme Court has placed *Kiobel* on the calendar for re-argument, specifically on the question of "whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." (Dkt. 17, p. 4). SMUG has attempted to distinguish *Kiobel* on the grounds that it involves corporate (not individual) defendants, who are headquartered outside of the United States. (Dkt. 18, p. 2). The fact remains, however, that the Supreme Court's extraterritoriality concern in *Kiobel* correctly focuses on **where the challenged conduct took place**, and not where the defendants – who, like Mr. Lively, have sufficient contacts with the United States to be subject to general jurisdiction here – are headquartered. *See e.g.*, *Kiobel*, No. 10-1491, Tr. Of Feb. 28, 2012 Oral Argument, at 7:7-9) (Justice Alito remarking "there's no particular connection between **the events** here and the United States") (emphasis added). Moreover, if the Supreme Court finds that the Alien Tort Statute cannot be applied extraterritorially, such decision will foreclose not only claims against corporate defendants, such as the ones in *Kiobel*, but also claims against individuals, such as SMUG's claims against Mr. Lively here. Undoubtedly, *Kiobel* has at least the potential to significantly alter the course of this litigation, if not to derail it completely. (Dkt. 17).

Moreover, SMUG's after-the-fact insinuation that Mr. Lively has various contacts in this District by virtue of his residence ignores the Supreme Court's recent emphasis in *Morrison* that: "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Morrison*, 130 S. Ct. at 2884 (italics in original). Mr. Lively's residence is therefore irrelevant. *Id*. What matters is where the alleged "persecution" took place, and SMUG unequivocally alleges that all six acts of alleged "persecution" took place in Uganda.

For the foregoing reasons, the Court should find that SMUG cannot overcome the strong presumption that the Alien Tort Statute does not reach extraterritorial conduct. The Court should dismiss with prejudice SMUG's Complaint for lack of subject-matter jurisdiction.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiff's Complaint with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically with the Court on June 22, 2012. Service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

/s/ Horatio G. Mihet________________
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