

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS  
SPRINGFIELD DIVISION

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SEXUAL MINORITIES UGANDA )

*Plaintiff,* )

v. )

SCOTT LIVELY, individually and as )  
President of Abiding Truth Ministries, )

*Defendant.* )

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**Civil Action**

**3:12-CV-30051**

EXPERT OPINION OF PROFESSOR M. CHERIF BASSIOUNI

## **I. Introduction**

1. I have been asked by Plaintiff, Sexual Minorities Uganda, to provide an expert opinion addressing whether “Crimes Against Humanity” constitutes a category of crimes under international criminal law and is an international law norm binding upon all states, including the “persecution” of a civilian population carried out on a widespread or systematic basis. And, whether such persecution would include a civilian population on the basis of its sexual orientation and gender identity.

2. Plaintiff’s counsel made available to me the following documents, namely:

- a. “Memorandum of Law in Support of Defendant Scott Lively’s Motion to Dismiss Plaintiff’s First Amended Complaint”, and
- b. “Plaintiff’s Memorandum of Law in Opposition to Defendant’s Motion to Dismiss First Amended Complaint”
- c. “First Amended Complaint Pursuant to Fed. R. Civ. P. 15(a)(1)(B) for Crime Against Humanity of Persecution”
- d. “Memorandum and Order Regarding Defendant’s Motions to Dismiss”

3. I am providing this expert opinion and any testimony in this case on a *pro bono* basis. I will only be compensated by Plaintiff for actual expenses incurred.

4. I base my opinion about the legal status of “Crimes Against Humanity” on the basis of my knowledge, expertise and experience as a scholar studying, teaching, writing about and practicing international law for more than 50 years, and affirm, to the best of my knowledge and ability, that what follows is a true, accurate, and correct statement and interpretation of conventional and customary international law.<sup>1</sup>

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<sup>1</sup> “Conventional law” refers to the body of international norms contained in treaties.

## II. Qualifications of Expert

5. My *Curriculum Vitae* is annexed hereto as Exhibit A.

6. I am currently Professor Emeritus of Law at DePaul University where I taught from 1964-2009. I am a founding member of the International Human Rights Law Institute at DePaul University, which was established in 1990. I am also one of the founders of the International Institute of Higher Studies in Criminal Sciences (ISISC) located in Siracusa, Italy, where I served as General-Secretary from 1972-74, Dean from 1974-88, and then as President to date. I also served as the Secretary General of the International Association of Penal Law from 1974-89 and as President for three five-year terms from 1989-2004, when I was elected Honorary President.

7. To date, I have authored 24 books and co-authored 4 more, edited 46 books, and authored 256 articles on International Criminal Law, Comparative Criminal Law, Human Rights, and U.S. Criminal Law that have been published in various law journals and books. More specifically in terms of expertise on the issue addressed in this report, I am the author of: *CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION and CONTEMPORARY APPLICATION* (Cambridge University Press 2011) and *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* (Martinus Nijhoff 2d ed. 1999) (1992).

8. I served as chair of the United Nations Diplomatic Conference on the Establishment of the International Criminal Court and was directly involved in the drafting of the statute's Article 7 on "Crimes Against Humanity". Previously, I was chair of the Security Council Commission to investigate war crimes in the former Yugoslavia, and in that capacity I contributed to the drafting of Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia on "Crimes Against Humanity".

9. Since 1975, I have been appointed to and served in 22 United Nations positions, including the following: Chair and then-member of the Commission of Inquiry for Libya (2011-12); Independent Expert on Human Rights for Afghanistan (2004-06); Independent Expert on the Rights to Restitution, Compensation, and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms (1998-2000); Chair, Drafting Committee of the Diplomatic Conference on the Establishment of an International Criminal Court (1998); Vice-Chair of the General Assembly's Preparatory Committee on the Establishment of an International Criminal Court (1996-98); Vice-Chair of the General Assembly's *Ad Hoc* Committee on the Establishment of an International Criminal Court (1995); Chair of the Commission of Experts Established Pursuant to Security Council 780 to Investigate Violations of International Humanitarian Law in the Former Yugoslavia (1993-94) and the Commission's Special Rapporteur on Gathering and Analysis of the Facts (1992-93); Consultant to the Sixth and Seventh United Nations Congress on Crime Prevention (1983 and 1985); Consultant to the Committee on Southern African of the Commission on Human Rights (1980-81); Co-chair of the Independent Committee of Experts Drafting the Convention on the Prevention and Suppression of Torture (1978); and Honorary Vice-President at the Fifth United Nations Congress on Crime Prevention (1975).

10. My writings on International Criminal Law have been cited numerous times by the United States Supreme Court, U.S. Courts of Appeals, and Federal District courts, as well as in a number of the decisions of the world's highest courts as indicated in the attached C.V.

11. I have been qualified as an expert on questions of International Criminal Law, more particularly on extradition, in a number of U.S. District Courts as well as before foreign courts. I



have not, however, been deposed or testified in connection with any case in a U.S. Court since 2010.

### **III – Opinion**

#### **A. Crimes Against Humanity Are Prohibited Under Customary and Conventional International Law and Constitute a *Jus Cogens* Norm.**

12. “Crimes Against Humanity” [hereinafter referred to as “CAH”] is an established category of international crimes. As recently stated by the International Law Commission’s Report on Crimes Against Humanity, dated 12 February 2015,

The crime [CAH] is an international crime; it matters not whether the national law of the territory in which the act was committed has criminalized the conduct. The crime is directed against a civilian population and hence has a certain scale or systematic nature that generally extends beyond isolated incidents of violence or crimes committed for purely private purposes. The crime can be committed within the territory of a single State or can be committed across borders. Finally, the crime concerns the most heinous acts of violence and persecution known to humankind. A wide range of scholarship has analyzed these various elements.<sup>2</sup>

13. As is the case with almost all international crimes, there is an evolutionary course that varies from crime to crime.<sup>3</sup> With respect to CAH, that evolution started in 1919 after the end of World War I until its universal recognition today.<sup>4</sup>

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<sup>2</sup> Special Rapporteur on Crimes Against Humanity, *First Rep. on Crimes Against Humanity*, Int’l Law Comm’n, 67th Sess., May 4-June 5, July 6-Aug 7, 2015, U.N. Doc. A/CN.4/680 ¶ 28 (by Sean D. Murphy), [hereinafter *Murphy Report*].

<sup>3</sup> See M. CHERIF BASSIOUNI, *INTRODUCTION TO INTERNATIONAL CRIMINAL LAW: SECOND REVISED EDITION* 137-45 (2d ed. 2013). (describing the evolution of 27 categories of international crimes).

<sup>4</sup> See M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION* 88-358 (2011).

14. The prohibition of CAH is evidenced in its inclusion in conventions and treaties and other instruments of international criminal law, judicial decisions rendered by international tribunals applying those instruments as well as by national courts applying domestic and international law.<sup>5</sup> CAH has also been included in the statutes of international criminal tribunals established by the Security Council as well as by agreement between the United Nations and a number of states, namely the mixed-model tribunals. The statutes of these tribunals that have included CAH have done so on the basis that this crime is recognized in customary international law. In addition, national legislation has also included CAH as a crime under domestic criminal law. The combination of conventional, customary and state practice as well as the writing of the “Most Distinguished Publicists” (Article 38, Statute of the International Court of Justice, attached to the U.N. Charter) evidences the principle that CAH has risen to the level of *jus cogens*. Consequently, its prohibition is a peremptory and non-derogable norm of international law.<sup>6</sup>

15. In conventional international law, CAH has been defined as an international crime in all the statutes that have established international criminal tribunals, namely: the International

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<sup>5</sup> Article 38 of the Statute of the International Court of Justice is the authoritative statement on the sources of international law and directs reference to: (a) international conventions, whether general or particular, establishing rules expressly recognized by contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of the rules of law. Statute of the International Court of Justice art. 38, ¶ 1, April 18, 1946. Similarly, the Restatement instructs that to determine “whether a rule has become international law, substantial weight” be accorded to:

- (a) judgments and opinions of international judicial and arbitral tribunals;
- (b) judgments and opinions of national judicial tribunals;
- (c) the writings of scholars;
- (d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 103(2).

<sup>6</sup> See BASSIOUNI, *supra* note 3, at 236. See also, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, cmt. k; Vienna Convention on the Law of Treaties art. 53, with annex, May 23, 1969, 1155 U.N.T.S. 331.

Military Tribunal (IMT)(Nuremberg),<sup>7</sup> the International Military Tribunal in the Far East (IMTFE)(Tokyo),<sup>8</sup> the International Criminal Tribunal for the Former Yugoslavia (ICTY),<sup>9</sup> the International Criminal Tribunal for Rwanda (ICTR),<sup>10</sup> and the International Criminal Court (ICC);<sup>11</sup> and the mixed model tribunals of: The Kosovo War and Ethnic Crimes Court (KWECC),<sup>12</sup> the Special Court for Sierra Leone (SCSL),<sup>13</sup> the Special Panels of the Dili District Court (East Timor Tribunal),<sup>14</sup> the War Crimes Chamber in Bosnia and Herzegovina (WCC)<sup>15</sup> and the Extraordinary Chambers in the Courts of Cambodia (ECCC).<sup>16</sup>

16. Further evidence of this norm can be found in the number of States incorporating CAH into their domestic legislation or where national courts have applied the international law of CAH in domestic proceedings. As of October 18, 2015, there are 123 State Parties to the Rome Statute of the International Criminal Court.<sup>17</sup> The Rome Statute identifies CAH as an

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<sup>7</sup> Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(c), Aug. 8, 1945 [hereinafter London Agreement], in *THE LAWS OF ARMED CONFLICTS* 915 (D. Schindler & J. Torman eds., 1988).

<sup>8</sup> Charter for the International Military Tribunal for the Far East art. 5(c), Apr. 26, 1946, T.I.A.S. No. 1589.

<sup>9</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia art. 3, S.C. Res 827, U.N. Doc S/RES/827 (May 25, 1993).

<sup>10</sup> Statute of the International Tribunal for Rwanda art. 5, S.C. Res 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

<sup>11</sup> Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 U.N.T.S. 3.

<sup>12</sup> Provisional Criminal Code of Kosovo of 6 July 2003 art. 117(1)(8), U.N. Doc UNMIK/REG/2003/25.

<sup>13</sup> Statute for the Special Court of Sierra Leone art. 2, Jan 16, 2002, 2178 U.N.T.S. 137, 145.

<sup>14</sup> Regulation No. 1999/1 on the Authority of the Transitional Administration in East Timor § 2, U.N. Doc. UNTAET/REG/1999/1 (1999) (on the applicability and observance of internationally recognized standards).

<sup>15</sup> Constitution of the Federation of Bosnia and Herzegovina Art. II, §§ 2-4, which the War Crimes Chamber, as part of the Court of Bosnia and Herzegovina, is based upon (*see Bogdan Ivanišević, The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*, INTERNATIONAL CENTER FOR TRANSNATIONAL JUSTICE 30 (2008)).

<sup>16</sup> G.A. Res. 57/228, Art. 9, U.N. Doc. A/RES/57/228 B (May 22, 2003).

<sup>17</sup> The International Criminal Court (“ICC”) was established in 2002 upon entry into force of the Rome Statute, its founding statute, which provides the court with jurisdiction over genocide, war crimes and crimes against humanity. Rome Statute, *supra* note **Error! Bookmark not defined.**. Ratification status can be found on the website of the ICC: *The States Parties to the Rome Statute*, INTERNATIONAL CRIMINAL COURT, [http://www.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (last visited Nov. 1, 2015).



international crime subject to its jurisdiction. These State Parties have undertaken the affirmative obligation to prosecute persons within their territory who have committed such crimes or to surrender them to the ICC for prosecution. This obligation exists irrespective of whether a given State Party has enacted specific national legislation to define CAH, which is defined in Article 7 of the ICC Statute. A State Party may therefore prosecute or extradite a person to the ICC to stand trial for CAH on the basis of Article 7 or on the basis of any specialized national legislation.<sup>18</sup>

17. Non-State Parties can rely on Art. 12(3) of the ICC statute to refer a “situation” to the ICC in reliance upon the definition of CAH contained in art. 7. Furthermore, non-State Parties to the ICC that have included CAH as part of their national legislation, as well as those which have not specifically included a crime in their national legislation under the rubric of “Crimes Against Humanity,” can also prosecute on the basis of provisions within their national criminal law that apply to the specifics of the conduct which falls within the meaning of CAH.<sup>19</sup>

18. A threshold element of CAH is that the acts be committed in the context or as part of a widespread or systematic attack against a civilian population. There is no requirement in international law that there be a nexus between the crimes and an armed conflict and, further, the “attack” against a civilian population, as referenced in the threshold of CAH, need not be a

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<sup>18</sup> See WILLIAM SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* art. 7, 137-87 (2010); I M. CHERIF BASSIOUNI, *THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: INTRODUCTION, ANALYSIS AND INTEGRATED TEXT* art. 7, 206-15 (2005).

<sup>19</sup> See *Regina v. Finta*, [1994] S.C.R. 701, 709-710 (Can.) (in which the Supreme Court of Canada found that “Crimes Against Humanity” existed in customary international law even before it was so defined in Article 6(c) of the Charter of the IMT).



military or armed attack.<sup>20</sup> In addition, the threshold requirement of “widespread or systematic” is disjunctive; the crime occurs if an attack is either widespread or systematic.<sup>21</sup>

19. Courts in the United States have recognized the prohibition of crimes against humanity as a clearly defined and widely accepted norm actionable under the Alien Tort Statute, 28 U.S.C. § 1350 (“ATS”). *See e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (2004) (Breyer, J., concurring) (crimes against humanity included in a subset of gross human rights offenses about which there is substantive and procedural agreement in international law); *In re Chiquita Brands Int’l, Inc.*, 792 F. Supp. 2d 1301, 1334 (S.D. Fla. 2011) (crimes against humanity actionable under the ATS); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005) (crimes against humanity part of “United States and international law long before [defendant’s] alleged actions”); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1344, 1352-54 (N.D. Ga. 2002) (crimes against humanity have been recognized as a violation of customary international law since the Nuremberg trials and are actionable under the ATS).

**B. Persecution Has Long Been Recognized as Crime Against Humanity.**

20. The definitions of CAH in these sources of conventional international law (i.e. treaty-based law) vary in some respects, but they all include “persecution” of a given group of persons from within the civilian population, based on a state policy reflected in a widespread or systematic conduct which is directed against members of that group, for purposes of infliction of harm upon them. The forms of persecution and the types of harm are not specified in these statutes, no more than they are in any national legislation which criminalizes the infliction of harmful conduct by one person against another. The reasons for the persecution, the motives of

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<sup>20</sup> *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Opinion and Judgment, ¶ 581 (Sept. 2, 1998) (“attack” may be “non-violent in nature, like imposing a system of apartheid . . . or exerting pressure on the population to act in a particular manner”).

<sup>21</sup> *Murphy Report*, *supra* note 2 at 125, *et seq.*

those engaged in it, or the means employed, are not defined in international criminal law nor in national criminal legislation, because the jurisprudence of courts is relied upon to recognize or identify the means employed that are designed to achieve the intended or anticipated harmful results that ensue. Indeed, there is no legislation that describes all the means likely to be conjured by nefarious human imagination to produce harm to others.

21. It is conclusively established in CAH jurisprudence that persecution against a group of persons or a segment of the population so targeted, for whatever reason the perpetrator may have conjured up and acted upon, in a widespread or systematic manner, falls within the meaning of CAH.

22. The question arises, in this case, as to whether the targeting for criminal prosecution and other deprivations of fundamental rights of persons on the basis of sexual orientation or gender identity (those who do not strictly fall in a heterosexual or gender-conforming category) constitutes persecution of that group of persons. The answer is that sexual orientation and gender identity is considered a group status under the foregoing international law sources, such that members of this group are protected from persecution based on this status. The reasons are: First, this is a distinct group within a civilian population. Second, singling out this group and withdrawing legal rights and protections from them, subjecting them to criminal prosecution and imprisonment based on their status or identity constitutes physical and psychological harm brought upon them. Third, when such conduct is embodied in law it is carried out on both a widespread and systematic basis.

23. The persecutions in these types of cases are based on the status of the person, whether that status is inherent, perceived, genetically predisposed or otherwise. To criminalize a person or group of persons for being other than heterosexual is a form of status criminality, which is

rejected in national legal systems. As an illustration, in the United States, this principle has been applied to laws targeting and discriminating against persons on this basis. *See Lawrence v. Texas*, 539 U.S. 558, 567, 574-75 (2003) (striking down law criminalizing same-sex sexual conduct that is “within the liberty of persons to choose without being punished as criminals”); *See also id.* at 583 (O’Connor, J., concurring) (conduct targeted by the law was “closely correlated with being a homosexual” and was thus “directed toward gay persons as a class”); *see also Romer v. Evans*, 517 U.S. 620 (1996) (holding as unconstitutional violation of the equal protection clause an ordinance which withdrew legal protections from persons based on their sexual orientation); *Obergefell v. Hodges*, 576 U.S. \_\_\_ (2015) (holding that states cannot deny same sex couples the fundamental right to marry).

24. The definitions of persecution in the jurisprudence of the international tribunals and conventional law vary, but they all contain essential elements requiring intentional discrimination that infringes upon the fundamental rights of a group or individuals because of their real or perceived membership in that group. One definition that has been consistently applied in the jurisprudence requires an act or omission that (1) discriminates in fact and which denies or infringes upon a fundamental right as provided in international customary or treaty law and (2) was carried out deliberately with the intention to discriminate. This definition was applied by the ICTY in *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, ¶ 431 (Mar. 15, 2002), and accepted by the Appeals Chamber at the ICTR in *Nahimana v. Prosecutor*, Case No. ICTR-99-52-A, Appeals Judgment, ¶ 985 (Nov. 28, 2007), though in both cases the tribunals were limited to prohibited grounds of persecution provided for in their respective statutes. The Rome Statute is essentially a more specific articulation of these basic elements.<sup>22</sup>

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<sup>22</sup> Art. 7(2) of the Rome Statute, *supra* note 11, defines persecution as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”



25. A number of other international conventions have specifically prohibited discrimination based on sex or other status.<sup>23</sup> International organizations and treaty bodies interpreting and applying these conventions have addressed prohibition of discrimination in various contexts, involving various human endeavors such as employment, as well as other activities engaged by persons whose status may be used to prevent them from enjoying the same rights and privileges that the law offers others. The African Commission on Human and Peoples' Rights issued a resolution in 2014 condemning the "increasing incidence of violence and other human rights violations, including murder, rape, assault, arbitrary imprisonment and other forms of persecution of persons on the basis of their imputed or real sexual orientation or gender identity," and noted the prohibition of discrimination and the right to equal protection of the law set out in the African (Banjul) Charter of Human and Peoples' Rights in doing so.<sup>24</sup> The Inter-American Court of Human Rights has held that art. 1(1) of the American Convention on Human Rights prohibits discrimination, including on the basis of "categories such as sexual orientation, which cannot be used as grounds for denying or restricting any of the rights established in the Convention".<sup>25</sup> The Human Rights Committee, the treaty body created by and to oversee implementation of the International Covenant on Civil and Political Rights, has observed that

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<sup>23</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, arts. 2 & 7, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); Organisation of African Unity, African (Banjul) Charter on Human and Peoples' Rights, arts. 2 & 3, OAU Doc. CAB/LEG/67/3 rev. 5; Council of Europe, *European Convention on Human Rights and Fundamental Freedoms*, art. 14., ETS no. 177 (Nov. 4, 1950); International Covenant on Civil and Political Rights arts. 14 & 26, Dec. 19, 1966, 999 U.N.T.S. 171; American Convention on Human Rights arts. 1 & 24, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

<sup>24</sup> African Commission on Human and Peoples' Rights, *Res 275: Resolution on the Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity*, May 12, 2014.

<sup>25</sup> *Atala Riffo & Daughters v. Chile*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 12.502, ¶ 93 (Feb. 24, 2012). The General Assembly of the Organization of American States has also passed a number of resolutions condemning discrimination on the basis of sexual orientation and gender identity and has relied on the prohibition against discrimination set out in the Universal Declaration of Human Rights and the American Declaration on the Rights and Duties of Man in doing so. *See e.g.*, Human rights, sexual orientation and gender identity, AG/RES. 2435 (XXXVIII-O/08) (June 3, 2008).

sexual orientation is a prohibited basis of discrimination as a form of sex discrimination under arts. 2(1) and 26.<sup>26</sup>

26. To identify which fundamental rights deprivations are to be considered in evaluating the incidence of persecution, the tribunals have referred to the Universal Declaration of Human Rights (“UDHR”), the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”). *See, e.g., Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgment, ¶ 621 (Jan. 14, 2000). Collectively these three treaties are referred to by some as the “international bill of rights.” They enshrine the rights to equality and non-discrimination (UDHR, arts. 2, 7; ICCPR, art. 2; ICESCR, art. 2, ), the rights to freedom of expression (UDHR, art. 19; ICCPR, art. 19), peaceful assembly and association (UDHR, art. 20; ICCPR, arts. 21-22), privacy (UDHR, art. 12; ICCPR, art. 17) and to be free from arbitrary arrest and detention (UDHR, art. 9; ICCPR, art. 9) and cruel, inhuman and degrading treatment (UDHR, art. 5; ICCPR, art. 7), among others. These rights are widely accepted norms of customary international law.<sup>27</sup> While these rights are interdependent, the rights to expression, peaceful assembly and association, in particular, are essential to permit individuals to protect, vindicate, and advance other basic international human rights. *See Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, arts. 5, 12, G.A. Res.53/144, annex, 53 U.N. GAOR Supp., U.N. Doc. U.N. Doc. A/RES/53/144 (1999).

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<sup>26</sup> *Toonen v. Australia*, Communication No. 488/1992, ¶ 8.7, Human Rights Comm., U.N. Doc. CCPR/C/50/D/488/199,(Apr. 4, 1992) (domestic law criminalizing same-sex sexual conduct amounted to a violation of the prohibition of arbitrary or unlawful interference with privacy, family, home or correspondence and unlawful attacks on honor and reputation, under art. 17 of the International Covenant on Civil and Political Rights as well as equal protection).

<sup>27</sup> *See also*, African (Banjul) Charter on Human and Peoples’ Rights, *supra* note 23, arts. 2-3, 5, 6, 9-11, 19, 1520; Inter-American Commission on Human Rights, American Declaration of the Rights and Duties of Man, arts. 2, 4, 5, 21-22, 25 (May 2, 1958); *European Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note **Error! Bookmark not defined.**, arts. 3, 8, 10-11, 14.

As such, deprivations of these fundamental rights from a targeted group can constitute persecution.

#### **IV - Conclusion**

Based on the above, I conclude the following:

27. “Crimes Against Humanity” is a category of international crimes prohibited under conventional and customary international law. It is binding upon all states in that it constitutes part of a peremptory norm of international law and is therefore *jus cogens*. Persecution is a long-recognized crime against humanity, and is thus equally recognized as an international law violation that is clearly defined and widely accepted.

28. The identification of human beings based upon their sexual orientation or gender identity for discriminatory purposes with consequences of criminal prosecution and incarceration or other deprivations of fundamental rights, falls within the meaning of “persecution” of that group, as their identification as such is a form of criminalizing the status of such persons.

Dated: November 2, 2015

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M. Cherif Bassiouni