**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**
**SPRINGFIELD DIVISION**

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| **SEXUAL MINORITIES UGANDA,** | : | **CIVIL ACTION** |
| | : | |
| **Plaintiff,** | : | **3:12-CV-30051-MAP** |
| | : | |
| **v.** | : | **JUDGE MICHAEL A. PONSOR** |
| | : | |
| **SCOTT LIVELY,** | : | |
| | : | |
| **Defendant.** | : | |

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**MEMORANDUM OF LAW IN SUPPORT**
**OF DEFENDANT SCOTT LIVELY'S MOTION TO AMEND**
**AND CERTIFY NON-FINAL ORDER FOR INTERLOCUTORY APPEAL**

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## INTRODUCTION

This Court has concluded that the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013), does not foreclose the Alien Tort Statute ("ATS") claims of Sexual Minorities Uganda ("SMUG"), because Scott Lively ("Lively") is a U.S. citizen residing in Massachusetts, and because "[t]he Amended Complaint adequately sets out actionable conduct undertaken by the Defendant in the United States to provide assistance in the campaign of persecution in Uganda." (Order Denying M. to Dismiss, dkt. 59, p. 44) ("Order"). The Court based its conclusion on **three** things that Lively allegedly did in the United States: (1) following his 2002 visit to Uganda, Lively from the U.S. allegedly encouraged, assisted and advised Ugandan government officials and citizens to enact laws that restrict, and to oppose measures that relax, homosexual rights (Order at 44, citing Amd. Compl. ¶¶ 47, 55-56); (2) after a Ugandan High Court ruling favorable to homosexuals, Ugandan citizens contacted Lively in the U.S. to invite him to attend a March 2009 conference in Uganda, which he accepted (*id*., citing Amd. Compl. ¶ 36); and (3) after his visit to Uganda, Lively from the U.S. reviewed draft legislation considered by the Ugandan Parliament, provided advice and communicated with Ugandan Parliament members about the legislation **that was never enacted**. (*Id*. at 44-45, citing Amd. Compl. ¶¶ 140, 161).

The Court's Order involves many novel, pivotal and controlling questions of law as to which there is substantial difference of opinion, and the resolution of which will either terminate this litigation or dramatically alter its scope. This memorandum addresses three such questions.

First, there is substantial ground for difference of opinion concerning whether this alleged conduct of Lively in the U.S., even if true, is sufficient to overcome the extraterritorial bar on the ATS after *Kiobel*. Several courts have already examined far greater activities by U.S. citizens in the U.S., and, with one exception, have all concluded that they lack subject matter jurisdiction to adjudicate claims by foreign plaintiffs injured on foreign soil. The one court that came to a different conclusion did so on inapposite facts, **and *sua sponte* certified its order for interlocutory appeal**.

Second, there is substantial ground for difference of opinion concerning whether "persecution," generally and on sexual orientation or transgender grounds, is a "clearly defined" and "universally accepted" crime against humanity actionable under the ATS. No other court has ever found that it is.

Third, there is substantial ground for difference of opinion concerning whether a U.S. Court may constitutionally punish a U.S. citizen for doing in the U.S. the three things alleged of Lively. No other court has ever found that it can.

These questions go to the very heart of this Court's subject matter jurisdiction and Lively's constitutional rights. The Court should amend and certify its Order for interlocutory appeal.

**STANDARD FOR CERTIFICATION**

Certification of a non-final order for interlocutory appeal is warranted where, as here, "such order involves a controlling question of law as to which there is substantial ground for difference of opinion and … an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

"'[C]ontrolling' means serious to the conduct of the litigation, either practically or legally." *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974). A question of law is controlling even if its resolution would not automatically end the entire case, if the scope of the case would be "significantly altered." *Philip Morris Inc. v. Harshbarger*, 957 F. Supp. 327, 330 (D. Mass. 1997) (certifying interlocutory appeal notwithstanding possibility that a reversal "would leave something of the case"); *see also Katz*, 496 F.2d at 755 ("nor need a reversal of the order terminate the litigation"). "All that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of the litigation in the district court." *Philip Morris Inc.*, 957 F. Supp. at 330.

"[I]t can be concluded that there is a 'substantial ground for difference of opinion' about an issue when the matter involves 'one or more difficult and pivotal questions of law not settled by

controlling authority.'" *Philip Morris Inc.*, 957 F. Supp. at 330 (quoting *McGillicuddy v. Clements*, 746 F.2d 76, 76 n.1 (1st Cir. 1984)); *see also In re Heddendorf*, 263 F.2d 887, 889 (1st Cir. 1959) (certification proper when "the proposed appeal presents a difficult central question of law which is not settled by controlling authority"). In the absence of controlling authority, "[t]he level of uncertainty required to find a substantial ground for difference of opinion should be adjusted to meet the importance of the question in the context of the specific case." 16 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3930 (2d ed. 1996). Therefore, if "proceedings that threaten to endure for several years depend on an initial question of jurisdiction, . . . certification may be justified at a relatively low threshold of doubt." *Id.*

Indeed, although interlocutory appeals are the exception rather than the rule, "**[s]uch an exceptional case might be one where the district court has denied a motion to dismiss for want of jurisdiction which raised a novel question** and is reluctant to embark upon an extended and costly trial until assured that its decision on the motion to dismiss is sustained." *In re Heddendorf*, 263 F.2d at 888 (emphasis added). Accordingly, whether a district court lacks subject matter jurisdiction is a quintessential controlling question for purposes of Section 1292(b). *Id.*; *see also United States v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1, 7 (1st Cir. 2005).

Finally, this Court need not conclude that its Order is erroneous to certify it for interlocutory appeal. Instead, the Court need only acknowledge that the Order involves at least one controlling question as to which there is substantial ground for difference of opinion. *See, e.g.*, *Al Maqaleh v. Gates*, 620 F. Supp. 2d 51, 55 (D.D.C. 2009) (certifying interlocutory appeal "although [the] Court believe[d] that its conclusions [were] correct"); *Brown v. Tex. & Pac. R.R.*, 392 F. Supp. 1120, 1126 (W.D. La. 1975) (certifying order for appeal even though "in the [c]ourt's mind there does not exist the strong possibility that the Memorandum Ruling was incorrect").

The questions presented here clearly warrant interlocutory certification.

## ARGUMENT

### I. There Is Substantial Ground for Difference of Opinion Concerning Whether a Foreign Plaintiff Injured on Foreign Soil Can Maintain ATS Claims Against a U.S. Citizen Who Allegedly Aided and Abetted from the U.S. Tortious Conduct on Foreign Soil.

#### A. Eight Post-*Kiobel* Courts Have Dismissed ATS Claims Against U.S. Citizens, Notwithstanding Allegations of U.S. Conduct Far Greater than Lively's.

Although the Supreme Court decided *Kiobel* less than five months ago, at least **eight** courts – appellate and trial alike – have already considered domestic conduct by U.S. nationals far greater in scope than the three domestic activities SMUG alleges of Lively. All eight have concluded such conduct was insufficient to confer subject matter jurisdiction under the ATS for injuries sustained by foreign plaintiffs on foreign soil. SMUG will undoubtedly offer myriad reasons why these decisions are erroneous, and the Court may disagree with these holdings. What SMUG cannot deny, however, is that substantial ground exists for difference of opinion on this crucial aspect of the Court's subject matter jurisdiction. That is all that is needed to permit an immediate appeal.

##### 1. *Balintulo v. Daimler AG,* 09-2778-CV L, 2013 WL 4437057 (2d Cir. Aug. 21, 2013).

In *Balintulo*, South African plaintiffs brought ATS class-action lawsuits against many defendants, including three U.S. corporate citizens – DaimlerChrylser, Ford and IBM – alleging that they aided and abetted crimes against humanity in South Africa, during that nation's apartheid regime. 2013 WL 4437057 at *1. By the time the Supreme Court decided *Kiobel*, the district court in *Balintulo* had denied motions to dismiss and denied certification for interlocutory appeal, so the case was already before the Second Circuit on applications for mandamus relief. *Id*. at *3-4. The Second Circuit requested and received supplemental briefs on the impact of *Kiobel*. *Id*. at *4.

To "resist [the] obvious impact of the *Kiobel* holding on their claims," the *Balintulo* plaintiffs argued vociferously – as SMUG does here – that *Kiobel* has no application to ATS claims against U.S. defendants. *Id*. at *6. Plaintiffs also argued – as SMUG does here – that **"defendants took affirmative steps in this country" to aid and abet apartheid**, *id*. (emphasis added),

including that: (1) IBM manufactured computer hardware and software in, and provided technical support from, **the U.S.**, all to the South African government's specifications, with the knowledge and purpose of enabling that government "to carry out geographic segregation and denationalization," and "to restrict black South Africans' movements, track dissidents, and target particular individuals for repressive acts"; and (2) Ford and DaimlerChrylser manufactured vehicles, parts and other equipment **in the U.S.**, specifically for "the apartheid security forces," and to the specification of the South African government, with the knowledge and purpose that the vehicles would be used to implement apartheid and perpetrate crimes against humanity. *Id*. at *3.

The Second Circuit was not persuaded, and concluded that "the Supreme Court's holding in *Kiobel* **plainly** bars the plaintiffs' claims." *Id*. at *9 (emphasis added).

> The Supreme Court expressly held that claims under the ATS cannot be brought for violations of the law of nations occurring within the territory of a sovereign other than the United States. The majority … **focus[ed] solely on the location of the relevant "conduct" or "violation"** …; and it affirmed our judgment dismissing the plaintiffs' claims because "all the **relevant** conduct took place outside the United States." **Lower courts are bound by that rule and they are without authority to "reinterpret" the Court's binding precedent in light of irrelevant factual distinctions, such as the citizenship of the defendants**. Accordingly, if all the **relevant** conduct occurred abroad, that is simply the end of the matter under *Kiobel.*

*Id*. at *7 (emphasis added) (internal citations and footnotes omitted).

*Kiobel* thus means that "a common-law cause of action brought under the ATS cannot have extraterritorial reach simply because some judges, in some cases, conclude that it should." *Id*. at *8. The court expressly rejected plaintiffs' allegations of domestic conduct that aided and abetted apartheid, concluding that **the place of the actual human rights violations themselves controls**. *Id*. "To hold otherwise would conflate the extraterritoriality analysis—which asks where the 'violation of the law of nations occurred,'—with the question of derivative liability." *Id*. at *8, n.28 (internal citations omitted). A contrary result would give impermissible effect to *Kiobel*'s concurring minority, which did not garner sufficient votes to control. *Id*. at *6. The Second Circuit instructed the district court to grant judgment as a matter of law for the defendants. *Id*. at *9-10.

The U.S.-made automobiles and computers at issue in *Balintulo* fit squarely within this Court's analogy of bombs designed and manufactured in this country with the intent that they explode on foreign soil. (Order at 39). There is, therefore, substantial ground for difference of opinion as to whether subject matter jurisdiction lies over alleged acts of persecution occurring on foreign soil, by virtue of U.S. conduct that allegedly aided and abetted that persecution.

**2. *Doe v. Exxon Mobil Corp.*, 09-7125, 2013 WL 3970103 (D.C. Cir. July 26, 2013) ("*Doe II*").**

In *Doe II*, the D.C. Circuit Court of Appeals vacated its earlier decision in *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011) ("*Doe I*"), in light of *Kiobel*. In *Doe I*, the D.C. Circuit had held that Indonesian plaintiffs could sue Exxon, a U.S. corporate citizen, under the ATS for aiding and abetting crimes against humanity at Exxon's natural gas extraction facility in Indonesia. 654 F.3d at 14-15. The *Doe I* court reasoned that "the extraterritoriality cannon does not bar appellants from seeking relief based on Exxon's alleged aiding and abetting of international law violations committed in Indonesia," *id*. at 26, because plaintiffs alleged that "**a U.S. citizen** is a cause of the[ir] harm," and claimed that "Exxon engaged in acts **in the United States** that were part and parcel of the harm they suffered." *Id*. at 27-28 (emphasis added). Exxon sought a rehearing en banc, but its request was held in abeyance pending the Supreme Court's decision in *Kiobel*.

Following *Kiobel*, the *Doe II* court requested briefing on *Kiobel*'s impact. Plaintiffs sought to capitalize on the *Doe I* court's understanding of extraterritoriality by emphasizing that, unlike the defendants in *Kiobel*, Exxon was a U.S. corporate citizen, with its principal place of business in the U.S.; Exxon "exerted significant control over [its Indonesian subsidiary]'s security"; "significant conduct took place in the United States"; and Exxon provided from the U.S. "significant guidance and participation" in the acts of violence perpetrated against plaintiffs in Indonesia.[1]

[1] Plaintiffs' Post-*Kiobel* Brief, *Doe v. Exxon Mobil Corp.*, doc. # 1436741, pp. 6, 12-13, 15-16 (D.C. Cir. May 17, 2013) (No. 09-7125).

The *Doe II* court was not persuaded and vacated its holding in *Doe I*, "in light of intervening changes in governing law regarding the extraterritorial reach of the Alien Tort Statute." 2013 WL 3970103 at *1 (citing *Kiobel*). It thus reinstated the district court's dismissal of the ATS claims for lack of subject matter jurisdiction. *Id*. Although the D.C. Circuit is allowing the district court "further consideration" on remand, its decision to vacate rather than affirm *Doe I* indicates that the court no longer believes – as it did in *Doe I* – that "significant conduct" in the U.S. by a U.S. citizen, which aids and abets torts on foreign soil, is sufficient to confer ATS jurisdiction.

**3. *Giraldo v. Drummond Co., Inc.*, 2:09-CV-1041-RDP, 2013 WL 3873960 (N.D. Ala. July 25, 2013).**

The plaintiffs in *Girlado* were Columbian nationals who alleged that "the Defendants (citizens and entities from the United States) committed acts **in the United States** in furtherance of human rights abuses in Colombia." 2013 WL 3873960 at *1 (emphasis added). Plaintiffs alleged that Drummond, a U.S. mine operator, and its U.S.–based officers committed crimes against humanity by aiding and abetting Columbian paramilitaries to murder Columbian civilians in Columbia. *Id*. at *2. To survive *Kiobel*, plaintiffs assembled an impressive array of **domestic conduct by domestic individuals and entities** which they claimed was "central to implementing the … war crimes and extrajudicial killings" in Columbia, including that:

> [1] Drummond's decision to provide material support to the [paramilitaries] and commissioning others to engage in war crimes and extrajudicial killings was made by [Drummond]'s CEO, Garry Drummond, **in Alabama**; … [2] the relevant decision-making to provide material support to the [paramilitaries] was made **in the United States**; … [3] Jim Adkins would travel frequently **to Alabama** to 'meet directly with Garry Drummond to agree on everything that Adkins had to do,' … obtained Garry Drummond's agreement in 1996 to start paying the [paramilitaries], [and] the plan was implemented by Adkins bringing $10,000 in cash payments **from Alabama** to Colombia to evade the law and Drummond's accounting system; [4] Drummond's **Alabama-based officers**, including Garry Drummond and Mike Tracy, made the decision to fund, and approved, payments to the Colombian military; [5] Drummond controls operations in Colombia **from its headquarters in Alabama**; and [6] Jim Adkins acted as Drummond's agent when he implemented the plan for Drummond to support the AUC's war effort in the area of Drummond's operations.

*Id*. at *5-6 (emphasis added).

Plaintiffs in *Girlado* argued, as SMUG does here, that *Kiobel* had no impact because it concerned only foreign defendants and foreign conduct. *Id*. at *4-5. The court disagreed, and concluded that "Plaintiffs' claims cannot survive the seismic shift that *Kiobel* has caused on the legal landscape." *Id*. at *1. The court did doubt plaintiffs' ability to prove the domestic conduct they alleged. *Id*. at *6-8. Critically, however, **the court assumed for the sake of argument that plaintiffs could, in fact, prove their allegations of domestic conduct at trial**, but concluded that plaintiffs' "theory on extraterritorial reach **still** does not hold water based on the most logical and unstrained reading of *Kiobel*." *Id*. at *8 (emphasis added).

The court reasoned that *Kiobel* relied on *Morrison v. National Australia Bank Ltd.*, 130 S.Ct. 2869 (2010), and affirmed *Morrison*'s holding that the extraterritorial "analysis depended 'not upon the place where the deception originated,' but upon **the focus of the statute at issue**." *Giraldo*, 2013 WL 3873960 at *8 (emphasis added) (quoting *Morrison*, 130 S.Ct. at 2884). Since "the ATS *focuses* on the torts of extrajudicial killings and war crimes (violations of the law of nations), and … the tort at issue occurred abroad, in Columbia, and *not* in the United States," the court concluded it had no jurisdiction. *Id*. at *8 (italics in original).

Notably, the court specifically rejected the same argument advanced by SMUG – that planning, preparation, approval and assistance provided from the United States to perpetrators of torts abroad sufficiently "touches and concerns" the United States to displace the presumption against extraterritoriality:

> **Plaintiffs can no more contend that approval in the United States of conduct committed abroad provides a basis for jurisdiction than could the plaintiffs in *Morrison* contend that fraudulent acts in the United States establish jurisdiction when the focus of the claim—purchases and sales of securities—occurred entirely abroad**. In fact, *Morrison* went so far as to state that the analysis depended "not upon the place where the deception originated" and rejected the Solicitor General's proposal to displace the presumption where an alleged violation "involves significant conduct in the United States that is material to the fraud's success." *Morrison*, 130 S.Ct. at 2884.

*Id*. at * 8, n.6 (emphasis added).

Finally, the court rejected ATS claims not only against Drummond, **but also against its officers** who, like Lively, were U.S. citizens residing in the U.S.. *See, e.g., Giraldo v. Drummond Co., Inc.*, 2:09-CV-1041-RDP, 2013 WL 3873965, *3 (N.D. Ala. July 25, 2013) (separate opinion rejecting ATS claims against Mike Tracy, for the same reasons as Drummond). Thus, the *Giraldo* court is also in sharp disagreement with this Court's surmising that "[a]rguably, a different rationale may apply to a natural U.S. citizen than an American corporation." (Order at 45, n.8).

Lively's alleged conduct in the U.S. in support of the alleged persecution abroad (*i.e.*, assisting in the passage or defeat of legal measures dealing with homosexual rights, commenting on drafts of proposed legislation that never passed, and accepting an invitation to speak in Uganda) pales in comparison to the domestic conduct found insufficient for jurisdiction in *Giraldo* (*i.e.*, providing "material support," including management and finances, to paramilitaries engaged in killing civilians). There is thus a clear difference of opinion as to whether the ATS can reach "material support" conduct in the U.S., when the alleged "crimes against humanity" themselves, and the alleged injuries therefrom, were indisputably perpetrated, if at all, on foreign soil.

**4. *Adhikari v. Daoud & Partners*, 09-CV-1237, 2013 WL 4511354 (S.D. Tex. Aug. 23, 2013).**

Plaintiffs in *Adhikari* brought ATS human-trafficking claims against KBR – a U.S. entity headquartered in Texas – alleging that KBR forcefully transported their Nepalese relatives to Iraq, where they were killed. 2013 WL 4511354 at *1-2. To survive *Kiobel*, plaintiffs argued that:

> KBR's **Texas and Virginia offices were actively involved in … managing** KBR's human trafficking-related activities. … **From the United States**, KBR employees such as Jill Pettibone **helped strategize key decisions** … . **KBR's U.S.-based employees also managed KBR's human trafficking-related activities in Iraq**. …
>
> KBR's **United States employees managed key decisions** related to human trafficking, **including developing training programs** and revising contracts in response to the military's trafficking-related directives. …
>
> KBR's U.S.-based employees also managed KBR's response to press inquiries into human trafficking, as yet further evidence of KBR's **U.S.-based management** of trafficking-related activities in Iraq. …

> This is not a case involving an isolated instance of misconduct committed abroad by the employees or agents of a U.S. corporation. This case involves **the ongoing and substantial involvement** not only of the corporation generally but **its U.S.-based officials and managers specifically**. [2]

The court, however, rejected the ATS claims because "Plaintiffs have not demonstrated sufficient domestic conduct by KBR to 'displace the presumption.'" 2013 WL 4511354 at *7.

Conceptually, the *Adhikari* plaintiffs' claim that "officials," "employees" or "agents" "managed," planned and oversaw **from the U.S.** the persecution of plaintiffs in a foreign land is no different than SMUG's allegations against Lively. The only difference is the far **greater** scope and detail of U.S.-based conduct that was alleged – but deemed insufficient – in *Adhikari*.

**5. *Al Shimari v. CACI Int'l, Inc.*, 1:08-CV-827 GBL/JFA, 2013 WL 3229720 (E.D. Va. June 25, 2013).**

In *Al Shimari*, the court dismissed the ATS claims of four Iraqi citizens, who claimed that a U.S. military contractor and its Virginia-based employees committed war crimes and torture at a detention facility in Iraq. 2013 WL 3229720 at *1-2. To survive *Kiobel*, plaintiffs highlighted that they were suing a U.S. defendant, with extensive U.S. operations, who "aided and abetted" war crimes in Iraq **from the United States**. *Id*. at *2, 8. The court rejected this argument, concluding that *Kiobel*, read in light of *Morrison*, precluded subject matter jurisdiction over claims of foreign nationals who were injured on foreign soil, **even where the defendant is a U.S. entity and is alleged to have planned and coordinated its conduct from the United States**. *Id*. at *8-10.

This Court has already indicated its disagreement with *Al Shimari* (Order at 45, n.8), which underscores the substantial ground for difference of opinion on this crucial jurisdictional question. What this Court may not know, however, is that plaintiffs in *Al Shimari* were represented by Mr. Baher Azmy, who also represents SMUG here. To survive *Kiobel*, Mr. Azmy told the *Al Shimari* court that:

[2] Plaintiffs' Post-*Kiobel* Brief, dkt. 593, pp. 32-35, *Adhikari v. Daoud & Partners* (S.D. Tx.) (09-CV-1237) (emphasis added).

> if the present case would not overcome this presumption, **there could be no case that would**;[3] and
>
> we stress so much how the constellation of these facts **more than frankly any other ATS case that I'm aware of in the country** would meet the touch and concern analysis because of U.S. legislative control over Iraq at the time, because of the U.S. corporation and because of continuing corporate practices in the United States that contributed to the conspiracy.[4]

SMUG would therefore be hard pressed to now argue that its case against Lively – of which its counsel was keenly aware when these representations were made – presents more U.S. conduct than *Al Shimari*. The only argument left for SMUG is that *Al Shimari* was incorrectly decided, which only confirms the existence of substantial ground for difference of opinion.

**6. Three Other Post-*Kiobel* Courts Have Dismissed ATS Claims Against U.S. Citizens for Injuries on Foreign Soil.**

Three other courts have applied *Kiobel* to reach the same result. *See Ahmed-Al-Khalifa v. Queen Elizabeth II*, 5:13-CV-103-RS-CJK, 2013 WL 2242459, *1 (N.D. Fla. May 21, 2013) (dismissing foreign plaintiff's ATS claims against President Obama and several U.S. corporations for aiding and abetting from the U.S. the South African apartheid); *Ahmed-Al-Khalifa v. Obama*, 1:13-CV-49-MW/GRJ, 2013 WL 3797287, *1-2 (N.D. Fla. July 19, 2013) (holding that *Kiobel* precludes subject matter jurisdiction over an ATS claim that President Obama conspired with two foreign officials to "persecute" individuals in China and North Korea); *Mwangi v. Bush*, CIV.A. 5:12-373-KKC, 2013 WL 3155018, *2, 4 (E.D. Ky. June 18, 2013) (dismissing foreign plaintiff's ATS claims against former President George H.W. Bush and his family, who allegedly orchestrated their conduct from the U.S., embarked on visits to Kenya from the U.S., and conspired with Kenyan actors to abuse plaintiff in Kenya).

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[3] Plaintiffs' Post-*Kiobel* Brief, dkt. 399, p. 25, *Al Shimari v. CACI Int'l Inc.*, (E.D. Va. 2013) (No. 08-827) (emphasis added) (available at http://ccrjustice.org/files/399_2013-05.03%20Opposition%20ATS%20re%20Kiobel.pdf, last visited August 31, 2013).

[4] Transcript of Oral Argument, pp. 23-24, *Al Shimari v. CACI Int'l Inc.*, (E.D. Va. 2013) (No. 08-827) (emphasis added) (available at http://ccrjustice.org/files/Al%20Shimari%20v.%20CACI%205-10-13.PDF, last visited August 31, 2013).

### B. Only One Post-*Kiobel* Court Has Retained ATS Jurisdiction on the Basis of U.S. Conduct Targeted at U.S. Citizens Overseas, and that Court *Sua Sponte* Certified its Decision for Interlocutory Appeal.

The only other court to reach a different outcome following *Kiobel* is *Mwani v. Bin Laden*, CIV.A. 99-125 JMF, 2013 WL 2325166 (D.D.C. May 29, 2013). The *Mwani* court concluded that *Kiobel* did not preclude jurisdiction over claims against Usama bin Laden, Al Qaeda and other foreign defendants arising from the bombing of the U.S. embassy in Kenya. 2013 WL 2325166 at *1-5. Although "overt acts in furtherance of that conspiracy took place within the United States," the court rested its decision heavily on the fact that "the events at issue in this case **were directed at the United States government**, with the intention of harming **this country [the U.S.] and its citizens** [and] this attack was orchestrated not only to kill both American and Kenyan employees inside the building, but **to cause pain and sow terror in the embassy's home country, the United States**." *Id*. at *4 (emphasis added) (internal quotes and citations omitted).

Even with this crucial factual distinction not present here, the court in *Mwani* acknowledged that "there may be a substantial difference of opinion among judges whether [its interpretation of *Kiobel*] is correct," and *sua sponte* certified its order for interlocutory appeal. *Id*. at *4-5. If even domestic "overt acts in furtherance" of an attack **on U.S. citizens and the U.S. government** abroad trigger substantial difference of opinion, then surely allegations of U.S. conduct directed entirely at foreign nationals on foreign soil give rise to even greater difference of opinion, as exemplified by the cases above. This Court should follow *Mwani* and certify its Order for interlocutory appeal.

## II. There Is Substantial Ground for Difference of Opinion Concerning Whether Persecution, Generally and on Sexual Orientation or Transgender Grounds, is a Clearly Defined and Universally Accepted Tort Actionable under the ATS.

This Court has concluded that it has subject matter jurisdiction over SMUG's ATS claims because persecution is a clearly defined and universally accepted crime against humanity. (Order at 20). There is substantial difference of opinion on this pivotal question, as well as on whether Lively's conduct could plausibly constitute "persecution" or "aiding and abetting persecution."

It is not enough to find that "crimes against humanity" in general are actionable under the ATS, nor that "persecution" can rise to the level of a crime against humanity. "[T]he 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) (emphasis added) (dismissing ATS claims for "cruel, inhuman, or degrading treatment" because, although proscribed generally by "major international agreements on human rights," there was no universal agreement as to what specific acts constitute this tort). "[T]he offense must be based on present day, very widely accepted interpretations of international law: **the specific things the defendant is alleged to have done must violate what the law already clearly is**." *Mamani v. Berzain*, 654 F.3d 1148, 1152 (11th Cir. 2011) (emphasis added) (dismissing ATS claim for crimes against humanity because, although some crimes against humanity are recognized, there is no universal consensus that the specific conduct alleged constitutes such crimes).[5]

Although courts have found that certain "crimes against humanity" are sufficiently defined and accepted to be actionable under the ATS, no court has ever even defined the elements of "persecution," much less imposed liability for "persecution" as a crime against humanity under the ATS. Even decisions of international tribunals cited by SMUG and relied upon by this Court confirm the lack of universal agreement on the existence and content of "persecution:"

> Unfortunately, although often used, **the term ["persecution"] has never been clearly defined in international criminal law nor is persecution known as such in the world's major criminal justice systems**. … **[C]rimes of the persecution type [are] composed of acts that may be punishable by domestic criminal law but which are not necessarily all punishable nor everywhere**.

[5] *See also*, *Forti v. Suarez-Mason*, 694 F. Supp. 707, 712 (N.D. Cal. 1988) ("To be actionable under the Alien Tort Statute the proposed tort must be characterized by universal consensus in the international community as to its binding status *and its content*. In short, it must be a universal, *definable*, and obligatory international norm) (italics in original) (dismissing ATS claim for cruel, inhuman and degrading treatment because of "definitional gloss" and lack of universal agreement over its elements); *In re Terrorist Attacks on September 11, 2001*, 714 F.3d 118, 125 (2d Cir. 2013) ("We regrettably are no closer now ... to an international consensus on the definition of terrorism or even its proscription; … Moreover, there continues to be strenuous disagreement among States **about what actions do or do not constitute terrorism** ….") (emphasis added) (affirming dismissal of ATS claim).

*Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment, ¶ 694 (May 7, 1997) (emphasis added) (quotes omitted) (cited by SMUG at dkt. 38, pp. 24, 26, and by the Court at Order, pp. 25, 27).

This Court, therefore, had to look solely to the Rome Statute to derive a definition (Order at 24), an international treaty that **the U.S. has expressly rejected**. *Doe I*, 654 F.3d 11, 35-36, n.22. The Supreme Court, in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), held that an international instrument that does "not itself create obligations enforceable in the federal courts" cannot be used to derive the existence or content of international norms. *Id*. at 734-35. There is, therefore, substantial difference of opinion as to whether the Rome Statute can be used to determine the existence **or elements** of persecution. *See Doe I*, 654 F.3d at 36, 39 ("The Rome Statute does not constitute customary international law") (declining to employ the Rome Statue to derive elements of aiding and abetting liability); *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 118 (2d Cir. 2008) (rejecting the Geneva Protocol as source of customary international law during the Vietnam conflict because of "the nature and scope of the reservations to ratification"); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 258 (2d Cir. 2003) (rejecting the American Convention on Human Rights as a source of customary international law because the U.S. has not ratified it, which "indicat[es] that this document has not even been universally embraced by all of the prominent States within the region in which it purports to apply").[6]

Even if "persecution" on political, racial or religious grounds were a "clearly defined" and "universally accepted" international tort, there is substantial ground for difference of opinion whether persecution **on sexual orientation or transgender grounds** is sufficiently clearly defined and universally accepted to confer subject matter jurisdiction under the ATS.

[6] Moreover, noting that "persecution" under the Rome Statute is defined as the "intentional and severe deprivation of fundamental rights," (Order at 24), this Court concluded that "in determining what constitutes a basic right, international courts have looked to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights." (*Id*. at 25). But **the Supreme Court has held that neither of those two international agreements is useful in determining international norms**, because "the Declaration does not of its own force impose obligations as a matter of international law," and "the Covenant … did not itself create obligations enforceable in the federal courts." *Sosa*, 542 U.S. at 734-35.

First, as this Court has noted, "the international treaties and instruments that provide jurisdiction over crimes against humanity list particular protected groups without specifying LGBTI people." (Order at 25). Because "[t]he ATS is no license for judicial innovation," and "[h]igh levels of generalities will not do," *Mamani*, 654 F.3d at 1152, there is substantial ground for difference of opinion as to whether a "clearly defined" and "universally accepted" norm can be derived from the general "savings clause" of an instrument that does not otherwise spell out a legal proscription.[7]

Indeed, Defendant has been unable to find any other ATS decision that recognized a clearly defined and universally accepted international norm emanating from general savings clauses of otherwise silent international agreements. Even the decisions of the ICTY tribunal cited by SMUG have repeatedly confined "persecution" to categories that do **not** include sexual orientation. *See e.g.*, *Prosecutor v. Tadic*, ¶ 697 (to constitute "persecution," the "discrimination **must be on specific grounds**, namely **race, religion or politics**") (emphasis added); *Prosecutor v. Perisic*, Case No. IT-04-81-T, Judgment, ¶ 118 (September 6, 2011) ("persecution" requires an "intention to discriminate **on political, racial or religious grounds**") (emphasis added).[8]

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[7] *Compare* Order at 26 (deriving an international norm of LGBTI protected status from the "savings clause" of the Rome Statute), *with In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 251 (S.D.N.Y. 2009) (declining to read between the lines of the Rome Statute to find "a tort of apartheid by a non-state actor," even though such a construction is "theoretically" possible, because the failure to **expressly** provide for it "demonstrates that private apartheid is not a uniformly-accepted prohibition of international character"); *and Flores*, 414 F.3d at 255 (an international agreement's lack of "limitations as to how or by whom these rights may be violated," **cannot** be construed as license for limitless application, and must be construed as an indication that the asserted norm is **not** "clear, definite and unambiguous"); *and id*. at 258-59 (refusing to find an international norm against pollution within the United Nations Convention on the Rights of the Child, because the instrument failed to specifically address pollution); *and Sosa*, 542 U.S. at 728, 736, n.27 (cautioning that "[w]e have no congressional mandate to seek out and define new and debatable violations of the law of nations," and concluding that "consensus" in many national constitutions against arbitrary detention was insufficient to recognize a cause of action under the ATS, because the consensus was "at a high level of generality" and the constitutions did not expressly prohibit the precise conduct at issue).

[8] SMUG attempts to cast these crucial limitations aside, by arguing that the ICTY tribunal's jurisdiction was "statutorily limited" to persecution on these specific grounds. (Dkt. 38, p. 26, n.10). This argument, however, proves too much. The admitted exclusion of sexual orientation and transgender identity from ICTY's jurisdiction cannot possibly be construed to mean that this category of "persecution" is clearly defined and universally recognized in international law. It means exactly the opposite. Like the ICTY tribunal, this Court's jurisdiction is also "statutorily limited," as the ATS prohibits recognition of torts whose existence, scope and content are not clearly defined and universally recognized. *Sosa*, 542 U.S. at 738.

Second, there is substantial difference of opinion as to whether a "clearly defined" and "universally accepted" norm proscribing "persecution" on sexual orientation or transgender grounds can be found notwithstanding the undisputed fact that **half or more** of the nations on earth do not observe such proscriptions.[9] The Supreme Court has held that it is one thing to label a handful of rogue nations as international law breakers and find that a norm is universally accepted notwithstanding their refusal to abide by it, but another thing entirely to conclude that half the world's countries are rogue states, while the other half are following a "universally accepted" norm:

> It is not that violations of a rule logically foreclose the existence of that rule as international law. Nevertheless, **that a rule as stated is as far from full realization as the one Alvarez urges is evidence against its status as binding law; and an even clearer point against the creation by judges of a private cause of action to enforce the aspiration behind the rule claimed**.

*Sosa*, 542 U.S. at 738, n.29 (emphasis added). The *Sosa* Court specifically considered an academic "survey of national constitutions." *Id*. at 736, n.27 (citing Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int'l L. 235, 260–261 (1993)). The survey indicated that "[t]he right to be free from arbitrary arrest and detention is protected in **at least 119 national constitutions**." Bassiouni, 3 Duke J. Comp. & Int'l L. at 261 (emphasis added). If acceptance of a "norm" by 119 out of 200+ nations falls short of "full realization" as required for jurisdiction under the ATS, surely there is substantial ground for difference of opinion as to whether the ATS can recognize "norms" which, according to SMUG's own statistics, are followed by only six, twenty or fifty-two nations. (*See* note 9).

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[9] SMUG's own statistics plainly demonstrate that the protections it advances for homosexual, transgender and intersex persons are not implemented in half or more of the world's nations. (Opposition to M. to Dismiss, dkt. 35, pp. 42-43) (claiming that: only **6 countries** "have explicit constitutional prohibitions against discrimination based on sexual orientation"; only **19 countries** "prohibit[] discrimination in employment based on gender identity"; only **20 countries** "grant asylum due to a claim of persecution based on sexual orientation"; only **24 countries** prohibit "incitement to hatred based on sexual orientation"; only **52 countries** "prohibit discrimination based on sexual orientation in employment"; and only **113 countries** "have moved to repeal" laws criminalizing homosexual conduct, though not all of them have succeeded). Although the number fluctuates, **there are upwards of 200 countries in the world**.

SMUG nevertheless claims that sexual orientation persecution **should** be universally proscribed, but this argument is foreclosed by *Sosa*, 542 U.S. at 738 (emphasis added):

> Whatever may be said for the broad principle Alvarez advances, in the present, imperfect world, **it expresses an aspiration that exceeds any binding customary rule having the specificity we require. Creating a private cause of action to further that aspiration would go beyond any residual common law discretion … appropriate to exercise.**

*See also Mamani*, 654 F.3d at 1152 ("We do not look at these ATS cases from a moral perspective, but from a legal one. We do not decide what constitutes desirable government practices.").

## III. There Is Substantial Ground for Difference of Opinion Concerning Whether a U.S. Court May Punish a U.S. Citizen for Conduct Legal in the United States.

At the end of the day, the only connection which SMUG can allege between Lively and the alleged acts of "persecution" in Uganda is that Lively "vilified the targeted community to inflame public hatred against it," and advised citizens how to pursue, and members of the Ugandan government how to enact, legislation restricting homosexual rights. (Order at 34). Assuming that SMUG could establish such conduct, and that it took place substantially in the U.S., there is no question that such conduct would **not** be unlawful in the U.S.. "Speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection." *Snyder v. Phelps*, 131 S. Ct. 1207, 1211 (2011). "[T]hreats of vilification or social ostracism" are fully protected speech. *N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886, 926 (1982).

There is currently a robust and often bitter debate in the U.S. as to whether homosexual rights should be restricted. Countless Americans are involved in intense advocacy over constitutional amendments and laws restricting marriage to heterosexual couples; opposing ordinances extending benefits or legal protections to homosexual or transgendered persons; opposing federal legislation prohibiting discrimination in employment based upon sexual orientation; and vigorously arguing these issues in the courts. At the same time, many other Americans question the wisdom of these efforts. But no one would dare file a federal lawsuit alleging that those responsible for enactment of marriage amendments in 30+ states, or for defeating the Employment Non-Discrimination Act, or for defeating transgender bathroom bills are somehow

perpetrating "widespread and systematic attacks against a civilian population," are responsible for the "intentional and severe deprivation of fundamental rights," and are therefore guilty of the "crime against humanity of persecution." No one would claim that private citizens advocating such measures "conspired" with or "aided and abetted" legislators to enact laws that constitute crimes against humanity, especially if, as is the case here, **the legislation in question never passed**.

While speech which is an "integral part" of a crime is not protected, (Order at 59), there is no question that "vilifying a targeted group" and engaging the legal and political process over rights afforded that group is neither a "crime" nor "aiding and abetting" a crime. At the very least, a contrary judicial determination is subject to substantial ground for difference of opinion.

That Lively's alleged conduct is fully protected political expression in the United States is not merely further proof that there is no "clearly defined" and "universally recognized" international norm that proscribes it, although it certainly is that. *Flores*, 414 F.3d at 257, n.33. ("it is highly unlikely that a purported principle of customary international law in direct conflict with the recognized practices and customs of the United States … could be deemed to qualify as a *bona fide* customary international law principle"). *Cf.*, *Mamani*, 654 F.3d at 1152 ("the specific things the defendant is alleged to have done must violate what the law already clearly is").

The legality of Lively's alleged conduct in the U.S. also raises serious due process and free speech questions about whether a U.S. court can punish it:

> We see no reasons why acts that are legal and protected if done in the United States should in a United States court become evidence of illegal conduct because performed abroad. We also reject the idea that the availability of petitioning immunity turns on the political "persuasion" of the government involved. The political character of the government to which the petition is addressed should not taint the right to enlist its aid.

*Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1366-67 (5th Cir. 1983); *see also Coca-Cola Co. v. Omni Pac. Co.*, 1998 U.S. Dist. LEXIS 23277, *28-30 (N.D. Cal. Dec. 9, 1998) (agreeing with *Coastal States*, and declining to impose liability for conduct directed at foreign government that was legal in the United States). This would be true even if the right to petition does not fully extend to foreign governments, *Coca-Cola, Co.* at *29, which is itself a controlling and dispositive question

never before decided by the First Circuit.[10] And it must be doubly true here, where SMUG cannot identify a single law that Lively advocated or "commented" upon which was actually enacted.

## IV. These Questions Are Controlling and their Resolution Will Materially Advance the Ultimate Termination of this Litigation.

There can be no serious dispute that these questions are sufficiently controlling to warrant certification. Resolution of Question III could bar SMUG's ATS and state law claims, and thus terminate the litigation. SMUG's state law claims could conceivably survive resolution of Questions I and II, but that does not make those questions less pivotal. As shown on pages 2-3, *supra*, a question need not dispose of the entire case to be controlling. SMUG would be hard pressed to contend that an issue earning two trips to the Supreme Court in *Kiobel*, generating hundreds of pages of briefing in this case, and receiving dozens of pages in the Court's Order is, after all, not "serious to the conduct of the litigation, either practically or legally." *Katz*, 496 F.2d at 755.

SMUG also could not show that resolution of Questions I and II in Lively's favor would not "significantly alter" "the scope of the case." *Philip Morris Inc.*, 957 F. Supp. at 330. SMUG filed this case solely as a "persecution" case under the ATS, (dkt. 1), adding its two state law claims only as an afterthought. (Dkt. 27). This Court has already indicated appropriate skepticism over the viability of at least one of SMUG's two state law claims. (Order at 78-79).

The ATS questions presented herein go to the very heart of this Court's subject-matter jurisdiction, which the First Circuit has identified as a quintessential issue for interlocutory appeal.

[10] The First Circuit (or any other Circuit, for that matter) has never limited petitioning immunity to one's own government. *Munoz Vargas v. Romero Barcelo*, 532 F.2d 765, 766 (1st Cir. 1976) ("no remedy even against private persons who urge the enactment of laws, regardless of their motives"); *Tomaiolo v. Mallinoff*, 281 F.3d 1, 11 (1st Cir. 2002) (same). One of the two district court cases relied upon by this Court (Order at 62) to establish this limitation, *Australia/E. U.S. A. Shipping Conference v. United States*, 537 F. Supp. 807 (D.D.C. 1982), **was vacated**, 1986 WL 1165605 (D.C. Cir. Aug. 27, 2086), and has not been used to confine First Amendment protections to the United States. The other district court case (Order at 62), *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), has been repeatedly rejected as "the minority view." *See, e.g.*, *Friends of Rockland Shelter Animals, Inc. (FORSA) v. Mullen*, 313 F. Supp. 2d 339, 344 (S.D.N.Y. 2004) (rejecting *Occidental Petroleum*-based argument that "the First Amendment right to petition the Government for a redress of grievances only applies to petitions to one's own government"); *Coastal States*, 694 F.2d at 1366; *Coca-Cola Co.*, 1998 U.S. Dist. LEXIS 23277 at *29-30.

*In re Heddendorf*, 263 F.2d at 888. Elimination of the ATS claims would obviate the need for prolonged inquiry (at summary judgment and trial) into lengthy and convoluted international accords and tribunal decisions, as well as for expert discovery and testimony on international norms, which the current discovery plan contemplates. It would also obviate the need for transnational discovery into whether a "widespread or systematic attack" has been perpetrated by the Ugandan government against its civilian population. Finally, it would eliminate SMUG's aiding and abetting claim against Lively, which would eliminate the unsettling foreign policy implications attendant to this Court's indictment of a foreign sovereign for crimes against humanity.[11]

For these reasons, ATS jurisdictional questions are routinely granted immediate appellate review, either by interlocutory appeal or, failing certification, by mandamus. *Balintulo*, 2013 WL 4437057 at *5 (because "ATS suits often create particular risks of adverse foreign policy consequences," and "the ATS places federal judges in an unusual lawmaking role as creators of federal common law," "a ruling that raises substantial questions of judicial power under the ATS … cannot be insulated from immediate review simply because a lower court refuses to certify the order for appeal"); *Mamani*, 654 F.3d at 1150-52, 1156 (accepting interlocutory appeal to determine whether an asserted crime against humanity was sufficiently defined and universally accepted); *Mwani*, 2013 WL 2325166 at *4 (issuing *sua sponte* certification for interlocutory appeal of order denying motion to dismiss ATS claims). Pleading secondary state law claims does not shield a decision on ATS jurisdiction from interlocutory appeal. *Mamani*, 654 F.3d at 1150-51, n.1 (district court certified, and Eleventh Circuit accepted, ATS jurisdictional issue for interlocutory appeal, notwithstanding plaintiffs' assertion of state law claims that were "not at issue in this limited interlocutory appeal").

[11] There can be no secondary liability for aiding and abetting an international law violation without finding that "the principal violated international law." *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 668 (S.D.N.Y. 2006) *aff'd*, 582 F.3d 244 (2d Cir. 2009). Accordingly, SMUG's aiding and abetting claim against Lively could not succeed unless this Court ultimately credits SMUG's allegations that sitting members of the Ugandan Parliament and other members of the highest levels of the Ugandan government have committed crimes against humanity.

## CONCLUSION

For the foregoing reasons, Defendant's Motion to Amend and Certify a Non-Final Order for Interlocutory Appeal should be granted.

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 September 6, 2013. 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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