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

| | | |
|---|---|---|
| **SEXUAL MINORITIES UGANDA** | ) | |
| | ) | |
| ***Plaintiff,*** | ) | |
| | ) | |
| ***v.*** | ) | |
| | ) | **Civil Action** |
| **SCOTT LIVELY, individually and as President of Abiding Truth Ministries,** | ) | **3:12-CV-30051** |
| | ) | |
| ***Defendant.*** | ) | |
| | ) | |

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

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## INTRODUCTION

Defendant has fallen far short of meeting the heavy burden he bears in seeking certification of this Court's order for interlocutory appeal. First, he inappropriately uses 28 U.S.C. § 1292(b) – a "hen's-teeth rare" vehicle for First Circuit review, *Kenney v. State St. Corp.*, 2011 U.S. Dist. LEXIS 104202, at *19 (D. Mass. Sept. 15, 2011) – to challenge this Court's *application* of clear Supreme Court precedent to the facts before it. There is no question as to the controlling legal standard to be applied to the question of extraterritoriality – the Supreme Court provided that standard in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). Defendant's proposed challenge to the application of this standard to Plaintiff's allegations is, as a matter of law, not appropriate for §1292(b) appeals. *See Yankee Candle Co. v. Bridgewater Candle Co., LLC*, 107 F. Supp. 2d 82, 89-90 (D. Mass. 2000) (Ponsor, J.).

Second, parties cannot, as Defendants attempts, use the interlocutory review mechanism to simply re-litigate arguments raised and rejected by the Court. In assessing whether Plaintiff presented a claim cognizable under the Alien Tort Statute ("ATS"), this Court rightly noted in applying the standard and methodology set by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), that the answer is "straightforward," "clear" and "easily discernible." Order at 20. All relevant legal authorities are in agreement as to the existence, wide acceptance and definiteness of persecution as an international norm. Defendant attempts to sow doubt as to the definiteness of this norm by extracting a tiny fragment of a key case at the International Criminal Tribunal for the Former Yugoslavia. However, the tribunal in that case actually surveyed the applicable international legal authorities to derive a specific definition and set of elements for persecution under international criminal law. The tribunal's definition and approach has served as the basis of subsequent articulations of the crime of persecution in

international criminal tribunals and is mirrored in the definition contained in the Rome Statute of the International Criminal Court.

Third, Defendant also resurfaces arguments made in his motion to dismiss mischaracterizing Plaintiff's claims as rooted in his offensive and inflammatory speech. This Court rightly noted that the Amended Complaint sets out allegations that Defendant's "actions have fallen well outside the protections of the First Amendment." Order at 57-58. Defendant cites to no authority – because there is none – demonstrating a difference of opinion as to the correct legal standard governing the use of speech as evidence of participation in, or management of, a crime. Nor does Defendant cite to any authority demonstrating a difference of opinion on the straightforward legal principle that "the petition clause cannot protect activities taken for unlawful purposes or toward unlawful ends." Order at 63. Nor does he cite to any authority demonstrating that the First Amendment right to petition extends to foreign governments: the authority he provides for this proposition actually affirms that it does not.

Finally, even if all of the statutory grounds for certification were present here – and they are not – this Court should exercise its broad discretion to deny Defendant's motion. An interlocutory appeal would only serve to unduly delay this litigation to the prejudice of the Plaintiff which continues to suffer from persecution. By contrast, Defendant has little to lose by proceeding in the litigation – despite Defendant's attempt to manufacture prejudice by blatantly misrepresenting to this Court the content of discussions between the parties' counsel regarding a discovery plan.

## ARGUMENT

A party seeking interlocutory review under 28 U.S.C. §1292(b) bears the heavy burden of demonstrating that the district court's order "involves [1] a controlling question of law [2] as to

which there is substantial ground for difference of opinion and [3] that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. §1292(b); *Caraballo-Seda v. Municipality of Hormigueros*, 395 F.3d 7, 9 (1st Cir. 2005). Based on its "policy preference against piecemeal litigation," and "prudential concerns about mootness, ripeness, and lengthy appellate proceedings," *Caraballo-Seda*, 395 F.3d at 9, the First Circuit "highly disfavors this measure, especially as to motions to dismiss," *Dahl v. Bain Capital Partners, LLC*, 597 F. Supp. 2d 211, 213 (D. Mass. 2009) (Harringon, J.). Courts are to use § 1292(b) certification "sparingly and only in exceptional circumstances." *McGillicuddy v. Clements*, 746 F.2d 76, 76 n.1 (1st Cir. 1984). Neither the saving of "appreciable trial time" nor a case's "tremendous implications" is determinative, *Caraballo-Seda*, 395 F.3d at 9, since judicial economy and the development of law are better served by well-reasoned appellate decisions rendered "in the light of full factual development" rather than the issuance of mere "advisory opinions rendered on hypotheses" alone, *Paschall v. Kansas City Star Co.*, 605 F.2d 403, 406 (8th Cir. 1979) (internal quotations omitted).

Even where the statutory requirements are met under § 1292(b), the grant of certification for interlocutory appeal still lies within the discretion of the district court. *See, e.g., Cummins v. EG & G Sealol, Inc.*, 697 F. Supp. 64, 67 (D.R.I. 1988); *Republic of Colom. v. Diageo N. Am., Inc.*, 619 F. Supp. 2d 7, 9 (E.D.N.Y. 2007). Factors courts consider in exercising this discretion include "(1) the benefit of further factual development and a complete record on appeal, particularly in rapidly developing or unsettled areas of the law; (2) the time an appeal would likely take; (3) the need for a stay pending appeal and the effect on the litigation including discovery, that would result from a stay; and (4) the probability that other issues may moot the need for the interlocutory appeal." *Republic of Colom.*, 619 F. Supp. 2d at 10.

## I. The Court's Application of *Kiobel* to Plaintiff's Allegations Is Not Appropriate for Interlocutory Review

### A. Defendant fails to present a pure question of law

As this Court's analysis of the claims presented here demonstrate, application of *Kiobel* does not present a "pure question of law" as required for the grant of interlocutory review. *United Air Lines, Inc. v. Gregory*, 716 F. Supp. 2d 79, 91 (D. Mass. 2010) (Gorton, J.).

To begin with, contrary to Defendant's assertion, Def. Br. at 4, *Kiobel*'s application of the presumption against extraterritoriality to claims under the ATS is a merits question, rather than a question of subject matter jurisdiction. *See Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (resolving that the application of the presumption against extraterritoriality is "a merits question"). The *Kiobel* court explained that "the principles underlying the presumption against extraterritoriality…constrain courts exercising their power under the ATS." 133 S. Ct. at 1665 (Roberts, C.J.). In other words, the question of extraterritoriality arises only once a court has already determined it has the authority to hear a case. *See id*. at 1664 ("The question here is not whether petitioners have stated a proper claim under the ATS, but whether a claim may reach conduct occurring in the territory of a foreign sovereign."); *see also id*. at 1665 ("[T]he question is whether *a cause of action under the ATS* reaches conduct within the territory of another sovereign.") (emphasis added).

The merits question courts must determine – as the Court did here – is whether "the claims against [the defendant] 'touch and concern the territory of the United States…with sufficient force to displace the presumption against extraterritoriality,'" Order at 45 (quoting *Kiobel*, 133 S.Ct. at 1669), a question that inherently requires an assessment of the facts as opposed to "an abstract legal issue" as required under § 1292(b). *McFarlin v. Conseco Servs.*, 381 F.3d 1251, 1258 (11th Cir. 2004). *Compare, e.g., Canty v. Old Rochester Reg'l Sch. Dist.*,

54 F. Supp. 2d 66, 77 (D. Mass. 1999) (Young, C.J.) (finding certification warranted to resolve whether Title IX precludes Section 1983 claims). Defendant would be asking the Court of Appeals to review the allegations in Plaintiff's Amended Complaint, as the Court did, *see* Order at 38-39, 44-45, and as Defendant himself did in seeking certification, Def. Br. at 4 ("at least eight courts…have already considered domestic conduct by U.S. nationals far greater in scope than the three domestic activities SMUG alleges of Lively") – an exercise that would not be necessary if the application of *Kiobel* presented a pure question of law. *See Illumination Mgmt. Solutions v. Ruud*, 2012 U.S. Dist. LEXIS 173144, at *12 (E.D. Wis. Dec. 6, 2012) (denying certification where "dismissal of the claims at issue does not involve a pure question of law" because "it would require the court of appeals to examine the Complaint and the causes of action alleged in that Complaint").[1]

**B. Because *Kiobel* raised and resolved the legal question of the extraterritorial reach of the ATS, there is no substantial ground for difference of opinion**

The "difference of opinion" required for review under §1292(b) "must arise out of genuine doubt as to the correct legal standard." *P. Schoenfeld Asset Mgmt. LLC v. Cendant Corp.*, 161 F. Supp. 2d 355, 360 (D.N.J. 2001). There is no dispute that *Kiobel* provides the applicable legal standard for assessing the extraterritorial reach of plaintiff's claims: a plaintiff's "claims [must] touch and concern the territory of the United States…with sufficient force to displace the presumption against extraterritoriality." Order at 45 (quoting *Kiobel*, 133 S.Ct. at 1669). All nine justices of the Supreme Court affirmed that this was the standard. *Kiobel*, 133

[1] Defendant points out the decision of the D.C. Court of Appeals to remand "for further consideration" *Doe v. Exxon Mobil Corp.* "in light of *Kiobel*." Def. Br. at 6 (citing *Doe v. Exxon Mobil Corp.*, 2013 U.S. App. LEXIS 16566, at *4 (D.C. Cir. July 26, 2013). The decision to remand the case to the district court, as opposed to merely affirming the district court's dismissal of plaintiff's ATS claims, affirms that *Kiobel* requires a factual assessment, rather than a purely legal one.

S. Ct. at 1669 (setting forth "touch and concern" standard in same paragraph as the holding); *id*. (Alito, J., concurring) (agreeing with "touch and concern" test but proposing different factual trigger); *id*. at 1670 (Breyer, J., concurring). *Accord Mwani v. Bin Laden*, 2013 U.S. Dist. LEXIS 74822, at *10-11 (D.D.C. May 29, 2013).

Since *Kiobel* provides the rule of law to address concerns of extraterritoriality, there can be no substantial ground for difference of opinion. *See Dahl*, 597 F. Supp. 2d at 213 (finding no substantial ground for difference of opinion where *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) provided the applicable legal standard for determining whether plaintiffs sufficiently pled an illegal agreement); *Yankee Candle*, 107 F. Supp. 2d at 89-90 (denying certification where "questions addressed in the ruling on the motion for summary judgment involved no more than application of well-established law, recently clarified by a unanimous Supreme Court opinion"). Indeed, courts in five of the seven circuits that have interpreted *Kiobel* applied the "touch and concern" test. *See Tymoshenko v. Firtash*, 2013 U.S. Dist. LEXIS 123240 (S.D.N.Y. Aug. 28, 2013);[2] *Adhikari v. Daoud & Partners*, 09-cv-1237, dkt. 617 (S.D. Tex. Aug. 23, 13); *Ahmed v. Magan*, 2013 U.S. Dist. LEXIS 117963 (S.D. Ohio Aug. 20, 2013); *Giraldo v. Drummond Co.*, 2013 U.S. Dist. LEXIS 103981 (N.D. Ala. July 25, 2013); *Al-Khalifa v. Obama*, 2013 U.S. Dist.

[2] Seven days *before Tymoshenko* was handed down, the Second Circuit Court of Appeals weighed in on this issue in *Balintulo v. Daimler AG*, 2013 U.S. App. LEXIS 17474 (2d Cir. Aug. 21, 2013). While the Second Circuit described *Kiobel*'s "touch and concern" test as "*dicta*," it recognized that the Supreme Court "had no reason to explore, much less explain, how courts should proceed when *some* of the relevant conduct occurs in the United States." *Id*. at *45. Moreover, *Balintulo*'s discussion of *Kiobel* is itself *dicta* because the court had denied mandamus, and thus the panel did not have jurisdiction to reach the issue. *Id*. at *17. The other decisions in the Second Circuit that made no mention of the touch and concern language similarly "had no reason to explore" it since, like *Kiobel*, they involved foreign-cubed facts – i.e., foreign plaintiffs, foreign defendants, and no conduct alleged in the U.S. *See Muntslag v. Beerens*, 2013 U.S. Dist. LEXIS 121035 (S.D.N.Y. Aug. 26, 2013); *Chen v. Honghui Shi*, 2013 U.S. Dist. LEXIS 110409 (S.D.N.Y. Aug. 1, 2013); *Munstlag v. D'Ieteren, S.A.*, 2013 U.S. Dist. LEXIS 70733 (S.D.N.Y. May 17, 2013).

LEXIS 101281 (N.D. Fla. July 1, 2013);[3] *Ezekiel v. B.S.S. Steel Rolling Mills*, 2013 U.S. Dist. LEXIS 92884 (N.D. Fla. Apr. 22, 2013); *Kaplan v. Cent. Bank of the Islamic Republic of Iran*, 2013 U.S. Dist. LEXIS 117528 (D.D.C. Aug. 20, 2013); *Mohammadi v. Islamic Republic of Iran*, 2013 U.S. Dist. LEXIS 76477 (D.D.C. May 31, 2013); *Mwani*, 2013 U.S. Dist. LEXIS 74822. The two courts representing the remaining circuits either conducted no analysis whatsoever, making it impossible to determine the legal standard the court was following, *Fotso v. Republic of Cameroon*, 2013 U.S. Dist. LEXIS 83948 (D. Or. May 16, 2013) (a foreign-cubed case), or simply described the test as "textually curious," *Al Shimari v. CACI Int'l, Inc.*, 2013 U.S. Dist. LEXIS 92937, at *31 (E.D. Va. June 25, 2013) – hardly a sufficiently reasoned analysis to consider it a substantial ground for difference of opinion.

Defendant's attempt to frame the legal issue more narrowly in order to demonstrate substantial grounds for disagreement is inappropriate. To merit interlocutory review, "[t]he legal question must be stated at a high enough level of abstraction to lift the question out of the details of the evidence or facts of a particular case and give it general relevance to other cases in the same area of law." *McFarlin*, 381 F.3d at 1259. Defendant does the opposite, combing through the ways in which various courts have determined that the facts before them were insufficient to displace the presumption against extraterritoriality under *Kiobel*'s test. In other words, Defendant's objections are with the Court's *application* of the *Kiobel* standard, "not with the correctness of the standard itself." *Babyage.com, Inc. v. Toys "R" Us, Inc.*, 2008 U.S. Dist.

[3] *See also Al-Khalifa v. Comm'r of Educ.*, 2013 U.S. Dist. LEXIS 110517 (N.D. Fla. July 2, 2013); *Al-Khalifa v. Minister of Interior*, 2013 U.S. Dist. LEXIS 108713 (N.D. Fla. July 1, 2013); *Al-Khalifa v. Bashar Hafez Al-Assad*, 2013 U.S. Dist. LEXIS 115440 (N.D. Fla. July 2, 2013); *Al-Khalifa v. Salvation Army, Nigeria Territory Soc. Servs. Section*, 2013 U.S. Dist. LEXIS 78173 (N.D. Fla. Apr. 29, 2013); *Al-Khalifa v. Elizabeth*, 2013 U.S. Dist. LEXIS 71682 (N.D. Fla. Apr. 19, 2013).

LEXIS 53918, at *72 (E.D. Pa. July 15, 2008). Critically, however, "[o]pinions cannot differ" on the application of a legal standard to a set of facts. *Dahl*, 597 F. Supp. 2d at 213 (explaining that "applying *Twombly* also demonstrates that no substantial grounds for difference of opinion can exist"). *See also United States ex rel. Elliott v. Brickman Group Ltd., LLC*, 845 F. Supp. 2d 858, 864 (S.D. Ohio 2012) ("§ 1292(b) is not appropriate for securing early resolution of disputes concerning whether the trial court properly applied the law to the facts").[4]

This Court closely reviewed Plaintiff's allegations to determine whether they met the *Kiobel* standard, Order at 38, 43-45, indicating that further factual development will permit a confident application of *Kiobel* – precisely the reason not to jump ahead to appellate review at this stage.[5]

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[4] That different cases have had different outcomes was in fact envisioned by the Supreme Court. Similar to its approach to pleading requirements in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court in *Kiobel* was "careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute" to be answered by the judicial experience of trial court judges reviewing the facts brought before them. 133 S.Ct. at 1669 (Kennedy, J., concurring). *See Haley v. City of Boston*, 657 F.3d 39, 52-53 (1st Cir. 2011) (evaluating the plausibility of a pleaded scenario under *Iqbal* is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense"); *NLRB v. Donna-Lee Sportswear Co.*, 836 F.2d 31, 38 n.9 (1st Cir. 1987) (the Supreme Court benefits from percolation among lower courts among different circuits for a standard to fully develop).

[5] While Defendant points out that the District of Columbia District Court in *Mwani*, which determined that plaintiffs' claims sufficiently "'touched and concerned' the United States with 'sufficient force' to displace the presumption," 2013 U.S. Dist. LEXIS 74822, at *11, *sua sponte* certified its order for interlocutory appeal, the court did so because issuing its opinion just shortly a month after *Kiobel* was decided made it "likely to be the first opinion interpreting the *Kiobel* decision," and plaintiffs had already finished presenting their evidence to the court, *id*. at *13-14. *See also Maqaleh v. Gates*, 620 F. Supp. 2d 51, 54-55 (D.D.C. 2009) (granting certification for interlocutory appeal in "extraordinary circumstances," where its opinion could "represent[] the only interpretation and application to date of the multi-factor test established in *Boumediene* [*v. Bush*, 128 S. Ct. 2229 (2008)]" because all habeas petitions by Bagram detainees were consolidated before the same judge). Since *Mwami* was issued, the same court has continued to apply the touch and concern test to other cases that have come before it, *see Kaplan*, 2013 U.S. Dist. LEXIS 117528, as have others across the country, *see supra* at 6-7.

**C. Interlocutory appeal would not materially advance the litigation**

Finally, an interlocutory appeal on this issue would not "materially advance the ultimate termination of the litigation." 28 U.S.C. §1292(b). Even if the Court of Appeals were to find substantial grounds for difference of opinion possible in the application of *Kiobel* because some courts have considered in their analysis the nationality and/or residence of the defendant, while others have only considered the two-justice minority's focus on "relevant 'conduct,'" [6] Def. Br. at 5 (quoting *Balintulo*, 2013 U.S. App. LEXIS 17474, at *7), this Court already determined that Plaintiff's claims would survive on *either* grounds. *See Ntsebeza v. Daimler A.G. (In re South African Apartheid Litig.)*, 624 F. Supp. 2d 336, 343 (S.D.N.Y. 2009) (denying certification for interlocutory appeal on issue of whether knowledge or intent is required for aiding and abetting liability under the ATS because plaintiffs adequately alleged both).

Specifically, this Court's analysis of the extraterritorial nature of Plaintiff's claims did not end at identifying Defendant's nationality and residence. This Court also concluded that the "Amended Complaint adequately sets out *actionable conduct* undertaken by Defendant in the United States to provide assistance in the campaign of persecution in Uganda." Order at 44 (emphasis added). *Compare Balintulo*, 2013 U.S. App. LEXIS 17474, at *50 (finding that the domestic conduct alleged was insufficient where it consisted of steps to circumvent the sanctions regime, which the complaint did not "tie" to the relevant human rights violations); *Giraldo*, 2013 U.S. Dist. LEXIS 103981, at *31(after rejecting some of plaintiffs' evidence as inadmissible, concluding that "[t]here is *nothing* left…to support Plaintiffs' contention that DLTD made decisions in the United States to conspire with and aid and abet the commission of war crimes in

[6] Justice Alito's proposal that an ATS cause of action should lie only if it turned on exclusively domestic conduct garnered only one additional vote. *Kiobel*, 133 S.Ct. at 1670 (Alito, J., concurring).

Colombia");[7] *Mwangi v. Bush*, 2013 U.S. Dist. LEXIS 85842, at *9 (E.D. Ky. June 18, 2013) (discussing no conduct alleged to have occurred in the U.S.).

Moreover, Plaintiff's state law claims, the discovery for which would almost entirely overlap with discovery required for Plaintiff's ATS claims, would still move forward regardless of how the Court of Appeals ruled on the application of *Kiobel*.

## II. There Is No Substantial Ground for Difference of Opinion that Persecution, Generally or on the Basis of Sexual Orientation and Gender Identity, Is a Sufficiently Definite Norm for Viability Under the ATS

Section 1292(b) is not a vehicle for defendants to rehash the arguments they made in support of their motion to dismiss, which the court already considered and rejected. *See City of New York v. Milhelm Attea & Bros.*, 2012 U.S. Dist. LEXIS 149512, at *13 (E.D.N.Y. Oct. 17, 2012); *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liab. Litig.*, 399 F. Supp. 2d 320, 324 (S.D.N.Y. 2005). *Accord E. Tennessee Natural Gas Co. v. 3.04 Acres In Patrick Cty.*, 2006 U.S. Dist. LEXIS 13933, at *3 (W.D. Va. Mar. 9, 2006). Nevertheless, Defendant uses his motion for § 1292(b) certification to simply reassert his argument that there is a lack of agreement as to whether the norm against persecution is clearly defined or sufficiently specific to permit recognition under the ATS pursuant to the standards set out in *Sosa*, 542 U.S. 692.[8]

Defendant's entire argument now rests solely on two sentences in a lengthy 1997 judgment in the *Tadić* case at the International Criminal Tribunal for the Former Yugoslavia (ICTY). Def. Br. at 13. In *Tadić*, the ICTY trial chamber undertook a careful analysis and

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[7] The court then in *dicta* proposes its own analysis of the "touch and concern" test that followed Justice Alito's minority formulation requiring that the violation of the *Sosa*-satisfying norm occur in the U.S. *Giraldo*, 2013 U.S. Dist. LEXIS 103981, at *32-33.

[8] Defendant does not appear to challenge the universality of persecution as a norm but instead addresses his arguments solely to the proposition that there is disagreement as to the content, or definition, of the tort. Def. Br. at 13.

survey of relevant authorities from which it derived a clear definition of the crime of persecution and its constituent elements. *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Judgment, paras. 694-718 (May 7, 1997) (noting at 705 that "[a]s the International Tribunal's closest historical precedent, the statements of the Nürnberg Tribunal on persecution are informative and *succinctly encapsulate the essence of the norm of persecution*") (emphasis added). After surveying the Nuremberg proceedings dealing with charges of persecution as well as other cases involving persecution by Nazi perpetrators, writings of experts, jurists and commentators, the Trial Chamber identified the elements of persecution as "a persecutory act or omission and a discriminatory basis for the act or omission" that "must be intended to cause, and result in, an infringement on an individual's enjoyment of a basic or fundamental right." *Id.* at para. 715. Later, the ICTY developed a slightly revised formulation of persecution: "an act or omission which does the following: 1. [D]iscriminates in fact and which denies or infringes upon a fundamental right laid down in international or customary or treaty law (the *actus reus*); and 2. was carried out deliberately with the intention to discriminate on one of the listed grounds…" *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Trial Judgment, para. 431 (Mar. 15, 2002). This formulation has been applied consistently since then. *See Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Appeal Judgment, para. 185 (Sept. 17, 2003); *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Appeal Judgment, para. 320 (Feb. 28, 2005); *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Appeal Judgment, para. 113 (Feb. 25, 2004). [9]

[9] Defendant cites to a number of cases which say nothing about persecution as a norm but which articulate the analysis required to determine actionable violations under the ATS. Def. Br. at 13. They further support the finding that persecution is a viable ATS claim. In *Xuncax v. Gramajo*, this Court observed that "[i]t is not necessary that every aspect of what might comprise a standard such as 'cruel, inhuman or degrading treatment' be fully defined and universally agreed upon before a given action meriting the label is clearly proscribed under international law." 886 F. Supp. 162, 187 (D. Mass. 1995). In *Xuncax*, the court was dealing with a norm that

Defendant wrongly asserts that the Court "*had* to look solely to the Rome Statute to derive a definition" of persecution, Def. Br. at 14, and once again argues that because the United States has not ratified the treaty establishing the International Criminal Court, it is not binding or enforceable in federal courts. Def. Br. at 14. First, the Rome Statute's definition is simply a more succinct synthesis of the same elements of persecution previously identified by other international tribunals. As Plaintiff previously noted, dkt. 38 at 25, the Trial Chamber in *Tadić* observed that the essence of the crime of persecution is that there must be "some form of discrimination that is intended to and results in an infringement of an individual's fundamental rights." *Tadić*, at para. 697. This essence is fully encapsulated in the Rome Statute's definition: "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity." Rome Statute, Art. 7(2)(g). Second, as previously addressed by Plaintiff, dkt. 38 at 27, the Rome Statute is simply evidence, like other treaties, of both the content of customary international law and of the specificity or clear definition of the norm required by *Sosa*. *See, e.g., Doe v. Saravia*, 348 F. Supp. 2d 1112, 1155 (E.D. Cal. 2004) (describing the Rome Statute as "an authoritative interpretation of crimes against humanity in international law"); *see also Abdullahi v. Pfizer*, 562 F.3d 163, 176 (2d Cir.

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had been subject to much less judicial application than persecution and still found the norm actionable under the ATS. In *Mamani v. Berzain*, the Eleventh Circuit simply holds that claims must be based on "present day, very widely accepted interpretations of international law." 654 F.3d 1148, 1152 (11th Cir. 2011). As set out in the Court's order and Plaintiff's brief in opposition to defendant's motion to dismiss, the claim for persecution is very clearly based on present-day, widely accepted interpretations of international law. Order at 20; dkt. 38 at 18-32. Defendant also points to *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988), which dismissed claims for cruel, inhuman and degrading treatment because of an inability to discern a definition of that offense in 1988, and *In re Terrorist Attacks on September 11, 2001*, 714 F.3d 118 (2d Cir. 2013), which declined to allow claims for terrorism due to the lack of any consensus about the content and definition of the offense. Unlike these violations, persecution has been repeatedly defined and its content agreed upon by international tribunals tasked with assessing individual criminal responsibility for the acts.

2009) (whether a treaty that embodies the alleged crimes is self-executing is relevant to, but not determinative of, the question of whether the norm permits ATS jurisdiction). The use of international instruments, whether ratified by the U.S. or not, as evidence of a norm is permitted by *Sosa*. *See Sosa*, 542 U.S. at 734-736 (explaining only that the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights did not themselves, standing alone, create obligations enforceable in the federal courts – not that they could not help inform the existence or content of customary international law).[10]

Defendant has thus failed to identify *any* disagreement as to the definition or content of the offense of persecution. The case he relies upon instead affirms the definiteness of the norm.

Defendant also argues that because no domestic court has "ever even defined the elements of 'persecution,' much less imposed liability for 'persecution' as a crime against humanity under the ATS," that it should not be recognized as actionable by this Court. Def. Br. at 13. This argument misstates what *Sosa* requires. While requiring that federal courts "not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when the ATS was enacted," *Sosa*, 542 U.S. at 732, the Supreme Court specifically rejected the idea that the door was closed to "further independent judicial recognition of actionable international norms," *id.* at 729 (and further instructing that "[j]udicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping").

[10] Defendant misstates *Sosa's* analysis in this regard when he extends the Supreme Court's recognition that the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights do not themselves "create obligations enforceable in federal courts," *Sosa* at 734, to also suggest that the international instruments are not "useful in determining international norms." Def. Br. at 14 n.9.

Defendant continues down this path, rehashing his argument that even accepting that the norm against persecution is widely accepted and clearly defined, persecution on the basis of sexual orientation and gender identity is not. Def. Br. at 14-17. Defendant zeroes in on the Court's reference to a "savings clause" in the Rome Statute, but completely ignores a critical aspect of this Court's ruling and Plaintiff's briefing on this point – that customary international law does not "limit the type of group that may be targeted for persecution." Order at 27-28 ("It is enough that Plaintiff alleges that the denial of fundamental rights it suffered was based on an 'unjustifiable discriminatory criterion.'"); *see also* dkt. 38 at 28-31.

Defendant rests this argument, once again, largely on the fact that the jurisdiction of existing international tribunals is limited to various specified grounds such as race, religion or politics and do not specifically include sexual orientation or gender identity. Def. Br. at 15 & n.8. Defendant characterizes Plaintiff's briefing as "attempt[ing] to cast these crucial limitations aside, by arguing that the ICTY tribunal's jurisdiction was 'statutorily limited' to persecution on these specific grounds." *Id*. It is not Plaintiff who argues this point, but the judges at the ICTY who have recognized this as a fact. After noting that customary international law does not limit persecution to certain definitive grounds, the Trial Chamber in *Tadić* acknowledged that the "possible discriminatory bases which the International Tribunal is empowered to consider are *limited by the Statute* to persecutions undertaken on the basis of race, religion and politics." *Tadić*, at para. 711 (emphasis added). Additionally, this Court referred to judicial decisions of international criminal tribunals which affirm that the group identity requirement should be interpreted broadly and that this comports with customary international law. Order at 26-27 (citing *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, Trial Judgment, para. 636 (Mar. 31, 2003) for the assertion that "the jurisdictional limit to prosecute persecution based on

race, politics and religion must be 'interpreted broadly'" and that it is often the perpetrator who "defines the victim group while the targeted victims have no influence of the definition of their status" and *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Trial Judgment, para. 1071 (Dec. 3, 2003)).[11]

Finally, Defendant again attempts to assert that the continued existence of persecution of LGBTI people means that persecution on this basis is not a clearly defined and widely accepted norm. The Court appropriately dispensed with this argument in a ruling well-grounded in law. Order at 28. *See also* dkt. 38 at 43.

### III. The Court's Rejection of Defendant's Attempt to Frame His Alleged Conduct as Protected Speech Is Not Appropriate for Interlocutory Review

Defendant seeks to re-litigate arguments based on the First Amendment that he made in support of his motion to dismiss, which the Court already considered and rejected. As in his memorandum of law supporting his motion to dismiss, Defendant once again misstates Plaintiff's allegations of his conduct.[12] Plaintiff *does not* allege that his "[s]peech on public

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[11] Defendant's invocation of the warnings from *Sosa* contained in *Mamani*, 654 F.3d at 1152, that "[h]igh levels of generalities will not do," Def. Br. at 15 & n.7, is not relevant here as the norm against persecution is easily discernible and not in any way subject to generalities. Likewise, his invocation of language from *In re S. African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009), and *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003), is not relevant to this case as the persecution norm has been expressly stated and applied consistently; there is no question as to "how or by whom these rights may be violated." It is further well-established, expressly, through relevant international law sources including the jurisprudence of the international tribunals, as well as commentary by experts and jurists, that customary international law does not limit the prohibited bases of persecution. *See* dkt. 38 at 30-32.

[12] At the same time that he mischaracterizes the allegations in the complaint, Defendant persists in depicting the conduct alleged as "legal in the United States." Def. Br. at 17. As Plaintiff noted in the Amended Complaint, dkt. 27 at 2 n.1, persecution as defined in international law finds a strong domestic-law parallel in the Ku Klux Klan Act of 1871, 42 U.S.C. § 1985(3), which punishes private conspiracies to interfere with civil rights when the conspiracy is motivated by group-based animus. *See also* dkt. 38 at 1-2. Defendant's conduct, as alleged, is not "legal" in the United States either.

issues" is actionable in and of itself. Def. Br. at 17. As Plaintiff has already explained – and as the Court has correctly understood – Plaintiff's Amended Complaint cites Defendant's public speech to demonstrate "evidence of Defendant's discriminatory animus and intent, as well as the persecutory goals of his conspiratorial acts, plans and agreements" and "proof of an independent agreement in furtherance of illegal conduct, i.e., persecution," not as illegal *per se*. Dkt. 38 at 14. Defendant has cited no authority to show any ground, much less substantial grounds, for difference of opinion on the legal principle that it is not "an abridgment of freedom of speech…to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed," Order at 59 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498, 502 (1949)); or that the "management of actual crimes" enjoys no First Amendment protection, *id*. at 62.

Nor has Defendant cited to any authority demonstrating substantial grounds for difference of opinion on the legal principle that "the petition clause cannot protect activities taken for unlawful purposes or toward unlawful ends." Order at 63 (citing *Cal. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 514 (1972)). Similarly, Defendant fails to cite to any authority disputing this Court's understanding that rulings granting companies *Noerr-Pennington* immunity from prosecution for their petitioning activity abroad "rest their conclusions on the scope of the Sherman Act itself and not on the First Amendment petition clause." Order at 63 n.11.[13] In fact, the case upon which Defendant primarily relies, *Coastal States Mktg., Inc. v.*

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[13] Defendant suggests that the Court inappropriately relied on *Australia/Eastern U.S.A. Shipping Conference v. United State*s, 537 F. Supp. 807 (D.D.C. 1982), because it "was vacated" and "has not been used to confine First Amendment protections to the United States." Def. Br. at 19 n.10. Defendant fails to note that *Australia/Eastern* was vacated as moot. 1986 WL 1165605 (D.C. Cir. Aug. 27, 1986). Moreover, contrary to his assertion, the decision has been cited for the premise that the right to petition is limited to one's own government. *See Laker Airways*,

*Hunt*, 694 F.2d 1358 (5th Cir. 1983), Def. Br. at 18, expressly affirms this Court's ruling by differentiating between the right to petition under the First Amendment, which was derived from "the need for a representative democracy to keep in touch with its constituents," and *Noerr-Pennington* immunity, which was "based on a construction of the Sherman Act" and not meant to "extend[] only so far as the first amendment right to petition and then end[] abruptly." *Id*. at 1364-66. The other authorities upon which Defendant relies are similarly limited to the anti-trust context. Def. Br. at 18, 19 n.10.[14]

Critically, this Court explained, "[d]iscovery may, or may not, reveal" that Defendant's actions are protected by the First Amendment. Order at 57. Thus, "[a]t this stage, it is far from clear that the First Amendment will foreclose liability on any set of facts that Plaintiff might show." Order 63-64. Hypothetical concerns are not the provenance of interlocutory review, particularly when "the court is well equipped" to address such issues should they arise. Order at 63-64. The Eighth Circuit Court of Appeals explained in *Paschall*,

> [O]nce the factual and legal development of this case is completed to the extent that our court has the judicially desirable record upon which the appellate court acts, the decision requested of us may no longer be necessary…Appellate courts cannot waste their time on problems that may never arise or speculate on how the problem will arise. The record before us should assure us that the legal issue has arisen and exactly how the problem arose before we fashion a response.

605 F.2d at 407 (internal quotations omitted). *See also Rahmi v. Trumble (In re Bon-Air P'ship)*, 464 B.R. 710, 720 (N.D. W. Va. 2011) ("because there has been no evidence 'to show that the

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*Ltd. v. Pan Am. World Airways, Inc.*, 604 F. Supp. 280, 287 n.20 (D.D.C. 1984); *see also Guessous v. Chrome Hearts, LLC*, 179 Cal. App. 4th 1177, 1184 (Cal. Ct. App. 2009).

[14] The one case that Defendant cites outside of the antitrust context is *Friends of Rockland Shelter Animals, Inc. (FORSA) v. Mullen*, 313 F. Supp. 2d 339 (S.D.N.Y. 2004), Def. Br. at 19 n.10, where the court expressly limits its holding to the specific claim there – tortious interference with a prospective business advantage – because it closely resembles the anti-trust context. *See id*. at 343 (citing only cases where the *Noerr-Pennington* doctrine is applied to claims for interference with business relations).

alleged conflict of interest is anything more than hypothetical[,] [appellant has] fail[ed] to meet this requirement for interlocutory appeal'"); *In re Bank of Am. Corp. Sec., Derivative, and Emp. Ret. Income Sec. Act (ERISA) Litig.*, 2010 U.S. Dist. LEXIS 109376, at *12 (S.D.N.Y. Oct. 7, 2010) ("They also raise certain hypothetical scenarios that are not present in this case, and seek further guidance as to a 'ready limiting principle.' But section 1292(b) is not a vehicle to solicit advisory opinions, and a court is to decide only the case and controversy before it.").

## IV. Even if the Statutory Grounds for Certification Were Met, the Court Should Exercise Its Discretion to Deny Defendant's Motion

Section 1292(b) "grants broad discretion to both district court and appellate court judges." *Cummins*, 697 F. Supp. at 67 (D.R.I. 1988). *See also Republic of Colom.*, 619 F. Supp. 2d at 9 (E.D.N.Y. 2007). The Court should exercise its discretion to deny Defendant's motion for interlocutory review.

First, an interlocutory appeal will unduly delay this litigation, seriously prejudicing Plaintiff. As Plaintiff has previously explained, dkt. 18, the more time passes, the more the climate of persecution and repression of sexual minorities in Uganda is likely to worsen, increasing the risks for Sexual Minorities Uganda, its member organizations, and their constituents. Moreover, the additional, substantial delay an interlocutory appeal will create will increase the risk of lost evidence and witnesses. *See In re South African Apartheid Litig.*, 624 F. Supp. 2d at 342 (denying motion for § 1292(b) certification) ("As memories fade and relevant actors pass away, discovery becomes more difficult and plaintiffs lose their chance for relief."); *see also Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989).[15]

[15] In his motion to stay these proceedings pending the Court's adjudication of Defendant's § 1292(b) motion, Defendant suggests that Plaintiff dragged its feet in bringing this case, *see* dkt. 66 at 3, despite the complaint's detailed allegations that persecution had escalated dangerously in recent years, *see* dkt. 27 at ¶¶ 34-42, 75-84, 105-118,131-138, 151-156, 159-164, 165-185, 197,

By contrast, Defendant has little to lose. "[T]he only harm [Defendant] stands to suffer from the unavailability of interlocutory review is an inchoate harm" from a non-final ruling which is "always a risk in litigation -- and not the sort of harm that warrants special solicitude." *Espinal-Dominguez v. Puerto Rico*, 352 F.3d 490, 498 (1st Cir. 2003). Otherwise, almost every denial of a motion to dismiss could be eligible for interlocutory review. As the First Circuit has noted, "the instances where section 1292(b) may be appropriately utilized will, realistically, be few and far between." *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1010 n.1 (1st Cir. 1988).

To manufacture a prejudice that would otherwise never exist, the Defendant goes so far as to blatantly misrepresent Plaintiff's discovery proposal. Neither in the parties' Rule 26(f) conference nor in Plaintiff's proposed discovery plan did it "indicate[] its intent aggressively to pursue transnational discovery, including discovery of sitting members of the Ugandan Parliament and other high-ranking Uganda government officials." Dkt. 66 at 2. The only time Plaintiff implied the possibility of transnational discovery was when its counsel, Pam Spees, Esq., simply proposed a discovery period of one year "given the transnational nature of the litigation." Declaration of Pam Spees, Esq., dated Sept. 20, 2013 [*hereinafte*r "Spees Decl."] at ¶¶ 4, 6; *see also id*. Ex. A. In fact, it was counsel for Defendant, Horatio Mihet, Esq., who expressed Defendant's desire to conduct depositions of third-party witnesses in Uganda. Spees

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217-222. More perverse, Defendant's suggestion effectively blames the victim of severe repression for not having been able to advocate on their own behalf – because of the very repression and criminalization of advocacy that Defendant sought to bring about. Defendant further asserts that Plaintiff "has sought and obtained lengthy extensions of time during the course of proceedings to date." Dkt. 66 at 3. Plaintiff sought extensions for a matter of weeks, *see* dkts. 23, 34, 55, not months or even years as an interlocutory appeal risks, and generally after Defendant's own extensions have caused scheduling conflicts for Plaintiff's counsel.

Decl. ¶ 5. As in any litigation, the district court – and litigants who perceive burden – have ample, routine mechanisms to manage discovery timing and burdens.

Second, there is no rush for the First Circuit to decide any of the issues Defendant raises in support of his motion for interlocutory review. There is no split among the courts in this circuit on any of these issues and no pending litigation under the Alien Tort Statute in any other court in this circuit. *Compare Muniz v. Winn*, 462 F. Supp. 2d 175, 183 (D. Mass. 2006) (Young, J.) (finding that the issue "crie[d] out for authoritative, prompt, precedential resolution in the First Circuit" where the judges in the District were divided and there were at least two dozen such cases pending in the District).

## CONCLUSION

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

Dated: September 20, 2013

Respectfully submitted,

*/s/ Pamela Spees*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was filed electronically, that it will be served electronically upon all parties of record who are registered CM/ECF participants via the NEF, and that paper copies will be sent to any parties indicated on the NEF as non-registered participants on September 20, 2013.

*/s/Pamela Spees*
Pamela Spees