

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

BASHE ABDI YOUSUF, et al., :
 :
 Plaintiffs, :
 v. : Civil Action No. 1:04cv1360 (LMB)
 :
 MOHAMED ALI SAMANTAR, :
 :
 Defendant. :

**DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION
FOR LEAVE TO FILE THE SECOND AMENDED COMPLAINT**

Defendant Mohamed Ali Samantar, by counsel, opposes the motion of Plaintiffs to file a second amended complaint on the grounds that the amendment wrongly pleads a claim against Defendant Samantar for participation in a "joint criminal enterprise." Plaintiffs' Proposed Second Amended Complaint, ¶¶ 96, 105, 115, 125, 135, 144, and 154. The insertion of such a claim in this action amounts to an impermissible futility in that, as Plaintiffs have conceded, not a single court in this country or elsewhere has recognized a civil claim of this character. Allowing such a claim also would be inappropriately prejudicial by misleadingly suggesting the participation by Defendant Samantar in the commission of a criminal act when neither Defendant Samantar nor, to his knowledge, any other individual who may have engaged in this purported "enterprise" has ever even been accused of a crime.

The Federal Rules of Civil Procedure mandate that leave to amend a complaint "be freely given when justice so requires." Fed. R. Civ. P. 15(a). A court may however deny leave to amend in certain instances including "undue prejudice to the opposing party by virtue of

allowance of the amendment [and] futility of amendment." Foman v. Davis, 371 U.S. 178, 182 (1962). In this instance, the proposed amendment is futile and prejudicial.

The insertion of a civil claim for alleged participation by Defendant Samantar in a joint criminal enterprise is manifestly futile in that it asserts a right to relief where no court cited by Plaintiffs, or any other known to Defendants, has ever recognized such a claim. The single decision cited by the Plaintiffs was a criminal conviction before the International Criminal Tribunal for the former Yugoslavia. Plaintiffs' Memorandum in Support of Their Motion for Leave to File the Second Amended Complaint, at 4. For the reasons set forth below, this decision does not and cannot establish a new cause of action for participation in a joint criminal enterprise.

First, the decision cited by Plaintiffs, Prosecutor v. Tadic, Judgement, ICTY Appeals Chamber, Case No. IT-94-1-A (July 15, 1999), was based upon a strict reading of the statute that created the tribunal and not on any statute or common law principle applicable to this Court. See ¶ 233.

Second, the claim was one recognizable in a criminal tribunal and implied no private cause of action. A court must exercise great caution in inferring a private right of action from a criminal statute, since civil enforcement does not benefit from "the check imposed by prosecutorial discretion." Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004).

Third, the absence of any international consensus as to the existence of this norm of participation in a joint criminal enterprise even in a criminal context prevents its being applied by American courts. "We think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world." Id. at 725

(holding that a claim for "arbitrary detention" does not reflect such an established norm despite the existence of international agreements arguably proscribing such action).

Finally, even a norm of established international validity is recognizable in an American court only if it is defined with great specificity. Id. (holding that enforceable norms must be defined with a specificity comparable to the offenses against ambassadors, violations of safe conduct, and piracy previously recognized by the Court). The claim of participation in a joint criminal enterprise has none of this specificity and has, indeed, been criticized as representing potentially an "enormous transfer of power from international judges to prosecutors, who have enormous discretion to decide how much wrongdoing to tie to any particular defendant" and as being "so loose, [it] approaches dangerously close to guilt by association." Allison M. Danner, Accountability for War Crimes: What Roles for National, International and Hybrid Tribunals?, 98 Am. Soc'y Int'l L. Proc. 181, 186 (2004).

The proposed amendment in asserting a claim against Defendant Samantar of participation in a joint criminal enterprise, accordingly, fails to state a claim upon which relief could be granted. In this way, it represents the kind of futile pleading that warrants the denial of a request to amend. Thus, in Hanover Ins. Co. v. Corpro Cos., Inc., 312 F. Supp. 2d 816 (E.D. Va. 2004), this Court denied a party's request to amend a complaint when this Court concluded that, even with the amendment, the complaint "would not remedy the complaint's failure to state a claim upon which relief could be granted." Id. at 824. A denial of a motion to amend is appropriate, indeed, not only when the amendment is intended to remedy a defect, as in Hanover Insurance, but in any instance in which the amendment fails to state a cognizable claim. Cf. Adkins v. Labor Ready, Inc., 205 F.R.D. 460, 461 (S.D. W. Va. 2001) ("[h]owever, it is


appropriate for a court to deny a motion to amend if the amendment will be futile, defined as being unable to survive a motion for summary judgment") (citations omitted). Since the claim by Plaintiffs of Defendant Samantar's alleged participation in a joint criminal enterprise would not survive a motion for summary judgment for the reasons stated above, the motion to amend the complaint to insert such a claim should be denied.

As a further basis to bar the amendment, the assertion that Defendant Samantar participated in a joint criminal enterprise would be highly prejudicial in that it would unjustifiably suggest his guilt of a crime. An imputation of criminal behavior is deemed so prejudicial that the Federal Rules of Evidence limit the introduction even of the conviction of an accused to circumstances where the probative value of admitting the evidence outweighs its prejudicial effect to the accused. Fed R. Evid. 609(a). In this instance, there is no allegation that Defendant Samantar or any of his alleged co-actors has ever been accused of a crime, let alone convicted of one. This Court should, accordingly, consider whether a claim of such doubtful cognizability as participation in a joint criminal enterprise should be the subject of discovery and possible evidence at trial where the very language of the claim wrongfully suggests an association of Defendant Samantar with criminal behavior.

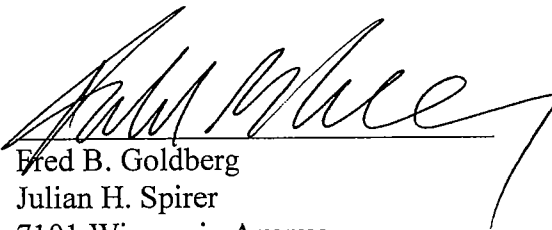
For the foregoing reasons, Defendant Samantar respectfully maintains that the introduction through the amended complaint of a claim of participation in a joint criminal enterprise would be futile and prejudicial and that Plaintiffs' motion to amend the complaint to add such a claim should, accordingly, be denied.

Respectfully submitted,

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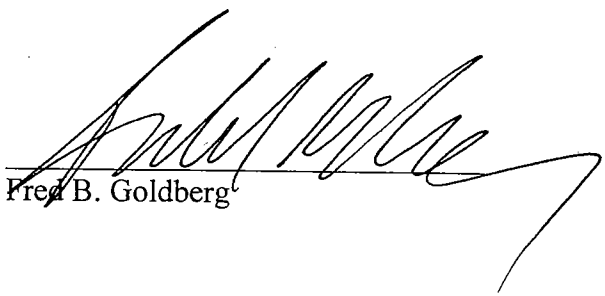
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CERTIFICATE OF SERVICE

I, Fred B. Goldberg, hereby certify that on this 2nd day of March, 2007, I caused to be served a true and correct copy of the foregoing Defendant's Opposition to Plaintiffs' Motion for Leave to File the Second Amended Complaint by first-class U.S. Mail, postage pre-paid, on the following:

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