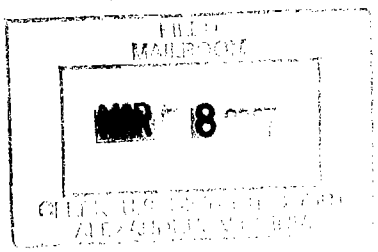
IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION



BASHE ABDI YOUSUF, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 1:04 CV 1360 (LMB/BRP)
	)	
MOHAMED ALI SAMANTAR,	)	
	)	
Defendant.	)	

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE THE SECOND AMENDED COMPLAINT

INTRODUCTION

Even though the parties in this case are not at issue and have not taken any discovery from each other, Samantar opposes the proposed inclusion of the doctrine of joint criminal enterprise as an additional theory of liability in the plaintiffs' proposed Second Amended Complaint, on the grounds of futility. But, as shown below, the complaint states a claim for joint criminal enterprise, which is now widely accepted by an important international tribunal. Moreover, whether this doctrine should be accepted by this Court is best addressed through a motion to dismiss or a motion for summary judgment, if Samantar should choose to file one. For these and other reasons set forth below, the Court should grant the plaintiffs leave to file their Second Amended Complaint.

ARGUMENT

Rule 15(a) provides that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15. The Supreme Court has identified four factors which might justify denial of leave to amend: (1) undue delay, bad faith or dilatory motive; (2) repeated failure to cure

deficiencies by previous amendments; (3) undue prejudice to the opposing party; or (4) futility. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Samantar does not make any argument regarding the first three *Foman* factors. Nor could he. There has been no undue delay, no bad faith, no deficiencies in prior amendments and no dilatory motive. More importantly, granting leave to amend will not cause undue prejudice to Samantar. To the contrary, this case is just getting underway, albeit after a long delay not caused by the parties. Samantar's Motion to Dismiss the First Amended Complaint is pending. He has not filed an answer. No party has taken any discovery from any other party.[1] Samantar does not oppose most of the amendments to the complaint.[2] Finally, Samantar intends to renew his motion to dismiss to address developments in the law in the past two years. (Transcript of 2/23/07 Status Conference at 13). (Exhibit A.)

The case law makes it clear that, under these circumstances, leave to amend should be granted. *See Bamm, Inc. v. GAF Corp.*, 651 F.2d 389, 391-392 (5th Cir. 1981) (holding that leave to amend should have been granted where, among other things, discovery had not been completed and there was no undue prejudice in allowing additional claims involving the same transaction); *see also Issen v. GSC Enter., Inc.*, 522 F. Supp. 390, 394 (N.D. Ill. 1981) ("But the defendants have failed to establish that they would be unduly prejudiced by this amendment which, though it is chronologically late in the litigation, comes before the close of discovery,

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[1] The Court's January 7, 2005 order stayed most aspects of this case but permitted discovery from agencies of the federal government. The plaintiffs have received some documents from the United States Department of State by subpoena. *See Yousuf v. Samantar*, 451 F. 3d 248 (D.C. Cir. 2006) (enforcing plaintiffs' document subpoena to the State Department and holding that federal agencies are subject to Rule 45 subpoenas).

[2] Samantar does not object to the following amendments of the Second Amended Complaint: the substitution of Aziz Mohamed Deria as plaintiff in a representative capacity for the claims of certain decedents, the voluntary dismissal of claims of plaintiffs John Doe III and John Doe IV, and other general revisions made throughout the Second Amended Complaint.

before trial, and before rulings on the pending motions to dismiss or for summary judgment and for class certification.").

Notwithstanding these authorities, Samantar opposes leave to amend based on his assertion that one aspect of the Second Amended Complaint – the theory of joint criminal enterprise – is futile. With these principles in mind, the plaintiffs briefly address here the doctrine of joint criminal enterprise, but note that this issue is more properly raised by a motion with full briefing. *Cf. Issen*, 522 F. Supp. at 394 (futility issue is "more appropriately addressed in the context of a motion to dismiss or for summary judgment").

Samantar argues that a joint criminal enterprise is not actionable because, in Samantar's view, the doctrine applies to criminal prosecutions, not civil actions; because the doctrine does not "rest on a norm of international character accepted by the civilized world" and lacks sufficient specificity to be accorded international validity;[3] and because the doctrine has not been widely recognized. Opposition at 2-4. None of these arguments justifies denial of leave to amend.

First, that the doctrine of joint criminal enterprise has arisen in connection with criminal cases does not preclude its application in civil claims under the Alien Tort Statute ("ATS"). Indeed, as expressly recognized by the *Sosa* Court, at the time of passage of the ATS there were three paradigmatic examples of actionable conduct under the statute, and all of them were criminal in nature: violation of safe conducts, infringement of the rights of ambassadors, and piracy. *Sosa*, 542 U.S. at 715, quoting 4 W. Blackstone, *Commentaries on the Laws of England* 68 (1769); *see also Sosa*, 542 U.S. at 719 ("the First Congress was attentive enough to the law of nations to recognize certain offenses expressly as criminal, including the three mentioned by

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[3] *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

Blackstone"). The ATS is well designed to provide civil relief to address conduct that may also be criminal. For example, courts consistently have applied the theory of command responsibility, which was first developed in the field of criminal law, in civil claims brought under the ATS. *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283 (11th Cir. 2002); *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994).

Samantar also argues that the doctrine of joint criminal enterprise does not satisfy the *Sosa* requirement that the underlying conduct be "specific, universal and obligatory." 542 U.S. at 732, quoting *Marcos*, 25 F.3d at 1475. Samantar's argument, however, misperceives *Sosa*'s instructions. The ATS requires only that the tort be "committed" in violation of international law, not that international law itself recognize a right to sue. *Marcos*, 25 F.3d at 1475. International law "never has been perceived to create or define the civil action to be made available." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J. concurring). While international law is often enforced through criminal prosecutions, it also permits states to establish appropriate civil remedies. *Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995). Thus, *Sosa* states that "the common law would provide a cause of action" to address the underlying violation of international law. 542 U.S. at 724. For these reasons, post-*Sosa* decisions make clear that issues of indirect liability are decided by federal common law, *Sarei v. Rio Tinto PLC*, 456 F.3d 1069, 1078 (9th Cir. 2006); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005), even if these theories of liability may not be universally accepted under international law.

In these circumstances the federal courts frequently look to the International Criminal Tribunal for the Former Yugoslavia ("ICTY") to determine whether theories of secondary liability are actionable under federal common law. *In re "Agent Orange" Product Liability*

Litigation, 373 F. Supp. 2d 7, 54 (E.D.N.Y. 2005); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1149 (E.D. Cal. 2004); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1329 (N.D. Ga. 2002). And, contrary to Samantar's suggestion, the doctrine of joint criminal enterprise has gained broad acceptance by the ICTY. *See* Allison M. Danner and Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 Cal. L. Rev. 75, 103, 107 (2005). "Joint criminal enterprise is becoming increasingly important at the ICTY." *Id.* at 107.

The growing international acceptance of the theory of joint criminal enterprise strongly suggests that it must be recognized as a part of our federal common law and a basis for secondary liability in civil actions under the ATS. To be sure, as Samantar notes, the plaintiffs are not aware of any ATS case that yet recognizes this theory of liability. But the plaintiffs also are not aware of a single case that rejects this theory. This Court should recognize this doctrine based on its wide acceptance by the ICTY. At a minimum, however, this is an issue of first impression, one that is particularly deserving of full briefing through appropriate motions practice.

CONCLUSION

For the foregoing reasons, the plaintiffs request that the Court grant them leave to file the Second Amended Complaint.

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Dated: March 7, 2007

CERTIFICATE OF SERVICE

I hereby certify, this 7th day of March, 2007, that a true copy of the foregoing was sent by electronic mail and overnight delivery to the following counsel of record:

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