New Frontiers in the ATS: Conspiracy and Joint Criminal Enterprise Liability after Sosa

Anna Sanders
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I. INTRODUCTION

The 2004 Supreme Court ruling in Sosa v. Alvarez-Machain1 resolved much of the controversy over which international law violations were cognizable under the ATS, but has left courts with little concrete guidance about how to apply the various theories of indirect liability. This conspicuous gap in the Sosa ruling has led to confusion, and an animated debate among courts about whether they must turn to international legal norms or federal common law as the basis for assessing and applying theories of indirect liability. The two liability doctrines examined in this Article, conspiracy and Joint Criminal Enterprise (JCE), present particular challenges to the courts, as they can be slippery and ill-defined concepts,2 and because their development within international jurisprudence is more controversial than other modes of vicarious liability, such as aiding and abetting.

Although conspiracy and JCE are often seen as one and the same, they are in fact distinguishable, both in their elements and form, as well as in their treatment in U.S. and international case law. This Article will begin in Part II

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2. JCE and conspiracy are often used interchangeably by courts, thus blurring the lines that distinguish them. See Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 260 (2d Cir. 2009) [hereinafter Talisman IV]. Furthermore, conspiracy as a theory of liability is often confused with its other juridical function as a standalone inchoate crime, in part due to the divide between common law and civil law countries. See infra Part II.B.; William A. Schabas, General Principles in the International Criminal Court Statute (Part III), 6 Eur. J. Crime Crim. L. & Crim. Just. 400, 413 (1998).
II. CONSPIRACY AND JCE: FILLING A GAP?

Before moving into more formalistic legal arguments, it is helpful to first contextualize the discussion of JCE and conspiratorial liability by considering the role these doctrines may serve under a statute that fundamentally stands for accountability and justice. Though it is unlikely that such considerations will be taken up by the courts, they provide a frame for understanding both the limits and possibilities of these legal doctrines as tools of accountability in human rights civil litigation.

Conspiracy and JCE are usually pled in conjunction with other theories of liability, such as aiding and abetting, command responsibility, or even direct liability. However, unlike these other modes of liability, conspiracy and JCE have the potential to cast a particularly wide net of responsibility, encompassing defendants who never materially participated in the violations in question, and who did not occupy a leadership position among those who did physically perpetrate the acts alleged. On the one hand, this expanded conceptualization of liability gives a much needed tool to plaintiffs and human rights attorneys to hold individuals responsible for crimes which they helped orchestrate but not necessarily perpetrate; on the other hand it runs the risk of diluting concepts of culpability and individual liability for violations of international law.

The controversies surrounding JCE and conspiracy liability are perhaps reflective of the uneasiness that states and jurists still feel towards the very concept of international criminal justice. International criminal law in many ways incorporates two contradictory purposes. International criminal justice is decidedly committed to holding only individuals responsible for the most egregious international law violations, and rejects attempts to criminalize an
entire society. However, because of the generally massive scale on which they occur, and the involvement of states or well-organized armed groups, international crimes by nature suggest collective culpability. International criminal law thus far has tried to reconcile the individual and collective culpability at play by targeting the individual actors who bear the greatest responsibility for the violations.

JCE and conspiracy straddle these dual purposes in a precarious way. They each create individual liability for actors who may not have participated in the physical perpetration of the crimes themselves, but whose role in the violations is viewed as particularly severe because they were part of the genesis of the collective criminal enterprise or plan. Further, because JCE and conspiracy hinge on the existence of a criminal enterprise or plan that implicate actors beyond the specific defendant, its pleading necessitates a finding of collective planning and action to perpetrate human rights violations. As one commentator has explained:

The JCE doctrine serves to link crimes to several persons (perpetrators and accomplices); it, conversely, connects persons with distinct crimes and, last but not least, it manages to portray the interaction and cooperation between members of a group or organization, showing the dynamics of collective action without which, according to many, international crimes cannot be understood.

However, at the same time that JCE is an individual liability doctrine, it potentially explodes the scope of individual liability by casting the net so wide as to encompass every individual who participated in the criminal enterprise. This concern has been mostly tempered at the international tribunals with the "gate-keeping" role that prosecutors play, and explicit limits on potential defendants enshrined in the court statute. Furthermore, the courts themselves


6. This is particularly so with the third level of JCE, described infra Part IV.A.

7. See Allison Marston Danner, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, 97 AM. J. INT'L L. 510, 518-22 (2003). Although JCE was revived in modern international law in the International Criminal Tribunal for the former Yugoslavia (ICTY) case against Dusko Tadic, who was admittedly a relatively low level perpetrator, this was primarily due to a dearth of apprehended defendants at the fledgling court which was being closely watched to see if it would deliver on its promise of providing accountability for the atrocities that defined the conflicts in the former Yugoslavia. Allison Marston Danner & Jenny S. Martinez, Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law, 93 CALIF. L. REV. 75, 104 (2005). Subsequent cases, however, have better captured the intent of JCE to go after high-level officials, who used their rank and/or political position to physically separate themselves from the direct commission of crimes. van der Wilt, supra note 5, at 98.
have refused to randomly use JCE to create liability for an overly-broad class of defendants. Much of the most important jurisprudence regarding JCE developed in the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) has been in decisions rejecting its use.\(^8\)

Nonetheless, JCE and conspiratorial liability may have an important role to play where other theories of liability do not account for the particular nature and organizational qualities of massive human rights violations. Consider for example a defendant who was a member of a militia with diffuse hierarchical structures, who nonetheless helped organize and instigate others to commit severe human rights abuses. Such a defendant would not be liable under a theory of direct liability, and indirect liability doctrines of aiding and abetting or command responsibility would have problematic application.\(^9\) Similarly, impunity would likely result for a political leader who acquiesced to or even helped implement a plan of ethnic cleansing within his jurisdiction.\(^10\) On an intuitive and moral level, it is hard to see why these individuals should escape liability for their actions and support of egregious human rights violations.

JCE and conspiratorial liability offer an innovative way to extend liability

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8. See, e.g., Prosecutor v. Brdanin, Case No. IT-99-36-T, Judgement (Sept. 1, 2004) [hereinafter Brdanin] (rejecting JCE liability allegations because none of the members of the JCE actually committed the crimes); Prosecutor v. Mpambara, Case No. ICTR-01-65, Judgement (Sept. 11, 2006) (dismissing JCE because it was not proven beyond a reasonable doubt that the accused had the requisite mens rea with regards the substantive crime); Prosecutor v. Limaj and others, Case No. IT-03-66-T, Judgement, paras. 665-670 (Nov. 30, 2005) (dismissing a charge based on JCE because it was not proven that the accused’s role was “substantial”).

9. See Prosecutor v. Tadic, No. IT-94-1-A, Judgement, para. 229 (July 15, 1999) [hereinafter Tadic] (explaining the difference between aiding and abetting and JCE liability under international law); Beth Van Schaack, Command Responsibility: The Anatomy of Proof in Romagoza v. Garcia, 36 U.C. DAVIS L. R. 1213 (2003) (outlining the elements of command responsibility including the existence of a superior-subordinate relationship, and a duty to prevent or punish); Ryan Lincoln, To Proceed with Caution? Aiding and Abetting Liability Under the Alien Tort Statute, 28 BERKELEY J. INT’L L. 604, 608 (2010) (explaining that at least one of the U.S. circuit courts appears to be settling on a heightened standard of “purpose” to substantially assist in crimes that were contemplated by the defendant).

to actors who certainly have a high degree of individual culpability, but who would otherwise be shielded from liability because of the multilayered and complex ways in which massive human rights violations are carried out. There are reasons to be cautious moving forward with applications of these traditionally criminal doctrines to the civil arena, but without them, meaningful accountability under the ATS may be significantly eroded.

III.
CONSPIRACY LIABILITY UNDER THE ATS

Conspiratorial liability extends liability to individuals who entered into an agreement to commit a particular offense, in instances where the planned event was in fact executed by at least one of the co-conspirators. While the use of JCE is a relatively new phenomenon in ATS litigation, plaintiffs have alleged conspiracy as a theory of liability quite frequently in the last two decades, including in several landmark ATS cases. Often pled in conjunction with more contentious theories of liability or substantive offense, the application of conspiratorial liability has generally been accepted without much scrutiny on the part of the courts.

The 2004 Sosa decision, which put to rest much of the controversy about the standards for substantive offense recognized under the ATS, appears to have opened the door to a new frontline of ATS litigation focusing on indirect liability. The Court held that the source of law for ATS jurisdiction must derive from universally recognized international legal norms and be

11. Although under Anglo-Saxon law and to a more limited extent international criminal law, conspiracy exists both as a mode of liability and a substantive offense as an inchoate crime, for the purposes of this Article, we will be focused exclusively on conspiracy as an indirect liability doctrine. See infra discussion at Part III.B.


13. See, e.g., Hilao, 103 F.3d at 776-77 (in which the defendants did not challenge the conspiratorial theory of liability, but did object to the application of command responsibility liability for a head of state); Doe v. Rafael Saravia, 348 F. Supp. 2d 1112, 1157 (E.D. Cal. 2004) (holding that assassination of the archbishop of El Salvador constituted “crimes against humanity” and was actionable under the ATS); Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019, 1026 (W.D. Wash. 2005) [hereinafter Corrie] (holding that the sale of a “legal, non-defective product” does not constitute a violation of the laws on nations).

"sufficiently definite to support a cause of action." Notably, however, the ruling did not clarify whether this same standard should apply to theories of liability as well.

Faced with this unsettled question, the post-Sosa judicial inquiry of conspiratorial liability addresses two different issues: First, must theories of liability derive from universally recognized international norms in conformity with the standard articulated in Sosa, or can they be based on federal common law? And second, assuming that international law must provide the basis for an allegation of conspiratorial liability, does this mode of indirect liability reach the high bar set by Sosa as a universally recognized international norm?

A. Establishing conspiratorial liability: must courts look to international law or federal common law standards?

The Sosa Court clarified that the ATS is purely a jurisdictional statute that allows courts to hear torts cases alleging violations of well-settled international law. The Court went on to explain that federal common law, and not the ATS, must provide the cause of action for remedies for these violations. The practical effect of this holding is that it requires courts to perform two levels of judicial inquiry, each involving a distinct body of law. Courts must first determine whether the violation alleged is a universally recognized norm under international law in order to claim jurisdiction. Where the plaintiff alleges direct liability, recognition of a cause of action should be unproblematic. However, where a theory of indirect liability is alleged, such as conspiracy, the Court left unanswered whether international law or federal common law is the appropriate source of law from which to derive the cause of action. While this debate applies to all forms of indirect liability related to the international law norm, it is a particularly critical issue for claims alleging conspiracy, as conspiratorial liability may indeed have its firmest groundings in federal common law and not international law.

In the pre-Sosa case of Eastman Kodak, the district court first set out that in the absence of more specific guidelines from the Supreme Court, "plaintiffs must demonstrate that international law, whether contained in universal custom or convention" includes a direct prohibition on conspiracy for the crimes alleged

15. Sosa, 542 U.S. at 725, 732 (2004) (holding that "courts should require any [ATS] claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized."). While many courts already followed this standard, the ruling in Sosa definitively put to rest any lingering doubts about whether still developing or controversial international law norms could be applied under the ATS.

16. See Corrie, 403 F. Supp. 2d at 1027 ("While international law may recognize accomplice liability in some instances, the conduct alleged must first rise to the level of a claim under Sosa.").

17. See infra Part III.B.
in that case.\textsuperscript{18} However, the Supreme Court soon backed away from this proposition, and cited with apparent approval other district courts’ decisions that conspiracy was allowed under the ATS, by relying on U.S. federal common law. The \textit{Eastman Kodak} Court explained that the use of federal laws to elucidate whether conspiracy can attach liability for violations that generally can only be committed by the state, “while not dispositive, [is] at least persuasive in the absence of any other guidelines.”\textsuperscript{19}

The \textit{Sosa} decision is conspicuously silent on modes of vicarious liability, and as one Second Circuit judge described, the decision “at best lends Delphian guidance on the question of whether the federal common law or customary international law represents the proper source” for deriving standards of indirect liability.\textsuperscript{20} The emphasis in \textit{Sosa} on looking to firmly settled customary international law as a basis for ATS jurisdiction certainly appears to encourage courts to look to international norms even for questions of indirect liability. The only mention of liability doctrines under the ATS in the entire \textit{Sosa} ruling comes in a footnote, in which the Court approvingly recognizes that lower courts have turned to international law to determine certain direct liability questions.\textsuperscript{21} However, besides the fact that this footnote in \textit{Sosa} may be properly seen as non-binding \textit{dicta}, it concerned direct liability—which \textit{actors} may be liable, and left unclear whether the Court intended this fleeting mention to extend to the determination of the source of law for indirect liability, which governs what \textit{behavior} may incur liability.\textsuperscript{22}

No court decision yet has engaged the debate over source of law for conspiratorial liability in ATS suits, and explicitly defended the use of federal common law over international law as a source of law, although the issue has been touched upon by a handful of cases. In a concurring opinion in \textit{Khulumani}, which dealt with aiding and abetting and not conspiracy, Judge Hall vigorously argued for the application of federal common law in assessing indirect liability claims.\textsuperscript{23} His approach was ultimately not adopted by the Second Circuit’s ruling on whether conspiracy and other vicarious liability may rely on federal

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\textsuperscript{18} \textit{Eastman Kodak}, 978 F. Supp. At 1091. However, other pre-\textit{Sosa} cases have looked directly and unequivocally to federal common law to supply the elements and pleading standards for conspiratorial liability. \textit{See}, e.g., Bodner v. Banque Paribas, 114 F. Supp. 2d 117, 125 (E.D.N.Y. 2000).

\textsuperscript{19} \textit{Eastman Kodak}, 978 F. Supp. at 1092.

\textsuperscript{20} \textit{Khulumani v. Barclay Nat. Bank Ltd.}, 504 F.3d 254, 286 (2d Cir. 2007) [hereinafter \textit{Khulumani}] (Katzmann, J., concurring).

\textsuperscript{21} \textit{Sosa} at 732, n.20 (looking at whether non-state private actors who commit offenses that are generally seen as state-related crimes can be held individually responsible).

\textsuperscript{22} \textit{Id. See also Khulumani}, 50 F.3d at 269 (Katzmann, J., concurring) (“While this footnote specifically concerns the liability of non-state actors, its general principle is equally applicable to the question of where to look to determine whether the scope of liability for a violation of international law should extend to aiders and abettors.”).

\textsuperscript{23} \textit{Khulumani}, 504 F.3d at 286-87.
law. However, his reasoning—that determinations on the scope of liability are within the domain of the cause of action, and as such is a question best left to federal common law—may still prove helpful to other litigants and courts.

In *Cabello*, the Eleventh Circuit upheld the application of conspiratorial liability in an ATS suit and articulated the elements for such a theory of liability from federal common law, without reference to international law. The court again affirmed ATS conspiratorial liability in *Aldana*, citing to both the *Cabello* holding and a Second Circuit ATS decision in which another federal statute was used as the source of agency law. The Ninth Circuit in *Sarei*, a case in which plaintiffs alleged conspiratorial liability, acknowledged that a post-*Sosa* assessment of whether vicarious liability claims are admissible under the ATS was in order, but ultimately left the question unresolved. However, in surveying the competing sources of potentially available law for conspiracy liability, the *Sarei* court exclusively referenced federal common law standards of vicarious liability in ATS suits.

In contrast, other decisions have explicitly rejected the use of federal common law as a source of law for conspiratorial liability in ATS suits. The district court in *Talisman III* acknowledged the *Cabello* decision but declined to follow it, insisting instead that customary international law must form the basis of relevant legal authorities. On appeal, the Second Circuit affirmed the district court’s approach, explaining, “[a]s a matter of first principles, we look to international law to derive the elements for any such cause of action.” The court’s decision relied heavily on Judge Katzmann’s concurring opinion in *Khulumani*, and affirmed his assertion that while federal common law should be referenced to determine whether there is a cause of action within federal courts, this analysis only comes after the threshold jurisdictional question of whether international law in fact recognizes the offense in question. The court further

24. See *Talisman IV*, 582 F.3d 244 (2d Cir. 2009).
26. The pre-*Sosa* Ninth Circuit decision in *Unocal* included a concurring opinion similar to Judge Hall’s. Judge Reinhardt argued that federal law and not international law should provide the basis for evaluating indirect liability. He explained, “the fact that the underlying conduct violated customary international law is sufficient to support liability not only on the part of the governmental actor, but also on the part of a third party whose liability is derivative thereof.” *Doe I v. Unocal Corp.*, 395 F.3d 932, 963 (9th Cir. 2002) (Reinhardt, J., concurring).
29. Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1202 (9th Cir. 2007) [hereinafter *Sarei*].
31. *Talisman IV*, 582 F.3d 244, 260, n.11 (2d Cir. 2009).
32. Id. at 258. See also *Khulumani*, 504 F.3d at 266-270 (Katzmann, J., concurring). It is important to note, however, that Judge Katzmann ultimately withheld judgment on whether federal law could indeed provide a basis for modes of indirect liability. See *Khulumani*, 504 F. 3d at 331.
reasoned that in keeping with Sosa, secondary liability could not be derived from the norms recognized in the forum country, as this could authorize such a significant expansion of liability that it would be as flagrant a judicial overstepping as the creation of a whole new tort.\textsuperscript{33}

The district court in \textit{In Re South Africa Apartheid Litigation} similarly held that it must “look to customary international law as the source of relevant authority” for conspiratorial liability.\textsuperscript{34} The court explained that in addition to an assessment of whether the norm stated in the cause of action is universally recognized as part of international law, the “language and logic of Sosa requires that this [c]ourt turn to customary international law to ascertain the \textit{contours of secondary liability} as well.”\textsuperscript{35} The district court cautioned that extending liability based on the laws of the domestic venue could lead to the backdoor inclusion of new and distinct ATS claims.\textsuperscript{36} Presumably, the court reasoned that if an individual can be held liable for a crime which he did not actually commit, and for which he would not be responsible under international law, by applying such a broad scope of responsibility, the courts will have created a new cause of action for the culpable but not necessarily criminal behavior of the defendant. The jurisdictional role of the court, the decision went on to clarify, is that of recognizing firmly settled international law, and not creating new causes of action.\textsuperscript{37}

Whether federal common law may be used to formulate indirect liability remains an unsettled question, especially for courts outside of the Second and Eleventh Circuit. However, proponents of using federal common law are at a noticeable disadvantage given the present case law addressing this issue. The Eleventh Circuit’s adoption of federal law elements for conspiratorial liability in \textit{Cabello} did not provide any reasoning of why this source of law was appropriate, nor did it engage in a discussion of how this approach can be reconciled with Sosa. Further, although the argument in the \textit{In Re South Africa Apartheid Litigation} decision that reliance on domestic regimes for secondary liability could create new and heretofore unrecognized international offenses appears somewhat alarmist and unfounded, it does echo the concerns of the Second Circuit \textit{Talisman} reasoning that substantially expanding the scope of liability could overstep the Sosa standard of only recognizing a narrow and well defined set of international law violations.

\textsuperscript{n.13.} \textit{Talisman IV}, 582 F.3d at 259.
\textsuperscript{34.} \textit{In re South African Apartheid Litigation} [hereinafter \textit{In re South African Apartheid Litigation}], 617 F. Supp. 2d 228, 263 (S.D.N.Y. 2009).
\textsuperscript{35.} \textit{Id.} at 256.
\textsuperscript{36.} \textit{Id.} See also infra p. 111 and accompanying n.50.
\textsuperscript{37.} \textit{In re South African Apartheid Litigation}, 617 F. Supp. 2d at 256.
B. Is conspiracy a cognizable international law norm under the ATS?

Assuming that courts settle on international law as the source of law for indirect liability, there still remains the hurdle of establishing that conspiratorial liability is recognized and well-settled under international law. ATS federal case law has not yet produced a clear answer on whether conspiratorial liability should be considered a universally recognized international legal norm in accordance with Sosa. Further clouding this issue is a series of district court decisions that base their rejection of conspiratorial liability on the conflation of conspiracy as an inchoate standalone offense, and as a theory of indirect liability for other completed offenses.

The 2006 U.S. Supreme Court decision in Hamdan v. Rumsfeld, though not an ATS case, has been erroneously relied on by courts in ATS cases to determine international legal character of conspiratorial liability. In this case, the defendant had been charged with the singular substantive offense of conspiracy, and the Court set out to determine whether conspiracy was considered a recognized crime under the laws of war. The Hamdan Court conducted a thorough review of American military tribunals, international criminal tribunal statutes and jurisprudence, and the scholarly writing of international jurists, and concluded that “the only 'conspiracy' crimes that have been recognized by international war crimes tribunals are conspiracy to commit genocide and common plan to wage aggressive war.” (emphasis added).

Despite that fact that the Hamdan Court explicitly and unambiguously limited its scope of review and findings to conspiracy as a standalone offense,

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39. Id. at 570. The Court further acknowledged that the overt actions he had taken in furtherance of this conspiracy were by themselves not crimes triable by a military commission. Id. at 612.
40. Id. at 563.
41. The authors of at least one law review article have pointed out legal sources that the court failed to consider that may have weighed against such a definitive exclusion of conspiracy as a standalone offense for war crimes. See Jonathan A. Bush, The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said, 109 COLUMBIA L.R. 1090, 1101, n.20, nn.412-23 and accompanying text (2009).
42. Hamdan, 548 U.S. at 610. The court further pointed out that conspiracy as a substantive crime belongs to the Anglo-American common law tradition, and does not constitute an internationally recognized norm. Id. at 611.
43. Id. ("Finally, international sources confirm that the crime charged here is not a recognized violation of the law of war. As observed above ... none of the major treaties governing the law of war identifies conspiracy as a violation thereof. And the only 'conspiracy' crimes that have been recognized by international war crimes tribunals (whose jurisdiction often extends beyond war crimes proper to crimes against humanity and crimes against the peace) are conspiracy to commit genocide and common plan to wage aggressive war, which is a crime against the peace and requires for its commission actual participation in a 'concrete plan to wage war.'" ) (citations omitted) (emphasis added). Additionally, there are no references whatsoever to conspiracy as a form of
at least two district courts have relied on this ruling to deny claims involving conspiracy as a form of liability for other recognized violations of international legal norms. 44

The court in In Re South Africa Apartheid Litigation incorrectly applied the Hamdan findings. The plaintiffs in this case had alleged violations of several well established international norms, and included conspiracy as a form of indirect liability for the completed offenses. 45 After supplying a muddled string of international authorities meant to show the unrecognized status of conspiratorial liability, 46 the court concluded that it was bound by the Hamdan decision, which it paraphrased as stating “that the law of war provides liability only for ‘conspiracy to commit genocide and common plan to wage aggressive war.’” 47 The district court’s substitution of the Hamdan Court’s clearly stated reference to “conspiracy crimes” in favor of the conceptually distinct “liability,” effectively changes the meaning of the narrow finding in Hamdan. 48 The court then follows on the heels of this striking misreading to state that it “declines to recognize conspiracy as a distinct tort.” 49 Considering that the plaintiffs did not ask the court to recognize a “distinct tort,” the only explanation for this strange assertion is that the court has taken the extreme and unjustified view that conspiracy liability itself creates a new tort. 50

Similarly, the court in Talisman cited Hamdan for the proposition that the charge of conspiracy can only be made in relation to genocide or aggression. 51 As in In Re South Africa Apartheid Litigation, the plaintiffs never leveled a

vicarious or secondary liability.


46. In only three sentences, the court managed to recognize the development of JCE, which it confusingly equated to conspiracy, in the International Criminal Tribunal for the former Yugoslavia, but countered such developments by citing to the International Criminal Court’s hesitation of employing conspiratorial liability, and then made a sweeping statement that conspiracy as an Anglo-American concept has never enjoyed international recognition. Id. at 263.

47. Id.

48. Id.; see Hamdan, 548 U.S. at 610.

49. In re South Africa Apartheid Litigation, 617 F. Supp. 2d at 263.

50. See supra note 45.

51. See In re South Africa Apartheid Litigation, 617 F. Supp. 2d at 256, and accompanying n.133 (citing Judge Katzmann’s concurring opinion in Khulumani for the proposition that “an allegation of aiding and abetting a violation of international law or conspiring to violate international law asserts a distinct claim”). If Khulumani is the source of the district court’s assertion that conspiracy liability creates a new tort, it is even more puzzling, as Judge Katzmann does not mention conspiracy at all in his concurrence, and in fact finds that aiding and abetting liability is a recognized form of international liability, thus not a distinct tort. Khulumani at 264-84 (Katzmann, J., concurring).

charge of conspiracy in their complaint, but rather included it as a theory of indirect liability for other internationally recognized violations. The court continued on to incorrectly equate Hamdan's finding of the international law status of inchoate conspiracy crimes with indirect liability, stating, "[a]s of today, therefore, liability under the ATS for participation in a conspiracy may only attach where the goal of the conspiracy was either to commit genocide or to commit aggressive war." On appeal, the Second Circuit correctly identified the Hamdan finding as being limited to inchoate offenses, but inexplicably did not address the lower court's misguided reliance on Hamdan as a basis for granting summary judgment in favor of the defendants.

Beyond the above cases, federal courts have made no serious inquiries into the status of conspiratorial liability in modern international law. Besides a reference in Sarei that vicarious liability appears to have been accepted as part of the laws of nations at the time the ATS was created, there is only a pre-Sosa decision in Talisman I, since overruled, which included a confusing survey of international legal resources and concluded that "the concept of complicit liability for conspiracy or aiding and abetting is well-developed in international law." Despite the flawed reasoning in the cases that defer to Hamdan, there is reason to believe that in fact conspiratorial liability is not a well developed norm in international law. Although many countries have conspiratorial liability statutes in their criminal codes, the use of this mode of liability at the

53. Id. at 665.
54. Talisman IV, 582 F.3d at 260. The court ultimately affirmed the district court's dismissal of the conspiracy liability theory by finding that the conspiracy claim the plaintiffs advanced, which was based on the Pinkerton doctrine of liability for any crimes that were the natural and foreseeable consequence of the criminal conspiracy, had not been proven to be a "universally recognized international law norm." Id.
55. See Lizarbe v. Rondon, 642 F. Supp. 2d 473, 490 (D. Md. 2009) [hereinafter Lizarbe] (concluding that "numerous U.S. and international bodies have recognized causes of action under ATS/TVPA based on theories of conspiracy and aiding and abetting" with only a brief reference to other cases).
56. Sarei, 487 F.3d at 1202.
57. Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 322 (S.D.N.Y. 2003). The international juridical sources and the court's accompanying analysis, however, do not clearly distinguish between conspiratorial and aiding and abetting liability.
58. See Alex Obote-Odora, Conspiracy to Commit Genocide: Prosecutor v. Jean Kambanda and Prosecutor v. Alfred Musema, 8 MURDOCH U. ELEC. J. OF L No. 1, paras. 14-34 (2001) (surveying the various conspiracy provisions in the criminal law of France, Hungary, China, Italy, Spain, Sweden, Germany, Poland, Israel, Canada, New Zealand, India and Nigeria). However, it does appear to be correct that conspiracy as an inchoate crime is an Anglo-American legal concept, largely unshared with the rest of the world. See Hamdan v. Rumsfeld, 548 U.S. 557, 702, n.14 (2006); Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgement, para. 187 (Jan. 27, 2000) (explaining that under the civil law tradition "[A] person cannot be punished for mere criminal intent or for preparatory acts committed.")
international level has been relatively scant. Nonetheless, this is a judicial undertaking that has not been approached with the seriousness that it deserves, and the question remains open as to whether conspiratorial liability meets the Sosa standard of firmly settled international law.

IV. JOINT CRIMINAL ENTERPRISE: THE NEW FRONTIER IN CONSPIRATORIAL LIABILITY

The use of JCE as a theory of liability in ATS suits is a relatively recent phenomenon, and has only been alleged in a handful of cases to date. The Second Circuit explained in *Talisman* that JCE is the international law equivalent of conspiracy. Though this is not entirely correct, as JCE and conspiracy liability have different elements (described below), it is true that JCE represents the primary if not lone “conspiratorial” theory of liability in modern international tribunals. There is scant ATS case law on this theory of liability, but based on its historic role in the WWII era tribunals, and its rapid development in international tribunals in the past decade and half, JCE likely reaches the Sosa standard, and may come to replace conspiracy liability in the post-Sosa era.

A. The elements and forms of JCE

After a decades-long hiatus following the WWII-era tribunals, JCE has emerged as a prominent and controversial legal theory following its enthusiastic affirmation in the ICTY and ICTR jurisprudence. Like conspiracy, it attaches liability to individuals who may have never materially contributed to the violation alleged. However, there are important differences between conspiracy and JCE.

First, JCE is solely a mode of liability and does not have a standalone offense equivalent to that for conspiracy. Second, although JCE like conspiracy requires that there be a “plurality of persons” involved, JCE is not premised on

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59. Conspiracy as a form of indirect liability for completed offenses is not included in the statute of any modern international tribunal, and has been a controversial concept in international law since Nuremberg. *See Commentary on the Rome Statute on the International Criminal Court: Observer’s Notes, Article by Article* (Otto Triffterer ed., 2d ed. 2008). Furthermore, the Statute for the International Criminal Court purposefully excluded the term “conspiracy” from article 25, which establishes modes of indirect liability. *See Schabas, supra* note 2, at 413, and accompanying n.100.

60. Running a search on Westlaw in the databases “brief-all, motions, pleadings” and with search terms “28 /5 1350 & “joint criminal enterprise” will yield about ten different ATS cases, all pleading JCE.

61. *Talisman IV*, 582 F.3d at 260.

62. *See Danner & Martinez, supra* note 7, at 111.

63. *See Cassese, supra* note 4, at 110, 114; *Rose, supra* note 7, at 360.
an "agreement" but rather on a "common plan," which the ICTY has deemed may develop extemporaneously and be inferred from several individuals acting in unison to carry out the specific criminal enterprise. The most noticeable difference, however, in the actus reus of JCE is that the accused must actually participate in the "execution" of the "common plan." The ICTY, relying on a report from the U.N. War Crimes Commission, has specifically distinguished conspiracy from JCE through this actus reus requirement explaining,

[whilst conspiracy requires a showing that several individuals have agreed to commit a certain crime or set of crimes, a joint criminal enterprise requires, in addition to such a showing, that the parties to that agreement took action in furtherance of that agreement.]

The ICTY was the first international tribunal to broadly recognize and articulate JCE as its own theory of liability. In the trial of Dusko Tadic, the accused was acquitted of the murder of several Bosnian Muslim civilians who were killed during a raid on their village, in which the accused took part. The Appeals Chamber applied JCE through the provisions in article 7(1) of the Tribunal's Statute, stating that although liability was "first and foremost the physical perpetration of a crime by the offender himself," the Tribunal might also assert its jurisdiction over the substantive crimes in question "through participation in the realization of a common design or purpose." After finding that the ICTY statute allowed for JCE as a theory of liability, the Tribunal further concluded that "the notion of common design as a form of accomplice liability is firmly established in customary international law."

The Appeals Chamber in Tadic went on to identify three forms of JCE or "common purpose" that are derived from customary international law, and which continue to be referred to as the scope of JCE. The first and second levels are relatively uncontroversial and are well grounded in the jurisprudence of the earlier WWII tribunals. The first level reflects the basic premise of JCE, and attaches liability where the accused willingly and with criminal intent, participated in a common design to commit specific offenses. The second

68. Tadic, Case No. IT-94-I-T, Judgment, para. 188. Additionally, the ICTY has pointed out that the use of the term "or otherwise aided and abetted" indicates that these articles were not meant to be exhaustive.
69. Id. para. 220.
70. Id. para. 196. Category one reflects the "common plan" liability in the WWII era tribunals. These cases involved German soldiers and civilians who were convicted of murder for their role in group lynchings of POWs, even though they may not have directly participated in the crimes. In many if not all of these cases, the defendants were all found to have been present or in the
level of JCE concerns "systems of ill treatment/repression," and requires a showing that the accused was aware of the repressive nature of the "system" and participated in the enforcement and furtherance of the system. The last form of JCE is the broadest and attaches individual liability for crimes that were not contemplated as part of the "common design" if those offenses are the "natural and foreseeable consequences" of the realization of the common design. Because this third category appears to be a modern conceptualization of JCE created at the ICTY, and not based on Nuremberg jurisprudence, its status as customary law is more precarious.

B. The nascent use of JCE in ATS litigation

Because of the recent and scant use of JCE in ATS litigation, there is little U.S. case law to refer to, amounting to only one direct ruling and a few references to JCE in dicta. In Lizarbe v. Rondon, the district court dismissed the defendant's objections to the pleading of JCE, and stated that case law supported the application of JCE in ATS cases. The court explained that numerous U.S. and international bodies have recognized causes of action under ATS/TVPA based on theories of conspiracy and aiding and abetting, and that the concept of civil recovery based on a theory of joint criminal enterprise has at least been acknowledged. The court further cited to ICTY jurisprudence and a footnote in another district court decision which refers to JCE as "liability for the violation of an international law norm," indicating an implicit recognition of JCE as an acceptable theory of liability under the ATS.

However, references to JCE in other ATS decisions have indicated it is not a doctrine that is likely to be uncritically accepted by the courts. In In re South African Apartheid Litigation, the court implied that the Hamdan holding that conspiracy was not an internationally recognized crime, extended to JCE as well. The scope of JCE conspiracy also appears likely to be a matter of immediate vicinity of the murders, and were not charged with any larger conspiracy. See Danner & Martinez, supra note 7, at 111.

71. Danner & Martinez, supra note 7, at 105-06 (citing Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, para. 203 (Sept. 17, 2003)). This second level is almost identical to the "systems of repression" liability recognized in the WWII era tribunals, which involved the criminal convictions of staff in German concentration camps for having participated in a "common design" to commit the offenses charged. In these cases, the fact of having been part of the concentration camp structure was enough to assert a "common design" by which offenses that took place at the camps could be alleged against the guards and other workers of the camps. See id. at 11.

72. Id. at 106 (citing Tadic, Case No. IT-94-1-T, Judgment, para. 204).

73. Lizarbe, 642 F. Supp. 2d at 491.

74. Id. at 490.


76. In re South African Apartheid Litigation, 617 F. Supp. 2d at 263. Note, however, that this reasoning reflects the court's confusion over conspiracy as a standalone inchoate offense (which
dispute among the courts. In accepting JCE, the *Lizarbe* court adopted the controversial third level of JCE that attaches liability for crimes outside of the common plan, as long as they were foreseeable. 77 This formulation, however, stands in contrast to the decision in *Talisman*, in which the court held that the defendant “could not be held liable under the ATS for the conduct of a co-conspirator merely because that conduct was foreseeable.” 78 The *Talisman* court rejected the plaintiffs’ argument that conspiracy liability under the ATS extended to include the *Pinkerton* doctrine. The *Pinkerton* doctrine postulates that a
defendant who does not directly commit a substantive offense may nevertheless be liable if the commission of the offense by a co-conspirator in furtherance of the conspiracy was reasonably foreseeable to the defendant as a consequence of their criminal agreement. 79

The court explained that while the ICTY and ICTR statutes both allow for conspiracy liability, neither of the tribunals’ statutes contain language supporting the application of the expansive *Pinkerton* mode of liability. 80

Because U.S. courts have issued very little guidance or reflection on the JCE liability theory, there are few conclusions to be drawn from the available case law. However, the rapid development of JCE in international tribunals over the last decade means that the doctrine could very likely meet the *Sosa* standard of firmly settled international law for purposes of ATS cases.

**C. The modern development of JCE in the international legal arena**

While JCE is still often referred to as a controversial doctrine, recent and extensive international jurisprudence provides the basis for a strong argument that it has reached the status of an accepted international legal norm. Court decisions in themselves do not necessarily constitute international law, but their recognition of JCE confers a degree of legitimacy that it forms part of customary

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77. *Lizarbe*, 642 F. Supp. 2d at 490. Under international case law:
Responsibility under the third category of JCE, that is for a crime other than the one agreed upon in the common plan perpetrated by one or more other members of the JCE, arises only if (i) the crime charged was a natural and foreseeable consequence of the execution of [the] enterprise, and (ii) the accused was aware that such a crime was a possible consequence of the execution of [the] enterprise, and, with that awareness, participated in [the] enterprise.


79. *Id.* at 663.

80. *Id.* at 665. See also *Talisman IV*, 582 F.3d at 260 (“plaintiffs have not established that ‘international law [universally] recognize[s] a doctrine of conspiratorial liability that would extend to activity encompassed by the *Pinkerton* doctrine.’”) (citing *Talisman III*, 453 F. Supp. 2d at 663).
international law, and federal courts have often referred to international tribunal decisions as legal authorities on the status of international law norms.

The acceptance of JCE in the ICTY and ICTR may help form a presumption about its status as customary international law, but it is certainly not dispositive of this. Because the ICTY and ICTR are both tribunals governed by a nearly identical statute, and with similar origins, courts will likely look to other international law fora to determine whether JCE is indeed a well established legal doctrine, or whether its development still remains controversial among states and international jurists. A review of other non-ICTY/ICTR judicial treatment of JCE is especially likely as this doctrine is currently being litigated in several recently established tribunals.

The Rome Statute, which was the founding instrument of the International Criminal Court (ICC), allows for indirect liability for ordering, and aiding and abetting crimes, and additionally attaches liability where the accused “in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.” Although the negotiations on the Statute predate the ICTY Tadic decision on JCE, it was not opened for signing until after the seminal JCE ruling, and so states certainly had warning of how such language was likely to be understood in the court. To date, there have been no indictments alleging JCE, but the matter is far from foreclosed.

The Special Panel for Serious Crimes established in East Timor

81. See Prosecutor v. Tadic, No. IT-94-1-T, Judgement, para. 662 (May 7, 1997) (“[T]he International Tribunal is only empowered to apply international humanitarian law that is ‘beyond any doubt customary law.’”) (quoting Sec’y General Report, para. 34)); Cassese, supra note 4, at 114 (“[T]he definitions of the crimes over which the Tribunal is vested with jurisdiction can only be found in customary international law, as was emphasized inter alia by the UN Secretary-General when he submitted the Statute to the Security Council for approval. Moreover, it is in customary international law that whenever the Statute is silent the Tribunal can find the general concepts of criminal law that it must apply on such matters as modes of responsibility, defences, etc.” (citations omitted)).

82. See, e.g., Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F. Supp. 2d 331, 338 (S.D.N.Y. 2005) (“ICTY and ICTR opinions typically engage in nuanced and exhaustive surveys of international legal sources, and as such, they are exceedingly useful as persuasive evidence of the content of customary international law norms.”) (also cited with approval in Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 287 (E.D.N.Y. 2007)).

83. In his concurring opinion discussing aiding and abetting liability in Doe I, J. Reinhardt resisted relying on ICTY jurisprudence as a source of law for “an undeveloped principle of international law promulgated by a recently-constituted ad hoc international tribunal.” Doe I v. Unocal Corp. 395 F. 3d 932, 967 (9th Cir. 2002) (Reinhardt, J., concurring).

84. See Sosa, 542 U.S. at 728 (noting that Congress’ intent was that ATS should “remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law” (quoting H.R.Rep. No. 102-367, at 3 (1991))).

85. ICC Statute, supra note 7, art. 25(3)(d).

86. Danner & Martinez, supra note 7, at 154.

87. See ICC Statute, supra note 7.
incorporated the exact language from the ICC statute regarding "common purpose," and has issued several indictments citing to this liability. The U.S. military commission also recognizes "common criminal purpose" in the regulations for elements of crimes triable at the commission.

The Special Court for Sierra Leone (SCSL), and the Extraordinary Chambers in the Courts of Cambodia (ECCC) were both established after the ICTY Tadic opinion recognized JCE as a theory of liability under international law, and after the Rome Statute was opened for signing. Although neither contains reference to JCE, or common plan or design in their statutes, both tribunals have recognized the applicability of JCE liability. Of the four active cases at the SCSL, the prosecutor has pled JCE liability in three of them. In the so-called AFRC case, the SCSL Appeals Court overturned the trial court’s dismissal of JCE liability, and reinstated it in the indictment. At the ECCC, JCE has yet to be included in an indictment, but a recent order issued by the Office of the Co-investigating Judges at the ECCC, clarified that JCE was an applicable form of liability for international crimes. The order further stated that all three levels of JCE can be alleged against defendants.

89. 32 C.F.R. § 11.6(c)(6)(i) (2003).
91. Second Amended Indictment, Taylor, SCSL-03-01-PT (May 29, 2007); Further Amended Consolidated Indictment, Brima, Kamara and Kanu, SCSL-04-16-PT (Feb. 29, 2005); Corrected Amended Consolidated Indictment, Sesay, Kallon and Gbbo, SCSL-04-15-T (Aug. 2, 2006).
92. Interestingly, the trial court’s rejection of JCE liability was not based on its lack of explicit inclusion in the SCSL statute, but rather was premised on the fact that the prosecution did not plead it in relation to one of the enumerated offense in the statute. Prosecutor v. Brima, Judgment, Case No. SCSL-04-16-T, paras. 56-85 (Spec. Ct. Sierra Leone, Trial Chamber II, June 20, 1997). In reversing this decision, the Appeals Chamber arguably expanded the scope of JCE as recognized by the ICTY, by stating that statute crimes need only be “contemplated” in the JCE, whereas the ICTY required that the crime be “involved” in the JCE. Prosecutor v. Brima, Kamara & Kanu, Case No. SCSL-2004-16-A, Judgment, para. 84 (Feb. 22, 2008). See also, Rose, supra note 7, at 362.
94. Extraordinary Chambers in the Courts of Cambodia, Order on the Application of the ECCC of the Form of Liability Known as Joint Criminal Enterprise, Case No. 002/19-09-2007-ECCC-OCU paras. 14-17 (Dec. 8, 2009).
U.S. courts may question the customary international law nature of JCE liability in light of the fact that four of the six international tribunal statutes contain no explicit reference to JCE or common plan/design. Customary international law is not formed exclusively through judicial decisions, but rather primarily depends on evidence of state ascension. While the conspicuous absence of JCE liability in statutes established after the ICTY decision in Tadic will likely force the courts to confront this issue, there are still solid indicators that this jurisprudence cannot be dismissed as the work of activist tribunals. The Rome Statute, which does explicitly adopt the “common purpose” language, has been ratified by 111 countries. Furthermore, the tribunals recognizing JCE—whether by statute or judicial interpretation—hail from three different continents, indicating that JCE is a universally recognized international law norm.

The recent international jurisprudence recognizing JCE favors a presumption that the doctrine is a cognizable international norm for the purposes of the ATS, regardless of whether the individual cases actually yield convictions based on JCE liability. U.S. courts may, nonetheless, choose to proceed with caution until decisions on these pending cases are reached for further guidance on the contours of JCE under international law.

V.
CONCLUSION: THE FUTURE OF JCE AND CONSPIRACY IN ATS CASES

Although often thought of as similar if not identical forms of liability, the future of JCE and conspiracy likely have divergent and almost mutually exclusive paths in ATS litigation.

If courts decide that federal common law should be relied on for indirect liability, conspiratorial liability will survive while JCE will not. Conspiracy liability has a long and robust history in federal common law, while JCE is a theory unknown outside of international tribunals. On the other hand, if courts are instead persuaded that the Sosa standard of firmly settled international law must be the source of law for vicarious liability, the result will be the opposite. While the inchoate crime of conspiracy to commit aggression and genocide exists, as detailed in the Hamdan decision, international law has little developed history on conspiracy as a mode of liability for attaching responsibility for the completed offense. JCE, however, though a relatively new international law norm, has potentially already assumed the status of customary international law through its adoption in every modern international criminal tribunal in the past.

95. The ICC and the Special Panel for Serious Crimes established in East Timor make reference to “common plan,” while the ICTY, ICTR, SCSL and ECCC do not.
decade. The only challenge to plaintiffs would be to present the JCE doctrine as not only being a universally accepted norm, but also as providing the requisite level of specificity as outlined in Sosa to be recognized as a cognizable cause of action.  

In any case, JCE, as a continually evolving (and solidifying) international law concept, is ripe for a more searching judicial review.  

Because of the almost mutually exclusive trajectories that conspiratorial and JCE liabilities have under the ATS, pleading both JCE and conspiracy liability would potentially force the courts into an interesting dilemma. By applying either domestically derived federal common law or international law, one of the theories may necessarily be excluded while the other accepted.  

However, the Sosa decision poses a final discretionary challenge to the use of conspiratorial or JCE liability regardless of the choice of law settled upon. The Sosa Court strongly cautioned the courts to use their discretion in creating new causes of action, and dedicated a significant portion of the decision outlining the reasons for such judicial caution.  

Sosa tasked the lower courts with being “vigilant doorkeepers” in order to limit the reach of the ATS to only a “narrow class of international norms.” The Court explained that “the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.”  

U.S. federal common law has an indisputably well established standard of conspiracy, which can be quite elastic in assigning liability to co-conspirators. Similarly, JCE, by incorporating the third level of liability for unplanned but “foreseeable” crimes, represents an expansive reach of legal responsibility. Given the firm admonition from the Supreme Court, lower courts may be hesitant about creating causes of actions that could potentially extend liability well beyond the “most responsible.” However, the fear that JCE and conspiracy will open the floodgates to ATS litigation against low-level defendants whose participation in the criminal enterprise was relatively insignificant seems alarmist at this point in time. Despite “gate keeping” role of prosecutors, the international tribunals have been far from permissive in their acceptance of JCE, and in fact, much of the most important jurisprudence issued in this area has come from domestic courts.

99. Id. at 725-29. “[T]here are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, 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 and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.” Id. at 725.  
100. Id. at 729.  
101. Id. at 732.  
on JCE under the ICTY and ICTR has been in decisions rejecting its use. U.S. courts are equally free to evaluate and reject claims that overreach liability and culpability standards. Furthermore, conspiracy has been used in ATS cases since the statute's reemergence in the 1980s, and JCE has been in the international legal arena for over a decade, and still there are less than a dozen ATS cases that have relied on JCE as a theory of liability, and no indication of abusive use of the conspiratorial liability doctrine by plaintiffs.

In order to pre-empt courts from taking the backdoor option highlighted in Sosa—to decline to recognize a cause of action based on the "practical consequences"—plaintiffs’ attorneys would be wise to maintain the integrity of these doctrines by using it for what it was ostensibly created: a theory of liability to fill the gap where defendants played a substantial role either as the auteur intellectuel, or when their participation in the common plan or conspiracy, though not amounting to a crime in itself, was particularly egregious. JCE and conspiracy liability can be a powerful tool for human rights litigation, but they are certainly not unassailable.

103. See cases cited supra note 8.

104. Lizarbe v. Rondon, 642 F. Supp. 2d 473, 490 (D. Md. 2009) provides an excellent example. In this case, the plaintiffs alleged several well established violations of criminal law under the indirect liability theories of conspiracy, JCE, and aiding and abetting. The defendant, then a lieutenant in the Peruvian Army, is alleged to have taken part in the planning of a massacre against civilians. During the commission of the killings and torture, the defendant and his troops allegedly burned house, fired shots and stood guard outside of the village blocking escape routes for fleeing survivors. Complaint, Lizarbe v. Rivera Rondon, No. 8:07-cv-01809-PJM (D. Md. July 11, 2007), available at http://cja.org/downloads/Rondon_Complaint_1.pdf.