

January 2008

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Recommended Citation

Matthew C. Dahl, *Soldiers of Fortune - Holding Private Security Contractors Accountable: The Alien Tort Claims Act and Its Potential Application to Abtan, et al. v. Blackwater Lodge and Training Center, Inc., et al.*, 37 *Denv. J. Int'l L. & Pol'y* 119 (2008).

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Soldiers of Fortune - Holding Private Security Contractors Accountable: The Alien Tort Claims Act and Its Potential Application to Abtan, et al. v. Blackwater Lodge and Training Center, Inc., et al.

Keywords

Contractors, Tort Claims, International Criminal Court, Jurisdiction, Military, War and Peace, Murder, Government Contracts, Workers' Compensation Law

**SOLDIERS OF FORTUNE – HOLDING PRIVATE SECURITY
CONTRACTORS ACCOUNTABLE: THE ALIEN TORT CLAIMS ACT
AND ITS POTENTIAL APPLICATION TO *ABTAN, ET AL. V.
BLACKWATER LODGE AND TRAINING CENTER, INC., ET AL.***

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Private security contractors play a prominent role in modern military operations. Of course the use of paid forces is not a new concept. Militaries utilized paid forces for hundreds of years, but technological advances have increased the mobility and firepower of private security contractors.² The United States now relies heavily on the private military industry in conducting its worldwide military operations.³ The U.S. used private security contractors to conduct narcotics intervention operations in Columbia in the 1990's.⁴ During the conflict in the Balkans, the U.S. used a private security contractor to train Croat troops to conduct operations against Serbian troops.⁵ Contracting out these operations allowed the U.S. to decrease its footprint in these conflicts, or leave no footprint at all. Today the U.S. has as many as 30,000 private security contractors in Iraq.⁶ However, repeated reports of misconduct by private security contractors are making the industry endure a level of scrutiny never encountered before. This note will focus on the Alien Tort Claims Act (ATCA) as a civil remedy to the misconduct by private security contractors overseas and how the case law regarding the ATCA will affect the recent lawsuit brought in the case of *Abtan v. Blackwater*.⁷

I. THE TREND TOWARD USING PRIVATE MILITARY COMPANIES

Governments use private security contractors for both practical and political reasons. Private military companies provide a wide range of services from training

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2. E.L. Gaston, Note, *Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement*, 49 HARV. INT'L L.J. 221, 221, 234-35 (2008).

3. JEREMY SCAHILL, *BLACKWATER: THE RISE OF THE WORLD'S MOST POWERFUL MERCENARY ARMY* xxi-xxii (Nation Books 2007) (discussing the rising size and reliance on private contractors and the government's inability to monitor them).

4. Gaston, *supra* note 2, at 235-36.

5. *Id.* at 236.

6. Steve Fainaru, *Iraq Contractors Face Growing Parallel War*, WASH POST, June 16, 2007, at A1.

7. *Abtan v. Blackwater*, No. 1:07-cv-01831 (D.D.C. second amended complaint filed Mar. 28, 2008) available at <http://ccrjustice.org/files/3.28.08%20Abtan%20Second%20Amended%20Complaint.pdf>.

to post-conflict/reconstruction support to direct military support.⁸ On the practical side, using private security contractors allows the military to delegate certain functions it would normally have to perform on its own. This delegation allows the military to focus its forces on higher priority issues.⁹ From a political perspective, using private security contractors allows countries to circumvent governmental regulations on how many troops they can send into a conflict area.¹⁰ Governments also benefit politically by utilizing private security contractors because public opinion is less affected by the injury or death of a contractor than an enlisted soldier.¹¹

Private security contractors are used in conflicts of all sizes. Governments all around the world are trending towards outsourcing military and security functions to these private security contractors.¹² Today, several hundred private security firms exist around the world and have a combined annual revenue of \$100 billion.¹³ Countries in Africa used them in small scale regional conflicts. For example, the government of Sierra Leone hired the South African private security firm Executive Outcomes to conduct direct military operations against a rebel group that took control of major diamond mines in the country.¹⁴

The U.S. continues to use them in the larger scale conflicts in Iraq and Afghanistan.¹⁵ Approximately 100,000 contractors are present in Iraq and a significant number of them are security contractors.¹⁶ This number is ten times the number of contractors used by the U.S. in the first Persian Gulf War, and is almost equal to the number of active duty military personnel in Iraq.¹⁷

The U.S. is growing increasingly more reliant on private security contractors in its operations in Iraq. A 2007 House of Representatives memorandum noted that as of March 2006, 181 private security firms operated in Iraq, employing

8. See, e.g., MPRI, International Security Sector Training and Education, <http://www.mpri.com/main/internationalsecuritysectort.html> (last visited Oct. 4, 2008) and Blackwater Worldwide, http://www.blackwaterusa.com/company_profile/comp_history.html (last visited Oct. 4, 2008).

9. Bryan Terry, Note, *Private Attorneys General v. "War Profiteers": Applying the False Claims Act to Private Security Contractors in Iraq*, 30 SEATTLE U. L. REV. 809, 819 (2007).

10. Gaston, *supra* note 2, at 235-36 (discussing how the United States used Private security contractors in Colombia to stay under congressionally set troop limits).

11. *Id.* at 235.

12. *Id.* at 224.

13. Kateryna L. Rakowsky, *Military Contractors and Civil Liability: Use of the Government Contract Defense to Escape Allegations of Misconduct in Iraq and Afghanistan*, 2 STAN. J. CIV. RTS. & CIV. LIBERTIES 365, 371 (2006).

14. *Id.* at 369.

15. Gaston, *supra* note 2, at 223.

16. Renae Merle, *Census Counts 100,000 Contractors in Iraq*, WASH. POST, Dec. 4, 2006, at D1. See also Rakowsky, *supra* note 13, at 370.

17. STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REFORM, 110TH CONG., MEMORANDUM, ADDITIONAL INFORMATION FOR HEARING ON PRIVATE SECURITY CONTRACTORS, at 2 (Feb. 7, 2007), available at <http://oversight.house.gov/documents/20070207112331-22533.pdf>. [hereinafter PRIVATE SECURITY CONTRACTORS MEMORANDUM]

48,000 employees.¹⁸ During the reconstruction period in Iraq, the U.S. has spent \$3.8 billion on security contractors.¹⁹ Salaries for employees of these contractors can get as high as \$33,000 a month.²⁰ These numbers account for 12.5% of U.S. government spending on reconstruction in Iraq.²¹ Notwithstanding this large government expenditure on private security contractors, numerous reports of contractors' misconduct have surfaced while no legal restraints exist to control them.²²

II. BLACKWATER

While hundreds of private security contractors are operating today, this article focuses on just one – Blackwater Worldwide (“Blackwater”). Blackwater is a major private security contractor used by the United States in Iraq, yet it remains controversial due to reports of misconduct by its employees.²³ Blackwater's alleged misconduct in Baghdad in 2007 led to the lawsuit *Abtan v. Blackwater*.²⁴

Blackwater was founded by Erik Prince – a former Navy SEAL – on December 26, 1996.²⁵ The idea arose from of a perceived need to offer privatized training for military and law enforcement.²⁶ In an effort to fulfill this need, Prince purchased 5,000 acres of land in eastern North Carolina for approximately \$1.3 million to create the Blackwater campus.²⁷ Through its first few years Blackwater's business and reputation grew rapidly as a facility offering tactical training for all kinds of government officials.²⁸ However, the September 11th attacks and the subsequent “War on Terror” changed Blackwater into a major player in the private security industry when it received \$5.4 million to guard the CIA's station in Kabul, Afghanistan.²⁹ Blackwater's role continued to grow and it now has more than \$500 million in government contracts.³⁰

Blackwater's operations as a government contractor came under intense scrutiny after an incident at al-Nisoor Square in Baghdad on September 16, 2007.³¹ While investigations are still ongoing, the allegations are that unprovoked

18. *Id.* There were 140,000 U.S. troops in Iraq in 2006 and 100,000 contractors. Of the major security contractors there were 1,500 from DynCorp, 1,000 from Blackwater, 500 from MPRI, and 6,500 from Titan. Merle, *supra* note 16.

19. PRIVATE SECURITY CONTRACTORS MEMORANDUM, *supra* note 17, at 2

20. *Id.*

21. *Id.*

22. *Id.* at 3.

23. *See, e.g.*, Gaston, *supra* note 2, at 229-30.

24. *Abtan v. Blackwater*, No. 1:07-cv-01831 (D.D.C. second amended complaint filed Mar. 28, 2008).

25. SCAHILL, *supra* note 3, at 32.

26. *Id.* at 25-26.

27. *Id.* at 32.

28. *Id.* at 34.

29. *Id.* at 45.

30. *Id.* at xix.

31. Mark Apuzzo and Lara Jakes Jordan, *FBI Finds Blackwater Trucks Patched*, ABC NEWS, Jan. 13, 2008, <http://abcnews.go.com/Politics/WireStory?id=4125132&page=1> (last visited Oct. 4, 2008).

Blackwater contractors opened fire in a crowded square in Baghdad.³² The incident resulted in the death of eleven Iraqi civilians and injuries to fourteen.³³ The attack prompted a full governmental investigation into the actions of Blackwater and other security contractors employed by the U.S. government. A memorandum sent out to the House Committee on Oversight and Government Reform reported that internal reports from Blackwater documented 437 incidents in which Blackwater contractors fired their weapons.³⁴ The reports showed that from January 1 to September 12, 2005, Blackwater engaged in 195 shooting incidents and 163 of those times, Blackwater personnel were the ones who fired first.³⁵ The reports suggested that the incidents resulted in 16 Iraqi civilian casualties and 162 incidents in which property of Iraqi civilians was damaged.³⁶

III. THE ALIEN TORT CLAIMS ACT (ATCA)

The Alien Tort Claims Act was passed in 1789 as a means by which citizens of other countries could bring tort actions in the federal district courts of the United States.³⁷ While the ATCA was passed over two hundred years ago, its use was limited until around 1980.³⁸ In 1980, the Second Circuit handed down its decision in *Filartiga v. Pena-Irala* and reintroduced the ATCA as a way to hold actors responsible for their actions even though those actions may have taken place on foreign soil.³⁹ The *Filartiga* decision recognized a three-part test – 1) an alien 2) must allege a tort 3) committed in violation of the law of nations or a U.S. treaty – in order to bring a suit based on the ATCA.⁴⁰ The Second Circuit found for the plaintiffs in *Filartiga* and held that the ATCA grants jurisdiction for U.S. federal courts over torts identified under international law.⁴¹

The *Filartiga* decision marked the beginning of the federal courts' interpretation and expansion of the reach of the ATCA. Courts later held that individuals, not just sovereign states, could be liable under the ATCA.⁴² The courts expressed willingness to construe the ATCA so that: 1) individuals could be held liable under the ATCA for crimes that they commit in furtherance of genocide or war crimes;⁴³ 2) groups of individuals who are not States, but nonetheless

32. *Abtan*, No. 1:07-cv-01831 at 3.

33. STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REFORM, 110TH CONG., MEMORANDUM, ADDITIONAL INFORMATION ABOUT BLACKWATER USA, at 6 (OCT. 1, 2007), available at: <http://oversight.house.gov/documents/20071001121609.pdf> [hereinafter BLACKWATER MEMORANDUM]

34. *Id.*

35. *Id.*

36. *Id.* at 7.

37. 28 U.S.C. § 1350 (1992).

38. Tina Garmon, Comment, *Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable Under the Alien Tort Claims Act*, 11 TUL. J. INT'L & COMP. L. 325, 339 (2003).

39. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

40. Garmon, *supra* note 38, at 339 (citing *Filartiga*, 630 F.2d at 887).

41. *Id.* at 340 (citing *Filartiga*, 630 F.2d at 885).

42. *Id.* at 340-43.

43. *Id.* at 341-42 (citing *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995)).

violate international laws;⁴⁴ and 3) corporations that work with States to violate international law.⁴⁵ The courts also recognized secondary liability as a mechanism to bring parties under the umbrella of the ATCA.⁴⁶ This secondary liability theory implicates any actor that “knowingly” aids others by “directly and substantially affecting the commission of [a] crime [violating international law].”⁴⁷ Another theory upheld by federal courts that imputes liability under the ATCA is the “joint action” theory.⁴⁸ The Southern District of New York said ATCA liability existed under the “joint action” theory if the plaintiff could prove that an individual willfully participated in actions with a State actor to violate international law.⁴⁹

Federal courts recognize ATCA liability under the theories listed above. In the next section the facts and law of four cases will be analyzed to show how the federal courts construe liability under the ATCA. After that the analyses of those cases will be applied to show how the ATCA can be used in the pending case of *Abtan v. Blackwater* and in potential future cases.

A. *Filartiga v. Pena-Irala: The Modern Interpretation of the ATCA*

The suit in *Filartiga* was brought by a doctor in Paraguay whose son was tortured and killed because Dr. Filartiga was a political activist who opposed the government in Paraguay at the time.⁵⁰ Following unsuccessful attempts to prosecute Pena-Irala (the man alleged to have tortured and killed Dr. Filartiga’s son) in Paraguay, Dr. Filartiga’s daughter, Dolly, found Pena-Irala living in New York City and had him arrested by the INS.⁵¹ While Pena-Irala was being held in the United States, the Filartigas filed a complaint in federal court alleging wrongful death and seeking damages in the amount of \$10,000,000.⁵² The federal court for the Eastern District of New York dismissed the case based on lack of subject matter jurisdiction, but the Second Circuit Court of Appeals upheld jurisdiction based on the ATCA.⁵³

The court analyzed the question of whether the ATCA applied to this suit on two levels. At the first level the court asked whether Pena-Irala’s actions violated the “law of nations.” A violation of the “law of nations” is a requirement to trigger application of the ATCA.⁵⁴ The court answered this question by finding that torture is unequivocally banned by international law; therefore, Pena-Irala’s actions fell under the ATCA.⁵⁵ At the second level, the court analyzed whether a

44. *Id.* at 342 (citing *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001)).

45. *Id.* at 342-43 (citing *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999)).

46. *Id.* at 345-49.

47. *Id.* at 346 (citing *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002)).

48. *Id.* at 349-50.

49. *Id.* at 349-50 (citing *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. Feb. 28, 2002)).

50. *Filartiga*, 630 F.2d at 878.

51. *Id.* at 878-79.

52. *Id.* at 879.

53. *Id.* at 880.

54. *Id.* at 880 (citing 28 U.S.C. § 1350).

55. *Id.* at 881. It is important to note that the court considered Pena-Irala’s actions to be actions by the state of Paraguay and not as an individual. (The Second Circuit mentions the *states* “power to

court in the United States was constitutionally authorized to hear a case based on the violation of international law.⁵⁶

The Second Circuit noted that the actions complained of in this suit did not violate a treaty of the United States,⁵⁷ but that in the absence of a violation of a treaty the court must also look to the “customs and usages of civilized nations” in determining what actions may violate the law of nations.⁵⁸ Furthermore, the law that is broken must be universally condemned by civilized nations and not simply one which one country may find immoral.⁵⁹ Without that distinction, countries could try to impose their own moral standards on other countries when the standards of those other countries are merely different and not necessarily universally abhorrent. However, the court quickly distinguished torture as universally condemned by the international community.⁶⁰ Given that Pena-Irala was charged with torture, and the court determined torture to be universally condemned by the international community, Pena-Irala’s actions constituted a breach of the law of nations which triggered the use of the ATCA in his case.

Next, the court analyzed whether a court in the United States was constitutionally authorized to hear a case based on the violation of international law. The court pointed out that the first Judiciary Act of 1789⁶¹ conferred federal jurisdiction to cases involving aliens bringing claims alleging violation of international law.⁶² Additionally, the court reasoned that the common law of the United States was based partly on international law and thus incorporated international law into the national common law.⁶³ At one point, Pena-Irala made an argument that the law of nations is only a part of the law of the United States insofar as Congress has explicitly defined it.⁶⁴ However, at this point, the court made its clearest statement regarding the scope and meaning of the ATCA: “we believe it is sufficient here to construe the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the

torture persons held in its custody” and the *state’s* “treatment of its own citizens.”)

56. *Id.* at 885 (Pena-Irala argued that Article III did not confer federal jurisdiction to violations of international law).

57. *Id.* at 880.

58. *Id.* at 880-81 (citing *The Paquete Habana*, 175 U.S. 677 (1900)).

59. *Id.* at 881 (discussing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (in *Banco Nacional* the Supreme Court decided not to exercise jurisdiction over the case because the wrong in the case merely represented the differing views of capitalist and socialist nations and not necessarily an act that was condemned by civilized nations)).

60. *Id.* at 881-85; See Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 10, 1948); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975).

61. *Id.* at 885.

62. *Id.*

63. *Id.* at 886 (“The law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became a part of the common law of the United States upon the adoption of the Constitution.”)

64. *Id.*

rights already recognized by international law.”⁶⁵ With that statement, the Second Circuit recognized the ATCA could be used by aliens to redress any wrong by a state actor that violated established international law.

Filartiga ushered in the federal courts’ modern view on international law and how it could be applied in the United States judicial system. The Second Circuit’s decision in *Filartiga* reflected a belief that international law had a place in federal jurisprudence because international law formed a basis of this country’s common law. With that belief, the court held that federal courts could deem States responsible for their actions when those actions violated international law. Subsequent decisions would further clarify how the ATCA could form the basis for lawsuits in the United States.

B. Iwanowa v. Ford Motor Co.: The Liability of Private Entities Under the ATCA

The dispute in *Iwanowa* arose out of crimes committed during World War II. During that time, Ford Motor Company had a plant in Germany operated by its German subsidiary, Ford Werke.⁶⁶ The complaint alleged that during the war the Nazis confiscated the Ford Werke plant and used it to produce military vehicles.⁶⁷ In order to operate the plant at a high capacity, the Nazis used forced labor.⁶⁸ This forced labor contingent consisted of prisoners taken by the Nazis during their military operations. The Nazis sold some of these prisoners to Ford Werke to work in its plant.⁶⁹

The Nazis took Plaintiff Iwanowa captive in Rostov, Russia in 1942.⁷⁰ Ford Werke purchased her and transported her to Ford Werke’s plant in Cologne.⁷¹ Once there, she and others were forced to perform heavy labor, for no pay, while periodically being beaten by security officials.⁷² Iwanowa and the rest of the workers were freed by Allied Forces in 1945. Iwanowa brought a class action suit against Ford Werke and its parent company, Ford Motor Co., in 1998.⁷³ Specifically, Iwanowa sought damages for restitution of unjust enrichment and damages for the pain and suffering caused by the working conditions.⁷⁴

During litigation of the suit, Defendants filed a motion to dismiss arguing that United States federal courts lacked subject matter jurisdiction to hear the case.⁷⁵ Iwanowa argued that the ATCA granted subject matter jurisdiction over her claim because Defendants’ actions during World War II violated the law of nations.⁷⁶

65. *Id.* at 887.

66. *Iwanowa*, 67 F. Supp. 2d at 432.

67. *Id.*

68. *Id.*

69. *Id.* at 432-33.

70. *Id.* at 433.

71. *Id.*

72. *Id.* at 434.

73. *Id.*

74. *Id.*

75. *Id.* at 437-38. Defendants filed a 12(b)(1) motion to dismiss the claim and the court treated it as a factual attack on the pleadings rather than a facial attack.

76. *Id.* at 438-39 (Discussing that if Iwanowa had claimed subject matter jurisdiction under the

Defendants challenged the use of the ATCA by saying that Congress did not intend it to be a private cause of action and also that the ATCA applied only to State actors and not private actors.⁷⁷ In response, the court looked to case law and congressional action, and found that the ATCA did provide for a private right of action. Following a previous Second Circuit case, the court reasoned that, after *Filartiga*, Congress had a golden opportunity to amend the ATCA when it passed the Torture Victim Protection Act (“TVPA”),⁷⁸ but chose not to do so.⁷⁹ The court emphasized the fact that Congress chose not to address the issue of a private cause of action under the ATCA even though it could have addressed the issue using the TVPA.⁸⁰ The court also drew attention to the fact that the Eleventh Circuit recognized the ATCA as creating a private right of action after *Filartiga*.⁸¹ Given the tacit support of other court decisions and the implicit support of Congress, the court in *Iwanowa* recognized the ATCA as granting a private right of action.⁸²

The court next considered whether the ATCA could apply to a non-state actor. In reaching its conclusion on this issue the *Iwanowa* court relied on the Second Circuit’s opinion in *Kadic v. Karadzic*.⁸³ The *Kadic* decision recognized that individuals could be held liable for certain violations of international law, which included slave labor.⁸⁴ Turning to numerous sources of international law and U.S. case law, the court in *Iwanowa* held that forced or slave labor was a clear violation of the law of nations.⁸⁵

The *Iwanowa* court recognized that forced labor or slave labor violated *jus cogens* norms.⁸⁶ The court explained, “*Jus cogens* norms are a narrow subset of the norms recognized as customary international law.”⁸⁷ *Jus cogens* violations are determined by looking at the treaties and commentary regarding international law to determine whether the international community recognizes a norm to be so fundamental as to make it nonderogable.⁸⁸ If a private entity commits a violation of *jus cogens* norms then it can be held liable as a private entity without being

Geneva or Hague Conventions, her claim would have been dismissed because the ATCA only applies to self-executing treaties. However, because *Iwanowa* claimed a violation under the “law of nations” her suit was able to go forward. *Iwanowa* met the first requirement of the ATCA (that the person bringing the suit be an alien) because she was a citizen of Belgium.)

77. *Id.* at 441.

78. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2006).

79. *Iwanowa*, 67 F. Supp. 2d at 442-43 (citing *Jama v. INS*, 22 F. Supp. 2d 353, 363 (D.N.J. 1998)).

80. *See Iwanowa*, 67 F. Supp. 2d at 443. (discussing how the Torture Victim Protection Act (“TVPA”) was passed after *Filartiga* as an amendment to the ATCA, which would have given Congress the perfect opportunity to address any concerns it had with the ATCA.)

81. *Id.* (citing *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996)).

82. *Iwanowa*, 67 F. Supp. 2d at 443.

83. *Id.* at 445 (citing *Kadic*, 70 F.3d 232 (2d Cir. 1995)).

84. *Kadic*, 70 F.3d at 240.

85. *Iwanowa*, 67 F. Supp. 2d at 439-41.

86. *Id.* at 441.

87. *Id.* at 441 n.18 (citing *Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988)).

88. *Iwanowa*, 67 F. Supp. 2d at 441 n.18.

involved in the action with a State actor.⁸⁹ The *Iwanowa* court explained that *Kadic* recognized liability for private entities for violations of *jus cogens* norms.⁹⁰ According to the court, *Kadic* represented the most recent view of international law, and since international law is in a constant state of flux, *Kadic* carried greater weight than other earlier opinions because it more closely reflected the current state of international law.⁹¹ Given the reasoning in *Kadic*, the *Iwanowa* court accepted the view that private entities could be held liable – outside of state action – for violations of *jus cogens* norms under international law.⁹²

In the end, Defendants in the *Iwanowa* case were successful in obtaining a dismissal because the suit was barred due to the running of the statute of limitations, treaties made at the conclusion of World War II, and the political question doctrine.⁹³ While Plaintiff may have lost, the court in *Iwanowa* added to the potential reach of the ATCA by supporting liability solely for private entities for violations of *jus cogens* norms.

C. *Wiwa v. Royal Dutch Petroleum Co.: The “Joint Action” Theory*

The injuries claimed in *Wiwa* were brought about by a corporation using a local military to support its operations.⁹⁴ Plaintiffs brought this case against the Royal Dutch Petroleum Company and Shell Transport and Trading Company, its subsidiaries, the Shell Petroleum Company and Shell Development Company of Nigeria, Ltd. (collectively “Royal Dutch”), and the president of the Nigeria subsidiary, Brian Anderson.⁹⁵ The crimes alleged in *Wiwa* occurred during the 1990’s when Royal Dutch was engaged in extracting oil from land belonging to the Ogoni people in Nigeria.⁹⁶ Plaintiffs claimed that Royal Dutch used the Nigerian

89. Although *Iwanowa* recognized liability for private entities based on *jus cogens*, it is important to note that *jus cogens* violations merely negate the state action requirement for private entities to be liable under the ATCA. Private entities can still be liable under the ATCA outside of *jus cogens* violations if their actions are intertwined with a State’s, but there must be a showing of state action to make the case. See *id.* at 441 (“*jus cogens* norms are a narrow subset of the norms recognized as customary international law.”) (citing *Reagan*, 859 F.2d at 940) and *id.* at 443 (“[i]nstead, we hold that certain forms of conduct violate the law of nations *whether undertaken by those acting under the auspices of a state or only as private individuals.*”) (emphasis added) (quoting *Kadic*, 70 F.3d at 239).

90. “The *Kadic* court concluded that the inclusion of ‘slave trade’ within both sections 702 and 404 of the Restatement demonstrates that this in an offense of ‘universal concern’ for which non-state actors may be liable.” *Iwanowa*, 67 F. Supp. 2d at 444 (quoting *Kadic*, 70 F.3d at 240).

91. *Iwanowa*, 67 F. Supp. 2d at 444-45 (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985); *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992)).

92. “No logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law.” *Iwanowa*, 67 F. Supp. 2d at 445. The court in *Iwanowa* accepted the view that private individuals could be held accountable for violations of international law, but the court did not find a basis for invoking the ATCA because it felt that Plaintiff proved that Defendants were de facto State actors. *Id.*

93. *Id.* at 491.

94. *Wiwa*, 2002 WL 319887, at *1.

95. *Id.* at *1-2.

96. *Id.* at *2.

military and police to support and protect its oil excavation operations in the area.⁹⁷ The complaint claimed that Plaintiffs and other Ogoni residents were tortured, raped, and murdered by the police and military who provided support to Royal Dutch.⁹⁸

The court decided that in order for Plaintiffs to move forward with their ATCA claims they would have to prove state action by Defendants.⁹⁹ The court reasoned that the crimes enumerated in the complaint fell short of the narrow set of crimes that do not require a showing of state action (*jus cogens* violations).¹⁰⁰ Because the Plaintiffs had to show state action, the court determined that the proper test to apply in determining state action was the "joint action" test.¹⁰¹ Under the "joint action" test, private entities are found to be state actors – thus state action exists – if those private entities willfully participate in joint action with a State.¹⁰² Defendants argued that the evidence was insufficient to show that Royal Dutch collaborated with the Nigerian government to violate international law.¹⁰³ The court found otherwise and decided that Plaintiffs did have a cause of action under the ATCA.¹⁰⁴

The complaint cited numerous instances in which Royal Dutch cooperated with, and directed, the Nigerian police and military. Plaintiffs alleged that Royal Dutch purchased weapons for the Nigerian police, helped plan raids against the Ogonis, provided materiel to the military and police, and even ordered violent responses against any kind of anti-Royal Dutch activities.¹⁰⁵ The court also held that the claims against Brian Anderson as a private individual were actionable under the ATCA for the same reasons they were actionable against Royal Dutch as a corporation.¹⁰⁶ Defendants attempted to argue that Plaintiffs had to produce evidence showing collaboration between Royal Dutch and the Nigerian government for each alleged act.¹⁰⁷ The court disagreed with this argument saying that §1983 – which the court used to evaluate what state action meant – did not

97. *Id.*

98. *Id.* The complaint contained 12 different claims including claims of negligence, intentional infliction of emotional distress, and RICO, but the other claims are not pertinent to the analysis of the ATCA.

99. *Id.* at *12-13. State action is defined as "Anything done by a government; esp., in constitutional law, an intrusion on a person's rights (esp. civil rights) either by a governmental entity or by a private requirement that can be enforced only by governmental action (such as a racially restrictive covenant, which requires judicial action for enforcement)." BLACKS LAW DICTIONARY 672 (3rd Pocket ed. 2006).

100. *Id.* at *12. Even though some of the incidents complained of involved summary execution and torture, the court found that Plaintiffs had to show state action since those violations were not committed in the course of genocide or war crimes (citing *Kadic*, 70 F.3d at 243).

101. *Wiwa*, 2002 WL 319887, at *13; see 42 U.S.C. § 1983 (2006). The *Wiwa* court looked to § 1983 as the standard by which private actors act under color of law with respect to the ATCA.

102. *Wiwa*, 2002 WL 319887, at *13.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at *14-15.

107. *Id.* at *14.

require a showing of concerted action for each specific act.¹⁰⁸ Because Plaintiffs demonstrated sufficient collaboration to show state action they did not have to make individual showings of collaboration for each act.¹⁰⁹

The *Wiwa* opinion represents the recognition of an avenue by which state action can be proven under the ATCA. This allows for the application of the ATCA to private entities for crimes outside of the limited set of *jus cogens* violations. As long as plaintiffs can show a substantial collaboration between a private entity and a government to violate international law then they can bring claims redressing their resulting injuries under the ATCA.

D. Doe v. Unocal: Aiding and Abetting Under the ATCA

In this case, Plaintiffs filed a class action lawsuit against Unocal and others on behalf of “tens of thousands” of people Plaintiffs said were injured by the actions of Unocal.¹¹⁰ *Unocal* arose out of conduct similar to that in *Wiwa*. The injuries in the case occurred because of a Unocal project to extract natural gas from Myanmar and transport it via pipeline through Thailand where it could be shipped across the world.¹¹¹ At this time Myanmar was controlled by the military and the military “provided security and other services” to Unocal’s project.¹¹² During the project, local villagers living near project areas alleged that the “security detail” engaged in numerous human rights violations including: murder, rape, torture, and forced labor.¹¹³ Plaintiffs brought claims under the ATCA, alleging that Unocal worked with the military junta controlling Myanmar at the time to perpetrate these crimes and further the business interests of Unocal.¹¹⁴

Defendants in this case tried to argue that, as a private entity, they could not be held liable under the ATCA because their conduct did not equate to state action.¹¹⁵ The court held that Unocal’s conduct violated *jus cogens* norms, and therefore, Plaintiffs did not have to prove state action.¹¹⁶ The crimes obviating the need for state action included murder, rape, torture, and forced labor.¹¹⁷

108. *Id.*

109. *See id.*

110. *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002). Unocal purchased 28% of a project in Myanmar from the French company, Total S.A. Unocal also owned the Union Oil Company of California which is actually the company that purchased the interest in the project from Total S.A. *Id.* at 937.

111. *Id.* at 936-37.

112. *Id.* at 937-38. According to a Unocal memorandum, four battalions of 600 men each were assigned to protect the pipeline corridor and each survey team had a security detail of 50 soldiers each. *Id.* at 938.

113. *Id.* at 939. Reports alleged that the Myanmar military forced villagers to work on the project and those that refused or tried to escape were tortured and/or killed. The military also allegedly raped villagers as well. *Id.* at 939-40.

114. *Id.* at 942-44.

115. *Id.* at 945-46. The court admits that in most instances, in order to bring a claim under the ATCA, the crimes committed must rise to the level of “state action.”

116. *Id.*; *see also Iwanowa*, 67 F. Supp. 2d at 445.

117. *Unocal*, 395 F.3d at 946 (citing *Kadic*, 17 F.3d at 243-44).

Plaintiffs argued that Defendants were liable under the ATCA because they aided and abetted the Myanmar military in perpetrating violations of international law.¹¹⁸ While aiding and abetting was a new argument under the ATCA, the court found it persuasive. It reasoned that the standard for aiding and abetting under the ATCA was “knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime.”¹¹⁹ The *Unocal* court based this standard on aiding and abetting standards set by the International Criminal Tribunals for Yugoslavia and Rwanda.¹²⁰ Furthermore, the court held that the *mens rea* required for the crime of aiding and abetting was that the defendant must have knowledge, but intent was not necessary.¹²¹

The court concluded that sufficient evidence existed to create a genuine issue of material fact on the allegation of forced labor, murder, and rape,¹²² and thus reversed the district court’s ruling and remanded the case back for further consideration.¹²³ In regard to the forced labor claims, the court reasoned that Unocal showed the Myanmar military where to provide security and infrastructure and did so with the *knowledge* that the military in that country had a history and tendency to use forced labor.¹²⁴ Furthermore, the court found that the forced labor would not have occurred but for Unocal hiring the Myanmar military to provide security for the project.¹²⁵ The court made similar findings on the claims of murder and rape. It said that the actions of Unocal amounted to “practical assistance” and had a “substantial effect” on the military’s ability to carry out these violations against the local villagers.¹²⁶ This assistance occurred when Unocal provided the military with intelligence on where to carry out security operations.¹²⁷

The decision in *Unocal* further expanded the reach of the ATCA. It supported the decision in *Iwanowa* that certain crimes do not require the actor’s conduct to rise to the level of state action in order for the ATCA to apply. Furthermore, *Unocal* created an aiding and abetting standard which could apply liability under the ATCA. This aiding and abetting standard created a lower threshold to implicate the use of the ATCA. In *Unocal*’s case, the Ninth Circuit held Plaintiffs met their burden by showing Unocal *knew* of the Myanmar military’s penchant for human rights abuses and told the military where to provide security and support.

118. *Id.* at 947.

119. *Id.*

120. *Id.* at 949-50; see *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶¶ 209, 234 (Dec. 10, 1998); *Prosecutor v. Musema*, Case No. ICTR 96-13-T, Judgment and Sentence, ¶ 114 (Jan. 27, 2000).

121. *Unocal*, 395 F.3d at 951 (citing *Musema* at ¶ 180-81).

122. *Id.* at 956 (The court concluded that there was not sufficient evidence to create a genuine issue of material fact in regards to the claims of torture.)

123. *Id.* at 953 (reversing the District Court’s grant of summary judgment on the ATCA claims in regards to forced labor) and *id.* at 956 (reversing the District Court’s grant of summary judgment on the ATCA claims in regards to murder and rape).

124. *Id.* at 952; see also *id.* at 940 (discussing the fact that Unocal had several warnings that the military in Myanmar often engaged in human rights violations).

125. *Id.* at 952-53.

126. *Id.* at 955.

127. *Id.*

IV. *ABTAN, ET AL. V. BLACKWATER LODGE AND TRAINING CENTER, INC., ET AL.*:
RESPONSE TO THE MASSACRE AT AL-NISOOR SQUARE

On October 11, 2007 the case of *Estate of Himoud Saed Abtan, et al. v. Blackwater USA, et al.*, was filed in the U.S. District Court for the District of Columbia where the plaintiffs claimed Blackwater was liable under the ATCA.¹²⁸ The suit was filed in response to the September 16, 2007 al-Nisoor Square incident.¹²⁹ The complaint claimed that heavily armed Blackwater personnel opened fire on innocent civilians in al-Nisoor Square resulting in multiple deaths and injuries.¹³⁰ The suit named seven plaintiffs and thirteen defendants, which included all of Blackwater and its subsidiaries as well as Erik Prince as an individual.¹³¹

This case will mark an important milestone in attempting to hold government contractors – especially private security contractors – accountable for their actions overseas. The plaintiffs' success or failure and how the ATCA is interpreted in this case are important because they could affect the number of future suits and how they will proceed. The *Abtan* complaint alleges the following counts: 1) war crimes; 2) assault and battery; 3) wrongful death; 4) intentional infliction of emotional distress; 5) negligent infliction of emotional distress; and 6) negligent hiring, training, and supervision.¹³²

The *Iwanowa* court held that the ATCA does create a private cause of action and that the ATCA can be applied to private individuals.¹³³ *Iwanowa* also discussed how the violation of the narrow subset of *jus cogens* norms obviates the need to prove state action to advance a case under the ATCA.¹³⁴ The addition of war crimes to the counts in *Abtan* could create a situation in which Plaintiffs would not have to prove state action under that count in order to recover under the ATCA. However, the meaning of “war crimes” is unclear in the *Abtan* complaint and without that specificity, determining whether Plaintiffs will not have to prove state action on all the counts is difficult.

Plaintiffs in *Abtan* will most likely have to proceed under the reasoning set forth in *Wiwa* and prove state action in order to hold Blackwater accountable under the ATCA. Again, the *Wiwa* court used the “joint action” test to determine state action as it applies to the ATCA.¹³⁵ In order to satisfy the “joint action” test,

128. See Center for Constitutional Rights, current cases, <http://ccrjustice.org/ourcases/current-cases/atban%2C-et-al.-v.-blackwater-usa%2C-et-al.> (last visited Oct. 4, 2008); see also *Abtan* No. 1:07-cv-01831 (D.D.C. second amended complaint filed March 28, 2008). On March 28, 2008 the original case was joined with another suit filed by the family of another of the Iraqis killed in the attack and nine of the injured Iraqis, changing the name of the case to *Abtan, et al. v. Blackwater Lodge and Training Center, Inc., et al.* <http://ccrjustice.org/ourcases/current-cases/atban,-et-al.-v.-blackwater-usa,-et-al.>

129. *Abtan*, No. 1:07-cv-01831 at 2.

130. *Id.* at 3.

131. *Id.* at 4-7.

132. *Id.* at 16-19.

133. *Iwanowa*, 395 F.3d at 946-47.

134. *Id.* at 945-46.

135. *Wiwa*, 2002 WL 319887, at *13.

plaintiffs must show that a private entity willfully participated in actions with a State to violate international law.¹³⁶ The *Wiwa* court found willful participation when Royal Dutch used the Nigerian police and military to protect their oil ventures in the country.¹³⁷ In *Wiwa* a State's forces were operating under the direction of a private entity. The opposite is true in *Abtan*. In *Abtan*, a private entity is acting under the orders of a State (the United States) rather than the other way around; thus, the case is factually different from *Wiwa* in a very basic, and possibly important way. However, the "joint action" test merely requires willful participation by a private entity and a State to break international law.¹³⁸ If the "joint action" test can apply to a private entity giving orders to a State, then the test should be applied to a State giving orders to a private entity.

The true hurdle of the "joint action" test is proving willful participation by the State and private entity. Such evidence seems to exist in the *Abtan* case. The aforementioned memorandum to the House Committee for Oversight and Government Reform references two incidents in which the State Department worked with Blackwater to essentially cover up incidents in which innocent Iraqis were killed. One incident involved a drunken Blackwater employee who shot and killed one of the Iraqi Vice President's guards.¹³⁹ Another incident referenced in the memorandum occurred when Blackwater contractors killed an innocent bystander in June 2005.¹⁴⁰ The Blackwater personnel failed to report the incidents and even tried to cover up their existence.¹⁴¹ The State Department did not conduct an investigation as to criminal liability in either incident, and instead negotiated with Blackwater to pay \$15,000 and \$5,000 respectively for each incident.¹⁴² The State Department chose to use these measures as an effort to quickly dispose of the incidents.¹⁴³

The evidence reported in the House memorandum shows cooperation between the State Department and Blackwater to avoid thorough investigations into incidents where innocent people were injured or killed. The information in that memo shows that the State Department was aware of incidents that violate criminal laws, but did not take the necessary procedures to remedy the situation and actually tried to cover them up. In response to the killing of the innocent bystander,

136. *Id.*

137. *Id.*

138. *Id.*

139. BLACKWATER MEMORANDUM, *supra* note 33, at 9-11. The above mentioned incident happened when the Blackwater employee attempted to enter the Iraqi Prime Minister's compound. The employee was confronted by one of the Vice President's guards and the employee shot him three times with a Glock 9mm handgun. The employee fled the scene and was apprehended a few hours later in his room at the Blackwater compound in Baghdad. When he was apprehended he was determined to be too drunk to be questioned. The consequences for his actions were that his contract with Blackwater was terminated and he was flown home to the United States. *Id.*

140. *Id.* at 12.

141. *Id.* at 12-13.

142. *Id.* at 2.

143. *Id.* at 12 (In response to the killing of the innocent bystander, correspondence inside the State Department said, "[W]e are all better off getting this case – and any similar cases – behind us quickly.").

correspondence inside the State Department said, “[W]e are all better off getting this case – and similar cases – behind us quickly.”¹⁴⁴ The quote by the State Department official shows that the U.S. government knew that these violations happened and that they will continue to happen, but that the government will continue to resolve disputes by paying relatively small sums of money and avoiding real investigation. Further demonstrating this point, following the incident involving the Iraqi Vice President’s guard, a State Department official proposed a \$250,000 settlement to the family and then reduced it to \$100,000.¹⁴⁵ Other State Department officials rejected both proposals as being much too large because setting such a precedent would be very costly for the government.¹⁴⁶ This type of reasoning is more evidence of the State Department’s knowledge that such incidents happened and will continue to happen, and that they do not want to properly respond with an investigation and would rather just pay money to cover the incidents up.

Plaintiffs still have a long row to hoe in proving state action through the “joint action” test. Since much of the evidence to prove state action is to be found in internal State Department and Blackwater communications, and communications between the State Department and Blackwater, evidence could prove difficult to acquire. However, if the evidence can be obtained, a court could very well find that state action exists.

The communications revealed in the House memorandum show a desire by a State to cover up actions by a private entity that violate customary international law. The communications also show that the State Department expects similar incidents in the future and plans on dealing with those incidents in a similar way – by not performing official investigations and using small monetary settlements to keep incidents quiet. Because Blackwater mainly operates in Iraq under contracts with the State Department to protect State Department officials,¹⁴⁷ this cooperation between the State Department (a State agency) and Blackwater (a private entity) could represent state action and expose Blackwater to liability.

V. CONCLUSION

Accountability and oversight for private security contractors continues to be a major problem in the wars in Iraq and Afghanistan.¹⁴⁸ Right now, the major security contractors in Iraq are Blackwater, Aegis, Dyncorp, Erinys and Triple Canopy.¹⁴⁹ All five of these companies are connected to questionable practices in carrying out their contracts. Aegis is a British security run by a former British military officer named Tim Spicer.¹⁵⁰ Spicer has a history of committing

144. *Id.*

145. *Id.* at 11.

146. *Id.*

147. *Id.* at 4 (Blackwater has been awarded over \$1.5 billion worth of contracts with the State Department between 2004 and 2006.).

148. PRIVATE SECURITY CONTRACTORS MEMORANDUM, *supra* note 17, at 7.

149. *Id.* at 2.

150. SCAHILL, *supra* note 3, at 159.

violations against civilian populations in his history as a mercenary.¹⁵¹ Aegis was accused of committing similar violations in Iraq when internet videos were posted depicting Aegis contractors firing on civilian vehicles in Iraq.¹⁵² The Erinys contingent in Iraq is commanded by former South African mercenaries.¹⁵³ The same House memorandum that focuses on Blackwater also mentioned Dyncorp and Triple Canopy. The report said that, while Blackwater was the biggest offender as far as unacceptable behavior, DynCorp and Triple Canopy combined for 138 shooting incidents in Iraq from 2005 to 2007.¹⁵⁴ In 62% of their shooting incidents, DynCorp fired first and in 83% of Triple Canopy's they fired first.¹⁵⁵

These statistics regarding private security contractors show that a great deal of abuse by contractors goes unaddressed. The "joint action" test has the potential to apply not only to action between the U.S. and private contractors, but also potentially to action between the new Iraqi government and private contractors. Security contractor Erinys reportedly built up a 14,000 man private army in Iraq that was partly comprised of Iraqis. That kind of cooperation between a security contractor and a State is similar to the cooperation in *Unocal* and opens up the door for these private entities to use Iraqi forces to commit war crimes or allows contractors to aid Iraqi forces in committing war crimes.

The *Abtan* case represents only one instance in which a private security contractor could be held accountable for its actions overseas. The various types of jobs these contractors do and the various amounts of cooperation they get from State actors could allow for ATCA liability under all the theories mentioned here. Watching how the *Abtan* case unfolds is important because the decision in the case and the application of the ATCA could have major effects on holding private security contractors liable in the future.

151. *Id.* at 159-60 (Spicer owned and operated another private military firm, Sandline, fighting in Papua New Guinea and Sierra Leone, that was accused use of excessive force against civilians.).

152. *Id.* at 161; see Videotape: DailyMotion.com, http://www.dailymotion.com/video/x34kfm_british-mercenaries-in-iraq (October 4, 2007) (last visited Oct. 4, 2008).

153. SCAHILL, *supra* note 3, at 77.

154. BLACKWATER MEMORANDUM, *supra* note 33, at 7

155. *Id.*