

Judge Refuses to Dismiss War Crimes Case Against Blackwater

by **JEREMY SCAHILL**

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On Wednesday, a federal judge **rejected** a series of arguments by lawyers for the mercenary firm formerly known as Blackwater seeking to dismiss five high-stakes war crimes cases brought by Iraqi victims against both the company and its owner, Erik Prince. At the same time, Judge TS Ellis III sent the Iraqis' lawyers back to the legal drawing board to amend and refile their cases, saying that the Iraqi plaintiffs need to provide more specific details on the alleged crimes before a final decision can be made on whether or not the lawsuits will proceed.

"We were very pleased with the **ruling**," says **Susan Burke**, the lead attorney for the Iraqis. Burke, who filed the lawsuits in cooperation with the **Center for Constitutional Rights**, is now preparing to re-file the suits. Blackwater's spokesperson Stacy DeLuke said, "We are confident that [the plaintiffs] will not be able to meet the high standard specified in Judge Ellis' opinion."

Ellis's ruling was not necessarily a response to faulty pleadings by the Iraqis' lawyers, but rather appears to be the result of a Supreme Court decision that came down after the Blackwater cases were originally filed. In a 5-4 ruling in May 2009 in **Ashcroft v. Iqbal**, the court reversed decades of case law and imposed much more stringent standards for plaintiffs' to document facts before going to trial. According to Ellis's ruling, which cites *Iqbal*, the Iraqis must now file complaints that meet these new standards.

Judge Ellis, a Reagan appointee with a **mixed record** on national security issues, rejected several of the central arguments Blackwater made in its motion to dismiss, namely the company's contention that it cannot be sued by the Iraqis under US law and that the company should not be subjected to potential punitive damages in the cases. The Iraqi victims brought their suits under the **Alien Tort Statute**, which allows for litigation in US courts for violations of fundamental human rights committed overseas by individuals or corporations with a US presence. Ellis said that Blackwater's argument that it cannot be sued under the ATS is "unavailing," adding that corporations and individuals can both be held responsible for crimes and torts. He said bluntly that "claims alleging direct corporate liability for war crimes" are legitimate under the statute.

Ellis also rejected Blackwater's argument that "conduct constitutes a war crime only if it is perpetrated in furtherance of a 'military objective' rather than for economic or ideological reasons." Ellis said that under Blackwater's logic "it is arguable that nobody who receives a paycheck would ever be liable for war crimes. Moreover, so narrow is the scope of [Blackwater's] standard that it would exclude murders of civilians committed by soldiers where there was no legitimate 'military objective' for committing the murders."

"What is important here is that the judge is saying that violations of war crimes can be committed by private people or corporations," says Michael Ratner, president of the Center for Constitutional Rights. He said Ellis's ruling is "an affirmation of the precedent set by CCR thirty years ago" when it brought the **first successful Alien Tort suit in 200 years** "that those who engage in violations of fundamental

human rights abroad can be held liable in the US." Ellis's ruling, he says, "is sympathetic to the idea that the Blackwater case is an appropriate use of the law."

But Ellis also ruled that the Iraqi plaintiffs failed to provide sufficient specific details linking Blackwater's owner Erik Prince to the alleged murders and other crimes in Iraq. In order for the case to proceed against Prince, Ellis wrote, "the complaints must state facts that would allow a trier of fact plausibly to infer that Prince intentionally killed or inflicted serious bodily harm on innocent civilians during an armed conflict and in the context of and in association with that armed conflict." The plaintiffs, Ellis ruled, "have failed to meet this burden."

In a hearing on August 28, Burke said that she has evidence that Prince ordered or directed the killings of innocent Iraqis and at that time asked Judge Ellis permission to later amend her cases if Ellis ruled that, in light of the *Iqbal* decision, such information was necessary for the cases to proceed. In his ruling, Ellis granted Burke's request in four of the five cases. In one case, involving the alleged murder of a bodyguard for the Iraqi vice president by a drunken Blackwater operative, Andrew Moonen, on Christmas Eve 2006 inside the Green Zone, Ellis found that there was insufficient evidence to suggest Prince "intentionally killed" the bodyguard or that his "conduct proximately caused the decedent's death."

In the four other cases, which include 18 Iraqi civilians allegedly killed by Blackwater, Ellis ruled that Burke could refile her claim with more details about Prince's alleged involvement and the role of the Blackwater corporation in the killings. Ellis found that the cases "could be amended to add factual allegations that would permit plausible inferences that Prince and Xe [Blackwater] defendants ordered killings of innocent Iraqi civilians... and that defendants' conduct proximately caused the injuries or deaths to plaintiffs."

Ellis rejected Burke's allegation that Blackwater engaged in summary executions, saying that under the law such classification of killings "require[s] state action, and none is alleged here." Blackwater also made an argument that the cases should have been tried in Iraq--or that the Iraqis' lawyers should have exhausted that possibility before filing their cases in US courts. Ellis shot down that argument and pointed out that Blackwater's own lawyers admitted that under the Paul Bremer-era Order 17 in Iraq, Blackwater would have immunity for its crimes under Iraqi law. Ellis also rejected Blackwater's claim that punitive damages are not allowed in these types of cases. As Ellis wrote, Blackwater's lawyers "offer no support" for this argument "in the case law or from recognized international treaties."

One of the central thrusts of the Iraqis' suits against Blackwater is that Erik Prince is the head of an organized crime syndicate as defined by the Racketeer Influenced and Corrupt Organizations Act. RICO is a federal statute permitting private parties to seek redress from criminal enterprises who damage their property. Burke and CCR decided to sue Prince and his companies directly rather than his individual employees because they say Prince "wholly owns and controls this enterprise." They allege that Prince directed murders of Iraqi civilians from Blackwater's headquarters in Virginia and North Carolina. Ellis dismissed the claims that the Iraqis have standing under the RICO Act, but ruled that they can file an amended complaint that "Prince ordered or directed the killings allegedly committed in Iraq from within the United States, and that such conduct proximately caused the damage allegedly suffered by the RICO plaintiffs." In one of the cases, Ellis ruled that the four-year statute of limitations had expired for a RICO claim.

On August 3, lawyers for the Iraqis submitted two **sworn declarations** from former Blackwater employees alleging that Prince may have murdered or facilitated the murder of individuals who were cooperating with federal authorities investigating the company. One former employee alleged that Prince

"views himself as a Christian crusader tasked with eliminating Muslims and the Islamic faith from the globe," and that Prince's companies "encouraged and rewarded the destruction of Iraqi life." What role, if any, these allegations will play in the amended complaints is unclear, but Burke insists she has evidence to back up all of her allegations.

Burke's case is also bolstered by the evidence the US government will present in its criminal case against Blackwater forces. On September 7, federal prosecutors in Washington, DC, **submitted papers** in the criminal case against five Blackwater operatives for their alleged role in the 2007 Nisour Square shooting in Baghdad that killed 17 Iraqi civilians and wounded more than 20 others. Burke is representing many of these families in her civil case. Blackwater forces "fired at innocent Iraqis not because they actually believed that they were in imminent danger of serious bodily injury and actually believed that they had no alternative to the use of deadly force, but rather that they fired at innocent Iraqi civilians because of their hostility toward Iraqis and their grave indifference to the harm that their actions would cause," the acting US Attorney in DC, Channing Phillips, alleges in court papers submitted by Kenneth C. Kohl, the lead prosecutor on this case. "[T]he defendants specifically intended to kill or seriously injure the Iraqi civilians that they fired upon at [Nisour] Square." The government also alleges that one Blackwater operative "wanted to kill as many Iraqis as he could as 'payback for 9/11,' and he repeatedly boasted about the number of Iraqis he had shot," while "several of the defendants had harbored a deep hostility toward Iraqi civilians which they demonstrated in words and deeds."

In its motion to dismiss, Blackwater also argued that to allow the company to be sued for alleged crimes in a war zone would violate the rights of the president of the United States under the "political question doctrine" to not have a "second-guessing of the battlefield decisions of the U.S. government." Ellis rejected that outright and noted: "The United States has appeared as an interested party and argues that if defendants committed the alleged conduct, they were not acting as employees of the United States when they did so. Moreover, the government states that its contracts with defendants 'provided for multiple layers of [Xe defendants'] management to oversee the day-to-day operations' of its employees and that the employees were under the direct supervision of Xe defendants' management when the alleged conduct occurred."

Judge Ellis's ruling only relates to the charges that Blackwater and Prince violated federal laws and not to the additional allegations that they also violated state laws. Even if Judge Ellis ultimately rejects all of the federal arguments made by Burke and CCR, which is a big if, the cases can still proceed under "common law," as has happened in other torture and war crimes cases. Ellis has not yet ruled on those charges.

About Jeremy Scahill

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