

## **ACCOUNTABILITY FOR PRIVATE MILITARY AND SECURITY COMPANY EMPLOYEES THAT ENGAGE IN SEX TRAFFICKING AND RELATED ABUSES WHILE UNDER CONTRACT WITH THE UNITED STATES OVERSEAS**

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Iraq is showing signs that a trafficking problem could emerge. The existence of displaced persons, widows and other vulnerable women, separated children or orphans dependent on humanitarian assistance to survive could gravitate toward peacekeepers and humanitarian workers as sources of potential income and safety only to be exploited for labor or sex. In many post-conflict situations, criminal elements have exploited the breakdown of rule of law and the desperation of vulnerable families, and abducted, forced, or tricked individuals into prostitution. Traffickers also flourish in situations with weak law enforcement . . . As we have seen elsewhere, the demand for prostitution often increases with the presence of military troops, expatriates, and international personnel who have access to disposable income.<sup>1</sup>

- *U.S. State Department, 2003 Trafficking in Persons Report*

Mr. Secretary, is it [the] policy of the U.S. Government to reward companies that traffic in women and little girls?<sup>2</sup>

- Representative Cynthia McKinney, on DynCorp's government contracts

I would have to go and find the facts, but there are laws and rules and regulations with respect to government contracts, and there are times that corporations do things they should not do, in which case they

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<sup>1</sup> OFFICE OF THE UNDER SEC'Y FOR GLOBAL AFFAIRS, U.S. DEP'T OF STATE, PUB. NO. 11057, *TRAFFICKING IN PERSONS REPORT 166* (2003), available at <http://www.state.gov/documents/organization/21555.pdf> [hereinafter *2003 Report*]. This is the first year Iraq is detailed in the report. From 2002-2007, Iraq was not given a tier designation but was instead included in the "Special Cases" section of the report.

<sup>2</sup> Fiscal Year 2006, National Defense Authorization Act—Budget Request from the Department of Defense: Hearing Before the H. Comm. on Armed Servs., 109th Cong. 66 (2005) (statement of Rep. Cynthia McKinney, Member, H. Comm. on Armed Services), available at [http://www.fromthewilderness.com/free/ww3/031505\\_mckinney\\_transcript.shtml](http://www.fromthewilderness.com/free/ww3/031505_mckinney_transcript.shtml) [hereinafter *National Defense Authorization Act*].

tend to be suspended for some period; there are times then that the - under the laws and the rules and regulations for the - passed by the Congress and implemented by the Executive branch - that corporations can get off of - out of the penalty box if you will, and be permitted to engage in contracts with the government. They're generally not barred in perpetuity.<sup>3</sup>

- *Fmr. Secretary of Defense, Donald Rumsfeld, responding*

The globalization of markets and labor forces, and the concomitant relaxation of travel barriers have spawned new trafficking scenarios and routes, including some that appear to defy easy explanation. The random factor of transnational trafficking will increasingly appear as the economic and logistical obstacles involved in transporting new victims to distant lands diminish.<sup>4</sup>

- *U.S. State Department, 2007 Trafficking in Persons Report*

Blackwater Worldwide is optimized to deliver a full range of mobility, logistics and construction solutions to include equipment, material, and personnel resources. With an extensive experience in both domestic and international air, ground, and sea operations, we can offer a variety of unique transportation services.<sup>5</sup>

- *Website, Blackwater Worldwide, Inc.*

## INTRODUCTION

In the recent era of undeclared and increasingly unpopular war, the Department of Defense (DOD) has progressively outsourced many military support functions to private contractors. Contractors handle tasks as varied as providing latrines to military and Green Zone installations, to driving supply trucks, to acting as bodyguards for government dignitaries.<sup>6</sup> Although the concerns expressed in this paper are applicable to all contractors assisting the United States Armed Forces, this article focuses primarily on the role of private military and security compa-

<sup>3</sup> *Id.* at 67 (statement of Hon. Donald Rumsfeld, Sec. of Defense).

<sup>4</sup> Office of the Under Sec'y for Democracy & Global Affairs & Bureau of Pub. Affairs, U.S. Dep't of St., Pub. No. 11407, Trafficking in Persons Report 7 (2007), available at <http://www.state.gov/documents/organization/82902.pdf> [hereinafter 2007 Report].

<sup>5</sup> Blackwater Worldwide, Mobility and Logistics Overview, [http://www.blackwaterusa.com/mobility\\_logistics/ML\\_mob\\_log\\_overview.html](http://www.blackwaterusa.com/mobility_logistics/ML_mob_log_overview.html) (last visited Feb. 7, 2008).

<sup>6</sup> Rajiv Chandrasekaran, Imperial Life in the Emerald City: Inside Iraq's Green Zone 13 (2006).

nies (PMSCs) in Iraq.<sup>7</sup> Intended to augment the numbers, training, experience, and armament of U.S. troops, throughout the initial invasion, occupation and “surge,” there are now between 100,000 and 180,000 PMSC employees in Iraq; more, by some estimates, than there are United States (U.S.) military troops.<sup>8</sup> This contingent of private forces stands as an enormous hidden cost of the Iraq War. These troops are not counted in government estimates of U.S. troops in Iraq. Although many PMSC employees in Iraq are American, their deaths and injuries are not counted among the already staggering numbers of U.S. military casualties, and the contracts that pay the salaries of these private employees from public funds are not included in DOD estimates of the total financial cost of war.<sup>9</sup>

This means that approximately half of the American forces facilitating and fighting the Iraq War are shadows in the DOD and State Department budget figures and casualty estimates. Behind every five reported deaths of American soldiers, there is the shadow of three unreported civilian contractor deaths.<sup>10</sup> Behind every billion dollars given to the Department of Defense to fund the war, there is the shadow of many more billions of dollars given to private companies; so many more billions of dollars that the government cannot trace much of the public money that has been dispersed to corporate contractors.<sup>11</sup> Behind every

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<sup>7</sup> Private military and security companies assist the military in the field and have taken over armed security functions traditionally performed by military personnel, such as escorting supply convoys. Other private companies have won government contracts for construction, food and water supply, sanitation, etc. but these contractors are less often armed and have less contact with the Iraqi public (leaving less risk they will exploit their authority in the manner discussed in this article).

<sup>8</sup> Alyssa Rubin & Paul Von Zielbauer, *The Judgment Gap: In a Case Like the Blackwater Shootings, There Are Many Laws but More Obstacles*, N.Y. TIMES, Oct. 11, 2007, A1.

<sup>9</sup> John Broder & James Risen, *Death Toll for Contractors Reaches New High in Iraq*, N.Y. TIMES, May 19, 2007, at A1. 917 contractors have been killed in Iraq with another 12,000 wounded. *Id.* In the first three months of 2007, for example, 146 contractors were killed as compared to 244 American soldiers, meaning nearly three contractor deaths for every five military deaths. *Id.* In that same quarter, 3,430 contractors filed insurance claims for injuries suffered in Iraq. *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> According to the Center for Public Integrity, KBR, Inc. has been awarded more than \$16 billion in U.S. government contracts between 2004 and 2006 for work in Iraq and Afghanistan., more than nine times the amount awarded to DynCorp International coming in a distant second-place. Center for Public Integrity, *Baghdad Bonanza: The Top 100 Private Contractors in Iraq and Afghanistan*, <http://projects.publicintegrity.org/wowII/> (last visited Jan. 24, 2009). On the list of the top 100 contractors working for the U.S. in Iraq, Titan Corp., now L-3 Communications, placed 6<sup>th</sup> and First Kuwaiti General Trading and Contracting, a company accused of illegally importing impoverished laborers from developing countries and withholding their travel documents during construction of the U.S. Embassy in Baghdad, placed 11<sup>th</sup>, just above Blackwater USA, now Blackwater Worldwide. Center for Public Integrity, *The Top 100: Private Contrac-*

soldier prosecuted under the Uniform Code of Military Justice for criminal activities and human rights violations, there are PMSC employees that cannot and will not be prosecuted under any existing law. The increased use of PMSCs in military missions has created a transnational problem of regulation and accountability, the humanitarian effects of which could prove a greater cost to the international community than any financial expenditure.

According to the companies themselves, PMSCs have agents in every part of the world and possess the capability to respond immediately to the needs of their clients, assembling and transporting equipment and personnel across borders, through unstable areas, and into and out of conflicts at a moment's notice.<sup>12</sup> The jurisdictional confusion created by the vastness, variety, and transnational character of PMSCs has created an accountability-free environment; a legal gray area, in which contractors operate on the margins of international, domestic, and military law.<sup>13</sup>

Jurisdictional confusion, in addition to corporate interference and accepted socio-historical norms concerning soldiers and the demand for sex workers inhibits prosecution of PMSC employees for sex trafficking related crimes.<sup>14</sup> This article evaluates existing laws governing prosecu-

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tors in Iraq and Afghanistan, 2004-2006, <http://projects.publicintegrity.org/wowII/database.aspx?act=toponehundredcontractors> (last visited Jan. 24, 2009). Total, the amount of U.S. contracts for work in Iraq in 2004, 2005, and 2006 were \$11 billion, \$17 billion, and \$25 billion, respectively, with \$20.4 billion going to a group of unnamed companies identified only as "foreign contractors." *Id.* For a more general discussion of the total cost of the Iraq War, see David Leonhardt, *What \$1.2 Trillion Can Buy*, N.Y. TIMES, Jan. 17, 2007, at C1.

<sup>12</sup> DynCorp International, End to End Security Solutions, [http://www.dyn-intl.com/media/5812/security\\_solutions.pdf](http://www.dyn-intl.com/media/5812/security_solutions.pdf) (last visited Apr. 13, 2009) (stating "DynCorp International delivers flexible and rapidly deployable, integrated security solutions to suit any situation in any part of the world . . . Thanks to our extensive database of law enforcement officers and our strong reputation among professionals in the field, we can recruit licensed, experienced Americans for policing and security functions for both short-term contingency needs and long-term force augmentation.").

<sup>13</sup> See John M. Broder & James Risen, *Armed Guards in Iraq Occupy a Legal Limbo*, N.Y. TIMES, Sep. 20, 2007, at A1; Nathaniel Stinnett, Note, *Regulating the Privatization of War: How to Stop Private Military Firms from Committing Human Rights Abuses*, 28 B.C. INT'L & COMP. L. REV. 211, 211 (2005); Heather Carney, Note, *Prosecuting the Lawless: Human Rights Abuses and Private Military Firms*, 74 GEO. WASH. L. REV. 317, 319 (2006); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 989 (2005); Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic and Strategic Problems with Privatizing War*, 82 WASH. U. L. Q. 1001, 1008 (2004); Jeremy Scahill, *Blackwater: The Rise of the World's Most Powerful Mercenary Army* 35 (2007).

<sup>14</sup> Victor Malarek, *The Natashas: Inside the New Global Sex Trade* 156 (2004); Jennifer Murray, Note, *Who Will Police the Peace-Builders? The Failure to Establish Accountability for the Par-*

tion of PMSC employees and articulates specific strategies under international and domestic law for prosecuting employees who participate in the sexual exploitation of women and children in Iraq, fuelling the international sex trade. This paper argues that current domestic and international regulations provide inadequate oversight and consequences for PMSC employees in Iraq. This article also argues that the U.S. government has a moral and ethical responsibility to improve its legal control over PMSCs and to allow the prosecution of U.S. citizens in the International Criminal Court when prosecutors fail to charge sex trafficking PMSC employees in U.S. courts.

Currently, there is no adequate governmental or military process in place for the criminal prosecution of PMSC employees engaged in sex trafficking activities and, until the recent Status of Forces Agreement went into effect, the responsibility for disciplining PMSC employees was left entirely to the corporations themselves.<sup>15</sup> As this article demonstrates, constitutional concerns, PMSC employee civilian status, the involvement of PMSC employees who are not U.S. citizens, and the U.S. protection of PMSCs from Iraqi jurisdiction, have effectively immunized PMSC employees from successful prosecution.

To illustrate the specific problems created by the international character of PMSCs and the jurisdictional obstacles to sex crimes prosecution of PMSC employees, Part I of this paper examines an historical fact pattern, namely the alleged sex trafficking activities of DynCorp employees under contract with the United Nations Police Task Force in Bosnia in 2000. Part II evaluates approaches to prosecuting contractors for sex trafficking under domestic and international laws for constitutionality, feasibility, and effectiveness. Part III then explores pending legislation aimed at advancing the laws pertaining to regulation of contractors in Iraq. Part III further articulates the need for an international

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participation of United Nations Civilian Police in the Trafficking of Women in Post-Conflict Bosnia and Herzegovina, 34 Colum. Hum. Rts. L. Rev. 475, 476-77 (2003).

<sup>15</sup> Barry Yeoman, *Dirty Warriors*, Mother Jones, Nov.-Dec. 2004, at 30, 35; James Glanz & Sabrina Tavernise, *Security Firm Faces Criminal Charges in Iraq*, N.Y. Times, Sept. 23, 2007, § 1, at 1; Sabrina Tavernise & Graham Bowley, *Iraq to Review All Security Contractors*, N.Y. Times, Sept. 18, 2007, <http://www.nytimes.com/2007/09/18/world/middleeast/18cnd-iraq.html?pagewanted=1>; Broder & Risen, *supra* note 13. The Status of Forces Agreement (hereinafter SOFA) that took effect on January 1, 2009 substantially reduces the immunity granted to American soldiers and contractors stationed in Iraq, many of whom may be subject to Iraqi law. Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, U.S.-Iraq, art. 12, Nov. 17, 2008, [http://graphics8.nytimes.com/packages/pdf/world/20081119\\_SOFA\\_FINAL\\_AGREED\\_TEXT.pdf](http://graphics8.nytimes.com/packages/pdf/world/20081119_SOFA_FINAL_AGREED_TEXT.pdf) [hereinafter U.S. Agreement with Iraq].

solution to this international problem; a “fail-safe” measure by which the international community can bring sex trafficking PMSC employees to justice in the event that U.S. courts fail in their duty to prosecute American citizens and American-employed contractors.

## I. BACKGROUND

Sex trafficking is a human rights violation that often goes hand-in-hand with armed conflict, unstable borders, and insufficient public security.<sup>16</sup> According to the Trafficking in Persons (TIP) Reports, published each year by the U.S. State Department, Iraq and its neighboring countries have become a breeding ground for sex trafficking, rape, child rape, kidnapping, and prostitution.<sup>17</sup> In 2004, the report declared:

Iraq appears to be a country of origin for women trafficked for the purpose of sexual exploitation to other countries within the region and to India. Reports indicate that an increasing number of Iraqi women and girls are being trafficked into Yemen for sexual exploitation. Some of these victims cited threats against their families as a means of coercion; others may be victims of debt bondage. To a lesser extent, there have been reports of girls and women being trafficked within Iraq for sexual exploitation. Shortly after the war, a number of young Iraqi women and boys were kidnapped and held for ransom, with some kidnapped girls being sold into prostitution. At this stage, due to the lack of adequate information, the scope and magnitude of the internal trafficking problem in Iraq remains difficult to establish. Once a formal Iraqi government is established, it will need to develop and implement a national anti-trafficking action plan that includes a comprehensive anti-trafficking law; law enforcement training in identification, investigation and interdiction; and regional coordination on anti-trafficking efforts.<sup>18</sup>

The situation had not improved by 2005:

Iraq is a country of origin for women and girls trafficked to Yemen, Syria, Jordan, and Gulf countries for the purposes of sexual and labor exploitation. Some Iraqi women and underage girls are reportedly trafficked from rural areas to cities within Iraq itself. According to

<sup>16</sup> 2003 Report, *supra* note 1, at 8; KATHRYN FARR, SEX TRAFFICKING: THE GLOBAL MARKET IN WOMEN AND CHILDREN 138 (2005).

<sup>17</sup> For a corresponding, detailed timeline of important events in the Iraq War, see A Timeline of the Iraq War, <http://thinkprogress.org/iraq-timeline> (last visited Jan. 26, 2009).

<sup>18</sup> OFFICE OF THE UNDER SEC’Y FOR GLOBAL AFFAIRS, U.S. DEP’T OF STATE, PUB. NO. 11150, TRAFFICKING IN PERSONS REPORT 251 (2004), available at <http://www.state.gov/documents/organization/34158.pdf>.

diplomatic and international organization sources in Syria and Yemen, there are thousands of Iraqi women working in prostitution in the two countries under conditions that constitute severe forms of trafficking in persons. In Damascus, many women and girls are exploited in commercial sexual situations in nightclubs and other establishments in Iraqi-populated areas, with some living and working under coercive conditions. Due to the special circumstances in Iraq, it is difficult to appropriately gauge the human trafficking situation in the country.<sup>19</sup>

Access to information had substantially improved by 2006, as reflected in the State Department reports. The State Department issued increasingly detailed reports regarding sex trafficking within Iraq's borders and included new information on the problem of labor trafficking. However, in 2007, women and children continued to be endangered by the frequency and violence of insurgent attacks, the lack of trained, equipped Iraqi police, and political instability:

Iraq may be a source country for women and children trafficked to Syria, Yemen, Qatar, United Arab Emirates, Jordan, Turkey, and Iran for the purpose of sexual exploitation. Some Iraqi girls are also believed to be trafficked internally from rural areas to cities such as Kirkuk, Erbil, and Mosul for sexual exploitation. Iraq may also be a destination country for men trafficked from South and Southeast Asia for involuntary servitude. These workers are sometimes offered fraudulent jobs in safe environments in Kuwait or Jordan. Some of these workers were reportedly coerced into involuntary servitude in Iraq, while others go to Iraq voluntarily but are still sometimes subjected to conditions of involuntary servitude after arrival. Although the governments of India, Pakistan, Sri Lanka, Thailand, and the Philippines have official bans prohibiting their nationals from working in Iraq, workers from these countries are reportedly coerced into positions in Iraq with threats of abandonment in Kuwait or Jordan, starvation, or force. Because of the special circumstances in Iraq, it is difficult to appropriately gauge the human trafficking situation in the country.<sup>20</sup>

The 2007 State Department report chronicled the effects of the Iraqi civil war on women and children within the country and in refugee camps in neighboring states:

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<sup>19</sup> OFFICE OF THE UNDER SEC'Y FOR GLOBAL AFFAIRS, U.S. DEP'T OF STATE, PUB. NO. 11252, TRAFFICKING IN PERSONS REPORT 232 (2005), available at <http://www.state.gov/documents/organization/47255.pdf>.

<sup>20</sup> OFFICE OF THE UNDER SEC'Y FOR GLOBAL AFFAIRS, U.S. DEP'T OF STATE, PUB. NO. 11335, TRAFFICKING IN PERSONS REPORT 269-70 (2006), available at <http://www.state.gov/documents/organization/66086.pdf>.

Iraq is a source and destination country for men and women trafficked for commercial sexual exploitation and involuntary servitude. Children are trafficked for commercial sexual exploitation; criminal gangs may have targeted young boys and staff of private orphanages and may have trafficked young girls for forced prostitution within Iraq and abroad. Iraqi women are trafficked to Syria, Jordan, Qatar, United Arab Emirates, Turkey, and Iran for the purpose of commercial sexual exploitation.<sup>21</sup>

The 2007 TIP Report's analysis of Iraq's neighboring countries, destination countries for many of the refugees fleeing the violence and insecurity, is equally disconcerting. The report describes the fate that awaits many of those that leave Iraq in search of safety. For example, the report cited Syria as "a destination country for women trafficked from . . . Iraq for the purpose of commercial sexual exploitation," and noted an anecdotal report that suggested Syria might be a transit country for trafficking into Kuwait, the United Arab Emirates (U.A.E.) and Lebanon for forced prostitution.<sup>22</sup> The U.A.E. is also a destination country for women trafficked from Iraq, Iran, and Morocco for commercial sexual exploitation, and serves as a transit country for men deceived into working involuntarily in Iraq.<sup>23</sup> Kuwait is also reportedly a transit country for South and East Asian workers, some recruited through deception and kept in conditions of involuntary servitude, trafficked into Iraq by Kuwaiti labor recruitment agencies.<sup>24</sup>

The 2007 report marked a divergence in tone, though it was similar to prior reports in its analysis of the region as a hotbed of human trafficking and related criminal activity. Whereas, in previous years, the United States had excused Iraq's failure to comply with minimum standards for prosecuting trafficking and protecting victims, the 2007 report appears less tolerant of the Iraqi government's shortcomings.<sup>25</sup> For the first time since the American invasion, the report includes detailed recommendations on steps the Iraqi government should pursue to combat trafficking:

Iraq should significantly increase criminal investigations of internal and transnational trafficking for both commercial sexual exploitation and involuntary servitude . . . Iraq . . . should take measures to curb the complicity of public officials in the trafficking of Iraqi women.

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<sup>21</sup> 2007 Report, *supra* note 4, at 217.

<sup>22</sup> *Id.* at 192.

<sup>23</sup> *Id.* at 203.

<sup>24</sup> *Id.* at 130.

<sup>25</sup> *Id.* at 217.

Furthermore, the government should monitor recruitment agencies and contractors importing foreign workers to ensure that no workers are being deceived or forced to work in Iraq involuntarily.<sup>26</sup>

Despite this stern language, Iraq appeared in the 2008 TIP Report, for the sixth consecutive year, in the section reserved for Special Cases, countries not ranked and therefore not exposed to potential sanctions.<sup>27</sup> The most recent TIP Report appears to wash its hands of the problem of trafficking in Iraq. Iraq is described merely as a country in “political transition,” which has yet to ratify the 2000 UN Trafficking in Persons Protocol, yet the report asserts no warnings, recommendations, or rankings.<sup>28</sup>

## II. LEGAL BLACK HOLES

The relationship between private military and security companies, unstable conflict and post-conflict areas, and sex trafficking is not unprecedented. The U.S. State Department has acknowledged the contributions of large military and contractor deployments, insecure borders, and the breakdown of the rule of law to increases in human trafficking.<sup>29</sup> U.S. politicians have debated the morality of granting lucrative government contracts to companies implicated in sex trafficking.<sup>30</sup> No case, however, better illustrates the potential dangers of contractors that engage in sex trafficking than the accusations leveled at so-called “peacekeepers” employed by an American PMSC in Bosnia in 2000. The alleged criminal activities of those contractors, described below, demonstrate what can go wrong when PMSCs are not sufficiently monitored, when regulation and discipline are left to companies rather than to the criminal justice system, and when jurisdictional confusion permits traffickers to escape prosecution.

### A. A WOMAN AND AN UZI: A PACKAGE DEAL

In 2000, thirteen employees of DynCorp, Inc., a Virginia-based PMSC employed by the UN Police Task Force in the Balkans, were ac-

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<sup>26</sup> *Id.* at 217-18.

<sup>27</sup> OFFICE OF THE UNDER SEC’Y FOR DEMOCRACY & GLOBAL AFFAIRS & BUREAU OF PUB. AFFAIRS, U.S. DEP’T OF STATE, PUB. NO. 11407, *TRAFFICKING IN PERSONS REPORT 271 (2008)*, available at <http://www.state.gov/documents/organization/105501.pdf>.

<sup>28</sup> *Id.*

<sup>29</sup> 2003 Report, *supra* note 1.

<sup>30</sup> National Defense Authorization Act, *supra* note 2.

cused of participating in a Bosnian sex slavery ring.<sup>31</sup> Kathryn Bolkovac, a DynCorp employee, reported to her supervisors that her male colleagues had made comments about women they owned or had purchased. Bolkovac was fired soon after.<sup>32</sup> DynCorp transferred the accused employees to Germany for investigatory interviews in response to evidence that the accused employees had not only consorted with local mobsters and warned them of imminent raids, but had actually engaged in trafficking themselves. Having effectively removed them from the jurisdiction of the Bosnian police, DynCorp then released the employees without alerting American or international law enforcement officials of the allegations against them.<sup>33</sup>

After overhearing a fellow helicopter mechanic brag, "My girl's not a day over 12," then DynCorp employee Ben Johnston reported this and other trafficking-related activities to the Army Criminal Investigative Command (CID) at Camp Comanche in Dubrave, Bosnia.<sup>34</sup> CID began an investigation but quickly determined that the American military did not have jurisdiction over UN contractor employees.<sup>35</sup> Alerted by CID, the Bosnian police began an investigation but mistakenly believed that they too lacked jurisdiction to arrest UN Task Force contractor employees.<sup>36</sup> By the time the Bosnian police did move to make arrests, the employees in question had been transferred beyond the reach of local authorities.<sup>37</sup> Like Bolkovac, Johnston was fired.<sup>38</sup> His supervisors claimed that he had discredited the company by bringing unsubstantiated charges against his coworkers.<sup>39</sup>

<sup>31</sup> Robert Capps, *Outside the Law*, SALON, June 26, 2002, <http://dir.salon.com/story/news/feature/2002/06/26/bosnia/index0.html> [hereinafter Capps, *Outside the Law*]; Robert Capps, *Crime Without Punishment*, SALON, June 27, 2002, <http://dir.salon.com/story/news/feature/2002/06/27/military/index.html> [hereinafter Capps, *Crime Without Punishment*].

<sup>32</sup> Malarek, *supra* note 14, at 163; Capps, *Outside the Law*, *supra* note 31.

<sup>33</sup> See Malarek, *supra* note 14, at 176-78; See Capps, *Outside the Law*, *supra* note 31.

<sup>34</sup> Malarek, *supra* note 14, at 175-76.

<sup>35</sup> Malarek, *supra* note 14, at 178; Robert Capps, Sex-slave Whistle-blowers Vindicated, SALON, Aug. 6, 2002, <http://dir.salon.com/story/news/feature/2002/06/27/military/index.html>.

<sup>36</sup> Capps, *supra* note 35.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Capps, *Outside the Law*, *supra* note 31. Bolkovac later won her lawsuit against the company for unlawful termination and DynCorp settled the Johnston case two days before it was set to go to trial. Capps, *supra* 35. One of Johnston's supervisors was eventually fired for having purchased prostitutes while at work in Dubrave. *Id.*

Nine of the thirteen employees investigated by CID and transferred out of the country by DynCorp were Americans.<sup>40</sup> Only seven were fired and none were criminally prosecuted.<sup>41</sup> The employee who had claimed to own a twelve-year-old sex slave was among those investigated and allowed to remain with the company.<sup>42</sup> CID agents escorted another man to the airport where he was flown out of the country. While still in Bosnia, the man had admitted that he had purchased a Moldovan woman and an Uzi from a local bartender active in the Serbian mob.<sup>43</sup> The employee was subsequently released from his job with DynCorp, but was never charged with any crime.<sup>44</sup> Unless the implicated employees return to Bosnian jurisdiction, they cannot be arrested or tried for the trafficking and related sex crimes they committed in 2000.<sup>45</sup>

## B. DISORDER 17: PMSCs IN IRAQ

The DynCorp example is particularly relevant to the war in Iraq because it serves as a model for what could happen if oversight of PMSC employees is not improved. DynCorp is still a major player in the world of privatized warfare.<sup>46</sup> The company is now one of the principle PMSCs engaged in military assistance operations in Iraq and currently holds a State Department contract to assist in the training of Iraqi police and in the management of Iraqi prisons.<sup>47</sup>

Though DynCorp is one of the largest and most prominent PMSCs currently holding U.S. military assistance contracts, it is hardly the only one.<sup>48</sup> There are between sixty and one hundred PMSCs engaged in military assistance activities in Iraq and approximately one in ten soldiers in Iraq are PMSC employees.<sup>49</sup> Studies by various human trafficking organizations have shown that the continued presence of military and paramilitary forces in volatile areas increases the demand for

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<sup>40</sup> See Capps, *Crime Without Punishment*, *supra* note 31.

<sup>41</sup> See Capps, *Crime Without Punishment*, *supra* note 31; Malarek, *supra* note 14, at 178.

<sup>42</sup> See Capps, *Outside the Law*, *supra* note 31.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*; Malarek, *supra* note 14, at 178.

<sup>45</sup> Capps, *supra* note 35.

<sup>46</sup> See Carney, *supra* note 13, at 326.

<sup>47</sup> *Id.*

<sup>48</sup> Carney, *supra* note 13, at 326. DynCorp, Triple Canopy, and Blackwater are the three largest American contractors employed by the U.S. in Iraq. Tavernise & Bowley, *supra* note 15.

<sup>49</sup> Daniel Bergner, *The Other Army*, N.Y. TIMES MAG., Aug. 14, 2005, available at <http://www.nytimes.com/2005/08/14/magazine/14PRIVATI.html?pagewanted=11>.

sex workers in those areas.<sup>50</sup> Traffickers respond to this rich market, providing a continual supply of women and children. Some are willing, but many more are the victims of kidnapping, “breaking,” and smuggling into U.S.-occupied areas.<sup>51</sup> There is extensive historical precedent for enterprising outlets of the sex trade that spring up to accommodate large military forces.<sup>52</sup> However, the rise of PMSC contracts poses a unique and harrowing challenge to domestic and international law that aims to regulate military complicity with sex trafficking.

U.S. reluctance to regulate military complicity with sex trafficking is exemplified by Coalition Provisional Authority (CPA) Order 17, a 2004 law immunizing PMSC employees from prosecution in Iraqi courts authored by Viceroy Paul Bremer.<sup>53</sup> On September 16, 2007, Order 17 received increased scrutiny when Blackwater employees opened fire on a crowd of Iraqi civilians in Nisour Square in Baghdad, killing seventeen and wounding nearly thirty others.<sup>54</sup> Despite eye-witness reports and crime-scene evidence of criminal culpability, Order 17 protected the employees involved from any criminal or civil accountability under Iraqi law.<sup>55</sup> The press coverage of the incident, including dramatic stories of a woman shot in the head at close range while holding her dead son in her

<sup>50</sup> See generally Malarek, *supra* note 14.

<sup>51</sup> *Id.* at 31. “Breaking” refers to the series of rapes and beatings traffickers inflict on their victims to “break” their will to resist before compelling them to service clients. For a thorough discussion of a corresponding increase in trafficking and prostitution in areas occupied by U.S. forces or used by U.S. soldiers on rest and relaxation (“R&R”). See Farr, *supra* note 16, at 189.

<sup>52</sup> Governments in the Philippines, Korea, and Japan, among others, have developed military brothels to serve large numbers of soldiers. Farr, *supra* note 16, at 165; see generally 2003 Report, *supra* note 1, at 21, 87, 120 & 138.

<sup>53</sup> Coalition Provisional Authority Order No. 17 (Revised), §§2, 4 (June 27, 2004), [http://www.cpa-iraq.org/regulations/20040627\\_CPAORD\\_17\\_Status\\_of\\_Coalition\\_Rev\\_\\_with\\_Annex\\_A.pdf](http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev__with_Annex_A.pdf) [hereinafter CPA]. “Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto. . . Certification by the Sending State that its Contractor acted pursuant to the terms and conditions of the Contract shall, in any Iraqi legal process, be conclusive evidence of the facts so certified.” CPA Order 17 has expired, and was replaced by the U.S.-Iraq SOFA. SOFA, *supra* note 15.

<sup>54</sup> Glanz & Tavernise, *supra* note 15; Tavernise & Bowley, *supra* note 15; Broder & Risen, *supra* note 13; James Glanz & Alissa J. Rubin, From Errand to Fatal Shot to Hail of Fire to 17 Deaths, N.Y. Times, Oct. 3, 2007, available at [http://www.nytimes.com/2007/10/03/world/middleeast/03firefight.html?\\_r=1&emc=eta1&oref=slogin](http://www.nytimes.com/2007/10/03/world/middleeast/03firefight.html?_r=1&emc=eta1&oref=slogin).

<sup>55</sup> CPA, *supra* note 53. Although passed in 2004, Order 17 passed into Iraqi law and, as it had not been rescinded, was still in effect at the time of the Nisour Square shooting in September of 2007, as per Law of Administration for the State of Iraq for the Transitional Period, at Art. 26(c) (March 8, 2004), available at <http://www.law.case.edu/saddamtrial/documents/TAL.pdf>. See also Glanz & Tavernise, *supra* note 15; Tavernise & Bowley, *supra* note 15; Broder & Risen, *supra* note 13.

arms, as well as the unsuccessful attempts of the Iraqi government to have Blackwater removed from Iraqi territory, drew renewed interest to the politically sensitive issues of privatized warfare.<sup>56</sup> Although U.S. and Iraqi investigations found that the shooting was unprovoked and unjustified, there can be no criminal prosecution in Iraqi courts for the employees involved.<sup>57</sup> Further, although Prime Minister al-Maliki and other Iraqi leaders demanded Blackwater's removal from Iraqi territory, the company returned to work guarding U.S. diplomats only five days after the incident, demonstrating the lack of legal and practical consequences for PMSC abuses of power.<sup>58</sup>

The Nisour Square shooting was not the first example of major human rights violations by a PMSC in Iraq. The allegations leveled against employees of Titan Corporation and CACI International, Inc, both PMSCs, stemming from the now infamous incidents of rape, sodomy, humiliation, sexual degradation, and other abuses of prisoners at Abu Ghraib prison in 2004, casts further doubt on the wisdom of the Coalition Provincial Authority (CPA) decision to delegate authority to PMSCs to discipline employees.<sup>59</sup> Although it was possible to court-martial the soldiers involved in the Abu Ghraib abuses, Order 17 protected the PMSC employees from prosecution in Iraqi courts.

## II. OBSTACLES TO SUCCESSFUL PROSECUTION UNDER CURRENT LAW

Order 17 expired at the end of 2008 with the implementation of the U.S.-Iraq Status of Forces Agreement, which grants Iraqi courts jurisdiction over U.S. contractors on Iraqi soil.<sup>60</sup> However, a number of obstacles still bar prosecution of PMSC employees in American and International courts. This section examines possible legal strategies for investigating and prosecuting PMSCs for sex trafficking and other human

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<sup>56</sup> See generally Glanz & Rubin, *supra* note 54; Tavernise & Bowley, *supra* note 15.

<sup>57</sup> Glanz & Tavernise, *supra* note 15.

<sup>58</sup> Glanz & Tavernise, *supra* note 15. Five Blackwater guards have since been charged in American courts, and one more has pleaded guilty, for their alleged roles in the Nisour Square shooting. See Dep't of Justice, Five Blackwater Employees Indicted on Manslaughter and Weapons Charges for Fatal Nisur Square Shooting in Iraq, Dec. 8, 2008, <http://www.usdoj.gov/opa/pr/2008/December/08-nsd-1068.html>.

<sup>59</sup> *Ibrahim v. Titan Corp.*, 556 F. 2d 1, 2-3 (D.D.C. 2007).

<sup>60</sup> SOFA, *supra* note 15, at art. 3.

rights abuses, and explains existing barriers to just and successful implementation of these strategies.

### A. SHEEP IN WOLVES' CLOTHING? CONSTITUTIONAL BARRIERS TO APPLYING THE UNIFORM CODE OF MILITARY JUSTICE TO PMSC EMPLOYEES

Many of the jurisdictional difficulties that protect PMSC employees from criminal prosecution for sex trafficking offenses arise from their unique position as civilians engaged in military and military-support activities. It is a popular suggestion, particularly in the wake of the September 2007 Blackwater shooting, to subject PMSC employees to the same laws as American soldiers.<sup>61</sup> The justice and constitutionality of this solution are questionable, however, considering that many contracted employees work as unarmed construction workers, drivers, security guards, translators, food service staff, and in other positions similarly civilian in nature.<sup>62</sup>

Moreover, it is doubtful that the Uniform Code of Military Justice (UCMJ), the criminal code underpinning the court martial system, is drafted to adequately respond to sex trafficking offenses.<sup>63</sup> There is no sex trafficking offense under the UCMJ and the required elements and sentencing provisions for other sex-based offenses leave much to be desired.<sup>64</sup> For example, the crime of "Rape of a Child Not Yet 12" only requires proof that the accused was engaged in a sexual act with a child that was not yet twelve years old.<sup>65</sup> For victims at least twelve, but not yet sixteen, however, the crime of rape requires proof of an additional

<sup>61</sup> One example is this post by Laura Dickinson, law professor and author on privatization and security issues. Laura Dickinson, *Prosecuting Military Contractors: More a Problem of Law in Action Than Law on the Books*, BALKINIZATION, Oct. 1, 2007, <http://balkin.blogspot.com/2007/10/prosecuting-military-contractors-more.html>.

<sup>62</sup> The 50,000 KBR employees and subcontractors working in Iraq, for example, provide laundry, food, sanitation and other logistical, non-combatant, services. Griff Witte, *Halliburton's Higher Bill: Rising Costs Reflecting Growing Demand for Firm's Services*, WASH. POST, July 6, 2005, available at [http://www.washingtonpost.com/wpdyn/content/article/2005/07/05/AR2005070501655\\_pf.html](http://www.washingtonpost.com/wpdyn/content/article/2005/07/05/AR2005070501655_pf.html). The military has contracted for products and services as diverse as cooks, water delivery, construction labor, and truck drivers. James E. Manker & Kent D. Williams, *Contractors in Contingency Operations: panacea or pain?*, AIR FORCE J. OF LOGISTICS (2004), available at [http://findarticles.com/p/articles/mi\\_m0IBO/is\\_3\\_28/ai\\_n9544154](http://findarticles.com/p/articles/mi_m0IBO/is_3_28/ai_n9544154).

<sup>63</sup> UNIF. CODE OF MILITARY JUSTICE, art. 120 (2006), available at <http://usmilitary.about.com/od/justicelawlegislation/a/art120new.htm> [hereinafter UCMJ].

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

aggravating factor.<sup>66</sup> This means that a sexual act with a victim who is at least twelve years old is not sufficient on its own to satisfy the statutory requirements for rape.<sup>67</sup> Rather, the prosecution must show that the accused used force, caused great bodily harm, used threats or placed the child in fear, rendered the child unconscious, or administered a drug or intoxicant.<sup>68</sup> Without proof of one of these aggravating factors, sex with a child of twelve to fifteen years is sufficient only to prove the lesser offense of “Aggravated Sexual Assault of a Child.”<sup>69</sup> This statutory difference essentially assigns a lesser degree of criminality to sexual acts with children over twelve, but still under the age of consent.<sup>70</sup> This assessment of criminality is reinforced by the Article 120 provisions for maximum sentencing. Whereas rape of an adult and rape of a child are punishable by “death or confinement for life,” and aggravated sexual assault of an adult is punishable by confinement for thirty years, aggravated sexual assault of a child carries a maximum penalty of twenty years confinement.<sup>71</sup>

In October of 2007, the UCMJ was amended to address issues of forced prostitution. “Forcible pandering,” the new offense created, requires:

- (a) That the accused compelled a certain person to engage in an act of prostitution; and (b) That the accused directed another person to said person, who then engaged in an act of prostitution.<sup>72</sup>

The wording of the statute is problematic in two respects. First, it is not clear whether two separate acts of prostitution are required by the “and” between subparts (a) and (b). Second, the statute does not address the possibility that the act of prostitution could be “compelled,” even though the victim, or her pimp, was paid. The statute regarding the offense of simple pandering, a lesser crime, specifically addresses situations in

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* The age of consent, as defined in the UCMJ is sixteen. *Id.* Although the difference in statutory considerations for victims under twelve and victims twelve to fifteen is discussed here in relation to rape and aggravated sexual assault, the dual provisions are mirrored throughout art. 120, including the statute describing aggravated sexual contact with a child. *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> The UCMJ was amended to include the offense of forcible pandering after the passage of the Trafficking Victims Protection Reauthorization Act of 2005. Trafficking Victims Protection Reauthorization Act of 2005, 109 P.L. 164, 119 Stat. 3558 (2006), *hereinafter* TVPA 2005. It went into effect in October of 2007 and it is not clear as yet whether judicial interpretation of the problematic wording of this statute will require two separate acts of prostitution. *Id.*

which something of value is exchanged for a sexual act.<sup>73</sup> The existence of these two seemingly overlapping statutes could cause confusion if applied to trafficking offenses in which a trafficker compels his victim to engage in acts of prostitution, for which she is paid and then returns her earnings to her captor-pimp.

Finally, although intended to respond to crimes of forced prostitution, “forcible pandering” is punishable by only five years confinement.<sup>74</sup> This is equivalent to the maximum sentence for an “indecent act,” a category of crimes including conduct such as videotaping another person’s buttocks without consent.<sup>75</sup> Despite the apparent inadequacy of the existing statutory language, however, extension of the UCMJ to PMSCs continues to be explored by legal and military scholars.<sup>76</sup>

Statutory concerns aside, there are other obstacles to the application of the UCMJ to PMSCs that engage in sex trafficking. Traditionally, the UCMJ pertained only to congressionally declared wars and prior to 2006, could not have applied to PMSC employees in the Iraq conflict.<sup>77</sup> The 2007 Military Authorization Act amended the UCMJ “by striking ‘war’ and inserting ‘declared war or a contingency operation’” and the DOD passed an accompanying initiative requiring contractors to follow the orders of a military commander in times of necessity.<sup>78</sup> However, the amended language does not provide enforcement mechanisms and does not clearly and unambiguously bring PMSC employees under the military chain of command.<sup>79</sup> There are no determined repercussions for a subcontractor who refuses to follow an order from a military supervisor and the PMSC employees under contract with the State Department, not the DOD, are still not accountable to military commanders under the revised language.<sup>80</sup>

<sup>73</sup> UNIF. CODE OF MILITARY JUSTICE, art. 134 (2006), available at <http://usmilitary.about.com/od/justicelawlegislation/a/art120new.htm>.

<sup>74</sup> UNIF. CODE OF MILITARY JUSTICE, art. 120 available at <http://usmilitary.about.com/od/justicelawlegislation/a/art120new.htm>.

<sup>75</sup> UCMJ Art. 120.

<sup>76</sup> See, for example, Major Mark A. Ries, *Contract and Fiscal Law Developments of 2006—The Year in Review: Special Topics: Contractors Accompanying the Force*, 2007 ARMY LAW. 161.

<sup>77</sup> *Id.* at 161.

<sup>78</sup> *Id.*; H.R. Con. Res. 5122, 109th Cong. § 552 (2006) (enacted), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_bills&docid=f:h5122enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h5122enr.txt.pdf). “Paragraph (10) of section 802(a) of title 10, United States Code (article 2(a) of the Uniform Code of Military Justice), is amended. . .” This addition is also known as the “Graham Amendment” after sponsoring Senator Lindsay Graham.

<sup>79</sup> Ries, *supra* note 76, at 161.

<sup>80</sup> *Id.* at 63.

In June of 2008, Alaa “Alex” Mohammad Ali, a Canadian contractor working as an interpreter for U.S. Armed Forces in Iraq, became the first civilian to be court-martialed under the amended UCMJ.<sup>81</sup> Ali was originally charged with aggravated assault related to the stabbing of another contractor but pleaded guilty to lesser charges,<sup>82</sup> precluding inquiry into the constitutionality of extending the UCMJ to civilians. According to the Public Affairs Office of Multi-National Force-Iraq:

Mr. Ali was afforded all the same rights, protections and privileges servicemembers receive in military court, including the right to counsel, right to speedy trial, protection against self-incrimination and presumption of innocence. He was represented by military defense counsel. He will continue to be afforded all the post-trial and appellate rights provided to servicemembers.<sup>83</sup>

Ali was sentenced to five months confinement by a military judge.<sup>84</sup>

Despite their participation in military activities, including interrogating prisoners, securing supply caravans, and participating in armed conflict, American civilian PMSC employees of U.S. corporations if prosecuted, are owed the due process protections of the Constitution.<sup>85</sup> Regardless of the amended language passed down by Congress, case precedent weighs against the constitutionality of prosecuting contractors in the same military courts martial as their enlisted counterparts.<sup>86</sup>

Constitutional questions aside, it would not necessarily be appropriate or just to subject all civilian employees of the military, the State Department, and the DOD engaged in operations in Iraq, to the UCMJ. Some are not under the supervision or authority of military commanders, an issue examined in depth in Part III. In addition, the civilian nature of the work of many PMSC employees does not justify the reduced due process protections granted soldiers in courts martial. Thousands of contractors and subcontractors on the ground in Iraq work at desks, in offices, as drivers, scientists, builders, engineers, and in any

<sup>81</sup> Associated Press, *Contractor Convicted in Rare Court Martial*, in MIL. TIMES, June 23, 2008, available at [http://www.militarytimes.com/news/2008/06/ap\\_contractor\\_court martial\\_062208/](http://www.militarytimes.com/news/2008/06/ap_contractor_court martial_062208/).

<sup>82</sup> *Civilian Contractor Convicted at a Court-Martial*, MULTI-NAT’L CORPS – IRAQ, June 23, 2008, available at [http://www.mnf-iraq.com/index.php?option=com\\_content&task=view&id=20671&Itemid=128](http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=20671&Itemid=128). The court martial of Ali, who is not an American citizen, for a crime committed in Iraq, does not settle the question of whether a charge under the UCMJ will be permitted to stand against an American citizen.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Reid v. Covert*, 354 U.S. 1, 7 (1957).

<sup>86</sup> *Id.*

number of other unarmed, non-military occupations with little or no work-related contact with the local population.<sup>87</sup> Although these employees still have the potential to engage in, and profit from, sex trafficking activities, they cannot be prosecuted for common crimes committed abroad according to the same model as their military and paramilitary counterparts. The employment of this large workforce in an environment replete with vulnerable civilians and little oversight demands an adequate strategy for the prosecution of PMSC employees engaged in human trafficking whether such employees act as soldiers or as civilians.

### **B. MILITARY EXTRATERRITORIAL JURISDICTION ACT (MEJA)**

The Military Extraterritorial Jurisdiction Act (MEJA)<sup>88</sup> is fast emerging as the primary tool for prosecutors in contractor-related crimes committed abroad. Passed in 2000, in response to the need for stronger sanctions for civilians working for the U.S. in foreign countries, MEJA was designed to extend the reach of the civilian criminal justice system to individuals that accompany the armed forces.<sup>89</sup> It provides for the prosecution of crimes committed abroad which, if committed in the U.S., would be considered felonies punishable by at least one year of prison.<sup>90</sup> MEJA is narrowly drafted, however, in its scope and jurisdiction.<sup>91</sup>

MEJA originally provided for civilian prosecution only of those contractors “employed by or accompanying” the U.S. Armed Forces.<sup>92</sup> In its 2000 incarnation, it was unclear whether employees of State Department contractors could be subject to MEJA provisions, as its limited scope seemed to restrict prosecution for common crimes to contractors with the Department of Defense.<sup>93</sup> Further, MEJA provides for prosecu-

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<sup>87</sup> Witte, *supra* note 62. Manker & Williams, *supra* note 62.

<sup>88</sup> Military Extraterritorial Jurisdiction Act of 2000 (MEJA), 18 U.S.C. § 3261 (2008). For a detailed, optimistic analysis of MEJA, see Andrew D. Fallon & Theresa A. Keene, *Closing the Legal Loophole? Practical Implications of the Military Extraterritorial Jurisdiction Act of 2000*, A.F. L. REV., 2001, at 271.

<sup>89</sup> Fallon & Keene, *supra* note 88, at 271.

<sup>90</sup> 18 U.S.C. § 3261(a).

<sup>91</sup> For a discussion of the shortcomings of MEJA, see Brian Parsons, *Significant Steps or Empty Rhetoric? Current Efforts by the United States to Combat Sexual Trafficking near Military Bases*, 4 NW. U. J. INT'L HUM. RTS. 584, 586-88 (2006).

<sup>92</sup> 18 U.S.C. § 3261(a)(1).

<sup>93</sup> See *id.*

tion only of those common crimes which would be considered felonies in the U.S. and punishable by at least one year of prison.<sup>94</sup>

In 2004, MEJA was amended to apply, not only to contractors with the Department of Defense, but also to contractors with any federal agency “to the extent such employment relates to supporting the mission of the Department of Defense overseas.”<sup>95</sup> Unfortunately, the vagueness of the “supporting the mission” provision and the reluctance of the DOD to clarify if and how the law will be implemented, cast doubt on the effectiveness of MEJA in prosecuting sex trafficking by PMSC employees. According to Deputy Assistant Attorney General Sigal Mandelker’s April 2008 statement before the Senate Committee on Foreign Relations, in the eight years since the passage of the act, only twelve cases have resulted in the filing of a Federal indictment under MEJA.<sup>96</sup> Of these twelve, four involving sexual abuse were successfully prosecuted (i.e., resulting in conviction) in federal court.<sup>97</sup>

One pending prosecution of a former U.S. soldier for the rape of an Iraqi girl and the murders of the girl and her family will test the potential effectiveness of MEJA in closing the jurisdictional gap between the UCMJ and civilian criminal law.<sup>98</sup> MEJA allows for the prosecution of American soldiers if they are no longer active duty members of the U.S. military, and therefore no longer subject to the UCMJ, when their crimes are discovered.<sup>99</sup> The defendant, Steven Green, was an active duty member of the United States Army when he allegedly committed the crimes in question, but had been discharged from the military by the time prosecutors received information sufficient to bring the sixteen-count indictment.<sup>100</sup> On August 28, 2008, the district court judge ruled that the Court had personal jurisdiction to try Green.<sup>101</sup> His discharge from the military meant he was no longer subject to the UCMJ and could be prop-

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* § 3267(1)(A)(ii)(II).

<sup>96</sup> Sigal P. Mandelker, Deputy Assistant Attorney Gen., Criminal Div., Dep’t of Justice, Closing Legal Loopholes: Prosecuting Sexual Assaults and Other Violent Crimes Committed Overseas by American Civilians in a Combat Environment, Statement Before the United States Senate Committee on Foreign Relations (Apr. 9, 2008) *available at* [available at](http://foreign.senate.gov/testimony/2008/MandelkerTestimony080409a.pdf) <http://foreign.senate.gov/testimony/2008/MandelkerTestimony080409a.pdf>.

<sup>97</sup> *Id.*

<sup>98</sup> *United States v. Green*, No. 5:06-CR-19-R, 2008 WL 4000872, slip. op. at 2 (W.D. Ky. Aug. 26, 2008). Green’s trial is slated to begin in April 27, 2009.

<sup>99</sup> 18 U.S.C. § 3261(d).

<sup>100</sup> *United States v. Green*, 2008 WL 4000872, at 2.

<sup>101</sup> *Id.* at 15.

erly tried in federal court.<sup>102</sup> The government announced it would seek the death penalty.<sup>103</sup>

MEJA prosecutions are currently handled by individual offices of the U.S. Attorney. The formation of a unified investigative and prosecutorial unit within the Department of Justice is one suggested solution to the rarity of MEJA prosecutions.<sup>104</sup> Geographical distance and the disparity in technology and techniques between the U.S. and many of the impoverished and unstable nations where PMSCs function pose obstacles to successful, constitutional investigation and prosecution. Proposed legislation, discussed below, calls for the creation of federal investigative units that could deploy internationally to the scene of the crime.<sup>105</sup> However, it is unlikely that a scene could remain secured during the time it would take for such a team to be organized, deployed, and reach its destination. A federal investigative unit could face the same challenges present in the aftermath of the September 2007 Blackwater shooting in Nisour Square.

In the days following the incident, a combination of Iraqi police officers and representatives of the American military and civilian presence in Baghdad attempted to collect and interpret evidence and interview witnesses.<sup>106</sup> Blackwater refused to make the employees involved in the incident available for interview or interrogation.<sup>107</sup> The company refused even to release the names of those employees implicated in the shooting, citing its Order 17 protections, concerns for the safety of its employees, trade secrets, and other security issues.<sup>108</sup>

Location in a foreign country and implication in criminal behavior in that country does not remove a U.S. citizen's constitutional protections under U.S. law, specifically his or her right to due process in the United States.<sup>109</sup> Rather, due process protections apply to all American citizens prosecuted in American courts.<sup>110</sup> However, the precise rules regarding evidence collection by foreign law enforcement personnel are subject to judicial interpretation.<sup>111</sup>

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Dickinson, *supra* note 61.

<sup>105</sup> Security Contractor Accountability Act of 2007, S. 2147, 110<sup>th</sup> Cong. (2007).

<sup>106</sup> Rubin & von Zielbauer, *supra* note 8.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> U.S. CONST. amend. V.

<sup>110</sup> *Id.*

<sup>111</sup> *United States v. Callaway*, 446 F.2d 753, 755 (3rd Cir. 1971).

Typically, evidence collected by a foreign government, without any participation of U.S. law enforcement personnel, then turned over to U.S. prosecutors, will be admitted, as long as the actions of the foreign government do not “shock the conscience” of the U.S. court.<sup>112</sup> This case precedent applies specifically to Fourth Amendment protections against searches without probable cause, but the admissibility of evidence collected by foreign law enforcement personnel does not guarantee its credibility in the eyes of a fact finder. Even if a court were to rule evidence collected by Iraqi authorities admissible in a U.S. court, such evidence would likely be suspect, either in the methods of its collection, its authenticity, or in the convoluted nature of the chain of evidence.<sup>113</sup> In many countries, the participation or the mere presence of local police could be sufficient to argue successfully to finders of fact in an American court that the scene was compromised, the witnesses and victims intimidated, and the evidence tainted.<sup>114</sup> This was certainly the case in the Nisour square shooting, where the involvement of the Iraqi police, who, ironically, are trained by PMSC contractors, was sufficient to raise similar concerns.<sup>115</sup>

On December 8, 2008, the Department of Justice unsealed a thirty-five count indictment against five Blackwater guards for their alleged roles in the September 16, 2007 Nisour Square shooting in Baghdad.<sup>116</sup> Paul A. Slough of Texas, Nicholas A. Slatten of Tennessee, Evan S. Liberty of New Hampshire, Dustin L. Heard of Tennessee, and Donald W. Ball of Utah were each charged with fourteen counts of voluntary manslaughter,<sup>117</sup> twenty counts of attempt to commit manslaughter,<sup>118</sup>

<sup>112</sup> *Id.*

<sup>113</sup> Rubin & von Zielbauer, *supra* note 8. Although this was the case in the FBI investigation in Iraq, it is not always the case. For an analysis of the various legal means by which foreign states can gather evidence that is admissible in U.S. courts, see Michael J. Bulzomi, *Investigating International Terrorism Overseas: Constitutional Considerations*, FBI LAW ENFORCEMENT BULLETIN, July 2002, at 25, available at [http://libcat.post.ca.gov/dbtw-wpd/article/FBI/FBI71\(07\)25-32Jul2002.pdf](http://libcat.post.ca.gov/dbtw-wpd/article/FBI/FBI71(07)25-32Jul2002.pdf).

<sup>114</sup> Rubin & von Zielbauer, *supra* note 8.

<sup>115</sup> *Id.*

<sup>116</sup> *Five Blackwater Employees Indicted on Manslaughter and Weapons Charges for Fatal Nisur Square Shooting in Iraq*, JUSTICE DEP'T PRESS RELEASE, Dec. 8, 2008, available at <http://www.usdoj.gov/opa/pr/2008/December/08-nsd-1068.html>.

<sup>117</sup> Related to the deaths of Amed Haithem Ahmed Al Rubia'y, Mahassin Mohssen Kadhum Al-Khazali, Osama Fadhil Abbas, Ali Mohammed Hafeedh Abdul Razzaq, Mohamed Abbas Mahmoud, Qasim Mohamed Abbas Mahmoud, Sa'adi Ali Abbas Alkarkh, Mushtaq Karim Abd Al-Razzaq, Ghaniyah Hassan Ali, Ibrahim Abid Ayash, Hamoud Sa'eed Abttan, Uday Ismail Ibrahim, Mahdi Sahib Nasir, and Ali Khalil Abdul Hussein. *Id.*

<sup>118</sup> Related to the wounding of Majed Salman Abdel Kareem Al-Gharbawi, Jennan Hafidh Abid al-Razzaq, Yasmin Abdul Kidr Salhe, Mohanad Wadhnah, Haydar Ahmad Rabie Hussain Al-

and one count of using and discharging a firearm during and in relation to a crime of violence.<sup>119</sup> A sixth Blackwater security guard, Jeremy P. Ridgeway of California, pleaded guilty to charges of voluntary manslaughter and attempt to commit manslaughter.<sup>120</sup>

The Justice Department claims that Blackwater's State Department contract falls within the meaning of supporting the mission of the Department of Defense overseas and is therefore subject to the 2004 amendments to MEJA.<sup>121</sup> This indictment marks the first prosecution against non-DOD private contractors and will test the strength of both the legal claims to jurisdiction over contractors affected under MEJA and the political will of prosecutors to apply the law to private, civilian employees.<sup>122</sup>

### C. TRAFFICKING VICTIMS PROTECTION ACT (TVPA)

The Trafficking Victims Protection Act (TVPA), originally passed in 2000, then amended and reauthorized in 2003, 2005, and 2008, is the primary instrument by which the United States government prosecutes human trafficking offenses.<sup>123</sup> The Act, bipartisan in its creation, with support on both sides of the aisle and in both houses of Congress, represents a sincere effort on the part of American legislators to address the increasingly pressing issues of trafficking within the United States and abroad.<sup>124</sup> The TVPA has given rise to valuable improvements in

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Khafaji, Hassan Jaber Salman, Farid Walid Hasoun Al-Kasab, Abdul Amir Raheem Jihan Yasser, Wisam Raheem Fliha Hasan Al-Miri, Talib Mutluk Diwan, Adel Jaber Sham'ma Al-Jadiri, Nasir Hamzah Latif Al-Rikabi, Mahdi Abid Khider Abbas Al-Faraji, Abdul Wahab Abdul Qadar Al-Qalamchi, Bara Sadoon Ismail Al-Ani, Sami Hawa Hamud Al-Sabahin, Fawziyyah Aliwi Hassoon, Ali Hadi Naji Al-Rubaie, Alah Majeed Sghair Zaidi, and Jassim Mohammad Hashim. *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> The FBI, at least, appears willing to take on contractor related challenges: "Today's indictments illustrate the FBI's expanded responsibilities and its dedication to respond to any crime scene; be it in the United States or on foreign soil. The FBI will continue to work with its law enforcement partners in this country and abroad to ensure that the nation's federal laws are enforced" said Joseph Perischini, Jr., Assistant Director in Charge, FBI Washington Field Office. *Id.*

<sup>123</sup> Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7104 (2000); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006); referred to hereafter as TVPA 2000, TVPA 2003, and TVPA 2005 respectively. References to "the Act," and "TVPA" generally, should be read as referring to the act and reauthorization acts, with amendments, as a whole.

<sup>124</sup> Evidence of this sincerity is a blunt assessment of the American response to human trafficking prior to 2000 found early in the text of the Act. "Existing legislation and law enforcement in the

immigration protections and social services provided to victims of trafficking within the United States.<sup>125</sup> Trafficking victims and victims of certain crimes and their minor dependants can now receive T-visas and U-visas to remain in the United States and receive assistance in acquiring legal services and meeting basic human needs.<sup>126</sup> Moreover, the TVPA has resulted in increased scrutiny of trends in trafficking, government responses, and international enforcement in the form of the Trafficking in Persons Reports, issued annually by the U.S. State Department.<sup>127</sup> The information summarized in the TIP Reports is valuable for trafficking researchers, responding government agencies, nongovernmental organizations (NGOs), and lawmakers.

Unfortunately, whereas the TVPA has made important progress toward accomplishing the goal expressed in its name, victim protection, it has proven to contain significant loopholes in the areas of prevention and prosecution.<sup>128</sup> Efforts to compel international improvements in anti-trafficking legislation, education, and enforcement have been undermined by a lack of political will and the uneven application of the economic sanctions proscribed in the Act for foreign nations that fail in their obligations to address trafficking problems.<sup>129</sup> Further, enforcement of

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United States and other countries are inadequate to deter trafficking and bring traffickers to justice, failing to reflect the gravity of the offenses involved. No comprehensive law exists in the United States that penalizes the range of offenses involved in the trafficking scheme. Instead, even the most brutal instances of trafficking in the sex industry are often punished under laws that also apply to lesser offenses, so that traffickers typically escape deserved punishment.” Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, §102(b)(14), 114 Stat. 1466, 1467 (2000).

<sup>125</sup> § 107, 114 Stat. at 1474.

<sup>126</sup> § 107, 114 Stat. at 1476. These visas are designed to address the specific circumstances of trafficking victims and victims of violent crime.

<sup>127</sup> § 103, 114 Stat. at 1471.

<sup>128</sup> As this article applies specifically to U.S. contractors engaging in sex trafficking activities abroad, a thorough analysis of the shortcomings of the TVPA is unnecessary and only those elements relevant to contractor accountability are examined herein.

<sup>129</sup> § 108, 114 Stat. at 1480 (Minimum standards for the elimination of trafficking), § 110, 114 Stat. at 1482 (Actions against governments failing to meet minimum standard): “It is the policy of the United States not to provide nonhumanitarian, nontrade-related foreign assistance to any government that does not comply with minimum standards for the elimination of trafficking and is not making significant efforts to bring itself into compliance with such standards.” The TIP Reports rank countries as Tier 1 (countries surpassing minimum standards for trafficking prevention, protection and prosecution), Tier 2 (countries meeting minimum standards), and Tier 3 (countries failing to meet minimum standards and subject to economic sanctions intended to compel compliance). § 110(b), 114 Stat. at 1482. The Tier 2 “Watch List” was created pursuant to the Trafficking Victims Protection Act of 2003 §6(e)(3) as a warning of impending Tier 3 status for countries with the capabilities to address issues of trafficking that were failing to perform adequately. The watch list was intended to be temporary but, as the president can choose to waive sanctions if doing so is in the interests of the U.S. (TVPA 2003 §6(i), Subsequent Waiver

the TVPA is hampered by overly narrow statutory definitions of prohibited offenses.

The TVPA is fundamentally flawed in its requirement that sex trafficking be effected through “force, fraud, or coercion” to qualify as a “severe form of trafficking” regulated by the Act.<sup>130</sup> The TVPA 2000 laid out fundamental definitions of “severe forms of trafficking in persons,” the category of offenses controlled by the Act.<sup>131</sup> Section 8 defines “severe forms of trafficking in persons,” as:

(A) Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person is induced to perform such act has not attained 18 years of age; or (B) The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion, for the purpose of subjecting to involuntary servitude, peonage, debt bondage, or slavery.<sup>132</sup>

Although “force” is not explicitly defined, the “findings” section does state that “[s]uch force includes rape and other forms of sexual abuse, torture, starvation, imprisonment, threats, psychological abuse, and coercion.”<sup>133</sup> Coercion is further defined as, “threats of serious harm to or physical restraint against any person; any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or the abuse or threatened abuse of the legal process.”<sup>134</sup> Debt bondage, in which trafficking victims must work off their debt to their trafficker for the cost of their transportation and living expenses, is considered coercion only if “the value of those services [prostitution] as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.”<sup>135</sup>

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Authority), it has become a black hole for U.S. allies with lax trafficking policies. Trafficking Victims Protection Act of 2003, Pub. L. No. 108-193, § 6(i), 117 Stat. 2875, 2884 (2003). As a result, TIP reporting continues to function poorly as a tool to pressure foreign nations into compliance with minimum anti-trafficking standards. One of the fundamental problems with previous incarnations of the TVPA is addressed in TVPA 2008, which limits a country’s stay on the watch list to two years before mandatory removal to Tier 3 status if “significant efforts” are not made. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5067 (2008).

<sup>130</sup> § 103(8), 114 Stat. at 1470.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> § 102(6), 114 Stat. at 1466.

<sup>134</sup> § 103(2), 114 Stat. at 1469.

<sup>135</sup> *Id.* § 103(4).

Under the Act, “sex trafficking” is simply, “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”<sup>136</sup> Without the “force, fraud, or coercion” requirement, sex trafficking is not considered a “severe form” of human trafficking.<sup>137</sup> Only severe forms of trafficking are included among the minimum standards for the elimination of trafficking required of countries to avoid the lowest ranking, Tier 3 status, and corresponding economic sanctions.<sup>138</sup> Consider an Iraqi woman who willingly enters into prostitution to support her family and is subsequently trafficked into Syria where her pimp insists she work off the cost of the journey and living expenses before being allowed to return home. The trafficker, having neither committed a fraud, nor used force or threats of force, and having made financial demands that do not rise to the definition of “debt bondage” is not engaged in a severe form of trafficking in persons. Pending legislation, discussed in Part III below, addresses the difficulties generated by the Act’s narrow definitions of prohibited offenses.

Under the TVPA, the penalties for sex trafficking and for child sex trafficking in particular are similarly unsatisfactory. The statutory language prohibiting severe forms of trafficking in persons reads:

Sex trafficking of children or by force, fraud, or coercion (a) Whoever knowingly—(1) in or affecting interstate commerce, recruits, entices, harbors, transports, provides, or obtains by any means a person or (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1) knowing that force, fraud, or coercion . . . will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b); (b) The punishment for an offense under subsection (a) is—(1) if the offense was effected by force, fraud, or coercion or if the person transported had not attained the age of 14 years at the time of such offense, by a fine under this title or imprisonment for any term of years or for life, or both; or (2) if the offense was not so effected, and the person transported had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title or imprisonment for not more than 20 years, or both.<sup>139</sup>

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<sup>136</sup> § 103(9), 114 Stat. at 1470.

<sup>137</sup> *Id.*

<sup>138</sup> § 104, 114 Stat. at 1471.

<sup>139</sup> 18 U.S.C. § 1591 (2007).

Thus, the TVPA, like the UCMJ discussed above, treats the trafficking of young teens and pre-teens (aged twelve to fifteen under the UCMJ and fourteen to seventeen under the TVPA) as a less grievous offense than the trafficking of younger children.<sup>140</sup> This unequal treatment comes despite the recognition under both statutes that these slightly older children still have not attained the legal age of consent (sixteen under the UCMJ and eighteen under the TVPA). Furthermore, the fact that the Act offers “a fine . . . or imprisonment . . . or both” as the penalty for sex trafficking signifies that it is possible that a trafficker convicted under the Act will receive only a fine.<sup>141</sup>

The TVPA suffers from several other significant shortcomings relevant to the subject of contractor accountability. Although the TVPA 2000 did not initially declare an intention to apply extraterritorially to U.S. citizens committing sex trafficking abroad, the Act did recognize the international character of trafficking-related crimes:

Trafficking in persons is a transnational crime with national implications. To deter international trafficking and bring its perpetrators to justice, nations including the United States must recognize that trafficking is a serious offense. This is done by prescribing appropriate punishment, giving priority to the prosecution of trafficking offenses, and protecting rather than punishing the victims of such offenses. The United States must work bilaterally and multilaterally to abolish the trafficking industry by taking steps to promote cooperation among countries linked together by international trafficking routes. The United States must also urge the international community to take strong action in multilateral fora to engage recalcitrant countries in serious and sustained efforts to eliminate trafficking and protect trafficking victims.<sup>142</sup>

Unfortunately, although the TVPA 2000 recognizes trafficking as a crime with international implications, its limited scope greatly reduced its effectiveness in regulating contractor-perpetrated trafficking abroad. Although there were initially no provisions in the Act for any special regulatory or prosecutorial mechanisms for American contractors working abroad, this oversight was corrected in the 2003 TVPA:

. . . any grant, contract, or cooperative agreement provided or entered into by a Federal department or agency under which funds . . . are to be provided to a private entity. . . shall include a condition that au-

<sup>140</sup> For example, a trafficker who sells a thirteen year-old for purposes of sexual exploitation could receive a life sentence under the TVPA, whereas one who sells a fourteen year-old can be sentenced to a maximum of twenty years.

<sup>141</sup> 18 U.S.C. § 1591 (2007).

<sup>142</sup> § 102(24), 114 Stat. at 1469.

thorizes the department or agency to terminate the grant, contract, or cooperative agreement, without penalty, if the grantee or any subgrantee, or the contractor or any subcontractor (i) engages in severe forms of trafficking in persons or has procured a commercial sex act during the period of time that the grant, contract, or cooperative agreement is in effect, or (ii) uses forced labor in the performance of the grant, contract or cooperative agreement.<sup>143</sup>

This version of the Act still did not explicitly extend the reach of the Act to cover crimes committed outside of the territorial jurisdiction of the U.S. Equally troubling was the fact that the TVPA 2003 provided for the possibility of a civil remedy, but required a victim to file suit “in an appropriate district court of the United States.”<sup>144</sup> This could prove a near-insurmountable obstacle to many foreign victims of trafficking perpetrated abroad.<sup>145</sup>

In 2005, language was added to the TVPA that expressly declared the extraterritoriality of the Act, that is, the fact that it can be applied to civilian employees of the United States present in foreign countries.<sup>146</sup> Section 3271 of the Act provides for extraterritorial jurisdiction over certain trafficking in persons offenses, stating:

Whoever, while employed by or accompanying the Federal Government outside the United States, engages in conduct outside the United States that would constitute an offense under . . . this title if the conduct had been engaged in within the United States or within the special maritime and territorial jurisdiction of the United States shall be punished as provided for that offense.<sup>147</sup>

Because there are no provisions for audits of trafficking-related reporting and discipline by contractors, these clauses regarding contractor accountability rely on self-reporting and voluntary compliance in the absence of

<sup>143</sup> Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 102-408, § 3(g)(1), 117 Stat. 2875 (2003). § 3(g)(2) defines “funds” in (1) as “funds made available to carry out any program, project or activity abroad funded under major functional budget category 150 (relating to international affairs)”. *Id.*

<sup>144</sup> § 4(a)(4)(A), 117 Stat. at 2878.

<sup>145</sup> However, if this obstacle could be overcome, filing suit against contractor traffickers under the TVPA could enable plaintiffs to avoid the difficulty of filing under the Federal Tort Claims Act (FTCA), discussed in Part II below. Specifically, there is no exception for those participating in armed conflict under the TVPA. *Id.*

<sup>146</sup> Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, §103, 119 Stat. 3558, 3562 (2006).

<sup>147</sup> *Id.* §3272 defines “employed by the Federal Government outside the United States” to include anyone “employed as a civilian employee of the Federal Government, as a Federal contractor (including a subcontractor at any tier), or as an employee of a Federal contractor (including a subcontractor at any tier) present or residing outside the United States in connection with such employment.” *Id.*

government oversight.<sup>148</sup> These amendments, recognizing the international character of human trafficking and reflecting an increased understanding of the relationship between contractors and human trafficking, represent significant progress, at least in theory, toward contractor accountability. However, the practical impact, the legal force, of the TVPA as it now stands, is defeated by its overly-narrow statutory definitions and lack of oversight and enforcement mechanisms.

#### D. INTERNATIONAL LAW

Considering the practical and political obstacles to prosecuting U.S. citizens in domestic courts for crimes committed abroad, and the inherently international character of both PMSCs and sex trafficking, a seemingly obvious solution would be to prosecute contractor employees who participate in sex trafficking under international law.

In 2000, the International Criminal Court (ICC) was created as a permanent body empowered by the United Nations to prosecute citizens of signatory nations that violate international law.<sup>149</sup> The ICC was intended to take over criminal prosecutions for the International Court of Justice, a body of the United Nations that could extend jurisdiction over war criminals only if the signatory nation gave consent to jurisdiction.<sup>150</sup> Article 7 of the Rome Statute specifically prohibits “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity,” as Crimes Against Humanity, and could therefore be used as grounds to try contractors that participate in sex trafficking in international courts.<sup>151</sup> The Clinton Administration signed the Rome Statute of the International Criminal Court on December 31, 2000, essentially on the eve of President Clinton’s departure from the White House. In signing the treaty, the United States accepted compulsory jurisdiction, a standing grant of consent to prosecute American citizens found to have violated international law as de-

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<sup>148</sup> Tenley A. Carp, *The FAR And DFARS Ban on Human Trafficking – Heavy On Rhetoric, Light On Enforcement*, 49 THE GOVERNMENT CONTRACTOR (2007) ¶ 12, available at <http://pogoarchives.org/m/cp/cp-TGC49-2-12.pdf>.

<sup>149</sup> Michael Byers, *WAR LAW: UNDERSTANDING INTERNATIONAL LAW AND ARMED CONFLICT* 10 (2005).

<sup>150</sup> *Id.* at 22-23.

<sup>151</sup> Rome Statute of the International Criminal Court art. 7(1)(g), July 17, 1998, A/CONF. 183/9, available at [http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf) (hereinafter Rome Statute).

scribed in the Rome Statute.<sup>152</sup> In 2002, however, the Bush Administration unsigned the Rome Statute, declaring it would not ratify the ICC and denouncing any obligations arising from its withdrawn signature.<sup>153</sup>

The ICC may prosecute citizens of a non-member country without consent to jurisdiction, but this would require the nation in which the criminal acts took place to request ICC intervention.<sup>154</sup> Currently, the U.S. has bilateral treaties with over 100 countries agreeing not to turn U.S. citizens over to the ICC for prosecution.<sup>155</sup> Further, the political, economic, and military strength of the U.S. on the international stage makes it unlikely that any third-party country will claim jurisdiction over American citizens for crimes committed in Iraq pursuant to ICC member states' obligations to prosecute war criminals.<sup>156</sup> If the recent failed attempts by Belgium and Germany to prosecute President George Bush, Donald Rumsfeld, and others for torture, human rights abuses, and other war crimes are any indication, the U.S. government is willing to exert enormous pressure on foreign courts to quietly drop such claims against American citizens.<sup>157</sup>

Complaints filed under a 1993 Belgian war crimes law were dropped after the law was amended in 2003 to preclude charges against President George W. Bush and General Tommy Franks.<sup>158</sup> The decision to alter the law came after Defense Secretary Donald Rumsfeld threatened a U.S. boycott of North Atlantic Treaty Organization's (NATO) Brussels headquarters.<sup>159</sup> The changes reduced Belgium's universal ju-

<sup>152</sup> *Id.* at art. 12(1).

<sup>153</sup> Letter from John R. Bolton, U.S. Department of State, to Kofi Annan, UN Secretary General (May 6, 2002), available at <http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm>.

<sup>154</sup> Rome Statute, *supra* note 151, art. 12(2)(a). The ICC may also exercise jurisdiction over the individual if the individual is a national of a member, so if a contractor employee is not a U.S. citizen, but rather is a national of a country that is a signatory to the Rome Statute, he or she may be subject to ICC jurisdiction. *Id.* at art. 12(2)(b).

<sup>155</sup> Press Release, U.S. Department of State, U.S. Signs 100<sup>th</sup> Article 98 Agreement (May 3, 2005), available at <http://2001-2009.state.gov/r/pa/prs/ps/2005/45573.htm>. For a list of some of these countries, see Coalition for the International Criminal Court, Status of US Bilateral Agreements (BIAs), <http://www.hrw.org/campaigns/icc/docs/bilateralimmunityagreements.pdf> (last visited Apr. 14, 2009).

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<sup>157</sup> Ian Black & Ewen MacAskill, *US Threatens NATO Boycott over Belgium War Crimes Law*, GUARDIAN, June 13, 2003, at 17, available at <http://www.guardian.co.uk/world/2003/jun/13/nato.warcimes>; Stephen Castle, *Belgium to Lift Threat of Bush War Crimes Trial*, THE INDEPENDENT, June 24, 2003, at 9, available at [http://findarticles.com/p/articles/mi\\_qn4158/is\\_20030624/ai\\_n12697704](http://findarticles.com/p/articles/mi_qn4158/is_20030624/ai_n12697704); *US Attacks Belgium War Crimes Law*, BBC NEWS, June 12, 2003, <http://news.bbc.co.uk/1/hi/world/europe/2985744.stm>.

<sup>158</sup> *US Attacks Belgium War Crimes Law*, *supra* note 157.

<sup>159</sup> *Id.*

risdiction, or the right to try certain grievous crimes in Belgian courts regardless of where they are committed, to jurisdiction only in cases where the victim or the defendant is a Belgian national or resident.

In 2006, in Germany, eleven Abu Ghraib prisoners and a Guantanamo detainee, the so-called “20<sup>th</sup> Hijacker,” filed suit against Donald Rumsfeld, Alberto Gonzales, and others.<sup>160</sup> The petitioners charged the defendants with specific violations of German law, arguing that they “ordered” war crimes, “aided or abetted” war crimes, or “failed, as civilian superiors or military commanders, to prevent their commission by subordinates, or to punish their subordinates.”<sup>161</sup> The German Federal Prosecutor declined to open an investigation.<sup>162</sup> In his decision, he cited the Prosecutor’s right not to prosecute crimes committed abroad “if a perpetrator is neither present in the country nor can be expected to be present.”<sup>163</sup> He further asserted that “the view of the complainant that the Federal Republic of Germany must act as a representative of the ‘international community’ and therefore at least take up investigations is . . . mistaken.”<sup>164</sup>

The United States’ reluctance to sign a treaty that provides for the prosecution of genocide, crimes against humanity, and war crimes continues to rankle the international community and sends a mixed message to the world regarding the U.S. commitment to see perpetrators of these crimes prosecuted and punished. The argument for re-signing and ratifying the Rome Statute, thereby accepting compulsory jurisdiction under the ICC as a vitally important strategy for ensuring contractor accountability, will be taken up in Part III of this paper.

U.S. legislative efforts over the past eight years since the DynCorp sex trafficking scandal emerged in Bosnia demonstrate a growing recognition of the need for comprehensive anti-trafficking statutes that extend U.S. jurisdiction to contractors working abroad. However, current laws concerning extraterritorial jurisdiction over civilian contractors in conflict areas have yet to strike the appropriate balance between pro-

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<sup>160</sup> Decision of the Prosecutor General Regarding the Criminal Complaint Against Donald Rumsfeld et al., Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 5, 2007, 3 ARP 156/06-2 (F.R.G.), available at <http://ccrjustice.org/files/ProsecutorsDecision.pdf>.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 4.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 7.

protecting the due process rights of civilian contractor employees and protecting the millions of victims trafficked internationally every year.<sup>165</sup>

Eliminating contractors entirely, or having PMSCs declared “mercenaries” and, therefore, prohibited under international law are approaches with heavy political and financial consequences for the U.S. government. As discussed above,<sup>166</sup> many of the tasks traditionally performed by military personnel are now undertaken by PMSCs and approximately half of U.S. forces in Iraq are comprised of contractors. Their removal would leave a tremendous void that would eventually have to be filled with U.S. military personnel. NGOs such as the Red Cross employ private security guards and PMSCs facilitate the process of democracy-building by protecting not only these humanitarian aid organizations, but also diplomats working to establish a functioning Iraqi government.<sup>167</sup> Deprived of immunity provisions such as Order 17, it will undoubtedly be more difficult, and therefore more expensive, to convince PMSCs to accept contracts in conflict areas. Although the UCMJ, MEJA, and the TVPA endeavor to regulate, rather than eliminate, PMSC employees working for the United States abroad, each falls short of providing the oversight and enforcement capabilities necessary to prosecute contractor sex traffickers while still protecting the rights of these American civilians.

As discussed below, new legislation and civil case precedent stand to address some of the shortcomings of existing law. However, none of the pending changes will alter the fundamental fact that the single most important element thus far undermining the prosecution of human rights abuses by mercenaries is not a lack of applicable law, but rather a lack of political will.<sup>168</sup> It is particularly important, given the role of the United States in creating instability in the Middle East<sup>169</sup> and

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<sup>165</sup> See generally 2005 Trafficking In Persons Report, *supra* note 19. The number of victims trafficked internationally is estimated at 12.3 million per year, 80% of which are women and children and up to 50% of which are minors. *Id.* at 6.

<sup>166</sup> See *infra* pp. 3, 4.

<sup>167</sup> *Id.* at 3.

<sup>168</sup> José Luis Gómez del Prado, Chairperson, UN Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Rights of Peoples to Self-Determination, Lecture at Madison, WI: Mercenaries, Private Military and Security Companies and International Law (Jan. 31, 2008), working paper available at [http://www.law.wisc.edu/gls/documents/gomez\\_del\\_prado\\_paper.doc](http://www.law.wisc.edu/gls/documents/gomez_del_prado_paper.doc).

<sup>169</sup> According to the 2007 Trafficking in Persons Report released by the State Department, Middle Eastern nations make up half of the 16 countries given “Tier 3” status. 2007 Trafficking in Persons Report, *supra* note 4, at 42. The 8 Middle Eastern Tier 3 nations cited in the report are: Algeria, Bahrain, Iran, Kuwait, Oman, Qatar, Saudi Arabia, and Syria. *Id.* Morocco is the only Middle Eastern nation to have achieved Tier 1 status. *Id.*

as a sending state for many of the PMSCs at work around the world that the American government account for this lack of political will to prosecute traffickers by inviting the oversight of the international community.

### III. ON THE HORIZON: NEW LEGISLATION AND RECENT CIVIL DECISIONS

The year 2007 marked three small steps forward in the battle to hold private security companies accountable for human rights abuses (1) proposed legislation in Congress to expand MEJA, (2) proposed legislation to amend the TVPA, and (3) a civil court ruling allowing a lawsuit against contractor employees implicated in human rights abuses. These legal advancements mark significant progress in contractor accountability reform. However, the virtue of these small measures in no way compares to the severity of the violations that prompted them. The pending changes fail to address the underlying problem: a lack of American political will to undertake prosecution of contractors, and do not provide adequate assurance to the international community that the United States will live up to its obligations to protect victims from private contractors.

#### A. EXTENDING MEJA

Two bills introduced in Congress demonstrate a new willingness to confront politically and economically dominant contractors (1) Representative David Price's Military Extraterritorial Jurisdiction Act (MEJA) Expansion and Enforcement Act of 2007 and (2) then Senator Barack Obama's Security Contractor Accountability Act of 2007 (S. 2147).<sup>170</sup> This interest in the behavior of contractors abroad arose from the September 16, 2007 Blackwater shooting, which occurred early in a highly contested presidential race. The proposed legislation emphasized U.S. jurisdiction over contractors of all U.S. agencies operating near a conflict area, established FBI "Theater Investigative Units" to investigate incidents of use of force by contractors, and required the Department of Justice to report on action taken in response to cases of contractor crime.<sup>171</sup>

<sup>170</sup> MEJA Expansion and Enforcement Act of 2007, H.R. 2740, 110th Cong. (2007), available at [http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h.r.02740](http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h.r.02740;); Security Contractor Accountability Act of 2007, S. 2147, 110th Cong. (2007), available at <http://thomas.loc.gov/cgi-bin/query/z?c110:S.2147.IS>.

<sup>171</sup> H.R. 2740 §§ 2(a)(3), (b) and (3); S 2147 §§ 2(a)(1)(C), (b) and 3.

Although neither bill was voted on in the Senate before the end of the legislative session, nor reintroduced in the current session, an analysis of the proposed changes serves to highlight the direction in which future legislation is likely to take and areas of concern still to be addressed by legislators.

Although the bills were touted as shoring up many of the loopholes that have prevented criminal prosecution of contractors in the past, the narrow construction of the new legislation left much legal territory unaddressed. S. 2147 limited the scope of FBI Theater Investigative Units to areas or proximity to areas where the Armed Forces are conducting a contingency operation and would not, therefore, have provided for the prosecution of American citizens employed as contractors by foreign governments, NGOs, NATO, or the United Nations.<sup>172</sup>

Neither bill provided for any process of review should the federal prosecutors charged with conducting these criminal prosecutions buckle to political pressure and simply refuse to prosecute a contractor employee for human rights abuses committed abroad. Such prosecutions would be costly, time-consuming, and politically contentious, and it is not difficult to imagine a U.S. Attorney intimidated by such pressure. In the event that there is strong case against a U.S. contractor for international human rights violations and American federal jurisdiction can be established, but a federal prosecutor refuses to bring charges, the international community should be able to hold the contractor accountable.

## B. AMENDING THE TVPA

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPA 2008), authorizes funding for the Act in the 2008 to 2011 budgets and amends the Act to more effectively address issues of child labor, forced labor, and sex tourism.<sup>173</sup> The bill, named for the famed British abolitionist, and aimed at combating a form of modern-day slavery, was signed into law 200 years after the Congress banned the importation of slaves into the United States on January 1, 1808.<sup>174</sup> Unfortunately, the version of the TVPA 2008 that was signed into law was stripped of many important provisions, including contractor

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<sup>172</sup> S. 2147 § 3(d).

<sup>173</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5067 (2008).

<sup>174</sup> Eric Foner, Op-Ed, *Forgotten Step Toward Freedom*, N.Y. TIMES, Dec. 30, 2007, at 10, available at <http://www.nytimes.com/2007/12/30/opinion/30foner.html>.

accountability measures and amendments that would have improved the government's ability to prosecute sex trafficking, contained in the bill's previous incarnation.<sup>175</sup> The TVPA 2008 does increase government accountability for contractor behavior. Whereas previous acts had authorized the creation of an Office to Combat and Monitor Trafficking, the TVPA 2008 *orders* that such an office be established.<sup>176</sup> The Act provides for the establishment of an integrated database to record trafficking trends,<sup>177</sup> and suggests that the Secretary of State establish a multilateral framework between countries importing and exporting labor to ensure that workers are protected from trafficking and exploitation.<sup>178</sup> Significantly, the bill would require that the Attorney General report annually on DOD efforts to combat human trafficking, and on federal actions taken to enforce policies against contractors who engage in trafficking or related activities.<sup>179</sup> The Inspectors General of the DOD, State Department, and USAID<sup>180</sup> are compelled by the law to investigate a sample of government contracts and subcontracts that may pose a heightened risk

<sup>175</sup> 122 Stat. 5067; William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007, H.R. 3887, 110th Cong. (2007), *available at* <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h.r.03887>: (H.R. 3887 EH passed overwhelmingly (405 to 2) in the House but did not pass the Senate before the end of the legislative session). It was reintroduced as the William Wilberforce Trafficking Protection Reauthorization Act of 2008, H.R. 7311 in the second session of the 110th Congress with numerous alterations, passed both houses, and became Public Law 110-457 on December 23, 2008. William Wilberforce Trafficking Protection Reauthorization Act of 2008, H.R. 7311, 110th Cong. (2008), *available at* <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR07311:@@L&summ2=m>.

<sup>176</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 102(e)(1), 122 Stat. 5044 (2008).

<sup>177</sup> § 108(a), 122 Stat. at 5050.

<sup>178</sup> § 111, 122 Stat. at 5052.

<sup>179</sup> §§ 231(H)(iii), (I)(i), 122 Stat. at 5073.

<sup>180</sup> TVPA 2008, like previous versions of the Act, spreads the responsibility for contractor accountability throughout many government departments and agencies. The DOL, the DOD, the State Department, the DOJ, and the Attorney General, among others, are charged with the various tasks of monitoring and combating trafficking. As eminent scholars in the area of contractor-accountability studies have posited, it would likely be more effective and more efficient to locate the responsibility for enforcement of the TVPA and other PMSC regulatory measures under the umbrella of a single department. *See* Dickinson, *supra* note 61. If the FBI is, in fact, eventually assigned the task of deploying "Theater Investigative Units" in response to contractor-related incidents of human rights abuse, then the Department of Justice may be the most appropriate body to monitor and prosecute PMSCs involved in trafficking. *See* Security Contractor Accountability Act of 2007, S. 2147, 110th Cong. § 3 (2007), *available at* <http://thomas.loc.gov/cgi-bin/query/z?c110:S.2147.IS>. However, the DOJ's resistance to the important amendments to the TVPA embodied in H.R. 3887 leaves some doubt as to its willingness to take on increased trafficking-related responsibilities. *See generally* John R. Miller, Op-Ed, *The Justice Department, Blind to Slavery*, N.Y. TIMES, July 11, 2008, at 17, *available at* <http://www.nytimes.com/2008/07/11/opinion/11miller.html> (discussion of DOJ's resistance to the bill).

of human trafficking. Some of the factors the agencies will consider in evaluating whether a government contract is abusive are whether a contractor confiscates an employee's passport or otherwise restricts an employee's mobility, abruptly or evasively repatriates employees, or deceives the employee as to the destination of the work.<sup>181</sup> The Inspectors General must then report their findings, including information on whether any abuses uncovered were prosecuted, to Congress.<sup>182</sup>

With regard to sex-trafficking internationally, the bill raises the minimum standards for the elimination of trafficking used to determine tier rankings in the annual State Department Trafficking in Persons (TIP) reports.<sup>183</sup> In addition to information about prosecutions and incarcerations for trafficking, education of government and police officials about trafficking and assistance to victims, TVPA country reports will also evaluate "whether the government of the country has made serious and sustained efforts to reduce the demand for commercial sex acts and participation in international sex tourism by nationals of the country."<sup>184</sup> In its explicit limitation on the length of time a country may stay on the special watch list,<sup>185</sup> the TVPA 2008 addresses one of the most significant shortcomings of previous TVPA bills.<sup>186</sup> As discussed above,<sup>187</sup> allies with sensitive political ties to the United States that have not made significant efforts to combat trafficking have traditionally been permitted to remain on the watch list indefinitely, protected from Tier 3 status and potential sanctions. TVPA 2008 specifies that a country included on the watch list for two consecutive years shall be moved to the Tier 3 list.<sup>188</sup> The president may waive removal of a country to the Tier 3 list, but must report credible evidence to Congress that (1) the country has a written plan to bring itself into compliance with minimum standards, (2) if implemented, the plan would constitute significant efforts, and (3) "the country is devoting sufficient resources to implement the plan."<sup>189</sup> These changes could mark tremendous progress toward improved reporting and

<sup>181</sup> § 232(b)(1)(A)-(D), 122 Stat. at 5073.

<sup>182</sup> § 232(c)(1), 122 Stat. at 5074. The Inspectors General will report to the Senate Committees on Armed Services and Foreign Relations and the House Committees on Armed Services and Foreign Affairs. § 232(c)(3), 122 Stat. at 5074.

<sup>183</sup> *Id.* § 106.

<sup>184</sup> § 106(2)(D), 122 Stat. at 5049.

<sup>185</sup> § 107, 122 Stat. at 5049.

<sup>186</sup> See generally *infra* Sec. III(C) (for discussion of the watch list and other shortcomings of previous TVPA laws).

<sup>187</sup> See note 129 *supra*.

<sup>188</sup> § 107, 122 Stat. at 5049.

<sup>189</sup> *Id.*

enforcement of international compliance with minimum standards for combating trafficking, though it has yet to be seen how frequently presidential waiver authority will be invoked.

Domestically, the bill creates several new trafficking-related criminal offenses, including “enticement into slavery,” “forced labor,” and “benefitting from financial gain in peonage, slavery, and trafficking in persons.”<sup>190</sup> The new offenses reach not only those that violate the new law, but also to those individuals such as landlords who knowingly benefit from violations, or recklessly disregard information that the service was coerced.<sup>191</sup> The new law amends the child sex trafficking law<sup>192</sup> to allow for the prosecution of those that exhibit reckless disregard of the fact that force, fraud, or coercion will be used to cause a child to commit a commercial sex act.<sup>193</sup> Furthermore, the government would no longer need to prove that the defendant knew that the child had not attained the age of eighteen years.<sup>194</sup>

The improvements embodied in TVPA 2008 are not nearly so striking as the amendments that were removed from the original version of the bill, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007 (H.R. 3887).<sup>195</sup> Among the changes proposed in H.R. 3887 that do not appear in the TVPA 2008 are *all* references to “contractors,” some provisions addressing the role of contractors in recruiting and importing individuals for forced labor within the United States, a provision criminalizing arranging sex tourism-related travel, and, the greatest disappointment, an amendment that would have removed the “force, fraud, or coercion” requirement from the criminal offense of sex trafficking.<sup>196</sup> H.R. 3887 passed the House of Representatives by a margin of 405-2 on December 4, 2007, but was then tabled in the Senate following an onslaught of criticism by the DOJ and groups as

<sup>190</sup> § 222(b)(1), (3), (5), 122 Stat. at 5067-68.

<sup>191</sup> § 222(b)(3), (5), 122 Stat. at 5068.

<sup>192</sup> § 222(b)(5), 122 Stat. at 5068.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007, H.R. 3887, 110th Cong. (2007), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h.r.03887>:

<sup>196</sup> *Id.* Chapter 117 would have amended statute, 18 U.S.C. § 2430 Sex Trafficking to read:

“Whoever knowingly, in or affecting interstate or foreign commerce, within the special maritime and territorial jurisdiction of the United States, or in any territory or possession of the United States, persuades, induces, or entices any individual to engage in prostitution for which any person can be charged with an offense, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.”

varied as the American Civil Liberties Union and the Heritage Foundation.<sup>197</sup>

Although the DOJ resisted many of H.R. 3887's amendments to U.S. trafficking law and policy, the greatest single point of contention was the creation of the criminal offense of "aggravated sex trafficking."<sup>198</sup> This offense was defined in the bill as sex trafficking by "force, fraud, or coercion," or trafficking of persons under the age of eighteen.<sup>199</sup> Thus, under H.R. 3887, it would not have been necessary to show "force, fraud, or coercion" to prosecute sex trafficking, but such a showing could be used to establish grounds for the aggravated offense.<sup>200</sup> Opponents of H.R. 3887, including the Erotic Service Providers Union, argued that this change in the statutory language would function to draw every act of prostitution under the definition of "sex trafficking," thereby federalizing all prostitution-related crimes.<sup>201</sup> If true, detractors claimed, this would cause great hardship to prostitutes, even to those working legally, and would heavily burden the DOJ, which would be required to investigate and prosecute the approximately 100,000 prostitution-related offenses that local police and prosecutors normally manage every year.<sup>202</sup>

In addition to the loss of this important provision, the removal of the "force, fraud, or coercion" requirement for the prosecution of sex trafficking, the TVPA also lacks contractor-specific clauses contained in H.R. 3887. Section 202 of H.R. 3887, which addressed issues of forced labor, debt bondage, and indentured servitude in the United States, is entirely absent from the TVPA 2008. H.R. 3887 would have required foreign labor contractors, defined as "any person who for any money or other consideration . . . performs any foreign labor contracting activity,"

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<sup>197</sup> Sex Workers Project, SWP Fact Sheet on Senate Anti-Trafficking Bill, Erotic Service Providers Union, [http://espu-ca.org/wp/?page\\_id=161](http://espu-ca.org/wp/?page_id=161) (last visited Jan. 29, 2009); *Letter to Senate Judiciary Committee of January 23, 2008*, <http://www.usdoj.gov/olp/pdf/global-rights-tvpra-senate-letter012308.pdf>; Brian W. Walsh & Andrew M. Grossman, *Human Trafficking Reauthorization Would Undermine Existing Anti-Trafficking Efforts and Constitutional Federalism*, THE HERITAGE FOUNDATION (Feb. 14, 2008), available at [http://www.heritage.org/Research/LegalIssues/upload/lm\\_21.pdf](http://www.heritage.org/Research/LegalIssues/upload/lm_21.pdf). In a scathing letter to the New York Times, former Ambassador on Human Trafficking for the U.S. State Department, John R. Miller, criticized the Justice Department for obstructing H.R. 3887's progress in the Senate. John R. Miller, *The Justice Department, Blind to Slavery*, THE NEW YORK TIMES (July 11, 2008), available at <http://www.nytimes.com/2008/07/11/opinion/11miller.html>.

<sup>198</sup> H.R. 3887 § 221.

<sup>199</sup> *Id.* at § 221(a)(1).

<sup>200</sup> *Id.*

<sup>201</sup> Sex Workers Project, *supra* note 197.

<sup>202</sup> *Letter to Senate Judiciary Committee of January 23, 2008*, *supra* note 197.

to register with the Department of Labor (DOL).<sup>203</sup> Foreign labor contracting activities include “recruiting, soliciting, hiring, employing, or furnishing, an individual who resides outside of the United States to be employed in the United States.”<sup>204</sup> Employers in the United States would be permitted to use only those foreign labor contractors registered with DOL.<sup>205</sup> H.R. 3887 also mandated that contractors disclose important information about employment opportunities, including location, duration, and conditions of employment, to prospective workers at the time of their recruitment and in writing, in a language understood by the worker.<sup>206</sup> DOL would have been required to create an electronic registration process and investigate and respond to complaints against foreign labor contractors.<sup>207</sup> H.R. 3887 would have required the Secretary of Labor to report on DOL progress in combating forced labor and child labor.<sup>208</sup>

Also entirely removed from TVPA 2008 was H.R. 3887’s strict prohibition on activities that facilitate and profit from sex tourism.<sup>209</sup> The bill would have made it a criminal offense to “for the purpose of commercial advantage or private financial gain” knowingly arrange, induce or procure “the travel of a person in foreign commerce for the purpose of engaging in any commercial sex act.”<sup>210</sup> Under this section, it is also a criminal offense to attempt to engage in such sex tourism-related activities.<sup>211</sup> Arranging or attempting to arrange sex tourism would have been punishable under this section by a fine, up to ten years in prison, or both.<sup>212</sup> In contrast to this strong stance against activities which foster and facilitate the sex tourism industry, TVPA 2008 merely places restrictions on the granting of passports to individuals that have already been convicted of sex trafficking of minors or of sex tourism.<sup>213</sup> Whereas H.R. 3887 would have made it a crime to even attempt to arrange sex tourism for another individual, TVPA 2008 orders that individuals con-

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<sup>203</sup> H.R. 3887 § 202.

<sup>204</sup> *Id.* § 202(b)(1)(B).

<sup>205</sup> *Id.* § 202(g)(6)(C).

<sup>206</sup> *Id.* § 202(g)(2).

<sup>207</sup> *Id.* § 202(e)(1).

<sup>208</sup> *Id.* § 111(a).

<sup>209</sup> *Id.* § 221(g)(1).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* § 221(a)(5)(B).

<sup>212</sup> H.R. 3887 Ch. 117.

<sup>213</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 236, 122 Stat. 5044, 5082 (2008).

victed of sex trafficking of minors or of sex tourism shall not receive passports or shall have their existing passports revoked.<sup>214</sup> The prohibition endures not for the life of the individual, nor even for a statutorily fixed term, but rather covers only the narrow period between conviction of the offense and completion of imprisonment and parole.<sup>215</sup> Demonstrating Congress' reluctance to meaningfully regulate and punish sex tourism, TVPA 2008 replaced a provision criminalizing arranging exploitative travel with the mandate that a convicted child sex trafficker or convicted sex tourist cannot possess a passport between the time of his conviction and the end of his sentencing obligations.<sup>216</sup>

H.R. 3887 endeavored to address the role of U.S. contractors in perpetuating trafficking trends and to ease prosecution of sex trafficking, forced labor, and sex tourism within the United States. TVPA 2008 leaves out the earlier version's most powerful provisions and perpetuates the shortcomings of previous incarnations of the TVPA, leaving serious concerns against which only future amendments and a level of international legal oversight can defend.

Although the legislation and judicial precedent introduced this year mark some progress toward accountability for private security companies that violate international human rights law, the potential for continued abuse and evasion of prosecution is great. So, too, is the responsibility of the United States to recognize the need for regulation of U.S. companies by the international legal community when those companies operate in the international arena. Expansion of U.S. domestic legislation to monitor, regulate, and prosecute PMSC employees undoubtedly represents positive change. Yet, the battle over H.R. 3887 and the resulting disappointments of the TVPA 2008, specifically the deletion of key contractor, sex tourism, and sex trafficking related regulations, demonstrate that the U.S. government has not yet taken full responsibility for eliminating human trafficking within its own borders. Moreover, U.S. resistance to criminal accountability for American citizens under international law remains entrenched, and is reflected in the narrow construction of the new legislation and the reluctance to involve the international community in the effort to regulate U.S. contractors abroad.

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<sup>214</sup> § 236(b)(1)(A), 122 Stat. at 5082.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

### C. A NEW MODEL FOR CONTRACTOR ACCOUNTABILITY?

A November 6, 2007 federal district court ruling posed civil litigation as another possible model for contractor accountability. In the absence of effective criminal prosecution, civil actions may emerge as a stopgap measure to compel PMSC compliance with international human rights norms.

The civil suit in question was filed on behalf of more than 200 Iraqis against two private security companies that provided contract interrogators and interpreters implicated in the human rights abuses committed at Abu Ghraib prison in 2003.<sup>217</sup> The U.S. District Court for the District of Columbia found that contractors who provided their own command structure and supervision of employees, separate from the military chain of command, could be held accountable for human rights abuses committed by workers under government contract.<sup>218</sup> Sued under the Federal Tort Claims Act (FTCA), CACI International and Titan Corporation (now L-3 Communications Titan) claimed that the Act's "combatant activities" affirmative defense preempted the plaintiffs' claims.<sup>219</sup> The defense, designed to protect soldiers in wartime from civil liability, would apply to contractors in the view of the Court, only if their activities "were necessary to and in direct connection with actual hostilities."<sup>220</sup> Moreover, the Court argued, the affirmative defense would justify summary judgment only if there was no question of fact as to whether Titan's linguists and CACI's interrogators "function[ed] as soldiers in all but name."<sup>221</sup>

The Court found that Titan's linguists "were acting under the direct command and exclusive operational control of the military chain of command," and granted summary judgment."<sup>222</sup> The Court determined, however, that there was sufficient evidence that CACI retained "operational control" over its interrogators, at least two of whom were accused of using dogs and "stress positions" to induce prisoners' cooperation, to leave a reasonable question of fact.<sup>223</sup> CACI, which is appealing the de-

<sup>217</sup> Ibrahim v. Titan Corp., 556 F. 2d 1, 2-3 (D.D.C. 2007). See generally Josh White, *Judge Allows Abu Ghraib Lawsuit Against Contractor*, THE WASHINGTON POST (Nov. 7, 2007), available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/06/AR2007110602025.html>.

<sup>218</sup> See Ibrahim, 556 F. 2d at 2-3.

<sup>219</sup> *Id.* (citing Federal Tort Claims Act, 28 U.S.C.A. § 2680(j) (2007)).

<sup>220</sup> *Id.* at 4.

<sup>221</sup> *Id.* at 3.

<sup>222</sup> *Id.* at 4.

<sup>223</sup> *Id.* at 10.

cision to deny its motion for summary judgment, will have the opportunity to raise the affirmative “combatant activities” defense under the FTCA at trial, but the suit, if successful, could set an important precedent as to the liability of private security companies for employees’ human rights abuses.<sup>224</sup> Establishing civil liability could provide an alternative avenue to contractor accountability in the absence of sufficient government regulatory measures.

## CONCLUSION

The intervening period between the DynCorp sex trafficking scandal in 2000 and 2008,<sup>225</sup> has seen new legislation and new approaches to the issue of contractor accountability and human trafficking. Plaguing these opportunities for progress is an underlying reluctance to impose and enforce strict, effective regulation. The recent willingness at the congressional level to address the role of PMSCs in perpetrating human rights abuses is tempered by a lack of political will to truly hold private companies accountable under domestic and international law.

Improvements in monitoring and in civil and criminal prosecution mechanisms are vital to the continued fulfillment of the United States’ promise to combat trafficking around the world. However, without an equal willingness to subject its own trafficking justice policies to oversight in the international community, this promise crumbles to empty hypocrisy.

There is a growing commitment within the academic and activist communities to bring government agencies and private corporations into productive dialogue on contractor accountability for human rights abuses.<sup>226</sup> Workshops and conferences have resulted in a deeper understanding of the omnipresence of PMSCs in the missions of the U.S. Armed Forces, international NGOs, and other bodies operating around

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<sup>224</sup> *Id.* David Dishneau, *Defense Contractor Claims Immunity In Iraq Torture*, THE SEATTLE TIMES (Sept. 26, 2008), available at: [http://seattletimes.nwsources.com/html/localnews/2008206321\\_apmdabughraiblawsuits1stldwrite thru.html](http://seattletimes.nwsources.com/html/localnews/2008206321_apmdabughraiblawsuits1stldwrite thru.html) (in October 2008, CACI filed for dismissal claiming absolute official immunity because the work of its interrogators was performed for the government).

<sup>225</sup> The year in which this paper was authored.

<sup>226</sup> See the Greentree Conference on Regulation of Private Military and Security Companies, March 22-24, 2007 and the Princeton Problem-Solving Workshop Series in Law and Security: A New Legal Framework for Military Contractors? June 8, 2007, available at <http://www.iilj.org/research/GreentreeNotes.asp>.

the world.<sup>227</sup> The guarantee of anonymity attached to statements produced in these discussions has resulted in straightforward assessments of the need for increased employee education and oversight.<sup>228</sup> Statements such as the “Greentree Notes,” resulting from a 2007 workshop at New York University (NYU), constitute a strong foundation for united action with regard to prevention of PMSC involvement in trafficking.<sup>229</sup> This growing dialogue forms a ground for a powerful renovation of corporate self-regulation policies and governmental engagement in PMSC employee regulatory mechanisms.

Striking elements of common ground that emerged from the Greentree conference included an agreement that “states are responsible under international law for the wrongful acts of PMSCs that can be attributed to them.”<sup>230</sup> Public international law potentially applicable to activities of PMSCs includes: human rights law, international humanitarian law, international criminal law, and international labor law.<sup>231</sup> Specifically, “the acts of all persons—regardless of status—carried out in the context of, and associated with, armed conflict must comply with international humanitarian law.”<sup>232</sup> The conference produced further commentary under the section entitled “Action Required” which argues:

Victims of wrongdoing by PMSCs should have access to a remedy. If a victim does not have access to a remedy in the territory in which the wrong occurred, he or she should have access to a remedy in the state of incorporation of the PMSC or in the contracting state. Immunity

<sup>227</sup> *Id.*

<sup>228</sup> Greentree Conference, *supra* note 226. This condition helped ensure the participation of senior officials representing PMSCs in the workshop. Among those attending were Doug Brooks, President of the International Peace Operations Association (IPOA), the lobby group for American PMSCs, and Andrew Bearpark, Director General of the British Association of Private Security Companies. From within the companies themselves were Lee Van Arsdale, CEO of Triple Canopy, Inc., one of the largest American PMSCs, Maj. Gen. (Ret.) John Holmes, Director of Erynis International Ltd., a British PMSC, Jim Schmitt, Vice President of Strategic Development for ArmorGroup North America, and Joe Mayo, Director of EOD Technologies. Also participating were Col. Christopher T. Mayer, Chief of Staff of the Pentagon’s Defense Reconstruction Support Office, and representatives of the Canadian, British and South African governments. Non-profit activist and academic groups such as the International Committee of the Red Cross and the International Peace Academy, among many others, represented the international community.

<sup>229</sup> CHAIRMAN’S NOTES FROM THE GREENTREE CONFERENCE ON REGULATION OF PRIVATE MILITARY AND SECURITY COMPANIES, INSTITUTE FOR INTERNATIONAL LAW AND JUSTICE, NEW YORK UNIVERSITY SCHOOL OF LAW (MARCH 22-24, 2007) (“GREENTREE NOTES”), *available at* <http://www.iilj.org/research/GreentreeNotes.asp>. The full report of the workshop is *available at* <http://www.iilj.org/research/documents/Regulatingtheprivatecommercialmilitarysector.1.pdf>.

<sup>230</sup> *Id.* ¶ 4.

<sup>231</sup> *Id.* ¶ 5.

<sup>232</sup> *Id.*

should not normally be granted to PMSCs. Where it is granted, immunity in one jurisdiction must never result in impunity. States must exercise oversight of contracts for private military and/or security services. States should report on their contracts for private military and/or security services to an appropriate national oversight body, such as a parliament. Non-state clients of PMSCs (such as intergovernmental organizations, NGOs, corporations) should be transparent in their dealings with PMSCs and develop best practices for such contracts. A global code of conduct should be adopted. A short handbook of obligations of PMSC personnel should be drafted and widely disseminated.<sup>233</sup>

In advocating increased efforts in prevention and legal accountability, the participants of the workshop recognized the fundamentally international impact of private military contractors and the enormous potential for abuse of power on an international scale. Although it is admirable that workshops such as those at NYU and Princeton have resulted in such specific recommendations for future preventative measures, legislative and corporate regulatory policies that effectively ensure PMSC accountability have yet to be enacted. An undercurrent of concern regarding the adequacy of national and corporate oversight mechanisms shadows the Greentree workshop's conclusions: "Effective state oversight capacity is necessary but insufficient to address all concerns about PMSCs. Self-regulation is necessary but insufficient to address all concerns about PMSCs."<sup>234</sup>

In addition to the shortcomings in domestic policies outlined above, there are undoubtedly a great many improvements that can be made to domestic policies governing criminal prosecution and corporate self-regulation. A report similar to the Trafficking in Persons Reports should be written annually to account for the activities of contractors working for the United States government, headquartered in the United States, or in any other way substantially associated with the U.S. Compliance with international human rights norms should be addressed, as should any complaints lodged with international, regional, or domestic law enforcement or judicial bodies.

In order to bid for government contracts, companies should be held to standards similar to those by which states are measured in the TVPA (1) education programs for employees, particularly those that will be deployed in the field and will have access to arms and to the local public, (2) an internal review process for investigating trafficking accusa-

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<sup>233</sup> *Id.* ¶ 12-18.

<sup>234</sup> *Id. Id.* ¶ 10-11.

tions, (3) mandatory reporting of trafficking employees to the U.S. government, and (4) a willingness to cooperate with domestic and international investigation of trafficking claims.<sup>235</sup> The Government Accountability Office (GAO) and/or the Department of Justice should be empowered to audit company practices and any company that is deemed to not be complying with minimum standards should be put on a watch list. If improvements are not made within a determined period of time, negligent companies should lose their contracts and the right to bid on new contracts until they reform their practices.

Just as there is a body within the State Department charged with investigating and prosecuting organized crime, there should be a single government body, either within the DOJ or within the State Department, responsible for investigating and prosecuting contractors.<sup>236</sup> It should no longer be left to individual U.S. Attorneys' Offices to decide whether or not to pursue charges against contractors involved in sex trafficking and the funding for such prosecutions should be undertaken by a body of government with greater financial resources.

The Trafficking in Persons Reports issued by the State Department could also be improved. Certainly, contractor accountability mechanisms including corporate self-regulation policies, and civil and criminal systems for dealing with contractor-related complaints, should be included as criteria for TIP report tier rankings. Although it may be difficult to rank states "in flux," such as Iraq, there should be a limit on the amount of time after a government takes hold that a state can be exempted from the ranking system. While evidence, discussed in the sections above, demonstrates Iraq and its neighboring states function as a hub of human trafficking, Iraq has been listed for the sixth consecutive year as a "Special Case" in the 2008 TIP report.<sup>237</sup> Though this categorization is arguably accurate, it should not be indefinite. The 2007 TIP report outlined specific steps the Iraqi government should take to combat trafficking and the State Department should include a deadline by which

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<sup>235</sup> For a detailed proposal for a licensing system for companies bidding for U.S. government contracts see United Nations Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Rights of People to Self Determination & The Wisconsin International Law Society, *Model Law for the Regulation of Private Military and Security Companies*, WIS INT'L LAW J. (2009), *forthcoming*.

<sup>236</sup> Dickinson, *supra* note 61; Security Contractor Accountability Act of 2007, S. 2147, 110<sup>th</sup> Cong. (2007).

<sup>237</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5067 (2008).

Iraq will be included in the Tier 3 rankings if it continues to fail to meet minimum standards.<sup>238</sup>

Finally, regarding violations of international humanitarian and criminal law, the decision to prosecute the illegal activities of private military and security companies should not lie with the United States alone. The most powerful minds in the field of private security have recognized, on some level, that it is not sufficient to leave the responsibility for regulating the behavior of PMSCs solely in the hands of the agencies that hire them and the corporations that profit from military support contracts abroad.<sup>239</sup> Rather, even these heavily invested corporate and governmental representatives appreciate: “[d]evelopment of a regulatory framework must recognize the rights, interests, and/or responsibilities of states and other clients, the industry (including personnel), international and national oversight bodies, and affected communities.”<sup>240</sup> Fundamentally, sex trafficking is an international injustice, PMSCs are international actors, and an international regulatory and prosecutorial framework is necessary to respond successfully to contractor involvement in human exploitation worldwide.<sup>241</sup>

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<sup>238</sup> 2007 Report, *supra* note 4.

<sup>239</sup> CHAIRMAN’S NOTES FROM THE GREENTREE CONFERENCE, *supra* note 226.

<sup>240</sup> *Id.* ¶ 9.

<sup>241</sup> Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 2, 199 Stat. 3558 (2006). (the State Department acknowledged this interrelationship, declaring:

“Congress finds the following: International and human rights organizations have documented a correlation between international deployments of military and civilian peacekeepers and aid workers and a resulting increase in the number of women and girls trafficked into prostitution in post-conflict regions. The involvement of employees and contractors of the United States Government and members of the Armed Forces in trafficking in persons, facilitating the trafficking in persons, or exploiting the victims of trafficking in persons is inconsistent with United States laws and policies and undermines the credibility and mission of United States Government programs in post-conflict regions. Further measures are needed to ensure that United States Government personnel and contractors are held accountable for involvement with acts of trafficking in persons, including by expanding United States criminal jurisdiction to all United States Government contractors abroad.”