

## NOTES

### BAGHDAD BOUND: FORCED LABOR OF THIRD-COUNTRY NATIONALS IN IRAQ

*Amy Kathryn Brown\**

Of course, many people think there is no such thing as slavery anymore, and I was one of those people just a few years ago.<sup>1</sup>

#### I. INTRODUCTION

In 2004, twelve men from a tiny village in Nepal signed employment contracts with a labor recruiter to work at a five-star hotel in Amman, Jordan.<sup>2</sup> The men were shipped instead to work for a U.S. subcontractor in Iraq, where they were ultimately kidnapped from the most dangerous stretch of the Amman–Baghdad Highway and executed by Iraqi insurgents.<sup>3</sup>

In Kuwait City, another group of Nepalese workers, who had knowingly signed contracts to work in Iraq for Halliburton's former<sup>4</sup>

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1. KEVIN BALES, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY* 6 (2d ed. 2004).

2. Cam Simpson, *Iraq War Contractors Ordered to End Abuses*, CHICAGO TRIB., Apr. 24, 2006, at 1.

3. *Id.* For documentary footage of the appalling working conditions faced by third-country nationals (TCNs) in Iraq, particularly in equipment convoys, see also *THE WAR TAPES* (SenArt Films 2006). While U.S. military vehicles commonly lack protective armor, TCNs' trucks often lack even windshields. *See id.*

4. *See* Press Release, Halliburton Company, Halliburton Completes Separation of KBR (Apr. 5, 2007), available at [http://www.halliburton.com/default/main/halliburton/eng/news/source\\_files/press\\_release/2007/corpnws\\_040507a.html](http://www.halliburton.com/default/main/halliburton/eng/news/source_files/news.jsp?newsurl=/default/main/halliburton/eng/news/source_files/press_release/2007/corpnws_040507a.html) (announcing KBR is no longer part of Halliburton).

subsidiary KBR, witnessed the executions on television and requested to be returned to Nepal.<sup>5</sup> The subcontractor refused to return the men's passports and later threatened to leave them on the streets of Kuwait City with no pay if they did not enter Iraq.<sup>6</sup> A Nepalese government official intervened and brought the workers safely back to Nepal.<sup>7</sup>

Of the roughly 48,000 contract laborers working for KBR in Iraq, an estimated 35,000 are third-country nationals (TCNs).<sup>8</sup> TCNs are non-American foreign workers brought from outside Iraq to work in that country. Recent investigations by the U.S. military reveal that abuses like these—subcontractors withholding TCNs' passports, charging exorbitant recruiting fees, lying to them about employment terms, and trafficking them into Iraq under threat of starvation and/or abandonment—are widespread.<sup>9</sup>

Initially, neither the U.S. government nor the multinational corporations with contracts in Iraq acknowledged any responsibility for these alarming practices.<sup>10</sup> Army officials maintained that these problems "are not Army issues," while Halliburton and KBR insisted that any concerns about subcontractor recruitment methods "should be directed to the subcontractor."<sup>11</sup>

For the first time, the Department of State's 2006 annual *Trafficking in Persons Report* acknowledged that Department of Defense (DoD) contractors and subcontractors in Iraq had violated U.S. legislation aimed at eliminating human trafficking.<sup>12</sup> The DoD,

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5. Cam Simpson, *Rescue Spares Some Workers: 'They Told Us That We Had to Go to Iraq'*, CHICAGO TRIB., Oct. 10, 2005, at 9.

6. *Id.* One of the Nepalese workers explained: "[Kuwaiti supervisors] told us that we could not return to Nepal . . . because we did not have the ticket and passport, or any money." *Id.*

7. *Id.*

8. Simpson, *supra* note 2.

9. *See id.* Some U.S. contract workers claim their employers retaliated against them for protesting the substandard working conditions of TCNs with whom they worked in Iraq. Ryan Clark, *Iraq: Work Cut Short After Complaining About Abuse of Third-Country Workers*, CINCINNATI ENQUIRER, OCT. 13, 2005, available at <http://www.corpwatch.org/article.php?id=12689>.

10. *See* Elise Labott, *Probe into Iraq Trafficking Claims*, CNN.COM, May 5, 2004, <http://edition.cnn.com/2004/US/05/05/iraq.india.trafficking/>. Reports of the human trafficking of TCNs in Iraq began to surface in May 2004 when Indian workers claimed they signed employment contracts to work in Kuwait, but were forced to work in Iraq. *See id.*

11. Simpson, *supra* note 2.

12. OFFICE TO MONITOR & COMBAT TRAFFICKING IN PERSONS, U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 19 (2006), available at <http://www.state.gov/documents/organization/66086.pdf> [hereinafter 2006 TRAFFICKING REPORT]. The report described the problem as follows:

resisting intense pressure from defense-contractor lobbying groups,<sup>13</sup> issued guidelines aimed at curbing the subcontractor violations,<sup>14</sup> but human rights advocates warn that the new DoD guidelines governing contractor practices in Iraq merely formalize existing violations and provide little real protection for TCNs.<sup>15</sup>

For instance, although the DoD guidelines order all contractors to return workers' confiscated passports immediately,<sup>16</sup> other important reforms will only be put into practice by altering the language of *future* DoD contracts.<sup>17</sup> Furthermore, the new rules do not require contractors to ensure that subcontractors are not in fact engaged in human trafficking.<sup>18</sup> Perhaps more importantly, the new DoD regulations do not affect Department of State contracts.<sup>19</sup> Finally, there is still no mechanism to ensure that contractors who have committed serious human rights violations in the past are barred from securing future U.S. military contracts.

This Note begins with an overview of modern day slavery, highlights the differences between traditional and contemporary slavery, and explains the involvement of multinational corporations—particularly private military contractors—in these abuses. It then examines the laws governing human trafficking and forced labor perpetrated by multinational contractors and subcontractors against third country nationals in Iraq, including applicable international and domestic law and recent corrective DoD

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A recent DOD investigation, prompted by late 2005 media allegations of labor trafficking in Iraq, identified a number of abuses, some of them considered widespread, committed by DOD contractors or subcontractors of third country national (TCN) workers in Iraq. Some of these abuses are indicative of trafficking in persons, and include: illegal confiscation of TCNs' passports; deceptive hiring practices and excessive recruitment fees; substandard living conditions; and circumvention of Iraqi immigration procedures. The TCNs are largely low-skilled workers from Nepal, India, Pakistan, Bangladesh, Sri Lanka, and the Philippines.

*Id.*

13. Cam Simpson, *U.S. Stalls on Human Trafficking: Pentagon Has Yet to Ban Contractors from Using Forced Labor*, CHICAGO TRIB., Dec. 27, 2005, at 1.

14. See 2006 TRAFFICKING REPORT, *supra* note 12, at 19.

15. Simpson, *supra* note 13.

16. 2006 TRAFFICKING REPORT, *supra* note 12, at 19.

17. Simpson, *supra* note 2.

18. Simpson, *supra* note 13. Indeed, defense contractor lobbyists rejected any "requirement that says you have to flow this through to everybody" and instead pushed for a provision that would only require contractors to report subcontractors who refused to sign antitrafficking contract clauses. *Id.*

19. Cam Simpson, *U.S. Tax Dollars Tied to Human Trafficking, Report Alleges*, CHICAGO TRIB., June 6, 2006, at 8. The Kuwaiti firm implicated in the Nepalese worker scandal holds a reconstruction contract with the Department of State, not the DoD. *Id.*

guidelines. Then, this Note explores the scant legal remedies available to victims of forced labor in this context and highlights the difficulties of holding contractors and subcontractors accountable for such abuses. Finally, it proposes several alternatives to strengthen applicable laws and regulations: a more expansive reading of the Thirteenth Amendment that would reach multinational corporations involved in forced labor abroad; a mechanism within the DoD that would police military contractors and subcontractors in Iraq for human trafficking abuses; and a policy that would deny known perpetrators of human trafficking (or any other serious human rights violation) contracts with the U.S. military for a predetermined period of time.

The aim of these proposals is twofold. First, to ensure that TCNs working in Iraq (and other dangerous conflict zones) do so willingly and not as unapprised victims of contemporary slavery practices. Second, to guarantee that military support contractors and subcontractors take concrete and meaningful measures to eradicate human trafficking from their operations.

## II. MODERN SLAVERY IN A GLOBALIZED WORLD

The global economy has created new markets for slavery. Although similar in some respects to traditional slavery, modern slavery is even more widespread and more difficult to combat. The existence of human trafficking and forced labor of TCNs in Iraq, although alarming, is far from an isolated phenomenon. This Part explores the face of modern slavery and the involvement of multinational corporations, especially military support contractors, in these deplorable practices.

### A. *The Rise of Modern Slavery*

It is impossible to precisely calculate the number of slaves in the world today, but estimates range from 27 million to 200 million.<sup>20</sup> Kevin Bales, one of the foremost scholars of modern slavery, asserts “[t]here are more slaves alive today than all the people stolen from Africa in the time of the transatlantic slave trade. Put another way, today’s slave population is greater than the population of Canada, and six times greater than the population of Israel.”<sup>21</sup>

Modern slavery is structurally, legally, and economically different from traditional forms of slavery.<sup>22</sup> In the antebellum United States, the concept of “otherness”—the idea that slaves are

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20. BALES, *supra* note 1, at 8-9. Bales places his own best estimate at 27 million. *Id.*

21. *Id.* at 9.

22. *See id.* at 6-33.

inherently different from and inferior to their masters—was necessary to justify slave ownership.<sup>23</sup> Today, the supremacy of global capital no longer requires the same contortions of legal and moral reasoning to excuse modern slavery.<sup>24</sup>

The increase in world population since World War II (especially in the Third World), coupled with rising poverty rates, has created a growing supply of slave labor.<sup>25</sup> This in turn has pushed the cost of slave “holdership”<sup>26</sup> so low as to make modern slaves disposable.<sup>27</sup> This disposable quality is reinforced by the fact that the modern business of slavery does not require a costly up-front investment.<sup>28</sup> When slaves were relatively expensive to purchase—as in the antebellum American South—slave owners had powerful incentives to invest in the health and longevity of their slaves, primarily to ensure long-term profitability.<sup>29</sup>

In contrast, the business of modern slavery is cheap and the profits to be reaped from it have never been greater.<sup>30</sup> Consequently, contemporary master-slave relationships are often short-lived, violent, and marked by utter indifference.<sup>31</sup> Modern slavery also has a different face. The shift from race-based exploitation to class-based exploitation has generated enormous increases in slavery within ethnic groups and smaller geographic regions.<sup>32</sup> Bales summarizes these differences as follows:

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23. *Id.* at 10. Other scholars assert that slavery has existed within ethnic groups and in numerous forms for centuries and that limiting the idea of slavery to the prevailing Western concept of racial domination makes it more difficult to identify and eradicate. See ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY*, at viii (1982); A. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 VA. J. INT'L L. 303, 317-20 (1999).

24. BALES, *supra* note 1, at 10.

25. *Id.* at 10-12.

26. *Id.* Bales insists that “ownership” is no longer a relevant term because slavery is prohibited throughout the world and slaveholders no longer have any legal rights or obligations to the slaves they control. *Id.* at 5. In fact, Bales argues that the lack of any legally recognized relationship works to the benefit of the slaveholders, who enjoy “total control without any responsibility for what they own.” *Id.*

27. *Id.* at 14-15.

28. *Id.* at 14.

29. *Id.* at 15.

30. *Id.* at 14-19. See also KEVIN BALES, *TESTING A THEORY OF MODERN SLAVERY* 9 (2006), <http://www.yale.edu/glc/events/cbss/Bales.pdf>.

31. BALES, *supra* note 1, at 17.

32. *Id.* at 10-11.

<i>Old Slavery</i>	<i>New Slavery</i>
Legal ownership asserted	Legal ownership avoided
High purchase cost	Very low purchase cost
Low profits	Very high profits
Shortage of potential slaves	Glut of potential slaves
Long-term relationship	Short-term relationship
Slaves maintained	Slaves disposable
Ethnic differences important	Ethnic differences not important <sup>33</sup>

Finally, modern forms of slavery tend to flourish in countries such as Iraq where legal systems have broken down due to war and/or political unrest, and where corruption is widespread.<sup>34</sup>

Social and cultural scholars assert that, despite its changed forms, the basic experience of slavery is much the same. Slavery continues to signify a kind of “social death,” robbing the slave of much more than his or her labor power.<sup>35</sup> Effectively cut off from ties to family, traditions, and culture, the slave ceases to have any meaningful personal existence and is defined primarily by his relationship with his master.<sup>36</sup>

### *B. The Forms of Modern Slavery*

Modern slavery falls into three broad categories: chattel slavery, debt bondage, and contract slavery.<sup>37</sup> Chattel slavery is the most similar to traditional slavery.<sup>38</sup> Workers remain in the servitude of their owners for the duration of their lives and their children are slaves from birth.<sup>39</sup> There is no employment agreement involved;

33. *Id.* at 15.

34. *Id.* at 29-31.

35. PATTERSON, *supra* note 23, at 7-8.

36. *Id.* Indeed, some scholars believe that social science theories are more effective than legal theories in recognizing and explaining the ever-adapting practices of modern slavery. *See, e.g.*, KEVIN BALES, UNDERSTANDING GLOBAL SLAVERY 54-55 (2005). Social scientists also stress that ascribing moral judgments such as “evil” to modern slavery does not help to combat it, because blanket moral judgments do not allow for any meaningful intervention. *Id.* at 24-39. Calling a slaveholder evil also precludes any understanding of the root causes of modern slavery, which are largely economic in nature. *Id.* at 25. As Bales remarks, “Almost all the actual slaveholders I have met and interviewed were family men who thought of themselves as businessmen. Pillars of the local community, they were well integrated socially, well connected legally and politically, and well rewarded financially.” *Id.*

37. BALES, *supra* note 1, at 19-20. This Note does not address the equally insidious practice of sex slavery. For an overview of sex slavery and the law, see BALES, *supra* note 36, at 65-68.

38. BALES, *supra* note 1, at 19.

39. *See id.* at 19. For a modern survey of chattel slavery throughout the world, see generally ROGER SAWYER, SLAVERY IN THE TWENTIETH CENTURY 12-31 (1986).

workers are taken by force and held against their will, often under threat of physical harm or starvation.<sup>40</sup>

In contrast, debt bondage requires the worker to assume a debt that must be repaid in order to secure his or her freedom to leave that job and seek another.<sup>41</sup> Although this appears on its face to be a voluntary economic arrangement, the value of the worker's labor is never applied to the debt or the worker is so poorly compensated that it is physically impossible for him to ever fulfill the original debt obligation.<sup>42</sup> As such, the worker is forced to work for many years (or a lifetime) in the futile attempt to pay off the initial debt.<sup>43</sup> Many workers in this situation are held against their will under threat of physical violence.<sup>44</sup> Finally, another menacing element of the debt bondage system is that some overseers sell families they perceive as "not working hard enough . . . to another . . . owner."<sup>45</sup> Slaveholders can further intimidate by threatening to sell the individual or family to another overseer who is "notorious for bad working conditions and bad treatment."<sup>46</sup>

Contract slavery is similar to debt bondage in that the worker voluntarily agrees to certain terms of employment and signs a labor contract.<sup>47</sup> Contract slavery is the second-most prevalent form of modern slavery and is especially pernicious because the labor contract, valid on its face, is used to mask the violence and control exerted over the worker after the contract is signed.<sup>48</sup> It is also an excellent recruitment tool because it reassures the worker that the job he or she contracts for is indeed legitimate, even if those promises later turn out to be false.<sup>49</sup> In Iraq, these sham contracts form the basis for subsequent trafficking and forced labor of TCNs.<sup>50</sup>

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40. See BALES, *supra* note 1, at 19; see also Simpson, *supra* note 2, at 1.

41. BALES, *supra* note 1, at 19-20.

42. See *id.*

43. See *id.* at 155-56.

44. See *id.* at 157.

45. See *id.* at 158.

46. *Id.* at 159.

47. See *id.* at 20, 26.

48. *Id.* at 20. Contract slavery is the "most rapidly growing form of slavery" and is "most often found in Southeast Asia, Brazil, some Arab states, and some parts of the Indian subcontinent." *Id.*

49. *Id.* at 26.

50. See Simpson, *supra* note 2.

C. *Multinational Corporations and Modern Slavery*

Multinational corporations (MNCs) are corporations that have business establishments or affiliates in multiple countries.<sup>51</sup> As evidenced by the move of manufacturing and service industry jobs in recent years, more and more MNCs are opting to move production to countries where labor costs and operational regulations are minimal. With the proliferation of MNCs, allegations of corporate involvement in international human rights abuses committed abroad have also increased.<sup>52</sup>

Many of the countries in which MNCs operate lack effective legal and law enforcement systems to address basic human rights abuses.<sup>53</sup> In some cases, the host government is itself carrying out systematic human rights abuses against its citizens.<sup>54</sup> In certain industries that require the extraction of natural resources (e.g., gas, diamonds, and coal), MNCs team up with repressive governments to gain access to those resources.<sup>55</sup> For example, during the early 1990s in Myanmar (Burma), the military government routinely used forced labor against its citizens to accomplish governmental and military objectives.<sup>56</sup> Despite warnings from human rights groups about forced labor in Myanmar, the California-based Unocal Corporation contracted with Myanmar's government to build an oil pipeline there.<sup>57</sup>

Allegations of U.S. involvement in forced labor abroad have also arisen in the manufacturing and agricultural industries.<sup>58</sup> The late 1990s witnessed a surge of reports and lawsuits asserting that high-profile clothing manufacturers such as The Gap and Abercrombie & Fitch were profiting from forced labor in their overseas garment

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51. See William H. Meyer, *Human Rights and MNCs: Theory Versus Quantitative Analysis*, 18 HUM. RTS. Q. 369 (1996). Corporations that transact business on a global scale are also referred to as multinational enterprises and/or transnational corporations. See PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 12-15 (1995).

52. Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 92 (2002).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 132-33.

57. *Id.* at 132.

58. See Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 989-92 (2002).

factories.<sup>59</sup> In addition, news reports exposed the use of cocoa harvested by West African slaves in U.S. chocolate manufacturing.<sup>60</sup>

Recent advances in U.S. law allow MNCs operating in conjunction with repressive regimes to be held criminally complicit for the government's human rights abuses.<sup>61</sup> More importantly, MNCs who more directly use and benefit from forced labor—even in the absence of host government repression—can be held independently liable for such conduct.<sup>62</sup>

However, despite these legal victories, the reality of policing human rights violations by MNCs abroad remains daunting. Companies can effectively insulate themselves from liability by constructing attenuated contractual relationships to strengthen a defense that they did not know about or contribute to the seemingly remote violations.<sup>63</sup> In Iraq, for example, the violations begin with “the conduct of village recruiters and human brokers across the globe who are several links up the chain from the subcontractors ultimately employing workers in Iraq.”<sup>64</sup> These extended contractual chains make it even more difficult to assess and police modern slave practices.

#### D. *Private Military Contractors, the U.S. Military, and Modern Slavery*

Civilians have accompanied the U.S. military into battle since the Revolutionary War.<sup>65</sup> It was not until the Civil War, however,

59. See *id.* at 990-91; see also BALES, *supra* note 1, at 236.

60. See Sumana Chatterjee, *Much of America's Sweets Made Possible Through Slave Labor on Ivory Coast*, KNIGHT RIDDER NEWS SERV., June 25, 2001, available at <http://www.globalexchange.org/campaigns/fairtrade/cocoa/knightRidder062501e.html>. In response to negative media coverage and consumer pressure, the World Cocoa Foundation and the Chocolate Manufacturers Association signed a protocol committing themselves to the elimination of child labor in that industry. See generally CHOCOLATE MFRS. ASS'N, PROTOCOL FOR THE GROWING AND PROCESSING OF COCOA BEANS AND THEIR DERIVATIVE PRODUCTS IN A MANNER THAT COMPLIES WITH ILO CONVENTION 182 CONCERNING THE PROHIBITION AND IMMEDIATE ACTION FOR THE ELIMINATION OF THE WORST FORMS OF CHILD LABOR (2001), <http://www.cocoainitiative.org/images/stories/pdf/harkin%20engel%20protocol.pdf>.

61. See Ramasastry, *supra* note 52, at 132-33.

62. See *id.* at 133.

63. See *Doe I v. Unocal Corp.*, 395 F.3d 932, 950-53 (9th Cir. 2002). The Ninth Circuit has not subsequently revisited the merits of this opinion, except to order that it carry no precedential weight. See *Doe I v. Unocal Corp.*, 395 F.3d 978 (9th Cir. 2003) (granting rehearing en banc). After the parties settled, the Ninth Circuit dismissed the appeal and vacated the order of the court below. *Doe I v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005), *vacating Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000).

64. Simpson, *supra* note 2.

65. Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 369, 373 (2004).

that their permanent role in U.S. military operations was established.<sup>66</sup> Civilian employees were heavily involved in World War II and numbered approximately 9000 during the Vietnam War.<sup>67</sup>

In recent decades, due to the changing nature of warfare and to desires of recent U.S. administrations to outsource all nonessential military functions to private contractors, military support personnel have been used in even greater numbers.<sup>68</sup> During the Balkan wars of the 1990s, for example, “contractor employees outnumbered military personnel, with 12,000 contractors supporting 9000 troops.”<sup>69</sup>

In addition to paring down the size of the U.S. military, the government also began to limit its contractual relationships to a handful of companies. In August 1992, the U.S. Army Corps of Engineers awarded Halliburton the unprecedented Logistics Civil Augmentation Program contract, “which basically meant that the federal government had an open-ended mandate and budget to send Halliburton anywhere in the world to support military operations.”<sup>70</sup>

In December 1992, Halliburton personnel were deployed to Mogadishu within twenty-four hours of the U.S. military intervention in Somalia.<sup>71</sup> When Halliburton left the country three years later, it was paid \$109 million and had become Somalia’s

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66. K. Elizabeth Waits, *Avoiding the “Legal Bermuda Triangle”: The Military Extraterritorial Jurisdiction Act’s Unprecedented Expansion of U.S. Criminal Jurisdiction over Foreign Nationals*, 23 ARIZ. J. INT’L & COMP. L. 493, 498 (2006).

67. *Id.*

68. *See id.* at 500-04. In 2003, former Secretary of Defense Donald Rumsfeld, pushing for increased outsourcing of military jobs to private contractors, estimated that there were “something in the neighborhood of 300,000 men and women in uniform doing jobs that aren’t for men and women in uniform.” Anthony Bianco & Stephanie Anderson Forest, *Outsourcing War*, BUS. WK., Sept. 15, 2003, at 68. Military privatization is not an anomaly. The move to privatize traditionally public functions has become so much a part of our accepted economic and social landscape that military privatization is viewed as a natural and acceptable phenomenon. As Jon Michaels astutely asserts:

[A]lthough these contracts and the harms that may accompany them are worrisome from an array of policy perspectives, conceptually speaking they are unremarkable: Driven by the same market-efficiency impulses that motivate the outsourcing of sanitation, catering, and even prison management responsibilities, the contracts to rebuild roads and schools in failed states and to manufacture new weapons do not compel us to rethink our basic understandings of American privatization.

Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1007 (2004).

69. Waits, *supra* note 66, at 499.

70. PRATAP CHATTERJEE, *IRAQ, INC.: A PROFITABLE OCCUPATION* 41 (2004).

71. *Id.*

largest employer.<sup>72</sup> During the U.S.-led invasion of Afghanistan, Brown & Root, a subsidiary of Halliburton, ran the two major U.S. military bases at Kandahar and Bagram.<sup>73</sup> In late 2002, the U.S. military sent Halliburton to Kuwait to set up military bases for the future invasion of Iraq.<sup>74</sup>

Private military support contracting carries with it a particular set of legal problems. Civilian contractors cannot be prosecuted for crimes under the Uniform Code of Military Justice.<sup>75</sup> Contractors also escape prosecution by local authorities because host governments often have no interest in or are incapable of asserting jurisdiction over the contractor.<sup>76</sup> More importantly, in Iraq the Coalition Provisional Authority issued decrees in 2004 “grant[ing] foreign contractors immunity from criminal prosecution by the Iraqi authorities.”<sup>77</sup> For the past several decades, contractors have been “accountable only to their employer[s].”<sup>78</sup>

In Bosnia, employees of private military company DynCorp bought girls as young as twelve from local brothels and kept them as sex slaves.<sup>79</sup> Both Bosnian authorities and the U.S. military were aware of these practices, but the contractors escaped prosecution because neither country could assert jurisdiction over the perpetrators.<sup>80</sup>

The Military Extraterritorial Jurisdiction Act of 2000 (MEJA)<sup>81</sup> attempted to close these gaps by authorizing prosecution in U.S. federal courts of individual military contractors for crimes committed abroad.<sup>82</sup> Despite this potentially powerful legal tool and widespread reports of human trafficking violations in Iraq, to date no U.S.

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72. *Id.* Military support contracting is very lucrative for both U.S. contractor companies and their U.S. employees. While U.S. military personnel earned an average of \$69,000 in 2000, U.S. contractor employees earned \$108,000. Jason Peckenpaugh, *Army Contractors Earn Higher Salaries, Study Finds*, GOV'T EXECUTIVE, July 26, 2001, available at <http://govexec.com/dailyfed/0701/072601p1.htm>. The discrepancy is actually higher—the value of contractor benefits is not reflected in the estimated figure. *Id.*

73. CHATTERJEE, *supra* note 70, at 45-46.

74. *Id.* at 46.

75. See Waits, *supra* note 66, at 507-09.

76. P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 537 (2004).

77. Press Release, Human Rights Watch, Iraq: Pass New Law Ending Immunity for Contractors (Jan. 9, 2008), available at 2008 WLNR 466515.

78. Waits, *supra* note 66, at 505.

79. *Id.* at 493-94.

80. *Id.* at 494.

81. Pub. L. No. 106-523, 114 Stat. 2488 (codified as amended at 18 U.S.C. §§ 3261-3267 (2006)).

82. 18 U.S.C. § 3261 (2006).

military contractor personnel have been prosecuted for human trafficking under MEJA.<sup>83</sup>

*E. Private Military Contractors in Iraq*

The U.S. invasion of Iraq has proved extremely lucrative for U.S.-based contractors, especially for Halliburton. Despite reports of overcharging, mismanagement, and fraudulent accounting, Halliburton received \$4.3 billion in contracts from the DoD in 2003, nearly twice the value of DoD contracts it was awarded over the previous five years.<sup>84</sup>

As of 2006, Halliburton's then-subsubsidiary KBR held \$12 billion in U.S. military support contracts in Iraq and "ha[d] outsourced much of that work to more than 200 subcontractors, many of them based in Middle Eastern nations condemned by the U.S. for failing to stem human trafficking into their own borders or for perpetrating other human-rights abuses against foreign workers."<sup>85</sup> These subcontractors, in turn, rely on human brokers to supply them with inexpensive labor.<sup>86</sup>

III. HUMAN TRAFFICKING AND FORCED LABOR OF TCNS IN IRAQ

*A. How TCNs Are Lured to Iraq*

Human brokers solicit workers from very poor Asian countries such as Sri Lanka and Nepal, often with false employment contracts.<sup>87</sup> As in the case of the aforementioned Nepalese workers, these human brokers, who later connect the workers with contractors or subcontractors in Iraq, tell workers they will be guaranteed employment in "safe" zones such as Jordan or Kuwait.<sup>88</sup> Once workers have signed false employment contracts and have been

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83. See Letter from Martina E. Vandenberg, Jenner & Block LLP & Sarah E. Mendelson, Center for Strategic and International Studies, to Felisha Hitt, Department of Defense (Jan. 26, 2007), available at [http://www.csis.org/images/stories/Russia%20and%20Eurasia/070126\\_russia\\_trafficking.pdf](http://www.csis.org/images/stories/Russia%20and%20Eurasia/070126_russia_trafficking.pdf) [hereinafter CSIS Letter].

84. Andre Verloy & Daniel Politi, *Halliburton Contracts Balloon: Despite Being Under an Investigative Cloud, Company Gets \$4.3 Billion in 2003*, CTR. FOR PUB. INTEGRITY, Aug. 18, 2004, <http://publicintegrity.org/wow/report.aspx?aid=366>. In 2004, Halliburton held more than \$11.4 billion in contracts for postwar projects in Iraq and Afghanistan. *Id.*

85. Simpson, *supra* note 2.

86. *Id.* TCN contract workers are paid far less than U.S. nationals for the same work. See CHATTERJEE, *supra* note 70, at 28. In turn, Iraqi citizens are paid even less, primarily because U.S. contractors "simply do not trust Iraqi workers." *Id.* This can create large disparities in wages, even among workers who are doing essentially the same job. See *id.*

87. Simpson, *supra* note 2.

88. *Id.*

transported to Kuwait or Jordan, they are isolated from their families and often lack any financial resources.<sup>89</sup> Subcontractors are then in an excellent position to force or coerce the workers to enter Iraq.<sup>90</sup>

Another scheme rampant in bringing TCNs to Iraq is that of charging workers very costly broker fees to ensure job placement.<sup>91</sup> Families of these workers often assume massive debt to pay broker fees, which compels the TCN to “head into the war zone or remain in danger for much longer than [he] desire[s] just to pay those debts.”<sup>92</sup> For example, a Nepalese man who had signed an employment contract to work just inside Iraq during the day (with the promise that he would sleep in the safety of Kuwait) was sent to Camp Anaconda, deep inside Iraq.<sup>93</sup> As the base increasingly fell under attack, the worker demanded to be sent home.<sup>94</sup> The subcontractor refused to pay him and he eventually lost his family farm, which he had put up as collateral to pay the \$1500 broker fee.<sup>95</sup>

Two other elements of these violations deserve attention. First, TCNs’ living conditions in Iraq were substandard.<sup>96</sup> Second, many of the countries from which the workers were trafficked had imposed travel bans to Iraq such that the TCNs violated both home government and Iraqi immigration laws.<sup>97</sup>

### *B. Barriers to Policing Human Trafficking in Iraq*

#### 1. War and Political Instability

Human trafficking is especially difficult to control in countries such as Iraq where legal systems are weakened by war and political collapse.<sup>98</sup> Although Iraqis voted for a new constitution and parliamentary government in 2005, the violence of the insurgency has taken center stage in the fight for a viable democratic Iraq.<sup>99</sup>

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89. *See id.*

90. *See id.*

91. *Id.*

92. *Id.*

93. Simpson, *supra* note 5.

94. *Id.*

95. *Id.*

96. *See* Simpson, *supra* note 2. One element of the DoD regulations will require “measurable, enforceable standards for living conditions (e.g., sanitation, health, safety, etc.) and establish 50 feet as the minimum acceptable square footage of personal living space per worker.” *Id.*

97. *Id.*

98. *See* BALES, *supra* note 30, at 3-4.

99. *See* Gary Langer, *Ebbing Hope in a Landscape of Loss Marks a National Survey of Iraq*, ABC NEWS, Mar. 19, 2007, <http://abcnews.go.com/images/US/1033a/>

Iraq has had to use resources intended for trafficking prevention for counter-insurgency operations and training.<sup>100</sup> For example, the antitrafficking component of the Iraqi police force curriculum was replaced by counter-insurgency training and has not been reinstated.<sup>101</sup>

The Department of State and the Iraqi government acknowledge that TCNs from southeast and southern Asia are being unwillingly trafficked into Iraq through fraud or coercion, while others who knowingly agree to work in Iraq are being “subjected to conditions of involuntary servitude after arrival.”<sup>102</sup> Despite knowledge of these ongoing violations, the Iraqi government has failed to police or prosecute them.<sup>103</sup> As of April 2006, Iraq had not reported any convictions or prosecutions of human trafficking crimes or any evidence that it had investigated such crimes.<sup>104</sup>

In response to this situation, the Department of State recommended that Iraq should “ensure that its police force, prosecutors, and judges are trained in identifying, investigating, and prosecuting trafficking cases” and should also “monitor recruitment agencies and contractors importing foreign workers to ensure that no workers are being forced to work in Iraq involuntarily.”<sup>105</sup> Although these recommendations might be manageable in a different context, it is unlikely that Iraq will implement them in the near future given its deteriorating social and political situation. Clearly, until the political situation in Iraq is stabilized, the Iraqi government will continue diverting human trafficking funds (as well as other crucial social resources) to counter-insurgency operations.

## 2. Government Corruption

Corruption, within the companies themselves and within host governments, is a further impediment to the prosecution of human trafficking offenses perpetrated by private military contractors and

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Iraqpoll.pdf. In fact, seventy-four percent of Iraqi respondents now describe their own neighborhoods as unsafe (compared to thirty-six percent in 2005), while fifty-three percent reported death or injury of at least one family member or close friend. *Id.*

100. See 2006 TRAFFICKING REPORT, *supra* note 12, at 270.

101. *Id.*

102. *Id.* at 269-70. They also recognize that Iraqi women and children are being trafficked within Iraq as well as to other Middle Eastern countries to work as sex slaves. *Id.* at 269.

103. See *id.* at 270.

104. *Id.*

105. *Id.* at 270-71.

subcontractors.<sup>106</sup> In the Balkans, U.S. contractor personnel who were accused of sex trafficking “fled the host country (on occasion with the logistical help of their immediate supervisor) almost immediately after those allegations arose.”<sup>107</sup> These underhanded practices, although effectively minimizing the scandal, make investigating and prosecuting such allegations impossible.

In Iraq, government corruption is rampant.<sup>108</sup> Iraq’s Public Integrity Commission recently reported that “\$8 billion in government money has been wasted or stolen during the past three years” and, even more notably, “20 members of the [commission] had been slain since it began its work.”<sup>109</sup> Given this level of government corruption—in addition to the political and social insecurity of Iraq—it is not surprising that contractors and subcontractors are able to engage in human trafficking with total impunity.

### 3. Military Contractor Fraud

Allegations of military support contractors overcharging the U.S. government for their services are well known. The cost-plus nature of Halliburton’s government contracts, which rewards the company despite its wasteful spending practices, has resulted in business scams ranging from driving empty trucks to billing for unperformed labor.<sup>110</sup> Contractor DynCorp was paid \$43.8 million to build a residential site for DynCorp trainers, which remained unused, and spent nearly \$4.2 million on unauthorized work, including an Olympic-sized swimming pool and twenty VIP trailers.<sup>111</sup>

Clearly, rampant corruption within the Iraqi government and in the military contracting industry makes it far more difficult to effectively detect and prosecute human trafficking and forced labor violations.

## IV. THE DIFFICULTIES OF PROSECUTING FORCED LABOR OF TCNS UNDER EXISTING LAW

Currently, there is no legal regime to directly and effectively address the unique problem of forced labor by military contractors

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106. See CSIS Letter, *supra* note 83, at 2; see also Bassem Mroue & Quassim Abdul-Zahra, *Watchdog: Corruption Has Cost Iraq \$8 Billion*, VIRGINIAN-PILOT, Apr. 5, 2007, at A6.

107. See CSIS Letter, *supra* note 83, at 2.

108. See Mroue & Abdul-Zahra, *supra* note 106; see also Bassem Mroue & Quassim Abdul-Zahra, *Iraq Misused \$8 Billion*, *National Watchdog Says*, ST. LOUIS POST-DISPATCH, Apr. 5, 2007, at A8.

109. See Mroue & Abdul-Zahra, *Iraq Misused \$8 Billion*, *supra* note 108.

110. See CHATTERJEE, *supra* note 70, at 28-37.

111. Griff Witte & Renae Merle, *Reports Fault Oversight of Iraq Police Program*, WASH. POST, Jan. 31, 2007, at D1.

and subcontractors in their foreign operations. As this Part demonstrates, these abuses persist inside a kind of black hole among potentially powerful legal tools. The Thirteenth Amendment, the Trafficking Victim Protection Act, the Alien Tort Claims Act, MEJA, and the DoD's remedial guidelines, while containing elements of potentially powerful legal tools, do not provide adequate protections.

A. *Toward a Broader Interpretation of the Thirteenth Amendment*

Although Thirteenth Amendment jurisprudence in the United States has expanded and adapted over time to outlaw many nontraditional forms of involuntary servitude, the Supreme Court has failed to fully acknowledge the economic and social realities of modern day slavery.<sup>112</sup> A broader interpretation of the Thirteenth Amendment would more effectively proscribe and eliminate contemporary slavery, especially in the context of MNCs operating abroad.<sup>113</sup>

1. The Thirteenth Amendment and the Proscription of Involuntary Servitude

The Thirteenth Amendment was enacted primarily to end the enslavement of African Americans in the South, but it embodied much more than the desire to eliminate racial servitude in this country.<sup>114</sup> It "was a milestone in the elimination of racial oppression, but it was also a milestone in the elimination of labor subjugation."<sup>115</sup> As various scholars have asserted, the Thirteenth Amendment stood for the greater principle of ensuring that men and women were able to exercise full freedom of their labor rights.<sup>116</sup>

After the Civil War and the elimination of chattel slavery, widespread and lucrative debt peonage systems emerged in the South.<sup>117</sup> Slaves could no longer be legally owned or sold, but the result of the debt peonage relationship was virtually the same.<sup>118</sup> The worker, upon accepting a job, would voluntarily assume a debt that would be difficult (if not impossible) to repay.<sup>119</sup> A worker who left

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112. See generally Wolff, *supra* note 58.

113. See generally *id.*

114. See Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 495 (1989).

115. *Id.*

116. See, e.g., James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 963 (1997).

117. Wolff, *supra* note 58, at 981-82.

118. See *id.* at 982-83.

119. *Id.* at 981.

the job before satisfying the debt obligation faced criminal prosecution and debtor's prison.<sup>120</sup> Even at the turn of the twentieth century, a very substantial percentage of black sharecroppers in the South continued to be bound by these debt peonage arrangements.<sup>121</sup>

In striking down legal schemes that appeared on the surface to be valid labor arrangements, but actually amounted to slavery, the Supreme Court applied a broad definition of involuntary servitude.<sup>122</sup> In *Clyatt v. United States*,<sup>123</sup> which tested the willingness of the Court to reach the substance of the peonage legal regime, the Court unequivocally declared:

Peonage is sometimes classified as voluntary or involuntary; but this implies simply a difference in the mode or origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. But peonage, however created, is compulsory service[]—involuntary servitude.<sup>124</sup>

By the 1960s, the racial servitude proscription of the Thirteenth Amendment, at least in regard to African Americans, appeared to have been largely fulfilled. Some African American migrant farm workers in North Carolina and Florida filed claims against certain labor camps, but these claims were few and far between.<sup>125</sup> Despite the progress in eliminating racial servitude of African Americans, the burden of labor subjugation shifted to other economically disadvantaged groups.<sup>126</sup> “From the 1960s through the 1980s . . . more cases began to involve immigrants.”<sup>127</sup> In contrast to the debt peonage schemes of the past, “threats of deportation or harm to family members” were more commonly cited as coercive methods to compel labor.<sup>128</sup>

In the 1984 case of *United States v. Mussry*, defendants allegedly recruited a group of Indonesians who did not speak English to work

120. *Id.* at 982.

121. JACQUELINE JONES, *THE DISPOSSESSED* 107 (1992).

122. *See* *Clyatt v. United States*, 197 U.S. 207, 215-16 (1905) (holding that the Thirteenth Amendment prohibited voluntary peonage schemes); *Bailey v. Alabama*, 219 U.S. 219, 241 (1911) (holding that antifraud statutes aimed at compelling employment also violated the Thirteenth Amendment).

123. 197 U.S. 207 (1905).

124. *Id.* at 215.

125. *See* *United States v. Booker*, 655 F.2d 562, 565 (4th Cir. 1981).

126. *See* Maria L. Ontiveros, *Immigrant Workers' Rights in a Post-Hoffman World—Organizing Around the Thirteenth Amendment*, 18 *GEO. IMMIGR. L.J.* 651, 667-68 (2004).

127. *Id.* at 668.

128. *Id.* at 667-68.

as servants in the United States.<sup>129</sup> Upon arrival, defendants withheld the workers' return plane tickets and passports, paid them very low wages, and required that they "work off . . . the debts resulting from the costs of their transportation."<sup>130</sup> Even though the workers were not threatened with physical violence, the Ninth Circuit held that this labor relationship rose to the level of involuntary servitude because workers were psychologically under the power of the employer and were effectively prevented from quitting.<sup>131</sup> The Ninth Circuit recognized the need to interpret the Thirteenth Amendment through a modern lens:

In deciding the issues before us, we must consider the realities of modern economic life: yesterday's slave may be today's migrant worker or domestic servant. Today's involuntary servitor is not always black; he or she may just as well be Asian, Hispanic, or a member of some other minority group. Also, the methods of subjugating people's wills have changed from blatant slavery to more subtle, if equally effective, forms of coercion.<sup>132</sup>

By contrast, the Second Circuit did not agree that the Thirteenth Amendment's proscription of involuntary servitude could include such subtle forms of coercion.<sup>133</sup> In *United States v. Shackney*, a family of Mexican farm workers, who had come to the United States to work for the defendant, alleged that their treatment amounted to involuntary servitude.<sup>134</sup> There, the employer required family members to sign a series of promissory notes and threatened immediate deportation if they chose to leave the farm.<sup>135</sup> The family members received only ten dollars cash during the course of their employment and further claimed that the defendant discouraged them from enrolling their children in school.<sup>136</sup> The father left the premises four times during the course of their employment, only once without the boss accompanying him.<sup>137</sup>

Despite strong indications that the employer had psychologically isolated and effectively controlled the family, the Second Circuit held that the employer's behavior did not rise to the level of involuntary servitude.<sup>138</sup> The family members, in the Second Circuit's view, could

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129. 726 F.2d 1448, 1450 (9th Cir. 1984).

130. *Id.*

131. *Id.* at 1453-54.

132. *Id.* at 1451-52 (citations omitted).

133. *See United States v. Shackney*, 333 F.2d 475, 485-87 (2d Cir. 1964).

134. *Id.* at 476.

135. *Id.* at 477-79.

136. *Id.* at 478.

137. *Id.*

138. *Id.* at 486-87.

have left the farm and could not have reasonably believed that they were compelled to stay.<sup>139</sup> In the words of Judge Friendly:

[A] holding in involuntary servitude means . . . action by the master causing the servant to have, or to believe he has, no way to avoid continued service or confinement . . . not a situation where the servant knows he has a choice between continued service and freedom . . . .<sup>140</sup>

Ultimately, the Supreme Court adhered to the Second Circuit's more formalistic view to resolve the split between the circuits regarding the scope of the involuntary servitude prohibition.<sup>141</sup> Thus, in *United States v. Kozminski*, the Court held that it could not make a finding of involuntary servitude in the absence of legal coercion or physical force.<sup>142</sup>

## 2. The TVPA Response to *Kozminski*: Still Not Enough

Partly in response to the Supreme Court's narrow reading of involuntary servitude in *Kozminski*,<sup>143</sup> Congress enacted the Trafficking Victim Protection Act (TVPA) in 2000.<sup>144</sup> The TVPA expressly states that "[i]nvoluntary servitude statutes are intended to reach cases in which persons are held in a condition of servitude through nonviolent coercion."<sup>145</sup>

The TVPA requires the Department of State to monitor human trafficking worldwide and issue an annual report detailing its findings.<sup>146</sup> The TVPA, although clearly a step forward in recognizing more subtle forms of contemporary slavery, does not allow prosecution of U.S. companies for violations of human trafficking abroad.<sup>147</sup> Instead, the TVPA mandates that host governments take responsibility for investigating and prosecuting human trafficking crimes.<sup>148</sup> The TVPA is not helpful in prosecuting trafficking and

139. *Id.* at 486.

140. *Id.* Indeed, the court appeared more concerned that employers, despite the "highly reprehensible" treatment of their employees, "might be victimized by disgruntled employees able to convince prosecutors, and ultimately juries, of their story." *Id.* at 487.

141. *See* *United States v. Kozminski*, 487 U.S. 931 (1988).

142. *See id.* at 944.

143. *See* Bo Cooper, *A New Approach to Protection and Law Enforcement Under the Victims of Trafficking and Violence Protection Act*, 51 EMORY L.J. 1041, 1049 (2002).

144. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified in scattered sections of titles 8 U.S.C., 22 U.S.C., and 42 U.S.C.).

145. *Id.* § 102(b)(13), 114 Stat. at 1467.

146. *See id.* § 107(a), (b)(1)(D), 114 Stat. at 1474-75.

147. *See id.* §§ 110-111, 114 Stat. at 1482-86 (providing for actions against foreign governments and foreign persons only).

148. *See id.* § 110, 114 Stat. at 1482-84.

forced labor of TCNs in Iraq because it requires the Iraqi government, which has diverted its human trafficking resources to counter-insurgency operations, to take the lead in prosecuting trafficking violations.<sup>149</sup>

3. The Thirteenth Amendment Could Also Prohibit MNCs from Benefiting from Slave Labor Abroad

A broader interpretation of the Thirteenth Amendment is needed to prevent MNCs from taking advantage of forced labor in foreign jurisdictions.<sup>150</sup> Currently, Thirteenth Amendment jurisprudence does not prohibit MNCs from exploiting forced labor abroad, despite the fact that the Reconstruction Congress both understood and moved to abolish slavery on many levels.<sup>151</sup>

As previously mentioned, after the passage of the Thirteenth Amendment the Supreme Court repeatedly elevated substance over form to strike down slavery-like peonage systems and antifraud legislation within the United States.<sup>152</sup> Finally, in *Pollock v. Williams*, the Court put to rest attempts to circumvent the Thirteenth Amendment through peonage laws.<sup>153</sup> “[N]o state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor.”<sup>154</sup>

Tobias Wolff asserts that the Thirteenth Amendment and subsequent legal jurisprudence in that area contemplated the elimination of slave labor from U.S. industry, wherever those practices might arise.<sup>155</sup> The drafters of the Thirteenth Amendment, he contends, “understood all . . . aspects of slavery—the interpersonal, the institutional, and the industrial—to be vital

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149. *See id.*; *see also* 2006 TRAFFICKING REPORT, *supra* note 12, at 270 (stating that antitrafficking training for new security officers has been replaced by counter-insurgency training).

150. *See generally* Wolff, *supra* note 58 (proposing the translation of the Thirteenth Amendment’s core principles into the global economic environment).

151. *See id.* at 994-1031 (reviewing historical and legal developments related to forced labor in America).

152. *See* *Clyatt v. United States*, 197 U.S. 207, 218 (1905) (holding that the Thirteenth Amendment prohibited voluntary peonage schemes); *Bailey v. Alabama*, 219 U.S. 219, 240-45 (1911) (holding that antifraud statutes aimed at compelling employment also violated the Thirteenth Amendment). The Court was willing to look beyond mere words to analyze these laws for their real impact—i.e., virtual enslavement. *Id.*

153. *Pollock v. Williams*, 322 U.S. 4 (1944).

154. *Id.* at 18.

155. *See generally* Wolff, *supra* note 58, at 994-1031.

elements of the practice that they sought to eradicate with the Amendment's enactment."<sup>156</sup> As such:

[T]he knowing use of slave labor by U.S. based entities in their foreign operations constitutes the presence of "slavery" within the United States, as that term is used in the Thirteenth Amendment, and . . . renders such U.S. entities subject to the prohibitory authority of the American courts through a private civil action.<sup>157</sup>

If it were fully developed in such a direction, the Thirteenth Amendment could be a powerful tool in the elimination of modern slavery from MNC operations abroad.

*B. The Alien Tort Claims Act and its Application to Forced Labor in Iraq*

1. *Filartiga* Opens the Door

The Alien Tort Claims Act (ATCA), also known as the Alien Tort Statute,<sup>158</sup> provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>159</sup> In 1980, the case of *Filartiga v. Pena-Irala*<sup>160</sup> created a new body of law, incorporating international human rights norms into U.S. domestic law through the ATCA.<sup>161</sup>

*Filartiga* involved a suit brought by the family of a man who had allegedly been tortured and killed in Paraguay by a former Paraguayan official, Pena-Irala.<sup>162</sup> While the district court dismissed the action on the grounds that the suit would violate principles of national sovereignty,<sup>163</sup> the Second Circuit held that the Filartigas had standing to sue because torture was a universally accepted violation of international law and was therefore among the violations contemplated by the ATCA.<sup>164</sup>

The fact that neither the Filartigas nor Pena-Irala were U.S. citizens did not negate the U.S. courts' obligation to hear certain kinds of claims based on universally recognized violations of

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156. *See id.* at 979.

157. *Id.* at 978.

158. 28 U.S.C. § 1350 (2006).

159. *Id.* (enacted in the Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77).

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

161. *See id.* at 880-89.

162. *Id.* at 878-79.

163. *See id.* at 880.

164. *Id.* at 883-85.

international law brought within its jurisdiction.<sup>165</sup> As such, the case opened the door for foreign nationals to bring suit in U.S. federal courts against individual violators of international law.

2. *Unocal* Extends the Alien Tort Claims Act to Reach Corporations Engaged in Forced Labor

Subsequent case law expanded the reach of the ATCA. In *Doe I v. Unocal Corp.*,<sup>166</sup> the Ninth Circuit sought to determine whether the Unocal Corporation, which had effectively hired the Myanmar government to provide security for a pipeline Unocal built in that country, could be liable for human rights violations carried out by the Myanmar military against its own citizens.<sup>167</sup>

Myanmar citizens alleged that Unocal had aided and abetted the Myanmar military in raping, torturing, and murdering villagers and forcing them to work in connection with Unocal's pipeline project, in violation of the law of nations under authority of the ATCA and RICO.<sup>168</sup> Plaintiffs presented substantial evidence that high-ranking Unocal officials were aware of the fact that the Myanmar military was forcing locals to construct its pipeline, helipads, and other related infrastructure.<sup>169</sup>

The court quickly dispensed with Unocal's assertions that it did not knowingly hire the Myanmar military for security and that it was unaware of the systematic human rights violations being perpetrated by the Myanmar government.<sup>170</sup> However, the court faced a more challenging inquiry in determining "whether the alleged tort requires the private party to engage in *state action* for ATCA liability to attach, and if so, whether the private party in fact engaged in state action."<sup>171</sup>

In its analysis of the forced labor claim and its ability to attach liability in the absence of state action, the Ninth Circuit looked to the language of *Tel-Oren v. Libyan Arab Republic*,<sup>172</sup> which stated that there were certain crimes, such as slave trading, which did not require state action in order for the ATCA to apply.<sup>173</sup> The case of

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165. *See id.* at 884-85.

166. 395 F.3d 932 (9th Cir. 2002).

167. *See id.* at 942-46 (explaining that state court jurisdiction is appropriate in the presence of personal jurisdiction, violations of foreign law, and similar forum policies).

168. *Id.* at 936-37.

169. *See id.* at 939-44.

170. *See id.* at 937-42. Indeed, the court found evidence to the contrary to be overwhelming on these two points. *See id.*

171. *Id.* at 945 (emphasis added).

172. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

173. *Unocal*, 395 F.3d at 945 (citing *Tel-Oren*, 726 F.2d at 794-95 (Edwards, J., concurring)).

*Kadic v. Karadzic*<sup>174</sup> further expanded this category, the Ninth Circuit noted, in holding that state action was not required in cases of war crimes or genocide.<sup>175</sup>

In light of these categories, the court in *Unocal* then examined whether forced labor was one of this small group of crimes that did not require state action on the part of the defendant.<sup>176</sup> Relying heavily on the language of the Thirteenth Amendment<sup>177</sup> and on broad readings of 18 U.S.C. § 1583,<sup>178</sup> the court found that “case law strongly supports the conclusion that forced labor is a modern variant of slavery. Accordingly, forced labor, like traditional variants of slave trading, is among the ‘handful of crimes . . . to which the law of nations attributes *individual liability*,’ such that state action is not required.”<sup>179</sup>

Dispensing with the lower court’s erroneous “active participation” standard,<sup>180</sup> the Ninth Circuit drew from several international criminal tribunal decisions<sup>181</sup>—primarily from *Prosecutor v. Furundzija*<sup>182</sup>—to craft its standard for aiding and abetting: “[W]e may impose aiding and abetting liability for *knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime . . .*”<sup>183</sup>

The Ninth Circuit concluded that a reasonable fact-finder could find Unocal’s alleged conduct to have met the actus reus component

174. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

175. *Unocal*, 395 F.3d at 945-46 (citing *Kadic*, 70 F.3d at 242-43).

176. *Id.* at 946-47.

177. U.S. CONST. amend. XIII, § 1.

178. This section of the statute, entitled “Enticement into Slavery,” reads:

Whoever kidnaps or carries away any other person, with the intent that such other person be sold into involuntary servitude, or held as a slave; or

Whoever entices, persuades, or induces any other person to go on board any vessel or to any other place with the intent that he may be made or held as a slave, or sent out of the country to be so made or held—

Shall be fined under this title or imprisoned not more than 20 years, or both.

If death results from the violation of this section . . . the defendant shall be fined under this title or imprisoned for any term of years or life, or both.

18 U.S.C. § 1583 (2006); *see also* *United States v. Booker*, 655 F.2d 562, 565 (4th Cir. 1981).

179. *Unocal*, 395 F.3d at 946 (emphasis and omission in original) (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 794-95 (D.C. Cir. 1984) (Edwards, J., concurring)).

180. *Id.* at 947.

181. *Id.* at 949-50.

182. *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998) (holding torture is a jus cogens violation over which nations have universal jurisdiction for prosecution).

183. *Unocal*, 395 F.3d at 951 (emphasis added).

of the standard.<sup>184</sup> First, the plaintiffs' accounts of being forced to clear roads, build helipads for defendant's employees, and haul materials to and from the pipeline site were convincing and "creat[ed] a material question of fact as to whether forced labor was used in connection with the construction of the pipeline."<sup>185</sup> Second, the evidence demonstrated that Unocal provided "practical assistance" to Myanmar in carrying out the human rights violations when it "hir[ed] the Myanmar Military to provide security and build infrastructure along the pipeline route in exchange for money or food."<sup>186</sup> Alternately, Unocal could have "encouraged" the commission of these crimes because it met daily with the military to direct military operations and by instructing military officials how and where to carry out their work.<sup>187</sup>

Finally, Unocal's acts could be found to have had a "substantial effect" on the military's operations because, in the absence of Unocal paying Myanmar for its services and telling it where to perform those services, the forced labor "probably would not have occurred in the same way."<sup>188</sup> This was substantially supported by two admissions of Unocal representatives.<sup>189</sup> One executive acknowledged, "[O]ur assertion that [the Myanmar military] has not *expanded and amplified its usual methods* around the pipeline *on our behalf* may not withstand much scrutiny." Another admitted, "If forced labor goes hand and glove with the military yes there will be *more forced labor*."<sup>190</sup>

There was also sufficient evidence to support the mens rea component of the crime—"actual or constructive (i.e., reasonable) knowledge that the accomplice's actions will assist the perpetrator in the commission of the crime."<sup>191</sup> The Ninth Circuit relied on the lower court's finding that "Unocal knew that forced labor was being utilized and that the Joint Venturers benefited from the practice."<sup>192</sup> It further found that Unocal "knew or should reasonably have known" that hiring the Military, paying it for its services, and telling it where and when to do its work "would assist or encourage the Myanmar Military to subject Plaintiffs to forced labor."<sup>193</sup>

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184. *Id.* at 952.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 953.

190. *Id.* (alterations and emphases in original).

191. *Id.*

192. *Id.* (citing *Doe/Roe II v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1310 (C.D. Cal. 2000)).

193. *Id.*

The Ninth Circuit's ruling was revolutionary for a number of reasons: it allowed ATCA liability to attach individually to corporations for certain violations of international law, even when the corporation was not involved in traditional state activity; it placed forced labor squarely in that category of violations;<sup>194</sup> and it loosened the requirements for aiding and abetting liability from "active participation" to "knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime."<sup>195</sup>

### 3. The Applicability of ATCA Liability to Forced Labor in Iraq

The progress achieved through *Unocal*<sup>196</sup> and its progeny will not be sufficient for most TCN victims of human trafficking and forced labor in Iraq. Applying current standards to the human rights violations occurring in Iraq, victims would likely face impediments to meeting the actus reus and mens rea elements for aiding and abetting liability, especially when contractors have farmed their operations out to a string of subcontractors and human brokers. However, the possibility exists that the ATCA could still contemplate some of these claims.

At first glance, the circumstances in Iraq are concededly different from the facts of *Unocal*. In Iraq, civilian contractor and private military support corporations have not hired the Iraqi government to assist them in gaining access to Iraqi resources. Iraq is under U.S. occupation and, as such, has not been approached as a willing business partner of the U.S. military and its contractors. Despite evidence of other serious human rights abuses and rampant corruption within the Iraqi government, human trafficking violations were not widely known to be systematically occurring in Iraq prior to the U.S. invasion. Additionally, connections between primary contractors operating in Iraq and subcontractors or human brokers carrying out the violations appear more attenuated.

#### a. Extensive Subcontracting Makes Aiding and Abetting Liability Under the ATCA More Difficult to Prove

In those cases where the alleged violator is many links down the chain from the primary contractor, aiding and abetting liability under the *Unocal* model will be difficult to prove. Although the existence of forced labor violations in Iraq is not in dispute,

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194. *See id.*

195. *Id.* at 947, 951.

196. *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002).

contractors would likely argue that their connection to the violations does not rise to the level of Unocal's involvement and therefore does not satisfy the necessary elements of the *Unocal's* aiding and abetting test.<sup>197</sup>

A court could find that primary contractors in Iraq provide "practical assistance" to subcontractors and human brokers when they contract work out to other companies.<sup>198</sup> In *Unocal*, the "practical assistance" prong was satisfied by the simple fact that Unocal hired the Myanmar military to provide security for its pipeline project.<sup>199</sup> However, a key fact in the *Unocal* case for proving that the assistance had a "substantial effect" on the commission of the crime is distinguishable from the Iraq scenario.

In *Unocal*, two high-ranking Unocal officials made especially injurious admissions, basically acknowledging Unocal's awareness that its relationship with the Myanmar military contributed to an increase in human rights violations.<sup>200</sup> It is unknown whether contractor personnel involved in these practices have made such equally injurious statements. From the outset, however, representatives of primary military contractors in Iraq exercised extreme caution, stressing that any concerns about subcontractors' labor practices "should be directed to the subcontractor."<sup>201</sup>

In the absence of such an admission of knowledge, it would be difficult to demonstrate that had a particular contractor not farmed out work to the subcontractor, the violations might have occurred differently or not at all. In *Unocal*, there was a strong nexus between the direction Unocal provided to the military (where to carry out operations) and the resulting violations.<sup>202</sup> In Iraq, the contractor's relationship to its subcontractor and the amount of direction it did or did not provide to that subcontractor are crucial pieces of information that are difficult to assess.

Clearly, in the absence of U.S. involvement in Iraq, human trafficking and forced labor abuses would certainly not occur the way they are now occurring,<sup>203</sup> but the "substantial effect" test does not

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197. See *supra* text accompanying note 183.

198. See *Unocal*, 395 F.3d at 952-53.

199. *Id.*

200. See *id.*

201. Simpson, *supra* note 2.

202. See *Unocal*, 395 F.3d at 937-39.

203. Indeed, the insurgency, stemming largely from the U.S. invasion and continued occupation of Iraq, has thwarted Iraqi efforts to prevent—or even assess—the scope of its human trafficking problem. See 2006 TRAFFICKING REPORT, *supra* note 12, at 269-70. Furthermore, U.S. involvement in Iraq has had the result of creating markets for human trafficking and forced labor in the private security and reconstruction industries in that country. See Simpson, *supra* note 2.

contemplate a larger causal chain.<sup>204</sup> It would have to be proved that a particular contractor's actions had some notable influence on the manner in which the subsequent violations occurred.<sup>205</sup> In Iraq, where chains of contracts and subcontracts snake around the globe, cumulatively contributing to these abuses, this element would be particularly difficult to establish.

Finally, the mens rea element of a contractor's involvement in forced labor in this context would also be difficult to substantiate. Again, this would turn on the contractor's "reasonable knowledge" that his conduct would aid the subcontractor or human broker in carrying out the crime.<sup>206</sup> In *Unocal*, the court was able to establish this element largely because human rights groups and other NGOs had warned Unocal that the Myanmar military was using rape, torture, and forced labor against its population.<sup>207</sup> Although news reports of human trafficking and TCNs' forced labor in Iraq surfaced in 2004,<sup>208</sup> serious trafficking and forced labor violations were clearly not as well-publicized or researched as the human rights violations that occurred in Myanmar.

To summarize, in situations where forced labor violations occur somewhere down a private contractual chain, it would be difficult for victims of forced labor in Iraq to seek redress against U.S. contractors under the ATCA.

b. ATCA Liability May Attach Where Contractors Are the Primary Actors

One important distinction, however, is that *primary contractors* in Iraq have acknowledged involvement in these abuses.<sup>209</sup> In those cases, aiding and abetting liability does not have to be proved, and thus individual liability under the ATCA could more easily attach. The only inquiry would be whether the forced labor violations did in fact occur and whether they were perpetrated by U.S. contractor employees.<sup>210</sup> Thus, workers who had had their passports withheld or who had faced threats of abandonment, starvation, or other forms of coercion in order to compel their labor could conceivably be successful against U.S. military contractors and their employees in U.S. federal court.

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204. See *Unocal*, 395 F.3d at 952-53.

205. See *id.*

206. *Id.* at 953 (requiring "actual or constructive (i.e., reasonable) knowledge").

207. See *id.* at 939-41.

208. See *supra* note 10 and accompanying text.

209. See Simpson, *supra* note 13. For example, "[DynCorp] fired eight employees for their alleged involvement in sex trafficking and illegal arms deals." *Id.*

210. See *supra* notes 179-95 and accompanying text.

### C. *The Reach of MEJA*

MEJA,<sup>211</sup> passed in 2000, was enacted in response to several incidents in which civilian contractors committed serious crimes in foreign jurisdictions while accompanying the U.S. military.<sup>212</sup> Since civilian contractors do not fall within the reach of the Uniform Code of Military Justice and since U.S. courts could not assert jurisdiction over crimes occurring abroad, civilians involved in serious crimes such as murder, child molestation, and sex trafficking escaped criminal prosecution.<sup>213</sup>

MEJA effectively closes this gap, covering “civilian employees of DoD, DoD contractors or subcontractors, and employees of either contractors or subcontractors.”<sup>214</sup> MEJA also covers foreign national contractors or contractor employees who are not citizens or permanent residents of the host nation.<sup>215</sup>

It is unclear whether MEJA will be an effective tool in the fight against civilian contractor abuses. While MEJA will probably withstand challenges under U.S. domestic law,<sup>216</sup> it might be susceptible to legal challenges on the basis of several principles of international law.<sup>217</sup>

### D. *DoD Remedial Guidelines Are Not Sufficient*

Current DoD guidelines governing regulation and discipline of contractors who engage in human rights violations are not sufficient to have a significant impact in this area. Certain provisions of the new guidelines are positive steps toward eliminating human trafficking in contractor operations, but more must be done.

As previously mentioned, the guidelines ordered all U.S. contractors to immediately return workers’ passports, the confiscation of which the DoD identified as widespread after a sweeping inspection of its contractors in Iraq.<sup>218</sup> Contractors who fail to comply with the new requirements could face harsh sanctions: “Contracts *could* be terminated, contractors *could* be blacklisted from future work and commanders *could* physically bar firms from bases . . . .”<sup>219</sup> The guidelines further order “that all businesses, no

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211. 18 U.S.C. §§ 3261-3267 (2006).

212. See Waits, *supra* note 66, at 493-95.

213. See *id.* at 494.

214. *Id.* at 518.

215. *Id.*

216. See *id.* at 520-30.

217. See *id.* at 530-34.

218. See Simpson, *supra* note 2. The DoD explained that “passports are seized, in part, to keep workers from accepting jobs with other firms.” *Id.*

219. See *id.* (emphasis added).

matter how far down the chain, ‘provide workers with a signed copy of their employment contract that defines the terms of their employment.’”<sup>220</sup>

These changes, excepting the requirement that contractors return withheld passports, will likely have little or no effect on the problem of human trafficking and forced labor in Iraq. Several of these contractual changes will only be reflected in the language of *future* contracts, leaving current contracts unaffected. Additionally, the harsh penalties threatened against contractors and subcontractors for trafficking violations are discretionary, not mandatory.<sup>221</sup> As such, the U.S. military may or may not choose to terminate contracts.

Furthermore, providing workers with employment contracts laying out the terms of their employment will likely have little impact in a system in which workers are lured to Iraq from other countries with apparently legitimate employment contracts. Finally, the new rules do not require contractors to ensure that subcontractors are not in fact engaged in human trafficking.<sup>222</sup> Subcontractors will merely sign contracts promising that they will not engage in human trafficking violations and no more action on the part of the primary contractor will be required. Perhaps more importantly, the new DoD regulations do not affect Department of State contracts, of which there are many in Iraq.<sup>223</sup>

One encouraging change since the DoD guidelines were issued is the news that KBR will now require all of its employees in Iraq “to undergo human-trafficking awareness training.”<sup>224</sup> Although educating its workforce is an important first step in eliminating human trafficking from KBR’s own operations in Iraq, this training would not likely assist KBR employees in detecting human trafficking carried out by subcontractors or by human brokers many steps down the chain. Additionally, it should be noted that KBR’s training policy was not mandated by the DoD regulations.<sup>225</sup>

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220. *Id.*

221. *See id.*

222. *See* Simpson, *supra* note 13. Indeed, defense contractor lobbyists rejected any “requirement that says you have to flow this through to everybody” and instead pushed for a provision that would only require contractors to report subcontractors who refused to sign antitrafficking contract clauses. *Id.*

223. *See* Simpson, *supra* note 19.

224. Simpson, *supra* note 2.

225. *See id.*

*E. The Law of the Marketplace*

It is not likely that market regulation will remedy the problem of offenses committed by private military contractors abroad.<sup>226</sup> As the Bosnian sex slave scandal demonstrates, the U.S. military, despite having the authority to terminate contracts with irresponsible contractors, rarely exercises such discretion.<sup>227</sup> After widespread reports and subsequent investigations into the Bosnian sex trafficking scandal, the U.S. government awarded DynCorp millions of dollars of reconstruction projects in Iraq.<sup>228</sup>

## V. CONCLUSION

Slavery is not a soon-to-be-eradicated remnant of the past, nor is the trafficking and forced labor of TCNs in Iraq an isolated phenomenon. With the rise of globalized labor, modern slavery is a growing social and economic reality.

The law surrounding private military contractors and their operations abroad is currently insufficient to deal with trafficking and forced labor problems like those occurring in Iraq. Although MEJA might allow for prosecution of military contractors involved in forced labor and trafficking, it could also be open to legal challenges on international law grounds. The ATCA, despite providing a means for foreign nationals to sue U.S. companies for international human rights violations committed abroad, will only be effective when the contractor is found to have a demonstrable and substantial role in the furtherance of those violations. The Thirteenth Amendment, which could be viewed more broadly to encompass and prosecute MNC involvement in modern day slavery, has not been construed as such by the courts. The DoD's new guidelines do not contain language strong enough to ensure concrete reforms.

In the absence of a comprehensive body of law applicable in this context, the U.S. government should actively work to ensure that private contractors, many of whom are carrying out essentially military functions abroad, are held responsible for crimes committed in other jurisdictions. To that end, the federal government should require mandatory termination of all military contracts (including contracts with the Department of State and other agencies) for companies who fail to comply with international human rights standards and bar such companies from future government contracts. Additionally, the Pentagon should create an internal

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226. See Singer, *supra* note 76, at 543 (arguing that the market, left alone, will be insufficient to regulate private armies); Phillip Carter, *How to Discipline Private Contractors*, SLATE, May 4, 2004, <http://slate.msn.com/id/2099954>.

227. See Waits, *supra* note 66, at 537-38.

228. See *id.*

oversight division to investigate allegations of human trafficking perpetrated by private contractor personnel and, if substantiated, order mandatory prosecution. Finally, contractors should be required to actively inquire into and regulate their subcontractors' practices.