

Offshoring the Army: Migrant Workers and the U.S. Military

Darryl Li



ABSTRACT

Long-running debates over military privatization overlook one important fact: The U.S. military's post-2001 contractor workforce is composed largely of migrants imported from impoverished countries. This Article argues that these Third Country National (TCN) workers—so called because they are neither American nor local—are bereft of the effective protections of American law, local regimes, or their home governments; moreover, their vulnerability is a feature, not a flaw, in how the U.S. projects global power today. TCN workers are an offshore captive labor force whose use allows the government to keep politically sensitive troop numbers and casualty figures artificially low while reducing dependence on local populations with suspect loyalties. Legislation to combat human trafficking has done little to remedy exploitation and abuse of TCN workers because of jurisdictional hurdles and the lack of robust labor rights protections. Substantive reform efforts should address the deeper issue at stake, namely that the government uses TCN workers to carry out a core state function—namely, the use of force—without a clear relationship of responsibility to them. Unlike with soldiers, the labor of TCN workers is not valorized as sacrifice and unlike mercenaries selling their services to the highest bidder, they are frequently indebted to the point of indenture.

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INTRODUCTION

Habeas attorneys visiting clients detained at the U.S. military base at Guantánamo Bay, Cuba, are generally subjected to a consistent morning routine: After waking up at the Combined Bachelor Quarters (CBQ) where civilian guests are housed, they take a ferry to the bay's windward side, where most of the base's facilities are located. There, under military escort, they make a breakfast stop at McDonald's (the only one in Cuba) before heading to the prison. At the CBQ, the McDonald's, and elsewhere on the base, visitors encounter contract workers from the Philippines and Jamaica¹ who are as much as 40 percent of the base population.² Like the detainees, these migrant workers are neither local nor American but what the military calls Third Country Nationals (TCNs).³

The extensive reliance on military migrant labor⁴ at Guantánamo is by no means exceptional.⁵ It is well known that the U.S. military has been radically

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1. These observations are drawn from a visit I undertook to Guantánamo in 2009 to see a client detained there. See *THE GUANTÁNAMO LAWYERS: INSIDE A PRISON OUTSIDE THE LAW* 43–44, 48, 74, 132 (Mark P. Denbeaux & Jonathan Hafetz eds., 2009) (recollections by defense attorneys at Guantánamo about visiting McDonald's and encountering Third Country National (TCN) workers).
 2. See *Naval Station Guantanamo Bay, Cuba*, NAVAL STATION GUANTANAMO BAY PUB. AFFAIRS OFFICE 4 (July 22, 2013), http://www.jtfgtmo.southcom.mil/xWEBSITE/fact_sheets/NavstaGTMO.pdf (listing total base personnel, including civilian contractors, at 4,960); Leona Mynes, *Guantanamo Sailors Represent U.S. Navy at Jamaican Air Show*, GUANTANAMO BAY GAZETTE, Apr. 29, 2011, at 2 (“More than 500 Jamaicans live and work at NS Guantanamo Bay, Cuba.”) available at <http://ufdcimages.uflib.ufl.edu/UF/00/09/86/16/00211/04-29-2011.pdf>; Lerone Simmons, *GTMO Gives: Community Rallies to Support Filipino's [sic] in Need*, THE WIRE (Guantánamo), Nov. 29, 2013, at 10 (“1,500 Filipinos . . . work on [the] base.”) available at <http://ufdcimages.uflib.ufl.edu/UF/00/09/86/20/00595/11-29-2013.pdf>.
 3. The term “third country national” does not have a stable definition across all U.S. government agencies, but it generally excludes foreigners with permanent residency in the United States. Furthermore, the U.S. Agency for International Development (USAID) excludes Australians, Canadians, South Africans, and British citizens from its working definition of TCN, instead grouping them with U.S. citizens as “expatriates.” See SPECIAL INSPECTOR GENERAL FOR AFGHANISTAN RECONSTRUCTION, PRELIMINARY OBSERVATIONS AND SUGGESTED ACTIONS BEFORE TRANSITION OF SECURITY SERVICES TO AFGHAN PUBLIC PROTECTION FORCE 2 (2012), available at <http://www.sigar.mil/pdf/alerts/2012-03-15-appf-alert.pdf>.
 4. In this Article, I will use the term military migrant labor interchangeably with TCN, which is more particular to the U.S. military argot.
 5. Nor is it new. Before the 1959 revolution, the base relied extensively on Cuban laborers who in time developed a strong union to represent their interests. After 1959, these workers were regarded with even greater suspicion by both the new communist regime and the base authorities. In time

transformed over the past fifteen years by widespread outsourcing to private contractors, whose numbers rival or even exceed those of uniformed personnel in war zones. Yet in the extensive policy debates and academic research on military privatization, an important fact has largely escaped notice: The vast majority of the overseas contractor workforce is not American. Most striking is the large number of migrant workers hailing from third countries. Thus, the so-called privatization revolution has also been an offshoring revolution, with U.S. contractors frequently overseeing an even larger set of foreign subcontractors and workers, both locals and TCNs. TCNs in particular work on U.S. bases under military authority while lacking most of the protections of American law, local regimes, or their home governments. They are often employed by non-U.S. companies subcontracted by American corporations, paid a fraction of what American contractors and soldiers make, and can be easily deported if deemed noncompliant. Many are forced to pay recruiting firms exorbitant fees to secure their jobs, leaving them highly indebted and effectively indentured. Unsurprisingly, stories of horrific abuse and mistreatment of TCNs have received considerable media coverage in recent years⁶ and sparked reform efforts back in Washington.

This Article argues that the offshoring of the military has given rise to the military migrant worker as a distinct category of person subject to governmental power without effective legal protection. TCNs face many of the same problems that migrant workers elsewhere do, but they are unusual because of their employment on behalf of a foreign government in the exercise of a core sovereign function: namely, the use of force.⁷ In war zones, TCNs are imported at the be-

the United States discovered that although importing workers from outside incurred some additional expenses, they could be disposed of more easily than Cubans who could appeal to local authorities. Nevertheless, a small (and dwindling) number of Cuban workers have continued to commute to the base every day. See JANA K. LIPMAN, *GUANTÁNAMO: A WORKING-CLASS HISTORY BETWEEN EMPIRE AND REVOLUTION* (2009) (detailing labor struggles between the U.S. Navy and foreign workers at Guantánamo).

6. See, e.g., *Fault Lines: America's War Workers* (Al Jazeera America, Mar. 7, 2014); David Isenberg & Nick Schwellenbach, *Documents Reveal Details of Alleged Labor Trafficking by KBR Subcontractor: The Najlala Episode Revisited*, PROJECT ON GOVERNMENT OVERSIGHT (June 14, 2011), <http://www.pogo.org/our-work/articles/2011/co-ht-20110614.html>; T. Christian Miller, *Foreign Workers for U.S. Are Casualties Twice Over*, PROPUBLICA (June 19, 2009, 7:00 PM), <http://www.propublica.org/article/foreign-workers-for-u.s.-are-casualties-twice-over-619>; David Phinney, *Blood, Sweat, and Tears: Asia's Poor Build U.S. Bases in Iraq*, CORPWATCH (Oct. 3, 2005), <http://www.corpwatch.org/article.php?id=12675>; Sarah Stillman, *The Invisible Army*, THE NEW YORKER, June 6, 2011, at 56; Alain Vicky, *Slaves to the Private Military in Iraq: Cheap Help From Uganda*, LE MONDE DIPLOMATIQUE, May 2012, available at <http://mondediplo.com/2012/05/05uganda>.
7. While many TCNs do not themselves bear arms during their ordinary course of employment, the same is also true of many uniformed personnel. Both are integral to the overall military effort, serve under military authority, and share in the hazards of serving in war zones.

hest of the United States, working and often living on its bases under the authority and jurisdiction of its military. This raises important and largely unaddressed normative questions about the responsibilities owed to them by the polity they serve. Migrant military work does not comfortably fit into conventional frameworks for understanding how and when we justify exposing individuals to the duties and risks of war. Unlike citizen-soldiers whose sacrifices are consecrated by the body politic, military migrant workers toil in war zones in support of a government to whom they are not bound by any social contract. And unlike mercenaries⁸ who maximize profits through their specialized military skills, TCNs are locked in deeply coercive contractual relationships that often rise to the level of indenture. TCNs thus unsettle fundamental assumptions about the relationship between violence, sacrifice, and exchange embedded in U.S. and international law. They constitute something distinct: an offshore military labor force that allows the United States to keep politically sensitive troop numbers and casualty figures artificially low while also reducing dependence on local populations with suspect loyalties.⁹ TCN vulnerability is thus a feature, not a flaw, of how the U.S. projects power overseas today.

Over the past decade, migrant labor has become indispensable to the U.S. military, with TCNs often outnumbering American and local contractors and even most coalition contingents. Hundreds of thousands of TCNs¹⁰ have worked in support of the U.S. military over the past decade in the arc of countries from east Africa to central Asia that have fallen under the purview of the Central Command (CENTCOM).¹¹ For much of 2010 and 2011, there were more

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8. Because of the pejorative connotations of this term, private military corporations have sought to distance themselves from it. In this paper, I rely on definitions of mercenary developed in international law—duly noting some of the relevant objections—in order to sharpen my analysis of the normative concerns raised by use of migrant military labor. *See infra* Part III.B.
 9. This is not to say that TCNs are historically unique or unprecedented. Indeed, they can be usefully compared to many other types of soldiers and military workers that have existed in relation to both imperial and national armies of the past. *See, e.g.*, JANICE E. THOMSON, *MERCENARIES, PIRATES, AND SOVEREIGNS: STATE-BUILDING AND EXTRATERRITORIAL VIOLENCE IN EARLY MODERN EUROPE* (1994); TARAK BARKAWI, *GLOBALIZATION AND WAR* (2005). This Article will compare TCNs to a few of the most relevant contemporary categories of military workers associated with the U.S. military in Part III.A, *infra*.
 10. *See infra* Part II.A; *see also* Sindhu P. Kavinnamannil & Sam McCahon, *In the Name of "Progress": Illegal Human Labor Trafficking Within Government Contracts*, *FRAUD*, May/June 2011, at 20, 45 (estimating that 250,000 TCNs passed through Iraq, based on 20 percent annual turnover rate).
 11. Founded in 1983, Central Command (CENTCOM) is one of the six geographically-defined unified combatant commands that the U.S. military uses to coordinate its activities in various parts of the world. It is headquartered at MacDill Air Force Base in Florida with major command outposts in Qatar and Bahrain. CENTCOM operates from Egypt to Kazakhstan; before 2008 it was also responsible for the Horn of Africa, which is now overseen by Africa Command (AFRICOM).

TCNs supporting the U.S. military in Iraq than American and local contractors combined. According to the latest figures, from April 2014, there were 28,080 TCNs in the CENTCOM area of responsibility, outnumbering both U.S. and local contract workers.¹² TCN workers are involved in nearly all aspects of base life, including construction, food preparation, entertainment, firefighting, and even armed guard duty. They come from dozens of countries, including Bosnia-Herzegovina, Chile, Colombia, Fiji, India, Nepal, Peru, the Philippines, South Africa, and Uganda. In Iraq, TCNs continued to play a major role in supporting the U.S. government presence after the formal end of combat operations and will likely do the same in Afghanistan as well in the event of a troop withdrawal. Post-sequestration downsizing of the U.S. military is likely to further strengthen pressures to employ migrant workers.¹³

The significance of TCNs for the broader U.S. security architecture and the diverse and multilayered legal regime governing it has been largely obscured until now. Legal scholars have rightly warned of the dangers posed by military privatization, especially for Congressional oversight of the executive branch's conduct of war.¹⁴ In the meantime, international law scholars have focused on holding military contractors and the states that employ them accountable under international human rights law and the laws of war.¹⁵ Labor and employment law scholars

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12. These figures are drawn from a quarterly contractor census conducted by the Pentagon in the CENTCOM Area of Responsibility (AOR), starting in 2008. OFFICE OF THE DEPUTY ASSISTANT SEC'Y OF DEF., CONTRACTOR SUPPORT OF U.S. OPERATIONS IN THE USCENTCOM AREA OF RESPONSIBILITY TO INCLUDE IRAQ AND AFGHANISTAN (2014), available at http://www.acq.osd.mil/log/PS/CENTCOM_reports.html [hereinafter CENTCOM Contractor Census]. For further figures and statistical analysis of the contractor population, see Part I.A, *infra*.
 13. See Thom Shanker & Helene Cooper, *Pentagon Plans to Shrink Army to Pre-World War II Level*, N.Y. TIMES, Feb. 23, 2014, at A1, available at <http://www.nytimes.com/2014/02/24/us/politics/pentagon-plans-to-shrink-army-to-pre-world-war-ii-level.html?r=0> (describing budget proposal to reduce the U.S. army to its lowest levels since before World War II).
 14. See, e.g., Laura Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 191–99 (2005); Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L. Q. 1001, 1040–48 (2004); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 1022–25 (2005); PAUL VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* (2007).
 15. See, e.g., LINDSEY CAMERON & VINCENT CHETAIL, *PRIVATIZING WAR: PRIVATE MILITARY AND SECURITY COMPANIES UNDER PUBLIC INTERNATIONAL LAW* (2013); ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS* 299–309 (2006); *WAR BY CONTRACT: HUMAN RIGHTS, HUMANITARIAN LAW, AND PRIVATE CONTRACTORS* (Francesco Francioni & Natalino Ronzitti eds., 2011); Peter W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521 (2004); HANNAH TONKIN, *STATE CONTROL OVER PRIVATE MILITARY*

have also examined the military contracting context.¹⁶ Yet by focusing on privatization in general rather than offshoring in particular, this extensive literature has yet to grapple with the far-reaching implications of such extensive reliance on foreign contract labor. This is unsurprising: Insofar as legal scholarship tends to focus on the development of doctrine by U.S. domestic courts, it is likely to overlook workers who are largely barred from filing claims before such courts in the first place.¹⁷

To the extent that TCNs have attracted public attention and scholarly interest, they have been perceived primarily as victims of human trafficking.¹⁸ Most significantly, outrage on Capitol Hill¹⁹ over TCN abuse prompted steps to remedy the worst forms of exploitation. Aside from their limited effect, antitrafficking measures focus on only the most egregious forms of abuse, ignoring more systemic aspects of exploitation and sidestepping the question of workers' rights and capacities to shape and pursue

AND SECURITY COMPANIES IN ARMED CONFLICT (James Crawford & John S. Bell eds., 2011); Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT'L L. 75 (1998).

16. See, e.g., Michael LeRoy, *The New Wages of War—Devaluing Death and Injury: Conceptualizing Duty and Employment in Combat Zones*, 22 STAN. L. & POL'Y REV. 1, 217 (2011) (analyzing the emergence of a “new war-labor paradigm” through military contracting).
17. Outside of the legal academy, the scholars who have dealt with this issue have tended to be sociologists of gender and the military. See, e.g., Maya Eichler, *Citizenship and the Contracting Out of Military Work: From National Conscription to Globalized Recruitment*, 18 CITIZENSHIP STUD. (2014) (“Recruiting workers beyond the boundaries of the US citizenry relies on, and reinforces, the global inequalities of citizenship that simultaneously intersect with gendered, racialized, and classed inequalities.”); Paul Higate, *Martial Races and Enforcement Masculinities of the Global South: Weaponising Fijian, Chilean, and Salvadoran Postcoloniality in the Mercenary Sector*, 9 GLOBALIZATIONS 1, 35 (2012) (“[The private military] industry has come increasingly to rely on masculine bodies from the global South in the form of so-called third country and local national men.”); Katherine E. McCoy, *Beyond Civil-Military Relations: Reflections on Civilian Control of a Private, Multinational Workforce*, 36 ARMED FORCES & SOC'Y 671, 688 (2010) (“The flexible, highly subcontracted, and global nature of the [private military corporate] labor force leaves states with little direct or even indirect control over much of their labor force. . . . [I]t also produces a large class of exploited violence workers.”); see also Amanda Chisholm, *The Silenced and Indispensable*, 16 INT'L FEMINIST J. OF POL. 1, 26 (2014) (ethnographic study of Nepali Gurkhas working for the British military in Afghanistan).
18. See, e.g., Jon Bradbury, *Human Trafficking and Government Contractor Liability: Is FAR 22.17 a Step in the Right Direction?*, 37 PUB. CONT. L.J. 4, 907 (2008); Amy Kathryn Brown, *Baghdad Bound: Forced Labor of Third-Country Nationals in Iraq*, 60 RUTGERS L. REV. 3, 737 (2008); Margaret Maffai, *Accountability for Private Military and Security Company Employees That Engage in Sex Trafficking and Related Abuses While Under Contract With the United States Overseas*, 26 WISC. INT'L L.J. 4, 1095 (2009); Victoria Starks, *The U.S. Government's Recent Initiatives to Prevent Contractors From Engaging in Trafficking in Persons: Analysis of Federal Acquisition Regulation Subpart 22.17*, 37 PUB. CONT. L.J. 4, 879 (2008).
19. See COMMISSION ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISKS 92–94 (2011) (congressional commission reporting findings on abuse of TCN workers).

their own interests.²⁰ In other words, TCNs are central to the contemporary U.S. security architecture but fall into a legal gap: Current labor and employment law is too parochial in territorial application, while human trafficking measures are too limited in substantive scope to effectively address TCN rights.

This Article will proceed in three Parts. Part I, based on original research using publicly available government data, charts the rise of the TCN phenomenon in the post-2001 U.S. military and reviews the human rights problems that have emerged. Part II demonstrates that the United States has a massive migrant military labor force without any coherent labor law to regulate it. In particular, it reviews the structural weaknesses of antitrafficking laws meant to protect TCNs, such as the Trafficking Victims Prevention Act (TVPA),²¹ as well as more recent reform efforts. Part III frames these legal problems in a set of broader normative questions about violence, sacrifice, and exchange. Specifically, it shows how military migrant workers lack the forms of compensation—moral or material—that soldiers and mercenaries enjoy, rendering them simultaneously vulnerable to abuse and useful to the contemporary U.S. military. In conclusion, this Article returns to the opening anecdote by linking the predicament of TCN workers to the plight of the other TCNs who have attracted much attention in recent years—namely extraterritorial prisoners in the “War on Terror” at Guantánamo and elsewhere. This juxtaposition draws attention to how overseas bases are not simply places where law is suspended.²² They are also nodes through which categories of people rendered vulnerable by law circulate.

20. A number of scholars have forcefully critiqued the human trafficking paradigm, arguing instead for greater emphasis on labor rights and liberalizing cross-border mobility. See Karen Bravo, *Free Labor! A Labor Liberalization Solution to Modern Trafficking in Humans*, 18 *TRANSNAT'L L. & CONTEMPORARY PROBLEMS* 545 (2009); James Gray Pope, *A Free Labor Approach to Human Trafficking*, 158 *U. PA. L. REV.* 1849, 1867–71 (2010); Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 *UCLAL. REV.* 1, 76 (2011).

21. Public Law 106-386, 114 Stat. 1464 (Oct. 28, 2000) (amended by Trafficking Victims Protection Reauthorization Act of 2003, Public Law 108-193); Trafficking Victims Protection Reauthorization Act of 2005, Public Law 109-194; William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Public Law 110-457; Ending Trafficking in Government Contracting Act of 2013, Public Law 112-239, §§ 1701–8; Trafficking Victims Protection Reauthorization Act of 2013 (Public Law 113-4). Hereafter I will use the term “TVPA” to refer to the statute as amended.

22. See, e.g., Gerald Neuman, *Anomalous Zones*, 48 *STAN. L. REV.* 1197, 1201 (1996) (using Guantánamo as an exemplar of “geographical zone[s] in which certain legal rules, otherwise regarded as embodying fundamental policies of the larger legal system, are locally suspended”).

I. MIGRANT LABOR AND THE U.S. MILITARY

Over the past decade, migrant labor from third countries has become indispensable to the U.S. military's ability to sustain extended land wars. The military privatization revolution has drawn widespread attention, analysis, and critique, with a considerable focus on how the structure of contracting arrangements has encouraged fraud, waste, and abuse by corporations.²³ Far less attention, however, has been paid to one major aspect of privatization, namely offshoring military tasks to foreign subcontractors and workers.²⁴ This Part demonstrates the importance of TCNs for the U.S. military presence in the greater Middle East area managed by CENTCOM, including Afghanistan and Iraq. It then demonstrates how military offshoring was shaped by the U.S. presence in the Persian Gulf, where privatization intersected with the region's own patterns of recruiting and managing migrant labor—giving rise to practices the U.S. government itself often criticizes on human rights grounds. Finally, this Part reviews the major types of exploitation and abuse endured by military migrant workers.

A. Trends in the Post-9/11 Military Labor Force

Since 2001, the U.S. military has undergone a stark transformation. For the first time, this Article attempts to measure the overall size and shape of the military labor force—including both service members and civilian contractors—in the crucial CENTCOM area of responsibility, including Iraq and Afghanistan. This study combines²⁵ data from a quarterly CENTCOM contractor census²⁶

23. See, e.g., PRATAP CHATTERJEE, HALLIBURTON'S ARMY: HOW A WELL-CONNECTED TEXAS OIL COMPANY REVOLUTIONIZED THE WAY AMERICA MAKES WAR (2009); DAVID ISENBERG, SHADOW FORCE: PRIVATE SECURITY CONTRACTORS IN IRAQ (2009); DINA RASOR & ROBERT BAUMAN, BETRAYING OUR TROOPS: THE DESTRUCTIVE RESULTS OF PRIVATIZING WAR (2007); P. W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY (2003).

24. One article in the U.S. Army's logistics journal has attempted to analyze some dimensions of this phenomenon. See Christine Schverak, *The Globalization of Military Logistics*, 42 ARMY SUSTAINMENT 3, 57, 58 (2010) (arguing that "[b]y choosing to hire foreign logistics contractors, the United States strategically altered its national logistics system from a primarily closed, state-based organizational system to a primarily open, non-state-based organizational system").

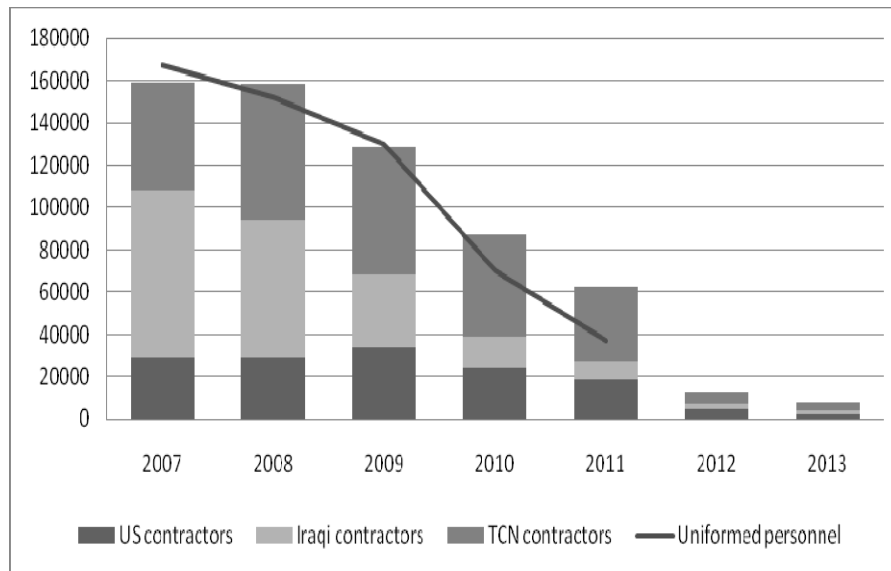
25. Data is presented on an annual basis by averaging the quarterly data provided by both sources. Averaging was undertaken to facilitate the visual presentation of data and also because data for contractors and uniformed personnel is collected during different months of the year, rendering comparisons on a quarterly basis infeasible.

26. See CENTCOM Contractor Census, *supra* note 12. Although the census began in August 2006, figures before September 2007 do not appear to be publicly available. In any event, the Congressional Budget Office has evinced "low confidence in the accuracy of the early quarterly counts" for Iraqi and TCN contractors, as they were mostly conducted manually. CONG.

with monthly reports on troop deployments to Iraq and Afghanistan supplied by the Department of Defense (DOD) to the U.S. Congress.²⁷ Unfortunately, there are no readily available statistics for use of TCNs by the U.S. military worldwide, and the CENTCOM data gives no breakdown on the nationalities of migrant workers. Nevertheless, even this limited data makes apparent the major role of TCN workers, including in armed security work.

The Iraq War presents perhaps the starkest example of the contemporary, multinational, public/private nature of the U.S. military. Figure 1 compiles data on uniformed personnel and contractors in Iraq.

FIGURE 1: U.S. Military Personnel and Contractors in Iraq



This graph illustrates the privatization revolution in action, with total contractor figures rivaling those of uniformed personnel and even exceeding them on average in 2008, 2010, and 2011. In terms of raw numbers, the total contractor

BUDGET OFFICE, PUBL'N. NO. 3053, CONTRACTORS' SUPPORT OF U.S. OPERATIONS IN IRAQ_10 (2008). These figures, which are current to April 2014, do not include contractors for other U.S. government agencies in Iraq such as the Department of State and USAID.

27. The monthly "Boots on the Ground" reports from the Department of Defense (DOD) to Congress are not publicly available. The data used in this table for troop figures is quoted in MOSHE SCHWARTZ & JENNIFER CHURCH, CONG. RES. SERVICE, PUBL'N NO. R43074, DEPARTMENT OF DEFENSE'S USE OF CONTRACTORS TO SUPPORT MILITARY OPERATIONS: BACKGROUND, ANALYSIS, AND ISSUES FOR CONGRESS 25 (2013). Troop levels for Afghanistan after May 2013 are drawn from the DOD CENTCOM contractor census.

workforce peaked at 163,591 in December 2007, just shy of the 165,700 uniformed personnel in the country at that time; by 2011, contractors outnumbered service members by a ratio of 1.7 to 1. This trend is consistent with increased reliance on contractors during the withdrawal phase: Contractors allowed the United States to maintain operations while reducing the politically sensitive number of uniformed personnel. Indeed, thousands of contractors continued to work for DOD even after the end of U.S. combat operations in December 2011.

This graph also makes clear that the privatization revolution has been an outsourcing revolution as well, with U.S. citizens constituting a minority of the contractor workforce. Indeed, since 2009, TCNs have been the single largest category; in 2010 and 2011, TCNs outnumbered U.S. and Iraqi contractors combined. They also outnumbered the total U.K. military contingent.²⁸ Figure 2 illustrates the composition of the contractor workforce in Iraq. Notably, the increased reliance on TCNs has come largely at the expense of Iraqi workers, whose share of the contractor population fell dramatically from 2007 to 2011. The percentage of U.S. workers also increased, albeit more modestly. This strongly suggests that TCNs are especially important to cover the withdrawal of U.S. forces.

FIGURE 2: DOD Contractors in Iraq by Nationality Category

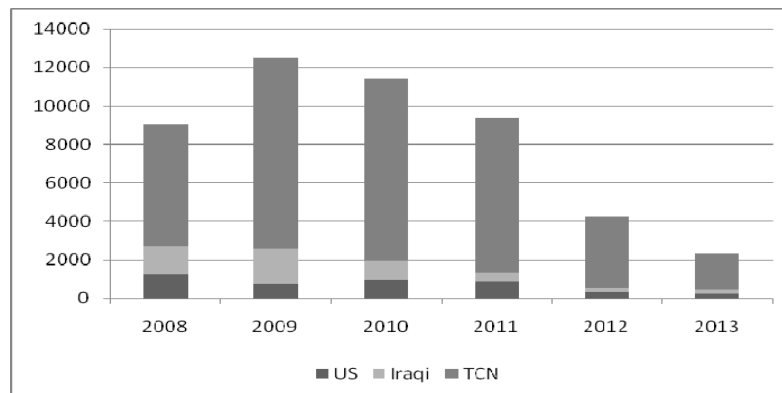
	%U.S.	%Iraqi	%TCN
2007	18.3	49.8	32.0
2008	18.3	41.3	40.4
2009	26.6	26.5	46.9
2010	27.6	16.8	55.6
2011	29.2	14.3	56.4
2012	36.6	18.7	44.7
2013	26.1	27.9	46.1

While contractors are normally thought of as performing support work for the military, it is striking that many TCNs in Iraq have been armed guards. Contractors are officially prohibited from engaging in offensive combat operations but frequently work in personal security details and also guard bases and convoys. In August 2008, employees of private security companies (PSCs) constituted

28. See *Iraq Approves Return of Small British Force*, CNN (Oct. 13, 2009, 2:12 PM), <http://www.cnn.com/2009/WORLD/meast/10/13/iraq.britain.pact/index.html?ref=nextin> (“About 46,000 British troops were in and around Iraq at the peak of major combat operations in March and April 2003 . . .”).

7.15 percent of the TCN population in Iraq, a figure that steadily climbed over the next three years. By January 2012, shortly after the withdrawal, 85.6 percent of the nearly 9,500 TCNs were employed in the security sector. Needless to say, these numbers translated into an overwhelming dominance of TCNs in the private security sector of the military workforce overall. TCNs have comprised between 70 and 88 percent of total private security personnel in the military labor force since 2008, dwarfing the combined numbers of U.S. citizens and Iraqis. The number of armed TCN security contractors appears to have peaked at 11,580—the equivalent of 11 percent of U.S. troops in the country around that time.²⁹ Ugandans in particular have been prominent in maintaining perimeter security on U.S. bases in Iraq and Afghanistan, at one point reaching nearly 10,000 in Iraq.³⁰ Indeed, while armed U.S. security contractors such as those fighting for the company then known as Blackwater have attracted the lion's share of attention, U.S. citizens have never exceeded 11 percent of the total security contractor force in this period. Figure 3 illustrates the breakdown.³¹

FIGURE 3: DOD Private Security Contractors in Iraq

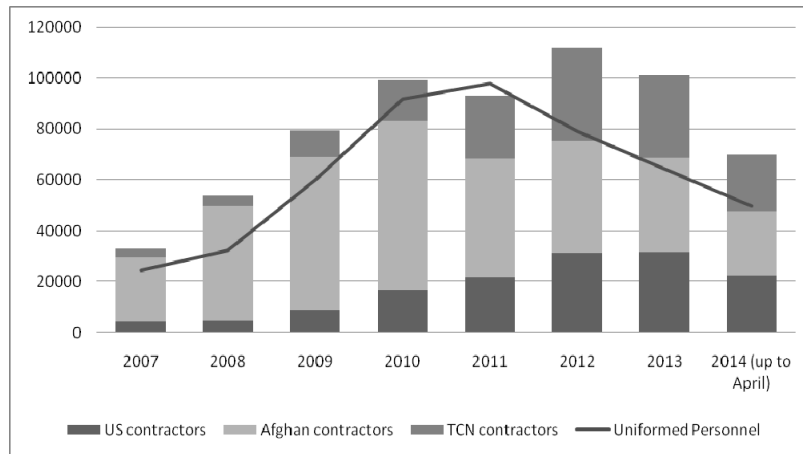


29. Compare CONTRACTOR SUPPORT OF U.S. OPERATIONS IN THE USCENTCOM AREA OF RESPONSIBILITY TO INCLUDE IRAQ AND AFGHANISTAN (Aug. 2009), in CENTCOM Contractor Census, *supra* note 12, with SCHWARTZ & CHURCH, *supra* note 27. Up until May 2010, the CENTCOM contractor census kept separate statistics for armed and unarmed private security companies (PSC) employees that indicated that the vast majority were armed, regardless of nationality.
30. See Max Delany, *Why 10,000 Ugandans Are Eagerly Serving in Iraq*, CHRISTIAN SCI. MONITOR (Mar. 6, 2009), <http://www.csmonitor.com/World/Africa/2009/0306/p04s02-woaf.html>; see also Vicky, *supra* note 6.
31. These figures are based on the quarterly CENTCOM contractor census, averaged on an annual basis for ease of presentation. The category of U.S. security contractors also included citizens of coalition countries (presumably mostly from the U.K.) from November 2008 to February 2009.

This pattern appears to hold for nonmilitary U.S. government operations in Iraq as well. According to the latest available data, from fiscal year 2010, TCNs comprised 49 percent of the about 11,000 contractors supporting the State Department in the country—and nearly 66 percent of private security personnel.³²

In Afghanistan, there have been striking similarities and differences in the use of contractors compared to Iraq. Figure 4 compiles data on both service members and contractors deployed to that country.³³ In Afghanistan, the overall extent of contractor reliance has been even greater than in Iraq. Contractors have consistently outnumbered service members in Afghanistan, except during the peak of the troop surge in 2011. And while contractor and troop figures in Iraq fell in tandem (albeit at different rates), in Afghanistan they have moved in opposite directions over the past two years: As U.S. forces have withdrawn, contractors have been deployed in even greater numbers. By the end of 2013, the ratio of contractors to military in Afghanistan peaked at 1.46 to 1.³⁴

FIGURE 4: Uniformed Personnel and Contractors in Afghanistan



32. These estimates are based on averages of quarterly figures. *See* DEP'T OF DEF., ANNUAL JOINT REPORT ON CONTRACTING IN IRAQ AND AFGHANISTAN: REPORT TO THE RELEVANT COMMITTEES OF CONGRESS 9 (2011).

33. One significant caveat applies: During the final quarter of 2010, DOD discovered that the number of Afghan contractors had been overstated during that year. *See* DEP'T OF DEF., CONTRACTOR SUPPORT OF U.S. OPERATIONS IN THE US CENTCOM AREA OF RESPONSIBILITY, IRAQ AND AFGHANISTAN 2 (2010).

34. *See* DEP'T OF DEF., CONTRACTOR SUPPORT OF U.S. OPERATIONS IN THE USCENTCOM AREA OF RESPONSIBILITY TO INCLUDE IRAQ AND AFGHANISTAN 2 (2014).

Within the Afghanistan contractor workforce, TCNs have not played as dominant a role as in Iraq, but the patterns still resonate with Iraq in some ways. U.S. forces have relied far more on local workers in Afghanistan than in Iraq. As withdrawal of U.S. service members has proceeded, the contractor workforce has nevertheless shifted away from Afghans to employing more TCNs and Americans, in roughly similar numbers. As of the latest figures, the contractor workforce is roughly equally divided between the three categories. Figure 5 tabulates the breakdown of the contractor workforce.

FIGURE 5: DOD Contractors in Afghanistan by Nationality Category

	%US	%Afghan	%TCN
2007	12.9	76.9	10.1
2008	8.8	83.0	8.1
2009	10.9	76.3	12.8
2010	16.6	67.1	16.2
2011	23.1	50.4	26.5
2012	27.9	39.4	32.7
2013	31.1	36.6	32.3
2014 (up to April)	32.0	36.2	31.8

The contrast between the U.S. military labor force in Iraq and Afghanistan is even more apparent in the security sector. Unlike in Iraq, security contractors in Afghanistan have mostly employed locals. Over time, there has nevertheless been a steady increase in the use of TCN contractors (and of U.S. citizens to a lesser extent) by PSCs: In late 2013, TCNs comprised 12.5 percent of total PSC contractors, while U.S. citizens were 8.9 percent.³⁵

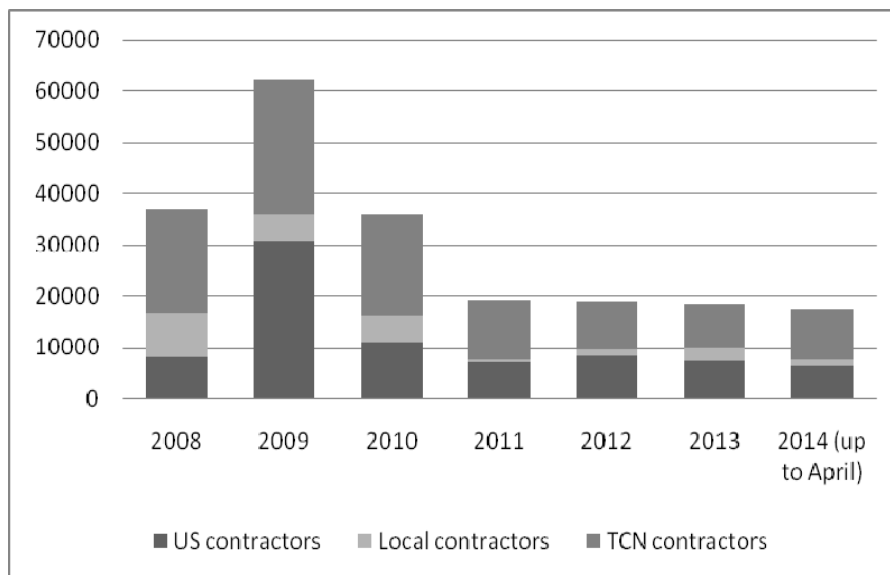
The greater emphasis on TCN use in Iraq compared to Afghanistan can be explained by several factors. First, U.S. forces disbanded the Iraqi army and faced an aggressive insurgency from the first year of the occupation, which strongly discouraged employment of Iraqis. In Afghanistan, U.S. forces had a much lower profile and began their mission with strong local militia partners. Yet as the Afghan mission has expanded along with the scale of the insurgency, U.S. forces have increasingly turned to TCNs. Second, Afghanistan's relative distance from the Gulf and its landlocked location made the importation of TCNs more expen-

35. *See id.*

sive and difficult than in Iraq. But in both instances, TCNs have played a major role, especially during periods of rapid increase or decrease in the number of troops.

Finally, figures for contractors in the CENTCOM area of responsibility outside Iraq and Afghanistan confirm that extensive use of TCNs is not limited to combat areas. The U.S. military presence in the region includes major bases in Kuwait, Bahrain (Naval Support Activity Bahrain, home of the U.S. Fifth Fleet), and Qatar (which hosts a forward headquarters for CENTCOM at Al Udeid Air Force Base). These bases are crucial staging areas for U.S. operations in Iraq and Afghanistan, as well as in the projection of U.S. military power throughout the greater Indian Ocean. Although there are no publicly available overall figures for service member deployments in the CENTCOM area to enable comparison with contract worker statistics, the raw numbers themselves are impressive, as depicted in Figure 6.

FIGURE 6: DOD Contractor Workforce, CENTCOM Area of Responsibility (Outside Iraq and Afghanistan)



TCNs reached a peak of 35,000 in 2009 and outnumbered local and U.S. contractors combined in 2008, 2010, 2011 and 2014. Locals were the least numerous category, at one point constituting as little as 3.7 percent of the contractor workforce. This figure is especially striking in light of the longstanding U.S.

military presence in many of these countries but is consistent with local labor recruitment practices.³⁶ Figure 7 depicts these trends in greater detail.

FIGURE 7: DOD Contractors in CENTCOM (Outside Iraq and Afghanistan) by Nationality Category

	%US	%Local	%TCN
2008	21.6	23.9	54.5
2009	49.6	8.2	42.2
2010	30.7	14.4	54.9
2011	36.7	3.7	59.6
2012	43.7	8.6	47.7
2013	45.3	15.0	39.7
2014 (up to April)	36.2	6.8	57.1

These figures provide a glimpse of the contemporary U.S. security architecture in the greater Middle East: a quasi-privatized army with a nationally segmented, hierarchical workforce.

B. Military Privatization in the Persian Gulf

The restructuring of the U.S. military at the end of the Cold War forms a crucial backdrop for the shift to a migrant labor workforce. While the broader push to privatize governmental functions affected the military, how and where privatization occurred also mattered. By shifting to a new center of gravity in the Persian Gulf, the U.S. military restructured in ways that meshed with that region's political economy.

Over the past two decades, the U.S. military has privatized many of its functions, especially those related to logistics and base support services. A major development was the rise of the Army's Logistics Civil Augmentation Program (LOGCAP), which enabled the military to delegate wide-ranging authority for logistics to private contractors. Instead of hiring private companies to provide specific goods or services, the Pentagon awards LOGCAP contracts to large companies ("prime contractors") to supply logistical needs for entire missions on an open-ended basis. In order to accomplish specific goals, prime contractors then issue task orders to subcontractors, which may be U.S. or non-U.S. companies.

36. See *infra* Part II.B.

Contracts have been widely criticized for reimbursement structures that guarantee a fixed percentage of profit, thus encouraging cost inflation, fraud, and waste by prime contractors and subcontractors.³⁷ The war in Iraq was mostly supported through the LOGCAP III contract, managed by KBR. The current LOGCAP IV contract relies on a handful of prime contractors rather than a single one: Operations in Afghanistan are divided between Fluor (northern and eastern regions) and DynCorp (west and south).³⁸ The first significant military operation to run on a LOGCAP contract was in Somalia in 1992, where prime contractor Brown & Root (now KBR) arrived less than twenty-four hours after U.S. forces. Privatization created a stronger incentive to reduce labor costs, providing an economic rationale for relying on non-U.S. workers, although not necessarily for importing migrant workers from third countries. In Kosovo, 90 percent of Brown & Root's workers were local, making it the biggest employer in the area.³⁹

Military privatization, however, is not simply an abstract process that unfolds in the same way across space and time. Crucial to understanding the rise of TCN labor in particular was the post-Cold War military's shift to a new center of gravity: the Persian Gulf. The 1990 Iraqi invasion of Kuwait marked a major shift in the global U.S. military posture, with the deployment of large ground forces to Saudi Arabia and Kuwait as a counterbalance to both Iraq and Iran. Since then, U.S. bases in the Gulf have been key staging areas for operations in Iraq, Afghanistan, and elsewhere. Unlike the major overseas hubs of the Cold War military in Western Europe and East Asia, the Gulf economies were built in large part on foreign migrant labor. Large numbers of noncitizens reside in Qatar (86.5 percent of the population), the U.A.E. (70 percent), Kuwait (68.8 percent), Bahrain (39.1 percent), and Saudi Arabia (27.8 percent).⁴⁰ Indeed, the military and police services of the Arab Gulf states themselves also make extensive use of foreign labor, at both the rank-and-file and officer levels. The U.A.E. and Qatari militaries employ large numbers of contractors from Pakistan, Egypt, and other

37. See Dickinson, *supra* note 14, at 203–05; RASOR & BAUMAN, *supra* note 23, at 249–50.

38. See Summer Barkley, *LOGCAP IV Overview—Civilian Contractors Supporting the Forces in OEF*, U.S. ARMY (Dec. 2, 2011), http://www.army.mil/article/70193/LOGCAP_IV_overview_civilian_contractors_supporting_the_forces_in_OEF.

39. See George Cahlink, *Army of Contractors*, 34 GOV'T EXEC. 2, Feb. 2002, at 43, 46 (“[A]bout 5,000 of the company's 5,500 workers in Kosovo are local residents, making the firm Kosovo's largest employer.”).

40. See BARRY MIRKIN, POPULATION LEVELS, TRENDS AND POLICIES IN THE ARAB REGION: CHALLENGES AND OPPORTUNITIES 37 (2010), available at <http://www.arab-hdr.org/publications/other/ahdrps/paper01-en.pdf>.

countries.⁴¹ Bahrain's extensive reliance on Pakistanis and other foreigners has attracted considerable attention since the 2011 uprising.⁴²

The Gulf states' migrant-driven economy converged with the changes in U.S. military logistics: Companies specializing in recruiting migrant labor for construction, logistics, and security in the petroleum and related industries were well-poised to lend their services to the U.S. military. Over preceding decades, Gulf regimes crushed budding labor movements that emerged around the oil industry⁴³ and replaced them with large numbers of migrants, all while extending state largesse to pacify and co-opt the citizenry. In contrast, contractors at the major U.S. airbase at İncirlik, Turkey, were forced into arbitration with local unions after major strikes in the late 1980s and early 1990s. One U.S. military contractor complained of the Turkish workers having a "home-field advantage";⁴⁴ in countries such as Kuwait, such concerns did not exist. As a result, large U.S. military contractors such as KBR, DynCorp, and Fluor can draw from a variety of smaller multinational companies to recruit and transfer workers through the Gulf. One Dubai-based company operating on bases in Afghanistan, Ecolog, was founded by an ethnic Albanian entrepreneur providing services to NATO peacekeepers in Kosovo.⁴⁵ One of the leading recruiters of Ugandan security guards for the U.S. military, Dreshak Group, is also based in Dubai but was founded in Pakistan.⁴⁶

C. Exploitation and Abuse

Human rights activists and journalists have done considerable work in exposing the abuses faced by TCNs from poor countries, whose situation has

41. See *Army, United Arab Emirates*, in JANE'S SENTINEL SECURITY ASSESSMENTS-THE GULF STATES 37 (2012); ANTHONY H. CORDESMAN & KHALID R. AL-RODHAN, GULF MILITARY FORCES IN AN AGE OF ASYMMETRIC WARS 148, 284-85 (2007).

42. See, e.g., Laurence Louër, *Sectarianism and Coup-Proofing Strategies in Bahrain*, 36 J. STRATEGIC STUD. 2, 245 (2013).

43. See ROBERT VITALIS, AMERICA'S KINGDOM: MYTHMAKING ON THE SAUDI FRONTIER (2006) (documenting how U.S. oil companies exported racially segregationist labor practices from the U.S. south to Saudi Arabia and cooperated with the Saudi government in crushing Saudi worker organization); 'Abd al-Hadi Khalaf, *Labor Movements in Bahrain*, MIDDLE EAST RESEARCH AND INFO. PROJECT, May/June 1985, available at <http://www.merip.org/mer/mer132/labor-movements-bahrain> (noting the repression of labor movements in Bahrain).

44. CHATTERJEE, *supra* note 23, at 56.

45. See *Ecolog Says Yes, to Shkëndija Football Club*, ECOLOG (July 31, 2013), http://www.ecolog-international.com/files/news_12.php (describing Ecolog founder's roots in the Albanian communities on the Macedonian-Kosovo border).

46. See DRESHAK GROUP, <http://www.dreshakgroup.ae> (last visited June 29, 2014).

been likened to indentured servitude or slavery.⁴⁷ While service members and TCNs may work side by side on U.S. bases, a complex web of entities often shields the U.S. government from responsibility for TCN workers. Prime contractors hire subcontractors (often foreign companies) to fulfill specific task orders. Subcontractors in turn use recruiting agencies to find and bring workers from other locations. In practice, there may be even more subcontractors and other intermediaries involved. Between the links in the contracting chain, responsibility is often obscured or displaced, facilitating abuse and exploitation. These problems are, of course, endemic to many situations of labor migration around the world; for TCNs, however, the employer is ultimately the U.S. government.

The plaintiffs' allegations in *Adhikari v. Daoud*, a lawsuit that has been pending in the U.S. District Court in the Southern District of Texas since 2008, illustrate some of the most egregious practices concerning TCNs. The plaintiffs in *Adhikari*, mostly deceased and proceeding through kin, were Nepalis allegedly promised jobs in luxury hotels in Jordan that paid \$500 per month.⁴⁸ They were hired by a Nepali labor recruiter working on contract with a Jordanian job brokerage company and transported by another Jordanian company to Amman, all at the behest of Daoud and Partners, a Jordanian firm that was in turn subcontracted by KBR.⁴⁹ After each paying up to \$3,500 in recruitment fees—paid for by loans charging exorbitant interest—the plaintiffs arrived in Jordan only to have their passports taken away.⁵⁰ They were then put in an unprotected convoy bound for Al Asad Air Force base in Ramadi, northern Iraq.⁵¹ Along the way, Iraqi rebels seized a dozen of the Nepalis; they beheaded one and executed the others with gunshots to the head.⁵²

The allegations in *Adhikari* echo reports about recruitment and employment practices that undermine migrants' freedom to work to the point where they resemble indentured servitude. One of the most egregious abuses has been outright lying by recruiters to migrants about their destinations, often promising

47. See, e.g., AM. CIVIL LIBERTIES UNION, VICTIMS OF COMPLACENCY: THE ONGOING TRAFFICKING AND ABUSE OF THIRD COUNTRY NATIONALS BY U.S. GOVERNMENT CONTRACTORS (2012); Kavinnamannil & McCahon, *supra* note 10.

48. See First Amended Complaint ¶ 64, *Adhikari et al. v. Daoud & Partners*, No. 4:09-cv-01237 (S.D. Tex. Dec. 22, 2008). In this Article all dollar amounts refer to U.S. dollars unless otherwise specified.

49. See *id.* ¶¶ 22–37.

50. See *id.* ¶¶ 65–70.

51. See *id.* ¶ 75.

52. See *id.* ¶ 87.

jobs in Kuwait or the U.A.E. and instead taking workers to Iraq.⁵³ Another has been the seizure of passports by employers, despite clear DOD policies to the contrary. Finally, and perhaps most widespread, is the practice of labor recruiters charging workers large sums of money, described as a recruitment or processing fee, in order to be considered for work abroad.⁵⁴ Often equivalent to many months of wages, migrants frequently have no choice but to go into debt at exorbitant interest rates. Migrants then toil under the threat that any failure to pay back their debts may result in violence, including sexual assault, against family members at home.⁵⁵ Employees who quit may also be charged fees for their repatriation.⁵⁶

After arrival at their work sites (which may include weeks or months of waiting in transit in Dubai or elsewhere),⁵⁷ TCN workers have also faced exploitative conditions of employment. Perhaps the most common problem is the discrepancy between wages promised by recruiters and wages actually paid. This situation is facilitated by the subcontracting process: Recruiters may promise one wage, only for the direct employers to promise another, with both blaming each other. When workers have taken on debt in order to migrate, they often have little choice but to accept whatever wages are offered. According to research by the ACLU and the Yale Law School Lowenstein Human Rights Clinic, TCNs are typically promised salaries of \$1,000–3,000 per month but may receive only \$150–500 per month instead.⁵⁸ A TCN janitor working twelve hours per day with only two days off in a month may make as little as \$0.82 per hour.⁵⁹ Moreover, TCNs often find themselves vulnerable to sudden adverse changes to their pay and benefits. Salaries for Ugandan security guards on U.S. bases steadily dropped from about \$1,000 per month in 2005 to \$400–500 in 2011.⁶⁰ Such situations of extreme vulnerability have also given rise to reports of rape, sexual as-

53. See CHATTERJEE, *supra* note 23, 146–50 (detailing cases of TCNs going to Iraq after being allegedly promised work in Kuwait or other countries).

54. See AM. CIVIL LIBERTIES UNION, *supra* note 47, at 21–23.

55. *See id.*

56. See EXPANDED SUMMARIES DCMA 0001-0009, available at https://www.aclu.org/files/pdfs/natsec/centcom/120423_DCMA%200001-0039%20Expanded%20Summary.pdf (reporting that TCNs at Ramadi airbase in Iraq told DOD inspectors that they had to pay \$300 to their employers if they left before the end of their contract).

57. See *Fault Lines: America's War Workers*, *supra* note 6 (interviews with Indian workers recruited for work on U.S. bases).

58. See AM. CIVIL LIBERTIES UNION, *supra* note 47, at 25.

59. *See id.*

60. See Chiara Carter, *Insecurities of Security Work in Iraq*, WEEKEND ARGUS (Cape Town), May 28, 2011, at 31; Julius Businge, *Return of the Iraq Guards*, THE INDEPENDENT (Aug. 27, 2011, 1:34 PM), <http://www.independent.co.ug/business/business-news/4543-return-of-the-iraq-guard>.

sault, and harassment.⁶¹ In addition, reports have suggested that TCNs have been given substandard or dangerous housing; most notorious were reports of “man camps” near military bases in Iraq consisting of overcrowded shipping containers.⁶²

In light of these hardships, there have been scattered instances of labor mobilization by TCN workers. In September 2009, over 170 Kenyan guards employed by SOC-SMG at Camp Echo near al-Diwaniyya, Iraq, addressed a letter to the base commander announcing their intention to down their tools.⁶³ The Kenyans argued that the action was necessary after attempts to negotiate a new employment contract had failed.⁶⁴ It is not known whether the strike went ahead and if so, what came of it. And on the night of August 20, 2010, Ugandan guards also employed by SOC-SMG refused to work the evening shift guarding Forward Operating Base Camp Bucca near Umm Qasr, Iraq, because of a salary dispute.⁶⁵ Media reports have mentioned worker uprisings over food shortages and wages on U.S. bases in Baghdad and Balad.⁶⁶

This Part of the article has provided a general overview of the offshoring of the U.S. military by demonstrating the extent of its reliance on foreign contractor labor, especially TCNs. This phenomenon resulted largely from the convergence of two factors: the general push toward privatization of government functions and the more specific shift of American military forces to the Persian Gulf, a region already heavily dependent on migrant labor. The use of migrant military labor has in turn produced many of the same abuses and forms of exploitation

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61. See, e.g., AM. CIVIL LIBERTIES UNION, *supra* note 47, 33–34; Stillman, *supra* note 6, at 61 (reporter’s account of meeting a Fijian beauty salon worker at Forward Operating Base Sykes, in northwestern Iraq, after being sexually assaulted by a supervisor from a Turkish subcontractor); Dec. of Duane Banks 2, Adhikari v. Daoud & Partners, 09-cv-01237, dkt. no. 405-5 (S.D. Tex. Oct. 23, 2012) (declaration by American ex-contractor recounting how a female TCN worker told him “she was having sex with [a] supervisor, that she needed her job and therefore felt helpless to rebuff his sexual advances”).
 62. See, e.g., Cable from Amb. Ryan Crocker to Washington D.C., KBR Subcontractor Suspected of TIP Violations, 09BAGHDAD35 (Jan. 7, 2009), available at http://www.wikileaks.org/plusd/cables/09BAGHDAD35_a.html (describing housing conditions for abandoned TCN workers near Baghdad International Airport).
 63. See *Notice to Ground Tools*, ACLU (Sept. 25, 2009), at DCMA IRAP 466–75, <https://www.aclu.org/files/pdfs/humanrights/IRAP%20FOIA%20Release%20DCMA%20IRAP%208-558.pdf>.
 64. See *id.* It is worth noting that Ugandan press reports from that period blame Kenyans for taking Ugandan jobs at lower pay. See, e.g., Fortunate Ahimbisibwe, *Uganda: Country Loses Iraq Jobs to Kenya*, ALL AFRICA, Jan. 10, 2009, <http://allafrica.com/stories/200901120330.html>.
 65. See *Corrective Action Request (CAR) VBC-10-TWCA-4023-0013-0001 LIII; Failure to provide the proper manning for FOB Bucca*, ACLU (Aug. 27, 2010), at DCMA IRAP 877–78, <https://www.aclu.org/files/pdfs/humanrights/IRAP%20FOIA%20Release%20DCMA%20IRAP%20559-1061.pdf>.
 66. See Stillman, *supra* note 6, at 64.

witnessed with the use of migrant labor elsewhere. The next Part addresses the specific legal issues that arise with migrant worker in the military context.

II. FROM WORKERS TO VICTIMS: MILITARY MIGRANT LABOR AND U.S. LAW

The post-2001 U.S. military fights ground wars using a labor force that is in significant part offshored to foreign nationals, including workers imported from third countries. Yet the United States continues to lack any coherent legal regime for regulating the treatment of its migrant military workforce. This Part outlines the predicament of TCN workers under U.S. law: Excluded from most labor protection provisions, they are treated primarily as potential victims of human trafficking. The trafficking framework, however, is not an adequate substitute for labor law and in this case leaves the core employer-employee relationship effectively beyond the review of U.S. courts.

A. Shutting Foreign Military Workers Out of U.S. Courts

The applicability of U.S. law to military bases overseas has long been a matter of intense debate, especially in the ongoing disputes over the detention center at Guantánamo Bay. Military commanders and contractor firms are the primary entities exercising authority over military workers,⁶⁷ but they do so in a situation of significant jurisdictional uncertainty, since neither U.S. nor local laws apply in their entirety. The debate over the applicability of U.S. law to overseas bases has in significant part been informed by a near-exclusive focus on constitutional rights and tort remedies.⁶⁸ Overseas military bases are spaces saturated with other

67. Contractor personnel are generally required to obey directives from the Combatant Commander. See 48 C.F.R. § 252.225-7040(d)(1)(iv) (2013). They can only be terminated, however, upon the order of the Contracting Officer, who may be in a separate chain of command. See *id.* § 252.225-7040(h)(1) (2013).

68. Tort actions by U.S. service members against military contractors have raised vexing questions under the political question doctrine and the “combatant activities” exception in the Federal Tort Claims Act, 26 U.S.C. § 2680(j) (2006). See, e.g., *Harris v. KBR*, 724 F.3d 458 (3d Cir. 2013) (allowing suit by survivors of U.S. soldier electrocuted by shower built by a military contractor in Iraq); *Bixby v. KBR*, 2012 BL 223817 (D. Or. Aug. 29, 2012) (permitting civil action by National Guardsmen against KBR for negligent exposure to toxic substances in Iraq). Tort claims by contractor employees, on the other hand, are generally precluded by the Defense Base Act, a statute discussed *infra*. See, e.g., *Fisher v. Halliburton*, 667 F.3d 602 (5th Cir. 2012) (holding that the DBA preempts negligence and fraud claims brought by truck drivers employed by KBR); *Brink v. XE Holding, LLC*, 910 F. Supp. 2d 242 (D.D.C. 2012) (DBA preemption of tort claims by U.S., South African, and Iraqi contractor employees).

legal regimes,⁶⁹ including executive branch regulations and layers of statute and contract that create limited grants of extraterritorial jurisdiction to courts within the United States. The result is an uncertain patchwork that effectively accords different rights to different categories of workers by nationality.

U.S. law applies to military contractors overseas only in limited instances, thanks in significant part to the presumption against extraterritorial applicability.⁷⁰ Legislative enactments in recent years have extended criminal jurisdiction over contractors in both military⁷¹ and civilian⁷² courts, regardless of nationality. But many labor laws still do not apply extraterritorially, including to overseas bases. These include the Service Contract Act, which establishes minimum wage for government contractor employees;⁷³ the Occupational Health and Safety Act;⁷⁴ the Fair Labor Standards Act;⁷⁵ and the National Labor Relations Act.⁷⁶ One category of labor law that does tend to apply extraterritorially is nondiscrimination law, but only to U.S. citizens working for U.S. firms or companies controlled by them. This includes Title VII of the Civil Rights Act,⁷⁷ the Age Discrimination in Employment Act,⁷⁸ and the Americans with Disabilities Act.⁷⁹

The only area of labor law that generally applies to non-U.S. contract workers overseas is compensation for death, injury, and other war-related hazards. The Defense Base Act (DBA)⁸⁰ and the War Hazards Compensation Act (WHCA)⁸¹ are interlinked workers' compensation statutes. The DBA requires contractors to insure workers against death or injury on U.S. government projects

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69. See Nasser Hussain, *Beyond Norm and Exception: Guantánamo*, 33 CRITICAL INQUIRY 4, 734 (2007) (describing Guantánamo as a space of “hyperlegality” rather than one of lawlessness); Fleur Johns, *Guantánamo Bay and the Annihilation of Exception*, 16 EUR. J. OF INT’L L. 4, 613, 614 (2005) (describing Guantánamo as a space “where law and liberal proceduralism speak and operate *in excess*” (emphasis in original)).
70. See EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991); see also *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 12 (2013); *Morrison v. National Australia Bank Ltd. et al.*, 561 U.S. 247 (2010); *Smith v. United States*, 507 U.S. 197 (1993).
71. See 10 U.S.C. § 802(2)(a)(10) (2012) (providing for court martial jurisdiction over “persons serving with or accompanying an armed force in the field” during any “declared war or contingency operation”).
72. See Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261 (2012).
73. See 41 U.S.C. § 6702(a)(3) (2012).
74. See 29 U.S.C. § 653(a) (2012).
75. See 29 U.S.C. § 213(f) (2012).
76. See *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 144 (1957).
77. See 42 U.S.C. § 2000e-1 (2012).
78. See 29 U.S.C. § 623(h) (2012).
79. See 42 U.S.C. § 12111(4) (2006).
80. See 42 U.S.C. §§ 1651–4 (2006). The Defense Base Act (DBA) is itself an extension of the Longshore and Harbor Workers’ Compensation Act (LHWCA), a statute that federalizes workers’ compensation in ports and waterways. See 33 U.S.C. §§ 901–950 (2012).
81. See 42 U.S.C. §§ 1701–6 (2006).

overseas, whereas the WHCA provides governmental compensation for harms that result from hostile acts.⁸² Although the DBA and WHCA apply to contract workers regardless of nationality, non-U.S. workers nevertheless face disadvantages in availing of them. Both statutes allow the Secretary of Labor to commute death and permanent disability benefits by 50 percent for non-U.S. nationals and their survivors, presumably to account for cost-of-living differences across different countries.⁸³ Media reports indicate that non-U.S. workers are often not informed of their compensation rights or lack realistic means to pursue compensation from their home countries.⁸⁴ One major problem is that DBA claims must be filed with Department of Labor (DOL) offices inside the United States; claims arising out of injuries and deaths in Afghanistan and Iraq, for example, must be filed in New York.⁸⁵ Citing “safety considerations,” DOL does not even send mail to DBA claimants in Iraq.⁸⁶ This creates major difficulties for injured workers or their families overseas, who are far less likely to have access to counsel with the expertise and commitment to pursue these claims.⁸⁷ The Department of Labor does not publish DBA statistics based on the nationality of claimants, but a search reveals a relatively limited number of such claims from non-U.S. workers in the administrative tribunals tasked with processing them.⁸⁸

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82. See Greta S. Milligan, *The Defense Base Act: An Outdated Law and Its Current Implications*, 86 U. DET. MERCY L. REV. 407, 420 (2009) (arguing that the War Hazards Compensation Act (WHCA) incentivizes contractors to take on riskier insurance policies, thus incurring greater cost to the U.S. government).
83. See 42 U.S.C. §§ 1652(b), 1701(c) (2006). The DBA excludes domestic and certain kinds of “casual” labor, which are far more likely to be performed by non-U.S. nationals. 42 U.S.C. § 1654 (2006). The WHCA excludes many local nationals (individuals “not living there solely by virtue of the exigencies of his employment”) unless they experience harms “while in the course of” employment. 42 U.S.C. § 1701(d)(2) (2006).
84. See, e.g., Miller, *supra* note 6; Vicky, *supra* note 6.
85. See *Division of Longshore and Harbor Workers’ Compensation (DLHWC)*, U.S. DEP’T LAB., <http://www.dol.gov/owcp/dlhwc/DBAOWCProcedures2-22-06.htm> (last visited Aug. 10, 2014).
86. *Id.*
87. See Jameson Cook, *Local Attorney Fights Insurance Companies*, MACOMB DAILY (July 23, 2012, 10:10 A.M.), <http://www.macombdaily.com/article/MD/20120723/NEWS01/120729877> (profile of a private attorney in Michigan who has developed a specialized DBA practice for Ugandans).
88. See, e.g., Mbule v. EOD Tech., Inc., BRB No. 11-0733 (Ben. Rev. Bd. July 24, 2012); Olunga v. Triple Canopy, BRB No. 11-0691 (Ben. Rev. Bd. Apr. 19, 2012); Kiwalabye v. SOC-SMG, Inc., OALJ Case No. 2012-LDA-00653 (Dep’t of Labor July 22, 2013); Kayemba v. Dreshak, OALJ Case No. 2013-LDA-00205 (Dep’t of Labor July 1, 2013); Kinuthia v. Global Strategies Group, OALJ Case No. 2013-LDA-00542 (Dep’t of Labor Mar. 10, 2014); Dervisbegovic v. Service Employees International, Inc., OALJ Case No. 2013-LDA-00066 (Dep’t of Labor Apr. 25, 2014); Rwomushana v. Triple Canopy, OALJ Case No. 2012-LDA-00693 (Dep’t of Labor Aug. 27, 2014).

In lieu of labor laws, the Department of Defense issued policy directives in June 2013 incorporating a sort of skeletal workers' bill of rights.⁸⁹ The instruction requires military contractors abroad to notify employees of their rights, *inter alia*, to hold their own identity and immigration documents, receive agreed-upon wages on time, take appropriate breaks, possess copies of their employment contracts in languages they understand, and receive wages and housing that meet local standards.⁹⁰ While it is too soon to assess the effect of these regulatory changes, this rule appears to be primarily declarative: It makes no provision for the enforcement of the rights mentioned therein and does not specify their legal basis,⁹¹ although a new federal contracting rule could provide some means of enforcement.⁹²

With most U.S. labor laws not in force on overseas bases, employment contracts become even more central in determining applicable law. In such a situation, the contracting process provides a way to legitimize a labor hierarchy based on citizenship.⁹³ Employment contracts involving U.S. parties—workers and corporations—can generally be litigated in domestic courts, especially if concluded on U.S. soil. Indeed, the self-evidence of jurisdiction over employment contracts for U.S. workers explains heavy corporate reliance on alternative dispute resolution to head off judicial review. The best-known example was KBR's unsuccessful resort to private arbitration in response to the suit brought by ex-employee Jamie Leigh Jones for negligence and other harms after she was allegedly raped by coworkers at Camp Hope in Iraq.⁹⁴

For foreign workers, however, the chances of accessing U.S. courts to litigate employment contracts for work done on overseas bases are virtually nonexistent. Non-U.S. workers are frequently separated from prime contractors and the military by multiple layers of subcontractors and recruiters. A typical TCN employment contract is executed outside the United States between two non-

89. See Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States, DFAR Supp. 252.225-7040(d)(8) (June 27, 2013); see also Contractor Personnel Performing in the United States Central Command Area of Responsibility, DFAR Supp. 252.225-7995(c)(2) (June 27, 2013) (same for nonmilitary contractor personnel in the CENTCOM area of responsibility).

90. *Id.*

91. Interestingly, the notification requirement does not mention one of the few rights that TCN workers unquestionably enjoy under U.S. law, namely compensation under the DBA.

92. For more, see *infra* Part II.D.

93. See also McCoy, *supra* note 17, at 681–83 (discussing the effects of national pay hierarchies on cohesion and morale in the contractor workforce).

94. See Jones v. Halliburton, 583 F.3d 288 (5th Cir. 2009). Halliburton ultimately prevailed at trial. See Mike Tolson, *Defeated at Trial, KBR Rape Accuser Sticks to Her Story*, HOUSTON CHRON., Oct. 3, 2011.

U.S. parties. Under such circumstances, the employment relationship is highly unlikely to exhibit sufficient contacts with the United States to trigger personal jurisdiction over employers.⁹⁵ Such workers almost never set foot in the United States in connection with their work, and the same may even be the case of their direct employers. Finally, to the extent written contracts exist, they are likely to include provisions specifying choices of law and venue other than the United States, such as the country where the contract is performed, the worker's country of origin, or the employer's country of origin. For most TCNs, access to justice in these jurisdictions is unlikely.

One of the few instances of a TCN employment contract that has publicly surfaced illustrates this problem. The contract, a five-page document drafted in English, was concluded between a Kuwaiti company called Najlāa International Catering Service and a Sri Lankan citizen employed as a "store supervisor" in Iraq.⁹⁶ Najlāa gained widespread notoriety in 2008 after it was accused of luring hundreds of South Asians to Iraq and then stranding them in shipping containers outside Baghdad airport.⁹⁷ The contract specifies a schedule of twelve hours of work per day, seven days per week, "and as many hours as may be required for the performance of the Employee's duties" for a monthly salary of \$700, the equivalent of about \$2 per hour.⁹⁸ It also gives the employer broad latitude to terminate the agreement without notice and imposes on the worker a penalty of \$2,500 if he resigns within the first year of employment or engages in any strike actions.⁹⁹ The contract refers only to employment in Iraq without mentioning an army base, rights to compensation under the DBA, or any connection with the U.S. military or contractor firms whatsoever. Finally, the contract holds that it "shall be governed by and construed in accordance with the Kuwaiti Labor Law (Private Sector) and any dispute arising out of this Agreement or in relation thereto shall be referred to and settled by the Courts of Kuwait."¹⁰⁰ Needless to

95. See *Walden v. Fiore*, 134 S. Ct. 1115, 1121–22 (2014) ("For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State.")

96. *Najlāa Employee Contract*, POGO: PROJECT ON GOVERNMENT OVERSIGHT, <http://pogo.archive.pub30.convio.net/resources/contract-oversight/najlāa/najlāa-employee-contract.html> (last visited Sep. 21, 2014) (reprinting a copy of the Najlāa employee contract).

97. See Isenberg & Schwellenbach, *supra* note 6.

98. The contract also includes three weeks of annual vacation. *Najlāa Employee Contract*, *supra* note 96, at 1.

99. *Id.* at 3, 5 ("The employee will bear total fees of 2500 USD to cover (medical test, recruitment fees, and ticket from his original country, residency fees, ticket to and from Iraq, and other expenses) [sic].")

100. *Id.* at 4. Interestingly, several terms of the contract appear to conflict with the relevant Kuwaiti labor law at the time, which set an eight-hour work day and specified at least one day of rest per week. See *QĀNŪN AL-‘AMAL FIL-QITĀ‘ AL-AHLĪ AL-KUWAYTĪ RAQM 38 LI-SANAT*

say, it is difficult to envision how a Sri Lankan worker sent to work on a U.S. military base in Iraq could effectively pursue an employment claim in a Kuwaiti court. The language of the employment contract and the overall structure in which it is embedded—firms from one country employing workers from a second to perform a contract on a military base in yet another country—together create a situation where the core employment relation for a major segment of the U.S. military workforce is effectively placed beyond review of U.S. courts and likely others as well.

In this Part, we saw how a baseline assumption that U.S. law does not apply on military bases abroad results in selective incorporation of labor rights according to civilian workers' nationality. In this setup, contract workers on U.S. bases overseas generally do not benefit from most major U.S. labor laws except for workers' compensation. U.S. citizens, however, can avail themselves of at least a few nondiscrimination statutes and can generally litigate their employment contracts in American courts. Local nationals are almost totally shut out of those courts, but their situation largely depends on their own governments' capability to influence the United States.¹⁰¹ In NATO member states and other major U.S. allies, status of forces agreements and other legal instruments specify a framework for labor rights for local employees.¹⁰² Meanwhile, the interests of TCNs—who are especially present in war zones—are largely left out of the concerns of both U.S. and local authorities. TCNs are not entirely outcast beyond legal protection,

1964 [*Law no. 38 of 1964 Concerning Labour in the Private Sector*], INT'L LAB. ORG., <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/36003/91973/F1629684142/KWT36003%20Arabic.pdf> at 33, 35 (last visited Aug. 10, 2014).

101. The government has been somewhat more active against contractors in cases involving disputes with local workers. In 2010, the military terminated a contract with an Oklahoma-based company shortly after a brief strike over unpaid wages allegedly endangered completion of prefabricated buildings at Camp Phoenix near Kabul. *See* Opinion by Administrative Judge Freeman on Appellant's Motion for Summary Judgment 7-10, Appeal of Red Sea Engineers & Constructors, ASBCA No. 57448 (Armed Services Board of Contract Appeals Nov. 9, 2011) (detailing labor disputes and their role in termination of the contract). In 2011, CENTCOM contracting command suspended two U.S. companies (with the same owner) after they failed to pay Afghan workers and left the country. *See CENTCOM Suspends U.S. Contractor Amid Non-Payment Allegations*, U.S. FORCES AFGHANISTAN (Jan. 5, 2011), <http://www.isaf.nato.int/images/stories/File/2011JAN/CENTCOM%20Suspends%20U.S.%20Contractor%20Amid%20Non-Payment%20Allegations%20USFOR-A%20Release%2020110105-01.pdf>.
102. *See, e.g.*, Agreement Between the Government of the United States of America and the Government of the Republic of the Philippines Relating to the Employment of Philippine Nationals in the United States Military Bases in the Philippines, U.S.-Phil., art. 1, May 27, 1968, 19 U.S.T. 5892 (requiring U.S. forces to extend broadly preferential treatment to Filipinos in hiring on military bases).

however. Instead, they are largely treated under laws dedicated to fighting human trafficking. The next Part addresses these laws.

B. Human Trafficking Law and Military Migrant Labor

The exclusion of foreign military workers from most U.S. labor and employment laws does not mean that they toil in an unregulated limbo. Local workers are governed largely according to whatever bilateral arrangement exists with the host nation, while the U.S. legal system largely treats TCNs as potential victims of human trafficking. The trafficking framework, however, is a poor substitute for labor and employment law, especially for military migrant labor. It only indirectly addresses concerns over wages, employment security, and the ability to organize and collectively bargain. Moreover, antitrafficking measures have had at best an unclear impact in meeting even the modest goals of improving the situation of TCN workers. Indeed, it is possible that in the context of the military's migrant contractor workforce, antitrafficking laws do more to distract from the absence of robust labor laws than to actually protect workers themselves.

The trafficking label applies to a spectrum of coercive labor practices and ancillary activities criminalized under U.S. law. Congress has resolved to combat human trafficking through the Trafficking Victims Protection Act (TVPA).¹⁰³ The TVPA is a wide-ranging and frequently amended legislative enactment that seeks to combat trafficking through regulatory means as well as through criminal and civil litigation. Accordingly, agencies across the federal government, including the Department of Defense, have adopted programs to combat trafficking in persons.¹⁰⁴ The TVPA operates on multiple levels to address human trafficking, both domestically and overseas. Certain criminal, civil, and administrative aspects are especially relevant to the abuse of TCN workers. At the criminal level, TVPA expanded the section of the federal criminal code that covered offenses relating to the slave trade by adding forced labor, trafficking for various forms of unfree labor, and related offenses.¹⁰⁵ Most important in this context is forced labor, work that is knowingly procured through various

103. See generally Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 2989–93 (2006) (on the history and origins of the TVPA).

104. See *Department of Defense Instruction No. 2200.01*, U.S. DEP'T DEF. (Sept. 15, 2010), available at <http://www.dtic.mil/whs/directives/corres/pdf/220001p.pdf> (outlining DOD policy on trafficking issues). The office of the DOD program to combat trafficking in persons has established a website. See *Combating Trafficking in Persons*, U.S. DEP'T DEF., <http://ctip.defense.gov>.

105. See *Victims of Trafficking and Violence Protection Act of 2000*, Pub. L. No. 106-386, 114 Stat. 1486-1488 (Oct. 28, 2000) (adding U.S.C. §§ 1589–92).

forms of unlawful coercion, including the use or threat of force, physical restraint, or abuse of legal process.¹⁰⁶ U.S. law also punishes anyone who “knowingly recruits, harbors, transports, provides, or obtains” forced labor “by any means”¹⁰⁷ or engages in related misconduct with regard to identity documents.¹⁰⁸ The TVPA was amended twice to ensure both civil and criminal extraterritorial jurisdiction in order to deal with contractor abuses.¹⁰⁹ It also includes a civil remedy for victims of human trafficking.¹¹⁰ At the administrative level, TVPA requires the inclusion of antitrafficking clauses in federal grants, contracts, and other cooperative agreements and empowers government agencies to cancel these agreements in cases involving human trafficking.¹¹¹ These provisions were added by Congress partially in response to reports of U.S. government contractor involvement with sex trafficking in Bosnia-Herzegovina.¹¹²

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106. Labor is considered “forced” when procured knowingly:
 “(1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
 (2) by means of serious harm or threats of serious harm to that person or another person;
 (3) by means of the abuse or threatened abuse of law or legal process; or
 (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint[.]”
 18 U.S.C. § 1589(a) (2012).
107. 18 U.S.C. § 1590 (2012).
108. *See* 18 U.S.C. § 1592 (2012).
109. *See* Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3562 (enacting 18 U.S.C. § 3271, extending federal criminal jurisdiction for trafficking over those “employed by or accompanying the Federal Government outside the United States”); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5071 (enacting 18 U.S.C. § 1596, which provides for additional extraterritorial jurisdiction over U.S. nationals and limited categories of foreigners for specific trafficking-related offenses).
110. *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2878 (adding 18 U.S.C. § 1595).
111. *See* 22 U.S.C. § 7104(g) (2012) (specifying antitrafficking measures in government contracting); Federal Acquisition Regulation § 22.17, 48 C.F.R. § 22 (2013) (implementing regulation for government procurement); Defense Federal Acquisition Regulation Supplement 222.17 (2006) (providing DOD policy guidance on implementation of FAR 22.17); Procedures, Guidance, and Information 222.1703 (2013) (further policy background for DOD antitrafficking policy).
112. The legislative history of the 2003 amendments to TVPA make specific reference to DynCorp’s alleged involvement in sex trafficking in Bosnia. H.R. REP. NO. 108-264, pt. 1, at 16 (2003) (“During an April 2002 hearing, the Committee heard testimony describing the involvement by some employees or agents of DynCorp International—a recipient of a U.S. Government contract for police work in Bosnia-Herzegovina—in prostitution, human trafficking, and sexual misconduct and of DynCorp’s retaliation against those who endeavored to bring such misconduct to light. The Committee intends for the Department of State and all other relevant government agencies to take necessary action to control the activities of such contractors who are essentially serving as representatives of the United States and often are perceived as such.”).

The impact of antitrafficking laws on TCNs has been unclear at best. In particular, the TVPA's promise of opening criminal and civil litigation against abusers of TCNs has not materialized. To date there have been over 300 criminal prosecutions under TVPA, but none have involved military migrant labor.¹¹³ The one civil case filed, *Adhikari*, has languished in court for over six years. Reports by the DOD Inspector General found only seven investigations of possible human trafficking incidents since between fiscal year 2009 and late 2011.¹¹⁴ Of these, three involved contractor labor, two concerned sex work, and two were of an unknown nature. One was referred to the FBI for further investigation, two resulted in corrective action by contractors, and the others were deemed unfounded or were still being studied. Meanwhile, a set of regulatory changes has been working its way through the government since a September 2012 executive order requiring contractors to draw up TVPA compliance plans.¹¹⁵

Unfortunately, there is little uniform data on TCN worker conditions, so it is difficult to gauge the impact of the TVPA's various amendments and other reform efforts. The Inspector General's reports focused primarily on reviewing DOD contracts to ensure that they contained language prohibiting involvement in human trafficking; they did not monitor for actual compliance in conditions of employment.¹¹⁶ The Defense Contract Management Agency conducts inspections of worker sites to ensure compliance with antitrafficking policies, but a sample of reports from Iraq and Afghanistan through 2010 released after a FOIA request suggests that the inspections are cursory and focused primarily on whether contractors are aware of antitrafficking policies and if TCN workers

113. See AM. CIVIL LIBERTIES UNION, *supra* note 47, at 7; UNIV. OF MICHIGAN LAW SCH. HUMAN TRAFFICKING DATABASE, <http://www.law.umich.edu/clinical/HuTrafficCases/Pages/searchdatabase.aspx> [hereinafter HUMAN TRAFFICKING DATABASE].

114. See DOD INSPECTOR GENERAL, REP. NO. DODIG-2012-086 EVALUATION OF DOD CONTRACTS REGARDING COMBATING TRAFFICKING IN PERSONS: AFGHANISTAN 11 (2012); DOD INSPECTOR GENERAL, REP. NO. DODIG-2012-041, EVALUATION OF DOD CONTRACTS REGARDING COMBATING TRAFFICKING IN PERSONS: U.S. EUROPEAN COMMAND AND U.S. AFRICA COMMAND 9 (2012); DOD INSPECTOR GENERAL, REP. NO. SPO-2011-002, EVALUATION OF DOD CONTRACTS REGARDING COMBATING TRAFFICKING IN PERSONS: U.S. CENTRAL COMMAND 7 (2011); DOD INSPECTOR GENERAL, REP. NO. IE-2010-001, EVALUATION OF DOD CONTRACTS REGARDING COMBATING TRAFFICKING IN PERSONS 5 (2010).

115. See *infra* Part II.D.

116. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5073 (directing the Inspectors General of the Defense Department, State Department, and USAID to review a sample of contracts deemed at heightened risk for trafficking abuses).

have access to their passports.¹¹⁷ The Special Inspector General for Afghanistan Reconstruction has initiated inquiries into allegations of trafficking on U.S. bases, and issued inquiry letters to Fluor and Ecolog in response to a documentary about TCNs broadcast by Al Jazeera.¹¹⁸ There do not appear to be any examples of contracts being canceled for trafficking violations.¹¹⁹ All of these indicia suggest that the TVPA has been ineffective in improving the plight of military migrant labor.

The TVPA's limitations stem from multiple sources. The following Part reviews some basic problems that emerge when applying the trafficking paradigm to the regulation of military migrant labor. The subsequent Part explores how the intersection between antitrafficking law and the structure of military contracting shapes and hinders reform efforts.

C. Military Migrant Labor as Human Trafficking: Three Basic Problems

The extension of the human trafficking model to military migrant workers raises three major problems that dovetail with some of the many general critiques of the TVPA. These critiques are (1) that the TVPA relies on an overly narrow conception of unfree labor, (2) that it is oriented toward the rescue of trafficking victims rather than their empowerment as workers, and (3) that it is used to justify draconian border control measures that themselves create the conditions for the most abusive forms of trafficking.¹²⁰ As military workers imported to other

117. See *Military Contractor Human Trafficking—Documents DCMA Release Pages 8-1831*, ACLU (Sept. 19, 2012), <https://www.aclu.org/human-rights/military-contractor-human-trafficking-documents-dcma-release-pages-8-1831>.

118. See Letter from John F. Sopko, Special Inspector General for Afghanistan Reconstruction, to David T. Seaton, Chairman and Chief Executive Officer, Fluor Corporation (Jul. 9, 2014), available at <http://www.sigar.mil/pdf/Special%20Projects/SIGAR-14-78-SP.pdf>; Letter from John F. Sopko, Special Inspector General for Afghanistan Reconstruction, to Steven L. Arnold, Director of the Board, Ecolog USA (June 13, 2014), available at <http://www.sigar.mil/pdf/Special%20Projects/SIGAR-14-70-SP.pdf>.

119. A search of federal court dockets as well as of the Armed Services Board of Contract Appeals website does not reveal any contract disputes based on termination for issues related to human trafficking.

120. Two other common critiques are not addressed here: (1) The TVPA insufficiently protects trafficking victims from detention or deportation by authorities. See, e.g., Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U.L. REV. 157 (2007) (showing how federal agencies have interpreted TVPA in an unrealistically narrow search for “deserving” victims); Dina Francesca Haynes, *(Not) Found Chained to Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGRATION L.J. 337, 388 (2007) (“[Y]ears after the passage of the TVPA, trafficking victims found in the United States are still too often treated like criminals by those charged with protecting them.”). (2) The TVPA and related antitrafficking efforts rigidly separate sex work from other kinds of labor trafficking and disproportionately focus on the former.

countries at the behest of the U.S. government, TCNs confound the assumptions of trafficking law in ways that highlight its limitations and problems.

First is the critique that the TVPA's concept of unfree labor is too narrow. Labor and employment law seek to regulate interactions between workers and employers, including through the negotiation and enforcement of work contracts. In contrast, the concerns of trafficking law are narrower and more moralistic. As mentioned above, the TVPA criminalizes forced labor, which requires demonstrating elements of force, threats, or physical restraint. The statute's definition of "severe forms of trafficking in persons" covers forms of labor obtained "through the use of force, fraud, or coercion."¹²¹ This distinction between free and unfree labor has been widely criticized by scholars for its rigidity in the face of what are often far more complex motivations and states of mind in migration and trafficking situations.¹²² In addition, the trafficking discourse has been faulted for tending to invest attention and moral outrage in the eradication of a narrow range of labor practices, thereby implicitly legitimizing a broader spectrum of workplace coercion.¹²³

In the case of TCNs, their engagement in military work, especially in combat zones, renders the distinction between free and unfree labor especially suspect. Like migrant workers in many other places, TCNs are effectively at the mercy of employers who may order their deportation at will. But their ability to escape is impeded by additional challenges: They are more or less confined to fortified bases and subject to U.S. military authority and discipline, including the Uniform Code of Military Justice. Moreover, they are often caught in conflict zones where local governments and other actors are likely to be violently hostile to their presence. Effectively, TCNs who wish to leave their employment are faced with the choice of returning home or being cast adrift in a strange country in the middle of armed conflict. Under such conditions, the "threat[s] of force"

See, e.g., Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655 (2010).

121. 22 U.S.C. § 7102(9) (2012). This definition is used in the certification of victim status under the TVPA, which is a prerequisite to receiving a special visa for trafficking victims. See 8 U.S.C. § 1101(a)(15)(T)(i)(I) (2012).

122. See Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409, 436–58 (2011) (arguing that courts have applied the TVPA's coercion standard too narrowly); Chacón, *supra* note 103, at 2981–87 (challenging the narrow understanding of trafficking based on victim "consent" in U.S. law).

123. See Dina Francesca Haynes, *Exploitation Nation: The Thin and Grey Legal Lines Between Trafficked Persons and Abused Migrant Laborers*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 48 (2009) (criticizing a "false dichotomy" between trafficking and "ordinary" labor migration).

and “physical constraint”¹²⁴ that characterize forced labor under U.S. trafficking law cannot be separated from the ordinary course of employment.

Second, the abolitionist orientation of trafficking law tends to treat migrants as victims in need of rescue, rather than as workers who can assert their autonomy.¹²⁵ The flaws of the rescue paradigm, however, are exacerbated when the traffickers are themselves working at the behest of the very authority charged with rescuing them, namely the U.S. government. Most of the TVPA’s provisions put the onus on the government to act, and the tools available to trafficking victims themselves—such as the civil suits discussed *infra*—are in practice quite limited. This is in significant part because most trafficking victims are at some level economic migrants and any legal recourse at their disposal could possibly be used to pressure their employers. Yet many trafficking victims in the domestic context do not have the right to work in the United States.¹²⁶ According labor rights to trafficking victims could be perceived as attempting to legalize undocumented migrants, and provoke vociferous opposition from anti-immigration groups.

In the case of TCN workers, this emphasis on salvation rather than empowerment is especially worrisome. Unlike undocumented workers within the United States (whether in the sex industry or other sectors), TCN labor is not only legal, it is valued by the government. This fact hardly works to their benefit, however. Robust enforcement of antitrafficking laws for military migrant labor would require governmental action against corporations that the military depends on in the battlefield, a course of action with high political and other costs.¹²⁷ Carrying out investigations in overseas war zones is never an easy task, and the government’s most high-profile criminal case against wartime contractors—the prosecution of Blackwater guards for the alleged killing of seventeen Iraqi civilians in Baghdad’s Nisur square—was mired in evidentiary and other difficulties for over seven years before finally resulting in a conviction.¹²⁸ Moreover, there is arguably even less political will to prosecute human trafficking cases of TCN

124. 18 U.S.C. § 1589(a)(1) (2012).

125. See Haynes, *supra* note 123, at 44 (“[T]rafficking law is founded on the paternalistic notion that we, the state, must protect the victims in our nation, and our nation itself, from criminals.”).

126. Victims of severe forms of trafficking certified as such by the U.S. government may apply for special visas (T visas) that include work authorization. Such visas, however, usually require cooperation with law enforcement in investigations against traffickers. See 8 U.S.C. §1101(a)(15)(T) (2012).

127. See Dickinson, *supra* note 14, at 172 (“[T]hough an agency could theoretically exercise oversight and terminate the contract with a noncompliant firm, agencies may be reluctant to do so because termination would force the agency to find other ways of providing the good or service at issue.”).

128. See *United States v. Slough*, 677 F. Supp. 2d 112 (D.D.C. 2009) (dismissing charges against Blackwater contractors), *rev’d* 641 F.3d 544 (D.C. Cir. 2011), *cert. denied* 132 S. Ct. 2710 (2012); see also Matt Apuzzo, *Guards Guilty in '07 Killings in Iraq Square*, N.Y. TIMES, Oct. 23, 2014, at A1, available at <http://www.nytimes.com/2014/10/23/us/blackwater-verdict.html>.

workers. Even minimal prosecution for wartime abuses against local civilians was important so U.S.-backed regimes in Baghdad and Kabul could show their populations that contractor abuses were not going entirely unpunished. But TCN workers have had no clear political constituency to advocate on their behalf, especially when defendants are well-resourced, politically-connected corporations on whom the military depends for vital services (and which are themselves often staffed and led by retired officers).

Third, critics have argued that the antitrafficking crusade has served to bolster harsh antimigrant measures in general, including border militarization.¹²⁹ The TVPA does more than encourage a tightening of America's borders; it also creates a global regime whereby the United States evaluates governments for their efforts to combat trafficking and can impose sanctions accordingly.¹³⁰ Taken together, the domestic and international dimensions of the TVPA can be perceived as an attempt to strengthen state border control regimes worldwide.¹³¹ Critics have argued that measures aimed at raising the cost of unauthorized migration only create more demand for the specialized skills of smugglers, thus encouraging the very abuses antitrafficking law seeks to eradicate.¹³² At a broader level, antitrafficking laws have been criticized for ignoring how U.S. economic policy—especially attempts to force poor countries to dismantle trade protections, deregulate markets, privatize industries and services, and slash social expenditure—encourages migration to richer countries.¹³³

129. See, e.g., Wendy Chapkis, *Trafficking, Migration, and the Law: Protecting Innocents, Punishing Immigrants*, 17 GENDER & SOC'Y 6, 923 (2003) (arguing that the TVPA ultimately does more to bolster anti-immigrant policies than to help trafficking victims); see also Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*, 36 SIGNS: J. WOMEN IN CULT. & SOC'Y 45 (2010) (attributing to the antitrafficking coalition between some feminists and some Christian Evangelical activists a shared policy preference for incarceration).

130. See Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437 (2006) (outlining the TVPA sanctions regime and a theory for evaluating it).

131. See also James Hathaway, *The Human Rights Quagmire of "Human Trafficking"*, 49 VA. J. INT'L L. 1, 25–34, 56 (2008) (criticizing U.S. antitrafficking efforts in the UN as attempts "to conscript less developed countries to join the developed world's migration control project").

132. See *id.* at 34–36; Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1615 (2010) ("[S]ome efforts to address the problem of trafficking within the framework of heightened border restrictions have the perhaps unintended effect of reinforcing migrants' vulnerability to exploitation.").

133. See, e.g., Pope, *supra* note 20, at 1867 ("With impressive unanimity, the financial and political elites of the first-wave industrialized countries tout the benefits of transnational 'free trade.' . . . But there is one factor of production that elites are content to wall away inside national borders: labor."); Bravo, *supra* note 20, at 561–74 (identifying the disjuncture between trade liberalization and restrictions on labor mobility as a major cause for trafficking); Chacón, *supra* note 103, at 2979–80

The situation of TCNs, however, presents a different challenge to antitrafficking law: Instead of restricting mobility, here the U.S. government is actively importing migrants from one country to another, often in ways that undermine local governments' own ability to control cross-border movements. In Iraq, the United States amended Iraqi law to streamline entry requirements for contractors for several years after the formal handover of power.¹³⁴ In Afghanistan, many contractors apparently continue to circumvent visa requirements by flying directly to and from U.S. bases and staying on the premises while in the country.¹³⁵ The network of U.S. military bases and flights constitutes a sort of parallel immigration system, in which holding a DOD travel authorization is in many ways more important than obtaining a host country entry visa.¹³⁶ This travel system is not hermetically sealed from outside realities, of course. On numerous occasions, TCNs entering via the military travel network were subsequently stranded in Iraq and Afghanistan after being abandoned by employers.¹³⁷ Like ordinary traffickers, the United States subjects TCNs to a regime of carceral mobility, in which they travel great distances but often remain under conditions of quasi-confinement. But unlike other traffickers, the United States does so under the color of law, carving out spaces of exemption from other country's sovereign authorities. In the case of TCNs, the invisible hand of global market pressures driving most migration takes the shape of an all-too-visible, gauntlet-clad fist.

Thus, military migrant labor confounds the human trafficking paradigm on multiple levels. Working in war zones, their labor cannot be readily classified as free or unfree; as adjuncts to the military, they cannot reasonably expect to be res-

(attributing the TVPA's shortcomings to "the wider failure of the U.S. law to successfully assess and grapple with the global and domestic forces that drive migration").

134. See Coalition Provisional Authority (CPA), Order No. 17 (revised): Status of the Coalition Provisional Authority, MNF - Iraq, Certain Missions and Personnel in Iraq § 13(4) (entered into force June 27, 2004), *available at* http://www.iraqcoalition.org/regulations/20040627_CPA_ORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf ("[T]here shall promptly be issued to Contractors, free of charge and without any restrictions, all necessary visas, licenses or permits.").
135. See SPECIAL INSPECTOR GENERAL FOR AFGHANISTAN RECONSTRUCTION, SIGAR ALERT 13-3, 12 (2013).
136. See 48 C.F.R. 252.225-7040(c)(4) (2013) ("Contractor personnel must have a Synchronized Predeployment and Operational Tracker (SPOT)-generated letter of authorization signed by the Contracting Officer in order to process through a deployment center or to travel to, from, or within the designated operational area.").
137. See Farhad Peikar, *Indian Workers From UAE Left Stranded in Afghanistan*, THE NATIONAL (Jan. 9, 2010), <http://www.thenational.ae/news/world/asia-pacific/indian-workers-from-uae-left-stranded-in-afghanistan>; Michael Ware, *Stranded Workers in Iraq: Recruiters Duped Us*, CNN (Dec. 4, 2008, 8:39 P.M.), <http://www.cnn.com/2008/WORLD/meast/12/04/iraq.forgotten.workers/index.html>.

cued by the very authority that is ultimately responsible for their plight; and because they are effectively beyond the jurisdiction of the countries in which they are located, they exemplify the limits of the United States commitment to encouraging strict border controls worldwide.

D. Extending Authority, Contracting Jurisdiction

Aside from these basic problems with applying the trafficking paradigm to TCNs, there are more specific practical problems that emerge in the intersection between antitrafficking law, government contracting rules, and U.S. federal court jurisdiction. This Part reviews how contracting is used to extend extraterritorial jurisdiction over military migrant labor while also short-circuiting it.

As mentioned above, the TVPA uses contracts as a mechanism to effectively enact limited extraterritorial regulation over military migrant labor.¹³⁸ The statute requires government contracts to include antitrafficking provisions and allows for their termination in cases of noncompliance.¹³⁹ Specifically, the TVPA resulted in Federal Acquisition Regulation¹⁴⁰ (FAR) 22.17,¹⁴¹ which mandates the insertion of an antitrafficking clause into government contracts. At the time this Article went to press, the contractual clause was relatively sparse. It required contractors to inform their employees about government policy against trafficking and consequences for noncompliance and to take “appropriate action” against subcontractors found to be in violation of that policy.¹⁴² Contractors were also required to notify the government about allegations of misconduct by employees or subcontractors, as well as any follow-up action.¹⁴³ The clause, however, did not require contractors to affirmatively investigate conditions or to ensure compliance.¹⁴⁴ Unsurprisingly, the FAR regulation had been ineffective in remedying the problem.

138. See Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1316–17 (2003) (citing examples in which legislatures use contracts to extend regulation of private actors).

139. See 22 U.S.C. § 7104(g).

140. The Federal Acquisition Regulations (FARs), codified at Title 48 of the Code of Federal Regulations, are rules for contracting across the government. The DOD supplements the FAR for its activities through the Defense Federal Acquisition Regulation Supplement (DFARS), codified at chapter 2 of title 48.

141. 48 C.F.R. § 22.1700 *et seq.* (2013).

142. 48 C.F.R. § 52.222-50(c) (2013).

143. 48 C.F.R. § 52.222-50(d) (2013).

144. See also Starks, *The U.S. Government's Recent Initiatives to Prevent Contractors From Engaging in Trafficking of Persons*, *supra* note 18, at 901–02 (criticizing FAR 22.17's scope as too broad and its evidentiary standard as too low); Bradbury, *Human Trafficking and Government Contractor Liability*,

New regulations were developed after the Obama administration's September 2012 executive order on trafficking in the military contracting context.¹⁴⁵ The changes—applicable to any overseas government contract worth more than \$500,000—include a ban on recruitment fees¹⁴⁶ and a requirement that employers cover repatriation costs.¹⁴⁷ They also require contractors to draft “compliance plans” that would, among other things, include procedures for employees to report complaints without fear of retribution as well as provisions to ensure “that wages meet applicable host country legal requirements” and that any housing provided “meets host country housing and safety standards.”¹⁴⁸

The related antitrafficking provisions in the 2013 National Defense Authorization Act are less stringent: They ban only “unreasonable” recruitment fees and do not hold contractors to any wage standards.¹⁴⁹ Contractors are required to certify the implementation of compliance plans and their lack of any knowledge of trafficking activities.¹⁵⁰ A new version of FAR 22.17 reflecting the executive order—and including an updated mandatory contract clause—was finalized in September 2014 but not yet published at the time this Article went to press.¹⁵¹ Workers returning from Iraq and Afghanistan, however, have indicated that because they have already taken on enormous debts before arriving at U.S. facilities, they are obliged to falsely claim that they did not pay recruitment fees in order to avoid losing their jobs.¹⁵²

More promising from a labor rights perspective is a concurrently proposed DOD supplement that introduces a skeletal “bill of rights” for contractor employees accompanying the U.S. military. The regulation would insert language into contracts requiring employees to be made aware of their rights to, *inter alia*, receive agreed-upon wages in a timely manner “that are not below the legal in-country minimum wage,” take lunch and work breaks, and possess a copy of their contracts written in a language they can understand.¹⁵³ The rule would also require that any employer-provided housing “meet[] host-country housing and

supra note 18, at 916 (“[A] contractor may decrease its awareness and limit liability by increasing the layers of subcontracting.”).

145. See Exec. Order No. 13627, 3 C.F.R. 13627 (2012).

146. See *id.* § 2(a)(1)(A)(ii).

147. See *id.* § 2(a)(1)(A)(iv)(II).

148. See *id.* § 2(a)(2)(A)(ii)–(iv).

149. See 22 U.S.C.A. § 7104(g)(iv)(IV)–(V) (West); *id.* § 7104(a).

150. See *id.* § 7104a(a).

151. See FAR Case 2013—001, 78 Fed. Reg. 187, 59317 (Sept. 26, 2013).

152. See *Fault Lines: America's War Workers*, *supra* note 6.

153. DFARS Case 2013—D007, 78 Fed. Reg. 187, 59325, 59328 (Sept. 26, 2013). The regulation was finalized in September 2014 but not yet published at the time this Article went to press.

safety standards.”¹⁵⁴ The bill of rights would also require contractors to “enforce the rights of Contractor personnel” and would provide a basis for termination of the agreement or other measures. This initiative is based on a similar effort developed by the Army and Air Force Exchange Service for the many TCN workers working in concession stores on bases around the world.¹⁵⁵ A noncontract based version of the rule was promulgated on an interim basis in 2013 for U.S. forces overseas as well as for other government contractors in the CENTCOM area of responsibility.¹⁵⁶

The proposed changes to the government’s contracting rules—especially the workers’ bill of rights—are welcome advances in protecting the rights of military migrant workers. Nevertheless, they are limited in several key respects. First, the provisions on wages and housing rely on host country standards, an approach that would leave workers vulnerable in places where such standards are vaguely defined, extremely low,¹⁵⁷ or nonexistent.¹⁵⁸ Second, the most labor-friendly aspects of these reforms—including the bill of rights and wage certification—are purely a product of administrative rule making without a clear legislative mandate. Third and most importantly here, these reforms do not give workers themselves any mechanisms to assert their rights. At most, workers can complain to the government and hope that further action is taken. Court review would be at best indirect, adjudicating a dispute between a contractor and the government, to which workers would not be a party. Moreover, the government’s own dependency on military contractors would discourage active enforcement.

While contracts serve as a means to extend jurisdiction over military migrant labor, they can also serve to forestall it. Unsurprisingly, this can be seen in the only means that the TVPA provides to TCN workers to seek justice them-

154. *Id.*

155. *See id.* at 59326; *see also Are Government Contractors Exploiting Workers Overseas? Examining Enforcement of the Trafficking Victims Protection Act: Hearing Before the Subcomm. on Tech., Info. Pol’y, Intergovernmental Rel. and Procurement Reform of the Comm. on Oversight and Gov’t Reform*, 102th Cong. 119–21 (2011) (statement of Michael P. Howard, Chief Operating Officer, Army and Air Force Exchange Service).

156. *See supra* Part II.A.

157. In Iraq and Afghanistan, for example, legal minimum wage is under \$1 per hour. *See, e.g.*, DEPT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2012: IRAQ 54 (2012) (specifying legal minimum wage for unskilled workers in Iraq at \$4.50 per day); DEPT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2012: AFGHANISTAN 48 (2012) (citing the minimum wage for Afghanistan at \$100 per month).

158. Countries with significant U.S. military presences (including TCN populations) that lack any private sector minimum wage include Bahrain (headquarters of the Fifth Fleet), Djibouti (headquarters of AFRICOM’s Combined Joint Task Force–Horn of Africa), and Qatar (CENTCOM’s forward headquarters). *See* DEPT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2012 (2012).

selves, namely the civil remedy available to trafficking victims pursuant to 18 U.S.C. § 1595. Civil suits under the TVPA are much less frequent than criminal prosecutions,¹⁵⁹ and for most TCNs, the costs and other difficulties of filing suit in a U.S. court are likely prohibitive.

Moreover, there is a basic structural tension between jurisdiction and liability in TVPA lawsuits regarding overseas subcontracting. TCNs are almost always directly employed by non-U.S. subcontractors. Yet the TVPA only provides jurisdiction for trafficking offenses taking place overseas when perpetrators are U.S. nationals, permanent residents, or others who are “present in the United States.”¹⁶⁰ The non-U.S. subcontractors most directly involved with TCNs can therefore easily avoid civil actions under the TVPA.

The history of the sole TVPA lawsuit filed by TCN workers so far,¹⁶¹ *Adhikari v. Daoud Partners*, mentioned above, illustrates this point. The district court in 2013 dismissed TVPA claims against Daoud Partners, the Jordanian subcontractor, because it was not “present in the United States” for the purposes of the statute.¹⁶² Yet earlier on, the *Adhikari* court found that sufficient contacts existed between Daoud Partners and the forum state (in this case, Texas) to support personal jurisdiction over it. In order to determine personal jurisdiction, the *Adhikari* court investigated whether Daoud had “substantial, continuous, and systematic” contacts with Texas, using the multifactor balancing test developed by the Supreme Court in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) and subsequent Fifth Circuit jurisprudence.¹⁶³ The court noted

159. See HUMAN TRAFFICKING DATABASE, *supra* note 113; see also Jennifer Nam, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking*, 107 COLUM. L. REV. 1655 (2007) (providing analysis of TVPA civil suits offering possible reason for relative paucity of cases).

160. 18 U.S.C. § 1596(a)(2) (2012). This provision provides for general extraterritorial jurisdiction; the TVPA also has a specifically criminal extraterritorial provision, 18 U.S.C. § 3271 (2012), that specifies no presence requirement (although personal jurisdiction would still have to be established).

161. The closest analogue to this case was a TVPA suit filed by a Libyan-U.S. dual national working as an interpreter with a U.S. military contractor in Iraq. See *Nattah v. Bush*, 605 F.3d 1052 (D.C. Cir. 2010) (permitting breach of contract claims to continue against employer).

162. See *Adhikari v. Daoud & Partners*, No. 09-cv-1237, 2013 BL 225427, at *9 (S.D. Tex. Aug. 23, 2013) (“The plain meaning of § 1596(a)(2) is clear. The offender must be present in the United States for a [TVPA] claim to be brought.”). The court has also dismissed TVPA claims against KBR, ruling that the version of the statute in effect during the time of the alleged harms could not be applied extraterritorially. See *Adhikari v. Daoud & Partners*, No. 4:09-cv-1237, 2014 BL 11094 (S.D. Tex. Jan. 15, 2014) (reversing an earlier finding in light of *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 12 (2013)).

163. Although the analysis of general personal jurisdiction in *Helicopteros* has since been largely overruled by *Daimler A.G. v. Bauman*, 134 S.Ct. 746 (2014), the search for “substantial, continuous, and systematic” contacts will likely remain relevant for evaluating specific personal jurisdiction over defendants instead. See Charles W. “Rocky” Rhodes IV & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 230 (2014) (“Jurisdictional dis-

that although Daoud was headquartered in Jordan, it was registered there as a “non-operating foreign company” and did all of its business on U.S. military bases in Iraq, almost entirely in dollar-denominated transactions.¹⁶⁴ Moreover, the court found that Daoud availed itself of the protections of U.S. law in multiple ways, including signing contracts with U.S. corporations that specified U.S. fora for the purposes of dispute resolution, litigating cases under the Federal Tort Claims Act and the Defense Base Act, and obtaining trademark protection for its business logo from the U.S. Patent and Trademark Office.¹⁶⁵ Hence, Daoud is an example of the missing link in the chain of contractor responsibility: U.S. courts may enjoy jurisdiction over foreign subcontractors for a variety of matters but not for civil suits under the TVPA. In other words, Daoud’s responsibilities under U.S. law seem to run in only one direction: toward U.S. entities, and away from foreign workers.

While the TVPA effectively lets foreign subcontractors off the hook, it hardly ensures accountability for the U.S. prime contractors that hire them either. Here, the problem is less jurisdictional and more a question of vicarious liability and evidence. Since the 2008 amendments, the TVPA’s jurisdictional reach for abuses against TCNs abroad undoubtedly extends to U.S. corporations. Such prime contractors would be exposed to possible liability for “knowingly benefit[ing] . . . from participation in a venture which that person knew or should have known has engaged” in trafficking-related abuses.¹⁶⁶ The overall thrust of this constructive knowledge standard is to discourage U.S. corporations from inquiring into the practices of their subcontractors.¹⁶⁷ True, recent regulatory develop-

putes won’t go away but will simply move to a new playing field. In cases where the parties previously would have argued about whether defendant’s contacts were ‘systematic and continuous’ for general jurisdiction, the parties will now argue about whether those contacts give rise to specific jurisdiction or to pendant jurisdiction.”) (citation omitted).

164. Memorandum and Order at 13, *Adhikari v. Daoud & Partners*, No. 4:09-cv-01237 (S.D. Tex. Dec. 12, 2011).
165. *Id.* at 15–22 (providing analysis of contacts for general jurisdiction purposes). Foreign subcontractors have also sued their U.S. prime contractors, including in cases tangentially involving TCNs, with varying degrees of success. *See, e.g.*, *MAKS v. EODT*, No. 3:10-cv-443 (E.D. Tenn. 2010) (successful tort and contract action by Indian-owned firm registered in Kuwait for claims arising in Afghanistan after defendant forcibly appropriated property and threatened plaintiff’s TCN employees at gunpoint); *Saeed et al. v. Bennett-Fouch Associates, L.L.C. et al.*, No. 2:12-cv-2278 (W.D. La. 2011) (suit by Afghan subcontractor for fraud and breach of contract).
166. 18 U.S.C. § 1595(a) (2012). Before 2008, the statute explicitly provided for perpetrator liability only. *See* Trafficking Victims Protections Reauthorization Act of 2003, Pub. L. No. 108-92, 117 Stat. 2878 (2003) (original version of 18 U.S.C. § 1595, enacted as part of 2003 TVPA amendments).
167. *See* Karin Dryhurst, *Liability Up the Supply Chain: Corporate Accountability for Labor Trafficking*, 45 N.Y.U.J. INT’L L. & POL. 641, 663 (2013) (noting that subcontracting “will reduce the probability

ments discussed above requiring contractors to certify compliance efforts of sub-contractors and agents may render attempts to turn a blind eye increasingly untenable. But the more intermediaries that exist between the prime contractor and the worker, the more opportunities there will be for corporations to argue that they had no reason to know about abuses and thus evade liability.

The structure of the TVPA's current civil action mechanisms results in a situation where those who are most directly responsible for TCN labor conditions can evade jurisdiction while the ultimate beneficiaries of those conditions can readily demonstrate ignorance of them. These two problems are, of course, interlinked: Without the capability to pursue discovery against non-U.S. subcontractors, plaintiffs are likely to face even greater obstacles in procuring evidence of U.S. corporate knowledge about the treatment of TCN workers.

III. NEITHER SOLDIERS NOR MERCENARIES: MILITARY MIGRANT LABOR AND U.S. POWER

The U.S. military's widespread use of TCNs is not simply a manpower management issue or a problem of legal regulation. It also raises disturbing normative questions about the meaning of offshoring military work and how it has produced military migrant workers as a distinct category of person subject to governmental power bereft of many legal protections. Even if the government were to replace or augment the trafficking law framework with robust labor protections, simply analogizing TCNs to ordinary migrant workers would fail to address the deeper normative questions that are particular to their situation as instruments of state power. Migrant military workers unsettle relationships between violence, sacrifice, and exchange that inform basic assumptions in domestic and international law. This Part expounds on this predicament by demonstrating how military migrant workers fail to fit into either of two dominant normative paradigms about fighting: citizen-soldiers and mercenaries. While the citizen-soldier is based on a notion of national sacrifice, mercenaries are largely viewed through the prism of material exchange.¹⁶⁸ Military migrant workers expose the limitations of both concepts while highlighting why they continue to exert such a hold over our thinking.

that the corporation had knowledge or should have had knowledge about the labor trafficking violations”).

168. These two paradigms express principles that almost always coexist in reality. Citizen-soldiers, after all, are often paid salaries for their work; and mercenaries often justify their actions in terms of normative causes in addition to financial motivation.

A. Beyond the Citizen-Soldier's Social Contract

The military migrant worker stands in sharp contrast to the paradigm of the citizen-soldier: the idea that war is most legitimate when conducted by those who act in the official army of their country of citizenship.¹⁶⁹ The idea of the citizen-soldier has a long and rich genealogy, elaborated by Niccolò Machiavelli, Jean-Jacques Rousseau, and many others.¹⁷⁰ Most relevant here is that the modern ideal of the citizen-soldier is tied to an idea of social contract, a form of relationship between members of a polity and a sovereign authority. Yet as Paul Kahn has argued, the notion of contract fails to capture something at the heart of soldiering: the willingness to be exposed to violence, which cannot be grounded in or guaranteed by any legal obligation.¹⁷¹ In other words, what distinguishes the social contract of the soldier from the private contract of the mercenary is the concept of sacrifice, specifically sacrifice to a national community.¹⁷² TCNs, however, are by definition outside any social contract with the United States. They do not enjoy any political relationship with the country whose military they support, and therefore the efforts they exert and the harms they endure are denied the status of sacrifice. Indeed, this lack is a significant reason why the harms they experience are framed in terms of human trafficking—since migrant workers are seen as outside any relationship of political responsibility, their sheer humanity is the only remaining basis for any normative considerations.

This point can be usefully illustrated by contrast with other common forms of military work that do not comport with the citizen-soldier ideal. While this model dominates modern debates over war and politics, it is historically the ex-

169. For the purposes of this discussion, I do not address another major area of debate in the literature on citizen-soldiers, namely questions of conscription and the contrast between the career soldiers and those serving for more limited terms.

170. See, e.g., NICCOLÒ MACHIAVELLI, *THE PRINCE* 44 (Quentin Skinner & Russell Price eds., 1988) (“Experience has shown that only rulers and republics that possess their own armies are very successful . . . it is more difficult for a citizen to seize power in a republic that possesses its own troops than in one that relies upon foreign troops.”); JEAN-JACQUES ROUSSEAU, *Considerations on the Government of Poland and on Its Planned Reformation*, in *THE PLAN FOR PERPETUAL PEACE, ON THE GOVERNMENT OF POLAND, AND OTHER WRITINGS ON HISTORY AND POLITICS* 167, 218–19 (Christopher Kelly ed., 2005) (suggesting the establishment of a citizens’ militia in Poland, patterned after Switzerland’s); see also SAMUEL HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* (1957); R. CLAIRE SNYDER, *CITIZEN-SOLDIERS AND MANLY WARRIORS: MILITARY SERVICE AND GENDER IN THE CIVIC REPUBLICAN TRADITION* (1999); SINGER, *supra* note 23, at 29–32.

171. See, e.g., PAUL W. KAHN, *PUTTING LIBERALISM IN ITS PLACE* 230–41 (2005).

172. See also BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 9–10 (1983) (attributing the emotional power of tombs of unknown soldiers to nationalism’s grounding in issues of “death and immortality”).

ception rather than the norm.¹⁷³ There is nothing new in the U.S. military making use of fighters who are not citizen-soldiers. Three contemporary categories are especially important. First, the United States has long allowed permanent residents to join the enlisted ranks, as well as citizens of Micronesia, Palau, and the Marshall Islands.¹⁷⁴ According to data from 2008, noncitizens comprised about 2 percent of the active-duty U.S. military.¹⁷⁵ Second are soldiers of allied states serving under overall U.S. command. Third are private contractors holding U.S. citizenship, who have been the overwhelming focus of debates on military privatization despite constituting a minority of the contractor workforce in the major wars of the past decade. It is worth noting that in Iraq and Afghanistan, TCNs have often outnumbered each of these categories.

What sets TCNs apart is the exclusion of their military work from any kind of social contract with the United States.¹⁷⁶ Permanent residents in the U.S. military are on the track to citizenship and indeed are entitled to expedited pro-

173. See, e.g., *supra* note 9.

174. See 10 U.S.C. § 504(b)(1)(B)–(C) (2012). The Secretary of Defense is also empowered to authorize the enlistment of any other individuals falling outside the ordinary citizenship criteria. See 10 U.S.C. § 504(b)(2) (2012). Noncitizens are generally prohibited from becoming officers, with some narrow exceptions in the army reserves. See MOLLY F. MCINTOSH, SEEMA SAYALA & DAVID GREGORY, CNA, NON-CITIZENS IN THE ENLISTED U.S. MILITARY 5 (2011), available at <http://www.cna.org/sites/default/files/research/Non%20Citizens%20in%20the%20Enlisted%20US%20Military%20D0025768%20A2.pdf>.

Although the statutory provision confining enlistment to permanent residents was enacted in 1968, foreign soldiers have played a significant role throughout U.S. military history. See, e.g., KEVIN ADAMS, CLASS AND RACE IN THE FRONTIER ARMY: MILITARY LIFE IN THE WEST, 1870–1890, at 25–26, 190–91 (2009) (discussing foreign-born soldiers on the frontier in the late 19th century); WILLIAM L. BURTON, MELTING POT SOLDIERS: THE UNION'S ETHNIC REGIMENTS (1998) (discussing German, Irish, and other European immigrants in the Civil War); NANCY GENTILE FORD, AMERICANS ALL!: FOREIGN-BORN SOLDIERS IN WORLD WAR I, at 45–66 (2001) (on conscription of immigrants during World War I); SCOTT REYNOLDS NELSON & CAROL SHERIFF, A PEOPLE AT WAR: CIVILIANS AND SOLDIERS IN AMERICA'S CIVIL WAR, 1854–1877, at 172–78 (2008) (discussing foreign soldiers and sailors on both sides of the U.S. Civil War).

175. See Jeanne Batalova, MPI: MIGRATION POL'Y INST., *Immigrants in the U.S. Armed Forces* (May 15, 2008), <http://www.migrationinformation.org/USFocus/display.cfm?ID=683>. Some 45,000 noncitizens served in the military (active-duty and reserves combined) in 2007. See MARGARET MIKYUNG LEE & RUTH ELLEN WASEM, CONG. RES. SERVICE, EXPEDITED CITIZENSHIP THROUGH MILITARY SERVICE: CURRENT LAW, POLICY, AND ISSUES 6 (2009). The UK, in contrast, recruited directly from Commonwealth states from 1998 to 2013 (before that time and now again, Commonwealth nationals had to live in the UK for at least five years in order to join). See VRON WARE, MILITARY MIGRANTS: FIGHTING FOR YOUR COUNTRY (2012).

176. It is entirely possible and indeed likely that personal and sentimental bonds are formed by TCNs and U.S. service members and contractors and that TCNs themselves develop alternative norms of allegiance and belonging. These are subject of my ongoing anthropological research and are outside the scope of this Article.

cessing of their naturalization applications.¹⁷⁷ Soldiers from allied or client states—as well as U.S. service members from dependent territories—are tied to a social contract with their own governments, which in turn have exercised their sovereign rights in choosing to fight alongside or on behalf of the United States. Even private contractors can be tentatively included in the social contract if they are U.S. citizens. While citizen-contractors do not occupy the same place in the American political imagination that service members do, their membership in the polity entitles them to some degree of political participation and visibility, to say nothing of marginally greater access to legal remedies.¹⁷⁸ Moreover, many of them are also veterans, ensuring considerable overlap between the categories of citizen-soldier and citizen-contractor. Mateo Taussig-Rubbo has identified ways in which citizen-contractor losses have been treated as national sacrifices, such as when the United States launched an assault on Fallujah to avenge the death of four Blackwater contractors, as well as the occasional awarding of medals to contractors.¹⁷⁹ Even the overwhelming emphasis on U.S. citizens in news coverage and scholarship on military contractors—at the expense of the foreign workers who constitute the vast majority of the contractor workforce—reflects the inclusion of U.S. citizen contractors in the national imagination.

For these reasons, it is unsurprising that there appear to be no systemic efforts to compile data on TCN casualties. There are no publicly available official statistics for TCN deaths in Afghanistan.¹⁸⁰ For Iraq, I have found only one attempted account so far: A report by the Special Inspector General for Iraq Reconstruction (SIGIR) identified 111 TCNs killed in support of U.S. government operations between May 1, 2003 and August 31, 2010, including those working in support of the State Department and USAID.¹⁸¹ This is almost certain to be a significant undercount, for several reasons. First, SIGIR arrived at its figure largely through consulting media reports, supplemented by data from USAID

177. See 8 U.S.C. § 1439 (2012) (setting forth conditions of naturalization for military veterans); see also LEE & WASEM, *supra* note 175, at 8–15.

178. See *supra* Part II.A.

179. See Mateo Taussig-Rubbo, *Outsourcing Sacrifice: The Labor of Private Military Contractors*, 21 YALE J.L. & THE HUMANITIES 101, 122–33 (2009). Taussig-Rubbo does identify one instance in which five Fijian contractors were posthumously decorated for fighting in Iraq. *Id.* at 150.

180. The Department of Labor has received DBA claims arising from 1,481 deaths in Afghanistan from September 1, 2001 to December 31, 2013, but there is no publicly available data on the nationality of these contractors; moreover, there is likely underreporting for TCN and Afghan deaths. See *Defense Base Act Summary by Nation*, U.S. DEP'T OF LABOR, <http://www.dol.gov/owcp/dlhwc/dbaallnation.htm> (last visited June 30, 2014).

181. See OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, SIGIR SPECIAL REPORT NUMBER 2: THE HUMAN TOLL OF RECONSTRUCTION OR STABILIZATION DURING IRAQI FREEDOM 9–10 (2010).

and the U.S. Army Corps of Engineers.¹⁸² Second, SIGIR identified 321 U.S. civilian contractor deaths during the same period.¹⁸³ Yet TCNs have consistently outnumbered U.S. contractors—including by a factor of over 10 to 1 at times in the higher-risk security field—likely rendering the true number to be significantly higher. Third, data from workers' compensation claims (admittedly limited in its own right) suggests a higher figure. The Department of Labor (DOL) publishes statistics on death and injury claims filed by military contractor personnel pursuant to the DBA. This data does not differentiate between contractors on the basis of nationality. According to the DOL, there were 1,605 death claims under the DBA arising from incidents in Iraq between September 1, 2001 and December 31, 2013.¹⁸⁴ Conservatively assuming that all of the 321 U.S. contractor fatalities identified by SIGIR resulted in DBA claims, this leaves at least 1,284 deaths of Iraqis and TCNs (plus any U.S. citizens killed after the period covered by the SIGIR report, presumably a small number). And as noted above in Part II.A, foreign contract workers are far less likely to file DBA claims than U.S. workers. While U.S. military deaths and even (to a far lesser extent) local civilian deaths are politically sensitive numbers in debates around war, TCNs are deemed not even worth counting.

B. The Lowest Bidders: Renegotiating the Mercenary Contract

At first glance, military migrant workers would appear to be just another kind of mercenary. Mercenaries have long been the subject of critical scrutiny in international law. Under the law of armed conflict (or international humanitarian law), mercenaries do not enjoy prisoner of war status, meaning that they can be punished for participation in hostilities.¹⁸⁵ Accordingly, some states have en-

182. *See id.* at 9–10. Even as a compilation of media reports, the estimate appears unusually low. The website icasualties.org, also based on media reports, identified at least 259 TCN workers killed over roughly the same time period. *See Iraq Coalition Casualties – A Partial List*, IRAQ COALITION CASUALTY COUNT, <http://icasualties.org/Iraq/Contractors.aspx> (last visited Nov. 11, 2014).

183. *See* OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, *supra* note 180, at 9.

184. *See Defense Base Act Summary by Nation*, *supra* note 180.

185. “A mercenary shall not have the right to be a combatant or a prisoner of war.” 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 47(1), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. The International Committee of the Red Cross considers this to be a customary rule of international humanitarian law. *See* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 391–95 (2005) (discussing the ban on mercenaries under customary international humanitarian law Rule 108). The United States objects to the customary status of this rule. *See* Michael J. Matheson, *The United States Position on the Relation of Customary International*

acted treaties to criminalize mercenary activity.¹⁸⁶

While the citizen-soldier is understood largely through the logic of sacrifice, mercenaries are primarily defined in terms of exchange. In this sense, mercenaries and TCNs share a superficial similarity: The relevant relationship defining their status is a private contract (or series of contracts), not a social one. The idea of mercenaries as driven primarily by profit motives is at the heart of persistent mistrust toward them in political thought and legal norms, even though they remain useful enough to resist total obsolescence.¹⁸⁷ Related to the primacy of the profit motive is the putative absence of other normative bonds such as patriotism that may help to constrain or regulate mercenary behavior.¹⁸⁸ Thus, the voluminous legal scholarship on mercenaries is understandably focused on questions of how to regulate their use, ensure their accountability, and assess the responsibility of governments that may employ them.¹⁸⁹ To the extent military migrant workers seek profits, however, they tend to do so under conditions that also render them particularly vulnerable to exploitation. While this may not remove them entirely from the category of mercenaries—a term whose definition has been hotly contested throughout history—it at least draws attention to a more nuanced account of the relationship between value (understood in material terms) and values (understood in political, ethical, or social terms) in warfare.

In order to illustrate this point, we can turn to the most widely accepted definition of mercenaries under contemporary international law, enshrined in article 47(2) of the 1977 First Additional Protocol to the Geneva Conventions:

Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 AM. U.J. INT'L L. & POLY 419, 469 (1987) (“This article was included in the Protocol not for humanitarian reasons, but purely to make the political point that mercenary activity in the Third World is unwelcome. . . . This politicizing of the rules of warfare is contrary to Western interests and the interests of humanitarian law itself.”).

186. A UN convention that went into effect in 2001 criminalizes anyone who “recruits, uses, finances or trains” mercenaries as well as any mercenaries who participate in combat. UN International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries, arts. 2, 3(1), Dec. 4, 1989, U.N. GAOR, 72d plen. mtg., U.N. Doc A/Res/44/34 (1989) [hereinafter UN Mercenaries Convention]; *see also* Convention of the Organization of African Unity (OAU) for the Elimination of Mercenarism in Africa art. 1(2), O.A.U. Doc. CM/817 (XXIX) Annex II Rev. 3 (1977) [hereinafter OAU Mercenaries Convention] (defining the crime of “mercenarism”).
187. *See, e.g.*, SARAH PERCY, MERCENARIES: THE HISTORY OF A NORM IN INTERNATIONALS RELATIONS 1 (2007) (“For as long as there have been mercenaries, there has been a norm against mercenary use. . . . mercenaries are considered to be morally problematic because they fight wars for selfish, financial reasons as opposed to fighting for some kind of larger conception of the common good.”).
188. *See* Minow, *supra* note 14, at 1020 (“[T]he military also may compromise its strength by relying on individuals from third-country nations who are paid little and shift loyalties based on who pays them.”).
189. *See supra* note 15.

A mercenary is any person who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.¹⁹⁰

This definition, with its six cumulative elements, was adopted in an era when the issue of mercenaries acting to undermine newly independent states or anticolonial movements in Africa and elsewhere was high on the international legal agenda. As such, it has come under criticism from multiple directions, largely because of its perceived narrowness and unwieldiness.¹⁹¹ Indeed, nearly all contractors serving with the U.S. military would fall outside this definition insofar as they are officially precluded from combat operations and the text requires direct participation in hostilities. Moreover, U.S. citizen contractors would be excluded by definition under provision (2)(d).

Nevertheless, this definition is useful in elucidating the specific problems posed by military migrant labor. Most interesting here is clause (2)(c), which the International Committee of the Red Cross (ICRC) official commentary on the Protocol describes as “the crux of the matter.”¹⁹² The provision legalizes the normative discomfort with the mercenary’s logic of exchange, combining both subjective and objective elements. First, it defines mercenaries as “motivated . . . essentially by the desire for private gain.” Second, the provision requires that mercenaries be promised “material compensation substantially in excess of that

190. Additional Protocol I, *supra* note 185, art. 47(2). This definition is substantially reproduced in the UN Mercenaries Convention, *supra* note 186, art. 1.

191. See CAMERON & CHETAIL, *supra* note 15, at 74–76; PERCY, *supra* note 187, at 167–76.

192. JEAN DE PICTET ET AL., INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 579 (1987); *see also* PERCY, *supra* note 187, at 179 (the Protocol’s definition “reflects a profound belief that it is wrong to be motivated by money rather than an appropriate cause”).

promised or paid to combatants of similar ranks and functions in the armed forces of that Party.” Here is where the definition collides with the reality of military migrant labor.¹⁹³

While TCNs are arguably motivated by the desire for private gain, one of the key rationales for their use is precisely their willingness to work for less than the wages paid to U.S. military personnel. A 2012 study by the ACLU estimated that TCN janitors make around \$275 per month; waiters \$300 per month; cooks \$500 per month; and chefs \$1,000 per month.¹⁹⁴ Armed security guards from Uganda made about \$400–500 per month in 2011.¹⁹⁵ In contrast, the monthly basic wage for the lowest enlisted rank in the U.S. military is \$1,531.50 per month.¹⁹⁶ This disparity strikingly inverts the supposition that mercenaries are defined by their higher, market-driven pay as opposed to soldiers, whose salaries are kept artificially low in the name of national service.¹⁹⁷ Moreover, such a comparison does not take into account the enormous debt that most TCNs have incurred, or the additional allowances and benefits that deployed service members often enjoy.

The ICRC commentary on this provision further illustrates the assumptions at work:

[T]he mercenary is considered to offer his services to the highest bidder, since he is essentially motivated by material gain. The highest bidder will normally be found on the richest side. However, as all soldiers of all armies receive a remuneration for maintaining themselves and their families, it was necessary, in order to be consistent, to specify that this remuneration should be substantially higher than that of the members of the army.¹⁹⁸

Here, the logic of exchange assumes very specific terms. This passage posits a distinction between soldiers—who are paid only to “maintain[] themselves and their families”—and market agents auctioning their services to the highest bidder. This *Lochner*-esque principle imagines a market in which workers have sig-

193. Notably, the “excess” compensation element is absent in the OAU convention. See OAU Mercenaries Convention, *supra* note 186, art. 1 (“A mercenary is any person who . . . is motivated to take part in the hostilities essentially by the desire for private gain and in fact is promised by or on behalf of a party to the conflict material compensation.”).

194. See AM. CIVIL LIBERTIES UNION, *supra* note 47, at 22.

195. See sources cited *supra* note 60.

196. See *Military Pay Table effective Jan. 1, 2014*, DEF. FIN. AND ACCOUNTING SERV., available at <http://www.dfas.mil/militarymembers/payentitlements/militarypaytables.html> (follow “Jan 1, 2014” hyperlink).

197. See Taussig-Rubbo, *supra* note 179, at 156–59 (discussion of the presidential Gates commission, which argued that conscription was a form of tax due to the payment of below-market wages).

198. PICTET ET AL., *supra* note 192, at 579.

nificant bargaining power in selling their labor. Migration, however, is often driven by economic disparities between contexts, often leaving workers with little leverage. While military migrant workers arguably earn wages that are higher than those available at home or elsewhere, they often make such choices under conditions of extreme poverty and indebtedness. The situation here is not one of states competitively bidding fees upward but rather pressures on workers driving wages downward. TCNs work according to a logic of exchange, but unlike the mercenaries imagined by the Additional Protocol, the terms of that exchange are decidedly not in their favor.

Of course, the exploitative logic of the TCN predicament does not mean that the concerns generally raised by mercenaries are absent. If mercenaries are more likely to lack commitment, act unaccountably, or serve to mask or dilute the responsibility of the states that hire them, this may be equally true of TCNs. But military migrant workers also point to a gap in the laws of war,¹⁹⁹ which repeatedly attempt to distinguish between “parties to the conflict” and civilians. TCNs are not quite either. Their attachment to the military renders their civilian status uncertain at best.²⁰⁰ And in their relationship to the army they service, they are denied the transcendence of sacrifice as well as the benefits of equitable exchange.

CONCLUSION

This Article began with a vignette about TCN workers at the U.S. naval base at Guantánamo Bay. I chose this example not only to convey a sense of migrant workers’ ubiquity on U.S. bases but to draw attention to another category of people: extraterritorial prisoners. Unsurprisingly, the military also uses the

199. TCNs potentially fall outside the definition of migrant workers under international human rights law as well, as the relevant UN convention excludes “[p]ersons sent or employed by . . . a State outside its territory to perform official functions, whose admission and status are regulated by general international law or by specific international agreements or conventions.” International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, art. 3(a), Dec. 18, 1990, 30 I.L.M. 1517 (entered into force July 1, 2003).

200. In international armed conflicts, civilians accompanying the armed forces are entitled to prisoner of war status, including “supply contractors, members of labour units or of services responsible for the welfare of the armed forces.” Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 4(a)(4), Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364.

In noninternational armed conflicts—the status of most U.S. military operations involving TCNs—civilians are targetable “for such time as they take a direct part in hostilities.” Additional Protocol I, *supra* note 185, art. 51(3). There has been intense debate over the scope of this provision. The United States and its supporters have generally pushed for a broad interpretation of “direct participation in hostilities” in order to maximize its discretion to treat individuals as military targets in the Global War on Terror. This same logic, however, could potentially render targetable a broader spectrum of contract workers, far beyond those who carry arms.

term Third Country National for Muslim detainees captured in Iraq and Afghanistan who are neither local nor American.²⁰¹ They are suspected as Islamist foreign fighters and often placed in different legal categories from local detainees.²⁰² The CIA's black site secret prisons in Thailand, Romania, and Poland were also reserved for prisoners who were neither American nor local.²⁰³ When U.S. forces handed over control of the Bagram prison to Afghan authorities in 2012, they retained custody of the several dozen TCN detainees there.²⁰⁴ Despite the many significant differences between TCN workers and TCN detainees, they face a similar kind of structural vulnerability: Viewed from the perspective of publics in the United States, in local countries, or in their home countries, they are generally kept out of sight in order to be out of mind. In the meantime, they circulate between different nodes in a global network of sites under U.S. control and influence.

The broad parallels between TCN workers and TCN detainees also point to the deep structural challenges facing reform efforts. Many incremental reforms that could ameliorate the conditions of military migrant workers are possible. These could include stricter enforcement of existing law and policy through rigorous spot inspections of labor conditions and criminal prosecutions under existing antitrafficking laws; allowing returned TCNs to file DBA claims at U.S. embassies in their home countries and conducting outreach to that end; adopting contracting policies that would force corporations to more transparently incorporate labor costs, rather than allowing recruiters and subcontractors to extract rents; building on the elementary labor rights framework in recent DOD regulations with possible adjudicatory mechanisms for labor disputes on major bases;

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201. See, e.g., Memorandum from Maj. Gen. William Brandenburg, Deputy Commanding General, Multi-National Force-Iraq, for Commander, U.S. Central Command regarding Request Authority to Sub-Delegate Release Authority for TCNs Held in MNF-I Facilities, Aug. 19, 2005, available at <http://wikileaks.org/static/pdf/US-DoD-TCN-Release-Approval-Delegated-to-DCG-do-2005-09-20.pdf> ("At present, there are 437 TCN detainees within MNF-I custody.").
 202. See Darryl Li, *A Universal Enemy?: "Foreign Fighters" and Legal Regimes and Exclusion and Exemption Under the "Global War on Terror,"* 41 COLUM. H.R. L. REV. 355, 402–13 (2010) (discussing the treatment of TCN detainees by U.S. forces in Iraq).
 203. See, e.g., INT'L COMM. OF THE RED CROSS, ICRC REP. ON THE TREATMENT OF FOURTEEN "HIGH VALUE DETAINEES" IN CIA CUSTODY 5 (2007), available at <http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf> (listing nationalities of detainees held in secret CIA prisons).
 204. See COMBINED JOINT INTERAGENCY TASK FORCE PUBLIC AFFAIRS, COMBINED JOINT INTERAGENCY TASK FORCE 435 FACT SHEET 1 (2013) ("[A] small section of [Bagram] . . . holds third-country national detainees who remain under U.S. [law of armed conflict] custody."); see also *Al Maqaleh v. Hagel*, No. 12-5404 (D.C. Cir. Dec. 24, 2013) (denying habeas jurisdiction for TCN detainees at Bagram).

and institutionalizing a protective role for the home governments of TCN workers, including allowing their diplomats access to workers on U.S. bases.

While such reforms are worth pursuing, the example of TCN detainees also provides sobering lessons about structural challenges. After over a decade of strenuous litigation and advocacy, several Supreme Court rulings,²⁰⁵ and a presidential order,²⁰⁶ the Guantánamo detention facility remains open for the foreseeable future. For TCN workers, the situation may not be as bleak: After all, they are a crucial source of support for the U.S. military and are not tarred with the politically toxic accusation of terrorism. But the vulnerabilities experienced by both TCN detainees and workers share a common structural feature: Their circulation through a network of extraterritorial sites leaves them disconnected from any popular constituency that could effectively exert pressure on their behalf.

Therefore, successful changes would depend on identifying overlaps between the interests of military migrant workers and other constituencies that are capable of counteracting the various influences that make offshoring the army so appealing to U.S. state and corporate elites and their foreign partners. Labor movements and antiwar organizations are potential allies for military migrant workers but may have sharply divergent interests as well. For legal scholars, at least, a necessary conceptual step is not only to understand Guantánamo and other spaces as places of sovereign exception but to focus on the distinct categories of people—especially prisoners and workers—produced through the act of circulation between them. A clearer understanding here of how law reconfigures the relationship between places and people can help to identify the possibilities and limits of solidarity.

205. *See Boumediene v. Bush*, 553 U.S. 723 (2008) (finding constitutional habeas rights for Guantánamo detainees); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (mandating Congressional authorization for Guantánamo military commissions); *Rasul v. Bush*, 542 U.S. 466 (2004) (granting statutory habeas corpus rights to Guantánamo detainees).

206. *See* Exec. Order No. 13492, 3 C.F.R. 13492, 105 (2009) (“The detention facilities at Guantánamo . . . shall be closed as soon as practicable, and no later than 1 year from the date of this order.”).