THE ABSENCE OF JUSTICE: PRIVATE MILITARY CONTRACTORS, SEXUAL ASSAULT, AND THE U.S. GOVERNMENT'S POLICY OF INDIFFERENCE

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As the United States remains in Iraq and Afghanistan, stories of abuse by private military contractors (PMCs) have flooded the news. This Note focuses on an area of PMC crime that has garnered less public attention and censure: sexual crimes against civilians in non-war zones. Emphasizing the lack of legal recourse for victims of sexual crime by PMCs and the systematic failure of the United States to punish sexual crime perpetrated by its own PMCs, the author argues that the United States should be held liable for the sexual crimes that its contractors commit, including those that occur outside of war zones.

This Note first explains the exponential growth in the United States' use of PMCs and highlights that governmental supervision of PMCs has not kept pace with the number of contractors that the United States employs. Noting that PMCs generally employ former members of the military, the author traces a culture of violence against women back to attitudes learned in the U.S. military, and then shows that PMCs are even more likely to be involved in crimes of sexual violence than U.S. soldiers.

The Note details and analyzes the possibility of responding to PMC sexual violence against civilians outside of war zones under U.S. military law, U.S. criminal law, criminal law where the crime occurs, International Human Rights Law, International Criminal Law, and the U.S. Alien Tort Statute (ATS). The author determines that these methods, as they stand now, are inadequate because of problems of limited jurisdiction, U.S. reluctance to prosecute contractors and willingness to protect U.S. nationals from prosecution abroad, requirements that violence be widespread or systematic before triggering international prosecution, and the absence of state liability for the actions of private individuals, unless the state condones the activities. The author calls for a three-fold solution: first, victims should file complaints against the United States in international courts, under the theory that the United States is liable for its contractors' acts, because

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it has condoned them by failing to punish them and even actively discouraging their prosecution; second, victims should sue individual perpetrators in the United States under the ATS, both to compensate victims and to deter contractors from future violence; third, and finally, the United States must act to close the jurisdictional gap that allows PMCs to escape prosecution by signing and supporting international treaties, developing its own stricter system of criminal liability for PMCs, and using contract mechanisms to enforce standards of conduct for PMCs.

I. INTRODUCTION

Many know about the controversial stories of abuses committed by private military contractors in Iraq following the U.S. invasion in 2003. Images of hooded prisoners stacked upon each other, naked, and within the confines of a prison ostensibly controlled by the U.S. military, flashed across television screens throughout the world.[1] A few years later, stories emerged of a violent rampage by contractor employees in a bustling intersection known as Nisour Square in Iraq, resulting in the deaths of seventeen Iraqi civilians.[2] The legal conclusions of these crimes have also been well recorded. Ex-employees of the private security firm formerly known as Blackwater were recently spared prosecution for the killing of those seventeen civilians in 2007.[3] Similarly, former employees of private security firms CACI and Titan were spared prosecution for their involvement in the detainee abuse at Abu Ghraib prison.[4]

Perhaps less well known, or at least faded from memory, are accounts of contractor participation in sexual abuse and human trafficking in other parts of the world. In 1999, employees of DynCorp, a private military contractor (PMC) firm based in the United States, were accused of buying and keeping women and girls as young as twelve years old in sexual slavery in Bosnia.[5] More shocking than the acts themselves is that none of those involved have ever been held accountable within a court of law.[6] The United States subsequently awarded DynCorp a new contract worth nearly $250 million to provide training to the developing Iraqi po-

1. *See* Rebecca Leung, *Abuse of Iraqi POWs by GIs Probed*, CBS NEWS.COM (Apr. 28, 2004), http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml.

2. Charlie Savage, *Charges Voided for Contractors in Iraq Killings*, N.Y. TIMES, Jan. 1, 2010, at A1.

3. *Id*.

4. Atif Rehman, Note, *The Court of Last Resort: Seeking Redress for Victims of Abu-Ghraib Torture Through the Alien Tort Claims Act*, 16 IND. INT'L & COMP. L. REV. 493, 497–99 (2006); Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42, 45–46 (discussing abuse by Titan and CACI).

5. Robert Capps, *Outside the Law*, SALON (June 26, 2002, 7:00 PM), http://www.salon.com/news/feature/2002/06/26/bosnia.

6. *Id*.

lice force, even though the company's immediate reaction to reports of the crimes was to fire the whistle-blowers.[7]

At the time of the Bosnia incident, the means available for holding PMCs accountable for crimes committed abroad were either nonexistent or completely inadequate to the task of bringing to justice private actors acting on behalf of the U.S. government abroad.[8] Liability depended on a variety of factors, including the laws of the country where the crime took place and the possible existence of an agreement between U.S. military officials and the government of the host country.[9] If committed today, these crimes could face sanction only if committed within the context of war.

Media depictions of detainee mistreatment and academic analysis of PMC abuse of civilians in Iraq and Afghanistan have spurred the creation of legislation directed at prosecuting PMCs for crimes committed in war zones.[10] Although these newly created laws suffer from problems of prosecution, these laws at least offer some hope for victims of crimes perpetrated by PMCs. Indeed, they are far better than the complete absence of liability for PMC crimes that remains the status quo in nonconflict zones. This Note suggests that emphasis should also be placed on the right to justice for civilian victims[11] of sex crimes committed by PMCs in non-conflict zones.[12]

An important and unexplored connection between PMC staff and the U.S. military suggests liability for these crimes should extend beyond the individual perpetrator to the U.S. government itself. Throughout history, women have been treated as spoils of war; wherever there has been military occupation, incidents of rape and sexual assault have been pre-

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7. P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 525, 538 (2004); David Isenberg, *There's No Business Like Security Business*, ASIA TIMES ONLINE (Apr. 30, 2003), http://www.atimes.com/atimes/Middle_East/ED30Ak03.html.

8. *See* Robert Capps, *Crime Without Punishment*, SALON (June 27, 2002, 6:03 PM), www.salon.com/news/feature/2002/06/27/military.

9. *Id*.

10. *See, e.g*., Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 720 (2006); Heather Carney, Note, *Prosecuting the Lawless: Human Rights Abuses and Private Military Firms*, 74 GEO. WASH. L. REV. 317, 323 (2006); Rehman, *supra* note 4, at 494.

11. This Note uses the label "victim" despite the ongoing debate on whether that word or "survivor" is more appropriate in discussing women impacted by sexual violence. The concern is that the term "victim" connotes powerlessness and vulnerability and perpetuates the subjugated status of women. Alternatively, use of the term "survivor" may imply that those who could not escape violence either consented to the abuse or were too weak to escape. This Note does not intend to perpetuate any of these myths and uses the terms interchangeably. *See* Bonita C. Meyersfeld, *Reconceptualizing Domestic Violence in International Law*, 67 ALB. L. REV. 371, 379–80 (2003).

12. *See* U.S. DEP'T OF DEF., OFFICE OF THE INSPECTOR GEN., CASE NO. H03L88433128, ASSESSMENT OF DOD EFFORTS TO COMBAT TRAFFICKING IN PERSONS: PHASE II – BOSNIA-HERZEGOVINA AND KOSOVO 8 (2003), http://www.dodig.mil/fo/foia/HT-Phase_II.pdf (discussing the need for justice for civilian victims of sexual crimes committed by contractors in post-conflict Bosnia and Herzegovina). Some of the assertions in this Note can be applied to a broader array of criminal activity in which PMCs engage around the globe. This Note emphasizes the particular problem of crimes committed within nonconflict zones to highlight the U.S. government's ineffectiveness in handling problems of violence against women.

valent.[13] Participation by U.S. military personnel in the sexual exploitation of female civilians through prostitution and rape has been well documented.[14] This legacy is now at risk of frightful expansion as government contractors, paid for by U.S. tax dollars, commit sex crimes with impunity throughout the world.[15]

The boards, corporate officers, and rank and file of PMC firms are composed of former military personnel who are lured by compensation greatly exceeding that of U.S. soldiers.[16] During their time in the U.S. military, these individuals learned to view women as the enemy "other," to be conquered and subdued.[17] This Note will show that sex-based crimes committed by PMCs are thus attributable to lessons learned in the U.S. military regarding women. Stationed throughout the world, PMCs now operate, in effect, with legal immunity while the U.S. government sits idly by.

This Note contributes to the vibrant discussion surrounding PMC issues by exploring two significant but unconsidered aspects of the problem. First, it calls attention to the jurisdictional gap that remains with respect to crimes committed by PMCs in nonconflict zones. Second, it draws attention to the particular problem of sexual violence against women that goes unchecked because of the jurisdictional gap. Thus, this Note argues that the U.S. government should be held responsible for these abuses based on its systematic failure to address the problem of PMC sexual violence against women.

Part II of this Note provides background on the increasing use of PMCs by the U.S. government and draws attention to the particular relationship between PMCs and sexual assault of residents of countries where they are stationed. It argues that such behavior may have been learned during prior service in the U.S. armed forces. Part III analyzes current methods of accountability for abuses committed abroad, providing a brief catalogue of law applicable to PMCs in order to highlight the U.S. government's repeated failure to remedy crimes committed by PMCs against women, particularly those outside of war zones. It also as-

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13. Amy E. Ray, *The Shame of It: Gender-Based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries*, 46 AM. U. L. REV. 793, 796–98 (1997); Nissa Thompson, *Does the International Violence Against Women Act Respond to Lessons from the Iraq War?*, 23 BERKELEY J. GENDER L. & JUST. 1, 5 (2008).

14. *See* Thompson, *supra* note 13, at 5; *see also* Donna M. Hughes et al., *Modern-Day Comfort Women: The U.S. Military, Transnational Crime, and the Trafficking of Women*, 13 VIOLENCE AGAINST WOMEN 901, 903–04 (2007) (reporting sexual crimes by U.S. military personnel over the six decades of U.S. presence in Korea).

15. *See infra* Part II.C.

16. *See* Chia Lehnardt, *Private Military Companies and State Responsibility*, *in* FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 139, 140 (Simon Chesterman & Chia Lehnardt eds., 2007); Martha Minow, *Outsourcing Power: Privatizing Military Efforts and the Risks to Accountability, Professionalism, and Democracy*, *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 110, 113 (Jody Freeman & Martha Minow eds., 2009); *see also* KEN SILVERSTEIN, PRIVATE WARRIORS 143–45 (2000).

17. *See infra* Part II.B.

serts that discrete incidents of sexual assault by PMCs are violations of international law and that the United States' failure to prevent or prosecute these crimes gives rise to liability under international human rights law (IHRL). Part IV makes specific recommendations to remedy the liability gap. Part V concludes.

II. BACKGROUND

Part II briefly recounts the dramatic growth of private military service companies out of the demise of the public army and subsequent problems in oversight by the U.S. government. It then describes the problem of sexual assault by U.S. military personnel, both within the ranks and on external populations. Finally, it details the relationship between PMC sexual violence and time served in the military.

A. *The Emergence of Private Military Companies in U.S. Military Operations*

Private actors on the battlefield are not a new phenomenon. In the year 329 BC, Alexander the Great employed 50,000 mercenaries in his sweep across Persia.[18] Early in U.S. history, contractors provided military support on the fields of the Revolutionary War, providing aid to George Washington's army.[19] More recently in U.S. history, private military contractors participated in the Iran-Contra operation.[20] Elsewhere, and more controversially, private soldiers battled on behalf of white-ruled Rhodesia in the 1970s.[21] Throughout the world, contractors have worked to topple more than one government.[22] Despite this history, the presence of private actors in military operations has become less controversial over time; rather than being labeled as mercenaries, these actors are now highly paid PMCs[23] of large and sometimes publicly traded global corporations.

The number of PMCs working under U.S. government contracts has exploded since the end of the Cold War, as the government has sought to reduce the size of the military budget.[24] For example, between 1985 and

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18. SILVERSTEIN, *supra* note 16, at 145; Carney, *supra* note 10, at 321.

19. K. Elizabeth Waits, Note, *Avoiding the "Legal Bermuda Triangle": The Military Extraterritorial Jurisdiction Act's Unprecedented Expansion of U.S. Criminal Jurisdiction Over Foreign Nationals*, 23 ARIZ. J. INT'L & COMP. L. 493, 497–98 (2006).

20. SILVERSTEIN, *supra* note 16, at 149–50.

21. *Id*. at 147.

22. *Id*. at 146–50.

23. There is some discussion on the proper terminology to be used when discussing private contractors who provide services to the military, depending on the type of services supplied. *See, e.g.*, DEBORAH D. AVANT, THE MARKET FOR FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY 22–26 (2005); CHRISTOPHER KINSEY, CORPORATE SOLDIERS AND INTERNATIONAL SECURITY: THE RISE OF PRIVATE MILITARY COMPANIES 8–33 (2006). This Note employs the term "PMC" so as to encompass the full range of individuals and companies that should be targeted for reform.

24. Minow, *supra* note 16, at 113.

1999, the Army's troop levels fell from 800,000 to 480,000.[25] As the size of U.S. military forces decreased, private security companies' profits soared as the government replaced work previously done by military personnel with private contractors.[26] Between 2000 and 2005, spending by the Department of Defense (DOD) on contractor services rose by 102%, from $133.5 billion to $270 billion.[27] In the theater of war, the ratio of private contractors to troops has increased dramatically. In the first Gulf War under President George H.W. Bush, the ratio was one to one hundred.[28] In the ongoing Iraq War, the ratio is one to ten.[29]

The dramatic growth in the use of contractors is attributable to the desire of Presidents Bill Clinton and George W. Bush to downsize the military.[30] During their tenure, Congress restricted the number of government employees that could be maintained but did not place similar limits on the number of private contractors.[31] President Bush in particular made an effort to outsource government functions to private companies.[32] His administration sought to reform the Pentagon into an entity concerned only with core defense activities by outsourcing management, technology, and business activities to the private sector.[33]

PMCs are perhaps best known for their security work in Iraq and Afghanistan, but they do more for the U.S. government than provide security. They also provide transportation, laundry, and food services; engage in policy development; manage weapons systems; and even supervise military personnel.[34] Not only do PMCs do everything, but they are also located everywhere. For example, the U.S.-based firm Brown & Root began providing logistical support services in Somalia in 1992 and has since provided such services in Rwanda, Haiti, Kuwait, Bosnia, Kosovo, Afghanistan, and Iraq.[35] According to Peter W. Singer,[36] an expert on PMC issues and a senior fellow at the Brookings Institution, PMCs are located in fifty countries across the globe.[37]

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25. SILVERSTEIN, *supra* note 16, at 144.
26. Minow, *supra* note 16, at 113.
27. MINORITY STAFF OF H. COMM. ON GOV'T REFORM SPECIAL INVESTIGATIONS DIV., DOLLARS, NOT SENSE: GOVERNMENT CONTRACTING UNDER THE BUSH ADMINISTRATION 5 (Comm. Print 2006) [hereinafter DOLLARS, NOT SENSE].
28. Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 149 (2005).
29. *Id*.
30. Minow, *supra* note 16, at 111.
31. *Id*.
32. *Id*.
33. *Id*. at 111–12; *see also* PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTION THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT 29–30 (2007).
34. *See* Minow, *supra* note 16, at 112, 115.
35. P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 142–48 (2008).
36. Biography of Peter W. Singer, BROOKINGS, http://www.brookings.edu/experts/singerp.aspx (last visited Mar. 5, 2011).
37. Singer, *supra* note 7, at 522.

Unfortunately, adequate supervision and management of these contracts has not kept pace with the exponential growth in the use of contractors, resulting in cost overruns and fraud.[38] A 2003 U.S. General Accounting Office report found a significant lack of oversight by hiring agencies over PMCs.[39] Until 2003, no government agency was responsible for keeping track of the numbers of PMCs working in Iraq.[40] An investigation by the Minority Staff of the House of Representatives Committee on Government Reform reported that one contractor, Halliburton, billed the federal government $1.4 billion in "questioned and unsupported charges."[41] The DOD Inspector General noted that government officials who had entered into contracts with private companies, such as Halliburton, failed to institute sufficient surveillance plans on eighty-seven percent of contracts reviewed and failed to document contractor performance in forty-three percent of contracts reviewed.[42] In part because of this failure of oversight, corruption grew in the period during which federal procurement of private contractors surged.[43] Caught up in the rush to profit from government privatization of military services were a Republican congressman and two top federal procurement officers, all convicted of corruption-related offenses.[44]

Financial misconduct has not been the only consequence of the lack of PMC oversight. A stark example of the failure of contractor oversight was the abuse of detainees at Abu Ghraib prison.[45] Although an Army unit was responsible for operation of the prison, a shortage of interroga-

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38. Minow, *supra* note 16, at 114.

39. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-695, MILITARY OPERATIONS: CONTRACTORS PROVIDE VITAL SERVICES TO DEPLOYED FORCES BUT ARE NOT ADEQUATELY ADDRESSED IN DOD PLANS 20 (2003).

40. Lehnardt, *supra* note 16, at 141. There is some indication that oversight over contractors is improving in Iraq. *See, e.g.*, David Isenberg, *Contractor Oversight Is Improving*, UPI.COM (Aug. 29, 2008, 6:47 PM), http://www.upi.com/Top_News/Special/2008/08/29/Contractor-oversight-is-Improving/UPI-17311220050031/. Additionally, the Government Accountability Office found that the DOD and the U.S. Department of State have taken steps to increase contractor oversight. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-966, REBUILDING IRAQ: DOD AND STATE DEPARTMENT HAVE IMPROVED OVERSIGHT AND COORDINATION OF PRIVATE SECURITY CONTRACTORS IN IRAQ, BUT FURTHER ACTIONS ARE NEEDED TO SUSTAIN IMPROVEMENTS 4–6 (2008). *But see* Press Release, Human Rights First, Private Security Contractor Oversight and Accountability Concerns, Iraqi Refugee Needs Will Persist Past President's Remarks (Aug. 31, 2010), *available at* http://www.humanrightsfirst.org/media/usls/2010/alert/648/index.htm.

41. DOLLARS, NOT SENSE, *supra* note 27, at 43. Halliburton is a Houston-based oil services company that was once run by former Vice President Dick Cheney. Minow, *supra* note 16, at 115. The manner in which Halliburton received its contracts is controversial. The use of "no bid" contracts, such as those awarded to Halliburton, grew by 110% from 2000 to 2005 (from $46.6 billion to $97.8 billion). *See* DOLLARS, NOT SENSE, *supra* note 27, at 8–9. These types of contracts are awarded without any competition whatsoever. *Id.* at 9.

42. Minow, *supra* note 16, at 115. Moreover, government oversight over PMC firms is often contracted out to other private companies, resulting in contractors supervising contractors. *See id.* at 118.

43. DOLLARS, NOT SENSE, *supra* note 27, at 39.

44. *Id.*

45. *See* MAJOR GEN. GEORGE R. FAY, ARTICLE 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 47–48 (2004), http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf.

tors and translators required the employment of private contractors.[46] Of the thirty-seven interrogators working at Abu Ghraib, only ten were U.S. military personnel.[47] Military investigations of the abuse found poorly supervised private contractors to be among the causes of the mistreatment of prisoners.[48]

Mistreatment of prisoners by contractors should not have come as a surprise, considering the resumes of those hired by PMC firms. Faced with explosive expenditures by the federal government, PMC firms needed to hire thousands of employees to fill spots in Iraq, and they needed to hire them quickly.[49] In the rush, many firms "recruited former police officers and soldiers who engaged in human rights violations—including torture and illicit killings—for regimes such as apartheid South Africa, Augusto Pinochet's Chile, and Slobodan Milosevic's Yugoslavia."[50]

B. A Culture of Misogyny: The U.S. Military's Problem with Sexual Violence Against Women

It is axiomatic that war impacts women differently than it does men,[51] and evidence suggests women are negatively affected even by the mere presence of military forces.[52] A DOD report on human trafficking in Bosnia observed traffickers rushing women to the area to meet the needs of military personnel stationed in the area after the war.[53] The troubled connection between U.S. military forces and sexual assault has not eased, despite military efforts to reduce the incidence of sexual assault of military servicewomen.[54] Research suggests that military culture

46. *Id*. at 48; *see also* Rehman, *supra* note 4, at 496.

47. Rehman, *supra* note 4, at 496.

48. FAY, *supra* note 45, at 50–52.

49. Carney, *supra* note 10, at 324.

50. *Id*. at 324–25 (internal quotation marks omitted).

51. Congressional findings for the International Violence Against Women Act included the following: "Displaced, refugee, and stateless women and girls in humanitarian emergencies, conflict settings, and natural disasters face extreme violence and threats because of power inequities, including being forced to exchange sex for food and humanitarian supplies, and being at increased risk of rape, sexual exploitation, and abuse." S. 2279, 110th Cong. § 2(8) (2007); Thompson, *supra* note 13, at 8–9; *see also* Judith Gardam & Michelle Jarvis, *Women and Armed Conflict: The International Response to the Beijing Platform for Action*, 32 COLUM. HUM. RTS. L. REV. 1, 5 (2000). A caveat: the author recognizes sexual abuse against men as an important issue worthy of discussion but focuses on sexual abuse against women to bring attention to the particular question of women's rights and human rights. For more information on sexual abuse against men within the international law context, see Kelly D. Askin, *Developments in International Criminal Law: Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT'L L. 97, 99–102 (1999).

52. *See* U.S. DEP'T OF DEF., *supra* note 12, at 7–8; Jacqueline Berman, *The Left, the Right, and the Prostitute: The Making of U.S. Antitrafficking in Persons Policy*, 14 TUL. J. INT'L & COMP. L. 269, 292 (2006).

53. *See* U.S. DEP'T OF DEF., *supra* note 12, at 8.

54. In 2004, then Secretary of Defense Donald Rumsfeld ordered a review of DOD procedures regarding the treatment of sexual assault victims in the military. Memorandum from Donald Rumsfeld, Sec'y of Def., on Department of Defense Care for Victims of Sexual Assaults to the Under Sec'y of Def. (Personnel and Readiness) (Feb. 5, 2004) (on file with author). In response, the Sexual As-

and views of women and sexuality are to blame for these intractable problems.[55] As PMC firms are composed of and controlled by former military personnel,[56] data regarding sexual violence and public military forces can serve as a proxy for the conduct of PMCs.

1. Violence in the Ranks—Soldier on Soldier Rape

In 2003, nearly thirty percent of female veterans from Vietnam through the first Gulf War surveyed by psychologist Anne Sadler and her colleagues said they were raped in the military.[57] A 1995 study of female veterans reported that ninety percent had been sexually harassed, which was defined broadly as anything from being pressured for sex to being leered at by fellow service members.[58] Military reports placed the number of sexual assaults in the military at 2670, but the Pentagon itself estimates that eighty to ninety percent of military sexual assaults are never reported and that the figure given is probably grossly inaccurate.[59]

Studies seeking to understand the continued problem of rape of female soldiers by other soldiers have found military culture to be more misogynistic than even military critics suspected.[60] One study by Duke law professor Madeline Morris noted that norms prevalent in military culture, such as the glorification of hyper-masculinity, promiscuity, and the representation of women as sexual targets, strongly correlate to sexual abuse against women.[61]

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sault Prevention and Response Office was established and "now serves as the Department's single point of authority for sexual assault policy and provides oversight to ensure that each of the Service's programs complies with DOD policy." *Mission & History*, U.S. DEP'T OF DEF., SEXUAL ASSAULT PREVENTION & RESPONSE, http://www.sapr.mil/index.php/about/mission-and-history (last visited Mar. 5, 2011). In its 2009 annual report on sexual assault in the military, the DOD showed an increase of eleven percent in reported assaults from 2008. U.S. DEP'T OF DEF., SEXUAL ASSAULT PREVENTION & RESPONSE, DEPARTMENT OF DEFENSE FISCAL YEAR 2009 ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 3 (2010), http://www.sapr.mil/media/pdf/reports/fy09_annual_report.pdf. The department attributed this jump to an increase in reporting, however, and not in the number of assaults. *See id*.

55. Anne G. Sadler et al., *Factors Associated with Women's Risk of Rape in the Military Environment*, 43 AM. J. INDUS. MED. 262, 271–72 (2003).

56. *See supra* note 16 and accompanying text.

57. Sadler et al., *supra* note 55, at 262.

58. Maureen Murdoch & Kristin L. Nichol, *Women Veterans' Experiences with Domestic Violence and with Sexual Harassment While in the Military*, 4 ARCHIVES FAM. MED. 411, 411, 415 (1995).

59. U.S. DEP'T OF DEF., SEXUAL ASSAULT PREVENTION & RESPONSE, *supra* note 54, at 3; Mike Mount, *Reports of Sexual Assault in Military Rise in 2008*, CNN.COM (Mar. 17, 2009), http://articles.cnn.com/2009-03-17/politics/military.assaults_1_sexual-assault-reports-detailed-fiscal-year?_s=PM:POLITICS.

60. *See* Helen Benedict, *Why Soldiers Rape: Culture of Misogyny, Illegal Occupation, Fuel Sexual Violence in Military*, IN THESE TIMES (Aug. 13, 2008), http://www.inthesetimes.com/article/3848. One study reported that:

> A differential between military rape rates and rates of other violent crime . . . exists both in peace and in war. In peacetime, military rape rates are reduced significantly less from civilian levels than are rates of other violent crime. In wartime, military rape rates are increased far more above civilian levels than are rates of other violent crime.

Madeline Morris, *By Fore of Arms: Rape, War, and Military Culture*, 45 DUKE L.J. 651, 673 (1996).

61. Morris, *supra* note 60, at 706–09.

Another study showed that rape and other forms of sexual assault were more likely to occur in environments where female soldiers were repeatedly harassed and pressured for dates.[62] The study also found a strong correlation between the behavior of superior officers and the incidence of rape, observing, "Officers allowing or initiating sexually demeaning comments or gestures towards female soldiers was associated with a three- to four-fold increase in likelihood of rape."[63] Lenient treatment of sexual assault offenders by superior officers remains routine, reinforcing the perception that female soldiers are a lesser class of soldier and therefore fair game for sexual abuse.[64]

Critics assert that negative perceptions about women in the military are deeply rooted in military culture and are discernable even at the highest levels of military command, including the federal government itself.[65] For example, the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW), an international agreement among nations to address, among other problems, unrelenting violence against women and girls, has not been ratified by the United States.[66] One reservation specified by Congress was its unwillingness to accept the proposition that women should be allowed to participate in direct combat.[67]

2. *Military Sexual Violence Against Civilian and Detainee Populations*

Sexual exploitation of civilian inhabitants of war-torn countries is not a phenomenon unique to the U.S. military.[68] Throughout history, sexual abuse of women has been regarded as an inevitable feature of war.[69] Space limitations prevent a thorough accounting of sexual crimes committed by U.S. military personnel; therefore, this Note will only review recent examples of sexual violence involving the U.S. military. For instance, in 2006, four soldiers were charged in the rape and murder of a fourteen-year-old Iraqi girl.[70] The soldiers subsequently murdered the girl's family, as well.[71] One of the soldiers, Steven Green, joined the Ar-

62. Sadler et al., *supra* note 55, at 268, 270.

63. *Id*. at 268.

64. *See* Miles Moffeit & Amy Herdy, *For Crime Victims, Punishment*, DENVERPOST.COM (May 17, 2005, 9:31 PM), http://www.denverpost.com/ci_0001767390.

65. *See id*.

66. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 [hereinafter CEDAW]. The United States did sign the convention in 1980 but has not ratified it. LOUIS HENKIN ET AL., HUMAN RIGHTS 364 (1999).

67. 140 CONG. REC. S13,927-04 (1994) (statement of S. Pell) ("[T]he United States does not accept any obligation under the Convention to assign women to all military units and positions which may require engagement in direct combat."); HENKIN ET AL., *supra* note 66, at 364–66.

68. *See* Muna Ndulo, *The United Nations Responses to the Sexual Abuse and Exploitation of Women and Girls by Peacekeepers During Peacekeeping Missions*, 27 BERKELEY J. INT'L L. 127, 130 (2009).

69. *Id*. at 131.

70. Paul von Zielbauer, *Soldier to Plead Guilty in Iraq Rape and Killings*, N.Y. TIMES, Nov. 15, 2006, at A23.

71. *Id*.

my soon after he was arrested for underage drinking, exemplifying problems with relaxed military recruitment.[72] The incident itself badly damaged the image of U.S. forces in Iraq, leading many to question the credibility of the United States as a defender of human rights.[73]

Finally, the abuses at Abu Ghraib were conspicuously sexual in nature. Army investigators have reported evidence of sexual cruelty, including "acts causing bodily harm using unlawful force as well as sexual offenses including, but not limited to rape, sodomy and indecent assault."[74] Notably, the investigators' report also included language attempting to cabin the military's liability, stating: "These incidents of physical or sexual abuse are serious enough that no Soldier or contractor believed the conduct was based on official policy or guidance. . . . [N]o policy, directive, or doctrine caused the violent or sexual abuse incidents."[75] Ultimately, the report attempted to place responsibility for the abuse on rogue actors by distinguishing the abusers' actions from those reflecting "Army values."[76] The report went on to blame a breakdown of Army leadership at the prison, concluding, "Despite these leadership deficiencies, the primary cause of the most egregious violent and sexual abuses was the individual criminal propensities of the particular perpetrators."[77]

C. Learning Misogyny, Exporting Misogyny: The Relationship Between PMC Sexual Violence and the U.S. Military

Rape of female PMCs by their co-workers has garnered public attention and even prompted legislation. Legislation passed in 2009, known as "the Franken Amendment," prohibits the DOD from doing business with contractor firms that require their employees to sign arbitration agreements for certain claims, including rape, assault, and harassment.[78] The legislation was prompted by the congressional testimony of a female KBR employee, Jamie Leigh Jones, who was locked in a shipping container by her employer after she notified her supervisors of her rape by a co-worker.[79] KBR sought to compel arbitration of her

72. *See Iraq Rape Soldier Given Life Sentence*, GUARDIAN.CO.UK (Nov. 17, 2006, 10:57 AM), http://www.guardian.co.uk/world/2006/nov/17/iraq.usa1.

73. *See* Suzanne Goldenberg, *More US Troops Charged with Iraqi Girl's Rape and Murder*, GUARDIAN.CO.UK (July 10, 2006, 11:43 PM), http://www.guardian.co.uk/world/2006/jul/10/usa.iraq.

74. LIEUTENANT GEN. ANTHONY R. JONES, AR 15-6 INVESTIGATION OF THE ABU GHRAIB PRISON AND 205TH MILITARY INTELLIGENCE BRIGADE 15 (2004), http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf.

75. *See id*. at 15–16.

76. *See id*. at 16.

77. *Id*. at 18.

78. Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 8116, 123 Stat. 3409, 3454–55 (2009).

79. *See* James Risen, *Limbo for U.S. Women Reporting Iraq Assaults*, N.Y. TIMES, Feb. 13, 2008, at A1; Dahlia Lithwick, *Open the Shut Case*, SLATE (Jan. 28, 2010, 6:31 PM), http://www.slate.com/id/2242792/.

complaint against the company.[80] Another KBR employee, Mary Beth Kineston, who was sexually assaulted by a KBR driver, testified that male co-workers acted as if no law applied to them.[81] She sought out JAG services on the base where she worked after reports to her employer of her rape went unanswered.[82] She described the culture of hostility toward women within her work environment in the following way:

> After I was raped, the sexual harassment in my department of 45 men and two women just intensified, to the point where me and this other woman, we were, like—we didn't know where to turn . . . we had supervisors pulling down their pants and urinating in front of us, I had pornography put in my truck all the time, and just different things like that, that we had to deal with on a daily basis.[83]

These accounts indicate that contractors retain attitudes toward women learned during their service in the military while employed through private companies.[84]

Sexual violence against women by male PMCs occurs both within the work environment and externally, in civilian populations wherever PMCs are located.[85] Although there are no statistics on the number of rapes or other crimes committed by PMCs abroad, U.S. government officials are evidently aware of and concerned about PMC involvement in human trafficking, forced sexual labor, and rape.[86] In 2003, a DOD Inspector General report on human trafficking in Bosnia-Herzegovina and Kosovo noted that "[c]ontractor employees are more likely than military personnel to be involved in illegal prostitution and human trafficking ac-

80. Risen, *supra* note 79.

81. *Id*.

82. *Closing Legal Loopholes: Prosecuting Sexual Assaults and Other Violent Crimes Committed Overseas by American Civilians in a Combat Environment: Hearing Before the Subcomm. on Int'l Operations and Orgs., Democracy, and Human Rights of the S. Foreign Relations Comm.*, 110th Cong. 4 (2008) (statement of Mary Beth Kineston) [hereinafter *Closing Legal Loopholes*].

83. *Id*. at 9.

84. *See* Morris, *supra* note 60, at 659 (noting that her data could be generalized to other countries' armed forces). Mary Beth Kineston attempted to get help from the JAG office on the base where she worked, but she was told that JAG services were not available for civilians. *Closing Legal Loopholes*, *supra* note 82, at 9. There were other signs that the U.S. military was completely unprepared to handle sex abuse cases more generally. For example, according to the testimony of Florida Senator Bill Nelson before the U.S. Senate Foreign Relations Subcommittee on International Operations and Organizations, Democracy and Human Rights, "the Sexual Assault Prevention and Response Office of the Department of Defense says it is not even aware of the procedures that the military criminal investigative services would take if they encountered a civilian sexual assault or harassment case, except for referring the victim to medical treatment." *Id*. at 2 (statement of Sen. Bill Nelson). A female employee victimized by a contractor co-worker noted that there were no medical protocols to deal with sexual assault on the base where she worked as medical staff. *Id*. at 12 (statement of Dawn Leamon).

85. *See* U.S. DEP'T OF DEF., *supra* note 12, at 2 (discussing PMC violence against civilian populations in Bosnia and Kosovo).

86. *See id*. "[The assessment]" found that while some contractors make an effort to monitor their employees' activities and address employee misconduct, contractor behavior in this regard is not uniform. Not surprisingly, anecdotal evidence suggested some level of DOD contractor employee involvement in activities related to human trafficking in Bosnia-Herzegovina and Kosovo." *Id*.

tivities."[87] The Inspector General also revealed that "contractors do not report . . . allegations against their employees regarding involvement in human trafficking to U.S. military commanders."[88] Both the DOD Inspector General and the State Department have recommended greater oversight of contractor behavior, suggesting the use of contract mechanisms, such as penalties and the risk of contract termination, to control abuse by PMCs.[89]

Finally, the context of these crimes must be considered. The abuses in Bosnia by DynCorp employees followed a genocidal campaign that used sexual violence as a tool of war on that country's women.[90] PMCs are in a unique position to exploit the vulnerabilities of women, because PMCs are often stationed in postconflict environments.[91] Studies have shown that histories of sexual violence are key indicators of future victimization.[92] Bosnian women, and others around the world like them, were first made to suffer the atrocities carried out on their bodies by enemy forces, and then they were made to suffer the repercussions, including further rape, abandonment, and even murder, for the "shame" brought on their families for being raped.[93] Some survivors experience a further degradation, as they are then treated by PMCs as sexual objects in a postconflict environment.[94]

III. ANALYSIS

The special relationship between private contractors and the government raises questions about the U.S. government's accountability for PMC crimes.[95] This Part analyzes the current means of holding PMCs accountable for crimes of sexual violence, with an emphasis on crimes committed in nonconflict zones. Currently, there are few mechanisms in place to address abuses committed by private contractors. The scant methods available have also been proven largely ineffective in bringing perpetrators to justice. This Part outlines the legal mechanisms currently in place to hold PMCs accountable for their crimes, exposing the jurisdictional gap that exists with respect to crimes committed in nonconflict zones.

87. *Id*. at 26.
88. *Id*. at 19.
89. U.S. DEP'T OF DEF., *supra* note 12, at 23; *see also* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 45 (10th ed. 2010), http://www.state.gov/documents/organization/142979.pdf.
90. *See* Andrew Osborn, *Mass Rape Ruled a War Crime*, GUARDIAN, Feb. 23, 2001, at 2.
91. *See* Cedric Ryngaert, *Litigating Abuses Committed by Private Military Companies*, 19 EUR. J. INT'L L. 1035, 1040 (2008).
92. Sadler et al., *supra* note 55, at 270–71 (citing studies).
93. Ray, *supra* note 13, at 803–05.
94. *See* Capps, *supra* note 5.
95. *See* Lehnardt, *supra* note 16, at 142.

A. *Military Systems*

When contractors commit crimes or otherwise cause injuries to citizens of foreign nations while stationed abroad, they largely remain immune from suit, unless the crime took place either in a war zone or on the premises of U.S. military or government installations.[96]

1. *Uniform Code of Military Justice*

The Uniform Code of Military Justice (UCMJ) is military law that regulates the armed forces.[97] Violations of the UCMJ are prosecuted in courts-martial.[98] Previously, the Supreme Court barred the use of courts-martial for civilians because they lack procedural safeguards found in civil courts, such as the right to a grand jury indictment and a jury trial before an Article III judge.[99] Despite questionable constitutionality, the UCMJ was amended in 2006 to allow jurisdiction over civilians serving with or accompanying military forces abroad during "declared war or a contingency operation."[100] Before the change, UCMJ jurisdiction over civilians was interpreted to apply only during times of formally declared war.[101] The change was made to address unlawful activity by PMCs in Iraq and Afghanistan.[102] A central problem with this approach is that it only covers contractors "accompanying" forces during times of war or conflict.[103] Only PMCs working under contract with the DOD "accompany" armed forces under the UCMJ.[104] Therefore, although the UCMJ

96. *Id*.

97. 10 U.S.C. § 802 (2006); Margaret Prystowsky, *The Constitutionality of Court-Martialing Civilian Contractors in Iraq*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 45, 50 (2008).

98. 10 U.S.C. § 804; Prystowsky, *supra* note 97, at 50.

99. Prystowsky, *supra* note 97, at 50. These restrictions developed over time in a series of cases beginning with *Reid v. Covert*. *See* 354 U.S. 1, 3, 39–41 (1957) (holding that court-martial trial of a civilian woman, who killed her husband on an Air Force base in England during peace time, was unconstitutional).

100. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2006) (codified at 10 U.S.C. § 802(a)(10)). A memorandum from Secretary of Defense Robert M. Gates described the expansion in jurisdiction. Memorandum from Robert M. Gates, Sec'y of Def., on UCMJ Jurisdiction over DOD Civilian Employees, DOD Contractor Personnel, and Other Persons Serving with or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations to the Sec'ys of the Military Dep'ts, Chairman of the Joint Chiefs of Staff, Under Sec'ys of Def., Commanders of the Combatant Commands (Mar. 10, 2008), http://www.dtic.mil/whs/directives/corres/pdf/DTM-08-009.pdf. The memorandum indicates that when a crime has been committed that would violate the laws of the United States, the DOD should notify the Department of Justice (DOJ) in order to ensure, where possible, the availability of federal courts for the accused. *Id*. at 2. If the DOJ declines to prosecute or otherwise does not respond, the military retains jurisdiction to prosecute according to usual UCMJ procedures. *See id*.

101. Prystowsky, *supra* note 97, at 49.

102. *See id*.

103. *See* 10 U.S.C. § 802(a)(10).

104. *See* Bruce Falconer & Daniel Schulman, *Blackwater's World of Warcraft*, MOTHER JONES, Mar.–Apr. 2008, at 71, 71–75.

increases the potential for justice among foreign crime victims, it is subject to limited application.[105]

2. *Defense Federal Acquisition Regulations*

In 2006, the U.S. government announced a rule to implement the Trafficking Victims Protection Act of 2000 (TVPA), which requires government agencies to use contract clauses that compel contractors to develop policies to ensure their employees will not engage in human trafficking or prostitution.[106] The TVPA and its rules, known as Defense Federal Acquisition Regulations, were implemented to counter the global problem of human trafficking and the modern day problem of slavery.[107] Among its goals, the TVPA is designed to protect and assist victims in the United States and abroad and to enhance federal criminal laws against traffickers.[108]

In 2002, the DOD adopted a zero-tolerance policy on trafficking activities for military personnel, after well-publicized allegations that U.S. military leadership "implicitly condoned" sexual slavery by permitting soldiers to regularly visit Seoul's "Hooker Hill."[109] The allegations included stories of women being sold from one brothel to another.[110] Then-Deputy Secretary of Defense Paul Wolfowitz issued a memorandum stating that henceforth, "It is the policy of the Department of Defense that trafficking in persons will not be facilitated in any way by the activities of our Service members, civilian employees, indirect hires, or DOD contract personnel."[111] Following up on this stern language, Congress amended the TVPA to mandate the use of clauses in government contracts that permit agencies to end contracts if private contractors engage in trafficking.[112]

In 2006, at the signing of the TVPA, President George W. Bush asserted,

> We cannot put the criminals out of business until we also confront the problem of demand. Those who pay for the chance to sexually abuse children and teenage girls must be held to account. So we'll

105. Human rights organizations, although wanting to bring PMCs to justice, have raised concerns with the court-martialing of civilians, seeking to have the new rules narrowly applied with as many due process protections as possible. *See* HUMAN RIGHTS FIRST, PRIVATE SECURITY CONTRACTORS AT WAR: ENDING THE CULTURE OF IMPUNITY 29 (2008), http://www.humanrightsfirst.org/wp-content/uploads/pdf/08115-usls-psc-final.pdf.

106. Tenley A. Carp, *The FAR and DFARS Ban on Human Trafficking—Heavy on Rhetoric, Light on Enforcement*, 49 GOV'T CONTRACTOR, Jan. 17, 2007, ¶ 12, at 1, 1; *see* 48 C.F.R. § 22.1703 (2009) (current rule).

107. *See* 22 U.S.C. § 7101(a); 48 C.F.R. § 22.1703; *see also* Carp, *supra* note 106, at 1–2.

108. 22 U.S.C. § 7101.

109. Carp, *supra* note 106, at 2.

110. *Id*.

111. *Id*. (internal quotation marks omitted).

112. *Id*. at 2.

> investigate and prosecute the customers, the unscrupulous adults who prey on the young and innocent.[113]

Unfortunately, these strong words were followed by weak accountability methods. The only mechanism for enforcement relies on contractor self-reports. Specifically, the implementing regulations require that a contractor immediately inform its contracting officer of "[a]ny information it receives from any source (including host country law enforcement) that alleges a [c]ontractor employee, subcontractor, or subcontractor employee has engaged in conduct that violates this policy" and inform its contracting officer of "[a]ny actions taken against [c]ontractor employees, subcontractors, or subcontractor employees pursuant to this clause."[114] A critic of the rule observed,

> [T]here appear to be no true means of enforcement. Contractors essentially have been asked to turn themselves in upon learning that an employee has violated this policy—even at the risk of contract termination, suspension and debarment. Thus, while the FAR and DFARS ban on human trafficking is a warning to [c]ontractors that such activities are expressly prohibited, it is doubtful that the regulations will accomplish their laudable objectives, since [c]ontractors are unlikely to self-report.[115]

In addition, the regulation does not authorize government agencies to conduct audits on contractors, increasing the likelihood that the requirements will be ignored.[116]

The DynCorp scandal reveals how unlikely contractor firms may be to comply with these mandates. The company fired the employee who revealed the existence of the slave ring in Bosnia for bringing shame on the company.[117] DynCorp's more than $2 billion in DOD contracts were not impacted by the allegations.[118] As a United Nations (U.N.) internal report on similar allegations against U.N. peacekeepers in the Democratic Republic of Congo noted, the lack of repercussions for those who participate in trafficking indicates "zero compliance with zero tolerance."[119]

B. Criminal Law

Numerous obstacles prevent successful prosecution under criminal laws. The primary problem with applying U.S. criminal law is the questionable constitutionality of applying criminal law extraterritorially.[120] Although there are limited ways to bypass this particular problem, pros-

113. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 21 (6th ed. 2006), http://www.state.gov/documents/organization/66086.pdf (internal quotation marks omitted).
114. 48 C.F.R. § 52.222-50(d) (2009).
115. Carp, *supra* note 106, at 1.
116. *Id*.
117. Capps, *supra* note 5.
118. *Id*.
119. Carp, *supra* note 106, at 2 (internal quotation marks omitted).
120. Prystowsky, *supra* note 97, at 51.

ecution remains difficult because of challenging investigative and evidentiary conditions. Finally, reluctance by prosecutors to bring charges is an enduring predicament. This Section discusses what opportunities exist for criminal prosecution.

1. Special Maritime and Territorial Jurisdiction

The Special Maritime and Territorial Jurisdiction Act (SMTJA) extends to crimes committed at certain types of military and government facilities in foreign territories.[121] Under the SMTJA, certain federal statutes criminalize sexual crimes committed by or against U.S. nationals at U.S. facilities overseas.[122] As with the UCMJ, this means of holding PMCs accountable suffers from jurisdictional loopholes. For example, crimes committed by contractors off the grounds of U.S. military bases and facilities cannot be prosecuted under the SMTJA.[123] In addition, many employees of private contractors are not U.S. nationals, so their crimes are not covered.[124] Whether because of its limited applicability or because of the reluctance of the Department of Justice (DOJ) to prosecute,[125] the SMTJA has been applied successfully in only one case, which involved a CIA contractor who beat an Afghani detainee who later died.[126]

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121. 18 U.S.C. § 7(9) (2006). For crimes by or against a U.S. national, SMTJ jurisdiction includes:

(A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and

(B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.

Id.

122. 18 U.S.C. §§ 2241–2245. Section 2241 criminalizes aggravated sexual abuse, which includes the use of force or threat of death, serious bodily injury, or kidnapping, or the rendering of a victim unconscious or impaired, to induce another person to engage in a sexual act. Section 2242 prohibits sexual abuse using threats less serious than in cases of aggravated sexual abuse or taking advantage of an impairment not of the aggressor's making. Section 2243 applies when the victim of sexual abuse is a minor or ward. Section 2244 criminalizes abusive sexual contact that does not rise to the level of conduct prohibited by §§ 2241–2243. Section 2245 provides for increased punishment if any of these acts results in death.

123. *See* 18 U.S.C. § 7(9); *Q&A: Private Military Contractors and the Law*, HUMAN RIGHTS WATCH, http://www.hrw.org/legacy/english/docs/2004/05/05/iraq8547.htm (last visited Mar. 5, 2011).

124. *See* 18 U.S.C. § 7(9); *Q&A: Private Military Contractors and the Law*, *supra* note 123.

125. *Q&A: Private Military Contractors and the Law*, *supra* note 123.

126. Ian Kierpaul, Comment, *The Mad Scramble of Congress, Lawyers, and Law Students After Abu Ghraib: The Rush to Bring Private Military Contractors to Justice*, 39 U. TOL. L. REV. 407, 410–11 (2008).

2. *Military Extraterritorial Jurisdiction Act*

In 2000, Congress enacted the Military Extraterritorial Jurisdiction Act (MEJA),[127] which authorized domestic prosecution of DOD contractors under U.S. criminal law for crimes committed abroad that would be considered a felony in the United States.[128] The MEJA fails in several respects. First, as of 2008, the DOJ has brought only five prosecutions for sex-based crimes out of twelve total prosecutions reported under this Act.[129] Human Rights Watch observed that there has been just one successful prosecution of a contractor under MEJA, which involved a DOD contractor who pled guilty to the possession of child pornography in February 2007.[130] Second, the jurisdiction of MEJA for contractors working for a department other than the DOD, such as contractors working under the Department of State, is uncertain because the language of the Act refers only to individuals "employed by or accompanying the Armed Forces."[131] Legislation proposed by then-Senator Barack Obama (D-IL.) and Congressman David Price (D-NC) in 2007, which would have expanded coverage to all contractors operating in areas where the military was carrying out "contingency operations," never materialized, though Congressman Price and Senator Patrick Leahy (D-VT) introduced similar legislation again in 2010.[132]

3. *Criminal Justice Systems Where the Crime Occurred*

There are several hurdles to placing responsibility for criminal prosecution of PMCs on the local police force where the crime was committed. First, when a member of the military commits a crime outside of the United States, that person is usually subject to jurisdiction of the host country.[133] This assumes, however, the existence of a functioning government. PMC firms are frequently positioned in weak or failed states where the criminal justice system is unable or unwilling to prosecute crimes committed by foreign nationals.[134] A state may be disinclined to

127. Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488 (codified at 18 U.S.C. § 3261).

128. *See* 18 U.S.C. § 3261(a); Minow, *supra* note 16, at 110.

129. David Isenberg, *Dogs of War: No Justice on Contractor Rape*, UPI.COM (Apr. 18, 2008, 1:59 PM), http://www.upi.com/Top_News/Special/2008/04/18/Dogs-of-War-No-justice-on-contractor-rape/UPI-76341208541541/; *see also* HUMAN RIGHTS FIRST, *supra* note 105, at 1 (discussing DOJ's unwillingness to prosecute contractors).

130. *Q&A: Private Military Contractors and the Law*, *supra* note 123.

131. *See* 18 U.S.C. § 3261. This gap is crucial because, although the DOD spent the most on contracts of all federal agencies, the State Department had the largest percentage growth in contract spending from 2000 to 2005. *See* DOLLARS, NOT SENSE, *supra* note 27, at 5.

132. *See* S. 2979, 111th Cong. (2010); H.R. 4567, 111th Cong. (2010); S. 674, 110th Cong. (2007); H.R. 2740, 110th Cong. (2007); *see also* David Isenberg, *Contractors and the Civilian Extraterritorial Jurisdiction Act*, HUFFINGTON POST (Feb. 2, 2010, 2:37 PM), http://www.huffingtonpost.com/david-isenberg/contractors-and-the-civil_b_446298.html.

133. *See* Singer, *supra* note 7, at 535.

134. *See id.*

bring contractors to trial, particularly in weak states, where PMCs provide security services the state itself is unable to supply.[135]

Even where a local government may desire to charge individual contractors, the U.S. government frequently negotiates agreements with the host country to turn over U.S. nationals accused of criminal activities on foreign soil.[136] Status of Forces Agreements (SOFAs), into which the United States enters with the host country, often determine the likelihood of criminal trials for contractors.[137] SOFAs govern many aspects of the military presence in the country.[138] Typically, SOFAs give jurisdiction to the military if the criminal activity constitutes a crime in the United States, and to the host country if the crime is unique to that country's laws.[139] Some SOFAs condition the sending of troops to another country on the host country's promise not to prosecute members of U.S. forces under its own laws.[140]

Another problem with relying on local police forces to prosecute crimes of sexual violence is that in many parts of the world violence against women is condoned, perhaps even encouraged, or, at the very least, considered an unimportant issue.[141] In Bosnia, locals convicted of participating in human trafficking received light sentences relative to the gravity of the crimes.[142] According to Human Rights Watch, "interviews and transcripts revealed with few exceptions that traffickers, most of them local Bosnians, needed harbor little fear of criminal prosecution or punishment for their crimes: trafficking laws went largely unenforced, providing no protection for the victims of these serious human rights abuses."[143]

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135. *See* Chia Lehnardt, *Individual Liability of Private Military Personnel Under International Criminal Law*, 19 EUR. J. INT'L L. 1015, 1031 (2008). Commission on Human Rights Special Rapporteur Enrique Bernales Ballesteros expressed concern over the vulnerability of some states to control by PMCs, noting that security companies "come to take control of the country's security and have considerable influence over production and economic, financial and commercial activities. Companies of this kind which market security internationally may acquire a significant, if not hegemonic, presence in the economic life of the country in which they operate." Special Rapporteur on the Right of Peoples to Self-Determination and Its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation, *Rep. on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, Comm'n on Human Rights, ¶ 121, U.N. Doc. E/CN.4/1997/24 (Feb. 20, 1997) (by Enrique Bernales Ballesteros). Although this statement was made in reference to contractors hired by the host nation and not the U.S. government, the potential for domination over host nations is a threat growing out of the dependence of nations on PMCs for security and other services. *See id.*; *see also* Lehnardt, *supra*, at 1031.

136. *See, e.g.*, HUMAN RIGHTS WATCH, HOPES BETRAYED: TRAFFICKING OF WOMEN AND GIRLS TO POST-CONFLICT BOSNIA AND HERZEGOVINA FOR FORCED PROSTITUTION 5–6 (2002), http://www.hrw.org/en/node/78603.

137. R. CHUCK MASON, CONG. RESEARCH SERV., RL 34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? 3–5 (2011).

138. *Id.* at 3.

139. *Id.* at 4–5.

140. *See id.* at 3–4.

141. *See, e.g.*, HUMAN RIGHTS WATCH, *supra* note 136, at 26–33.

142. *Id.* at 35.

143. *Id.* at 4.

Finally, as with the DynCorp employees implicated in the sexual slavery case in 2000, contractors can, and usually do, voluntarily repatriate themselves to escape prosecution, often aided in their escape by their employers.[144] The DOD report on human trafficking in Bosnia-Herzegovina and Kosovo specifically remarked on this problem, indicating such actions prevented criminal trials from taking place.[145]

C. *International Law: Women's Rights Are Human Rights*

Despite the dramatic rise in privatization of core government functions, such as military services, foreign assistance programs, and domestic social service programs, international legal scholars have not addressed the implications for this trend on the application of IHRL or international criminal law.[146] The applicability of IHRL to PMCs is unclear because no agreement exists on the human rights duties of private actors.[147] Consensus remains elusive potentially because states are reluctant to agree to any policy that would limit their ability to defend themselves in the way they choose, a right granted to states by the U.N. Charter.[148]

Several barriers exist in applying IHRL to PMCs. The next Subsections discuss possible remedies under international law for PMC sexual violence and obstacles to their successful use. Civil tort law of the United States is discussed in this Section because application of international law is a critical element of the Alien Tort Statute (ATS), the only U.S. civil remedy available for the problem at hand.[149] Also, this Section explores the presence of implicit gender bias within international law, as effective solutions to the problem of PMC sexual violence are hindered by the exclusion of certain gender-based crimes from consideration by international legal institutions.

1. *International Human Rights Law*

Developments beginning in the early 1990s recognized women's right to be free from violence as a human rights issue.[150] The U.N. Committee on the Elimination of All Forms of Discrimination Against Women declared that gender-based violence violates women's fundamental human rights, implicating the fundamental right to life and physical inte-

144. *See id*. at 64–67.
145. U.S. DEP'T OF DEF., *supra* note 12, at 22.
146. Dickinson, *supra* note 28, at 139.
147. Francesco Francioni, *Private Military Contractors and International Law: An Introduction*, 19 EUR. J. INT'L L. 961, 962 (2008).
148. *See* Singer, *supra* note 7, at 544.
149. *See* 28 U.S.C. § 1350 (2006); Russell G. Donaldson, Annotation, *Construction and Application of Alien Tort Statute (28 USCS § 1350), Providing for Federal Jurisdiction over Alien's Action for Tort Committed in Violation of Law of Nations or Treaty of the United States*, 116 A.L.R. FED. 387, 402 (1993).
150. Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas*, 34 HARV. INT'L L.J. 507, 509 (1993).

grity and also impinging on women's right to equality before the law.[151] Gender-based crimes are violations of the human right to physical integrity recognized by the U.N. Charter, customary IHRL, and numerous other multilateral treaties and conventions.[152] Decisions by the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda certified that violence against women, and rape in particular, is a form of torture and a crime against humanity.[153]

Arguments equating rape with torture derive from the analogies made between domestic violence and torture in the 1990s by activists supporting battered women.[154] Rape survivors, similar to domestic violence survivors, experience the process of dehumanization shared by torture survivors.[155] A DOD report on sexual assault in the military observed that rape is considered "perhaps the most traumatic of violent crimes on victims (excluding murder)," with research showing that ninety-four percent of recent rape victims will meet the criteria for post traumatic stress syndrome.[156] In the first case to try an individual for crimes of sexual violence under international criminal law, Jean-Paul Akayesu was convicted of participating in or otherwise encouraging the rape of at least two-dozen Tutsi women during the genocide in Rwanda.[157] The international tribunal hearing Akayesu's case equated rape and torture, noting, "Like torture, rape is used for such purposes as intimidation, degradation, [and] humiliation . . . . [and] is a violation of personal dignity . . . ."[158]

In her law journal article on using IHRL mechanisms to protect women from domestic violence, Katherine Culliton argues that a state's failure to prosecute abusers compounds the violation of women's human rights by depriving women of legal redress for damage to their right to

151. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19, 11th sess., Jan. 20–31, 1992, ¶¶ 1–2, U.N. Doc. CEDAW/C/1992/L.1/Add.15 (Jan. 29, 1992) [hereinafter General Recommendation No. 19]; *see also* Culliton, *supra* note 150, at 509.

152. *See* Culliton, *supra* note 150, at 514.

153. Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence, ¶ 65 (Dec. 6, 1999), http://www.unictr.org/Portals/0/Case/English/Rutaganda/judgement/991206.pdf (identifying rape and torture as crimes against humanity); Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶¶ 170–71 (Dec. 10, 1998), http://www.icty.org/x/cases/furundzija/tjug/en/furtj981210e.pdf (stating that although "[n]o international human rights instrument specifically prohibits rape . . . . [i]n certain circumstances . . . rape can amount to torture").

154. *See, e.g.*, Rhonda Copelon, *Intimate Terror: Understanding Domestic Violence as Torture*, *in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 116, 117 (Rebecca J. Cook ed., 1994).

155. *See* Meyersfeld, *supra* note 11, at 396.

156. U.S. DEP'T OF DEF., TASK FORCE REPORT ON CARE FOR VICTIMS OF SEXUAL ASSAULT 67 (2004), http://www.defense.gov/news/may2004/d20040513satfreport.pdf.

157. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 692–94, 696 (Sept. 2, 1998), http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf.

158. *Id*. ¶ 597; Diane Marie Amann, *International Decisions:* Prosecutor v. Akayesu, 93 AM. J. INT'L L. 195, 196 (1999). The tribunal agreed to consider rape charges only after witness testimony, a human rights investigation, and pressure by the panel's only female judge. *See* Amann, *supra*, at 196.

physical integrity.[159] Thus, women's human rights are violated not only by the criminal perpetrator, but also by the state's systematic failure to ensure equality before the law, because women are effectively denied legal redress for crimes committed against them.[160] IHRL institutions now accept the proposition that rape is a war crime, but private or individual acts of rape or sexual assault that do not occur within the context of war remain outside of the accepted jurisdiction of these institutions.[161]

A significant obstacle to the application of IHRL to individual PMCs is embedded within the conditions sufficient to prompt international mechanisms of accountability. To trigger the application of IHRL obligations under the Rome Statute of the International Criminal Court (ICC), the gravity of sexual violence against women must be severe enough so as to be classified as a crime against humanity or as genocide.[162] These crimes must be "widespread or systematic" to be labeled a crime against humanity or must be done with the intent to destroy a race to be considered an act of genocide.[163] Thus, individual episodes of sexual violence against women are insufficient to occasion censure by a core international criminal institution.[164]

In addition to the problem of scale, rape is only actionable at the international level when it is a war crime or when it is committed as part of a genocidal plan, leaving untouched rapes and other crimes of sexual violence committed by contractor personnel during times of so-called peace.[165] These problems point to greater concerns with the effectiveness of IHRL in eradicating sexual violence against women. This issue will be taken up in more detail in Part III.D.4.

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159. *See* Culliton, *supra* note 150, at 509, 513–14.

160. *See id*. at 513–14.

161. *See* Katie C. Richey, *Several Steps Sideways: International Legal Developments Concerning War Rape and the Human Rights of Women*, 17 TEX. J. WOMEN & L. 109, 111 (2007) ("To count as a crime against humanity, the rape must have been committed as part of a widespread or systematic attack on a civilian population.").

162. *See* Rome Statute of the International Criminal Court arts. 6–7, *adopted* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

163. *See id*.

164. *See id*.

165. *See* Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT'L L. 1, 71 (2008). Rape may also constitute a grave breach under the Geneva Conventions. Although rape is not specified in the Conventions as a grave breach, there is movement in the international community toward interpreting the Conventions' grave breach provisions to cover rape; the International Committee of the Red Cross has argued that "the grave breach of 'willfully causing great suffering or serious injury to body or health' (Article 147 of the fourth Geneva Convention) covers rape." Theodor Meron, Comment, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 426 (1993) (citation omitted). The U.S. Department of State also has stated recently that in some instances rape may constitute a grave breach. *See id*. at 427 n.22 (citing Letter from Robert A. Bradtke, Acting Assistant Sec'y for Legislative Affairs, to Sen. Arlen Specter (Jan. 27, 1993)).

a. Individual Contractor Liability

IHRL has traditionally been the province of states and state actors.[166] States can impose responsibility for IHRL violations to protect human rights on private actors by agreement or treaty, thereby permitting private actors to be held liable.[167] As will be discussed, however, the United States has sought to ensure PMC immunity from prosecution under international law, rather than imposing obligations on them.

Another seemingly obvious restriction on states, the prohibition on the use of mercenaries, is completely ineffective in limiting the use of PMCs or in prosecuting individual PMCs for abuses. The 1977 Additional Protocols to the Geneva Convention and the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries prohibits the employment of for-profit soldiers, or mercenaries.[168] These rules are fraught with weaknesses, however, as noted by Peter Singer: "[T]he Convention . . . lacks any monitoring mechanism, [and] has merely added a number of vague, almost impossible to prove, requirements that *all* must be met before an individual can be termed a mercenary and few consequences thereafter."[169] Most work

166. Dickinson, *supra* note 28, at 161.

167. *See id.*; *see also* HENKIN ET AL., *supra* note 66, at 315 ("A private person or entity may be guilty of a violation of human rights law if the obligation to respect international human rights norms was imposed on that person by treaty, or by customary law, or by the law of a state that has jurisdiction over that person.").

168. 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, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; *see also* International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, G.A. Res. 44/34, U.N. GAOR, 44th sess., U.N. Doc. A/RES/44/34 (Dec. 4, 1989) [hereinafter Convention Against Mercenaries].

169. Singer, *supra* note 7, at 531. Singer details the multiple problems with the application of international law regarding mercenaries, including: loose definitions that make it difficult to identify who is a mercenary, lack of international consensus on limiting the role of private actors in wars, and the absence of a monitoring body. *Id.*; *see also* 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, 78–79 (1998); Michael Scheimer, Comment, *Separating Private Military Companies from Illegal Mercenaries in International Law: Proposing an International Convention for Legitimate Military and Security Support that Reflects Customary International Law*, 24 AM. U. INT'L L. REV. 609, 613 (2009). Mercenaries are defined by the 1977 Protocol Additional to the Geneva Conventions as 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.

done by PMCs is outside the definition, and thus outside the scope of applicable treaties.[170] In addition, the conventions leave completely untouched the corporate employers of such individuals.[171]

b. Corporate Liability Under International Human Rights Law

International law has not addressed the liability of corporations for human rights violations.[172] Critics have condemned IHRL as increasingly irrelevant because it focuses on states as the only legitimate organs of war, thus leaving unanswered the question of the human rights duties of corporate-run armies.[173] PMC firms favor market-based controls, such as removal from government-approved contractor lists for violations.[174] In general, conventional corporate accountability mechanisms to eliminate wrongdoers from the market are inadequate to address the unique problem of corporate actors engaging in potential human rights abuses.[175] Traditional market controls that might curb abuses and encourage accountability are absent in the field of PMCs.[176] For example, when the services provided include private soldiers skilled in the use of weapons technology, the market is, not surprisingly, small.[177] Thus, the government is constrained in shopping out contracts, even when it might prefer not to work with a particular company.[178] As a result, one of the few forms of policing PMCs is practically useless, as withdrawal of a contract is unlikely under these circumstances. In addition, loss of business for the company is not likely to be a sufficient deterrent for individual employees of PMC firms.[179]

Moreover, the corporate structure itself provides a way for PMC firms to evade accountability for crimes and contract violations. PMC firms have engaged in reformation into new entities or broken themselves up into smaller units through the use of subsidiary structures to escape legal challenges or unwelcome government scrutiny.[180] Negative perceptions of Blackwater following the killings in Nisour Square in Iraq

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Additional Protocol I, *supra* note 168, art. 47; *see also* Convention Against Mercenaries, *supra* note 168, art 2.

170. Dickinson, *supra* note 28, at 152.

171. *See* Additional Protocol I, *supra* note 168, art. 47; *see also* Convention Against Mercenaries, *supra* note 168, art. 2 (criminalizing persons, but not companies, who recruit and train mercenaries).

172. Neither the Additional Protocol of 1977 nor the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries addresses liability for companies. *See supra* note 171 and accompanying text.

173. *See, e.g.*, Lehnardt, *supra* note 16, at 142.

174. Singer, *supra* note 7, at 546.

175. *See id*.

176. Minow, *supra* note 16, at 118.

177. *See id*.

178. *See id*.

179. Singer, *supra* note 7, at 546.

180. *Id*. at 535.

led the company to change its name to "Xe" last year.[181] As noted previously, PMC firms can also simply decide to relocate employees or entire operations in order to avoid prosecution.[182] The next Subsection discusses state responsibility for private actors when there has been a failure to implement procedures for accountability or to prosecute those who violate human rights.

c. State Responsibility for Private Actors

Attribution of IHRL violations to states for conduct that contravenes IHRL by nonstate actors, including corporations, is incredibly complex and still largely undecided.[183] Responsibility for IHRL violations committed by PMCs *within* the combat zone is governed by, inter alia, the Hague Convention and the Geneva Conventions.[184] The law applicable for crimes committed off the battlefield is less clear.

Principles of attribution determine a state's liability for private actors under IHRL; for the most part, only the deeds of state officials constitute an "act of state."[185] Section 702 of the *Restatement of the Foreign Relations Law of the United States* outlines state responsibility for breaches of customary IHRL by private individuals.[186] In general, "[a] state violates [customary] international law if, as a matter of state policy, it practices, encourages, or condones . . . torture or other cruel, inhuman, or degrading treatment or punishment, . . . [or] a consistent pattern of gross violations of internationally recognized human rights."[187] The comments to section 702 elaborate:

> A government may be presumed to have encouraged or condoned acts prohibited by this section if such acts . . . have been repeated or notorious and no steps have been taken to prevent them or to punish the perpetrators. That state law prohibits the violation and provides generally effective remedies is strong evidence that the violation is not state policy.[188]

181. *Blackwater Ditches Tarnished Brand Name*, USATODAY.COM (Feb. 13, 2009, 12:40 PM), http://www.usatoday.com/news/military/2009-02-13-blackwater_N.htm.

182. Singer, *supra* note 7, at 535. Executive Outcomes, the notorious PMC firm composed of former apartheid-era military personnel, used this particular maneuver following inhospitable treatment by the post-apartheid government in South Africa; the company simply moved its operations and later reincorporated under the name "Lifeguard" in Sierra Leone. *See id*. at 535, 540.

183. *See* Carsten Hoppe, *Passing the Buck: State Responsibility for Private Military Companies*, 19 EUR. J. INT'L L. 989, 990 (2008) (discussing regulatory gap in international human rights law for holding states accountable for contractor conduct).

184. *See id*. at 990–92. Attribution depends on proof that the actor was acting in a state capacity and exercising government control. Thus, within the conflict context, off-duty and unofficial conduct by private actors would not be attributable to the state. *See id*.

185. Lehnardt, *supra* note 16, at 143.

186. 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

187. *Id*.

188. *Id*. cmt. b.

The U.N. Committee on the Elimination of Discrimination Against Women uses similar language, asserting, "Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights, or to investigate and punish acts of violence, and to provide compensation."[189]

The United States may point to DOD efforts to curtail participation by military personnel in human trafficking and efforts to address sexual assault within the ranks. This is little more, however, than a case of the government saying one thing but doing another.

2. International Criminal Law

The Nuremburg Tribunal, to many, represents the beginning of international human rights.[190] Nazi leaders were convicted not only of war crimes but also of crimes against humanity, a concept that developed through customary international law.[191] The Tribunal failed, however, to indict and punish Nazi torturers specifically for sexual crimes.[192] This flaw has since been remedied by the explicit classification of sex-based crimes in the Rome Statute of the ICC.[193] In addition, both the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda prosecuted for the first time systematic sexual violence against women as a form of genocide and crimes against humanity.[194] These principles, however, cannot provide redress to victims of sexual abuse by PMCs in nonconflict zones for several reasons.

First, although systematic rape was declared a war crime after thousands of women were subjected to shocking acts of sexual violence in wars in the former Yugoslavia and Rwanda, sexual crimes committed by PMCs outside the context of war or armed conflict cannot be labeled a war crime. The Geneva Conventions and their Additional Protocols prohibit rape; however, crimes against humanity need to be conducted in the context of war to be punishable under these laws.[195] To come within the Rome Statute's prohibitions on rape and other sexual crimes, crimes

189. General Recommendation No. 19, *supra* note 151, ¶ 10.

190. HENKIN ET AL., *supra* note 66, at 276.

191. *Id*. at 275. For further discussion and an explanation of international customary law, see *supra* Part III.D.1.

192. *See* John D. Haskell, *The Complicity and Limits of International Law in Armed Conflict Rape*, 29 B.C. THIRD WORLD L.J. 35, 59–60 (2009).

193. *See* Rome Statute, *supra* note 162, art. 7(1)(g); *see also* Ndulo, *supra* note 68, at 127.

194. Ndulo, *supra* note 68, at 127, 131; *see also supra* note 153 and accompanying text.

195. As is clear from the Conventions' titles, they apply only in the context of war or armed conflict, and thus their prohibitions on rape apply only in times of war or armed conflict. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (Fourth Geneva Convention); *see also* Additional Protocol I, *supra* note 168, art. 76(1); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4(2)(e), June 8, 1977, 1125 U.N.T.S. 609.

must be "widespread or systematic."[196] Thus, international criminal law distinguishes between crimes committed in the context of armed conflict or crimes of a certain magnitude or gravity on the one hand and so-called "ordinary" crimes that are violations of human dignity but not "severe" enough to be brought within the jurisdiction of international criminal tribunals on the other.

Second, the United States is not party to the Rome Statute of the ICC.[197] Despite U.S. intransigence, persons, including U.S. citizens, can be made subject to ICC jurisdiction if the crime is committed in a territory that is a signatory to the Rome Statute.[198] The United States insists, however, on Bilateral Immunity Agreements (BIAs), which bar the transfer of U.S. citizens to the ICC.[199] BIAs have been established with thirty-seven nations that are parties to the ICC.[200] The legality of these agreements under international law is subject to debate, but they continue to be implemented and obeyed.[201]

3. U.S. Tort Law—The Alien Tort Statute

When criminal and military jurisdiction fail, or when there is simply a failure to prosecute, tort law may offer the only possibility for justice for victims of sexual assault perpetrated by PMCs abroad. This Subsection explores potential avenues of accountability under tort law and significant barriers to their application. Use of the Alien Tort Statute (ATS) has the added benefit of being a potential avenue for corporate accountability for crimes of PMC employees.[202]

a. Background

The ATS[203] has been one of the sole methods of holding individuals accountable in the United States for human rights violations committed internationally.[204] The ATS was enacted in 1789 but was rarely applied until it was revived in 1980 in the case of *Filartiga v. Pena-Irala*, when it was used to sue a former Paraguayan police officer accused of torturing a young man to death.[205]

196. Rome Statute, *supra* note 162, art. 7.

197. *Questions and Answers: US Bilateral Immunity Agreements or So-Called "Article 98" Agreements*, COAL. FOR THE INT'L CRIMINAL COURT, http://coalitionfortheicc.org/documents/FS-BIAs_Q&A_current.pdf [hereinafter *Bilateral Agreements*].

198. *See* Rome Statute, *supra* note 162, art. 12(2)(a).

199. *Bilateral Agreements*, *supra* note 197.

200. Carney, *supra* note 10, at 337.

201. *See Bilateral Agreements*, *supra* note 197.

202. For an interesting argument against the use of tort law to defend human rights violations, see Seamon, *supra* note 10, at 720 (proposing that torture should not be treated as a tort but should be treated as a civil rights and human rights violation).

203. 28 U.S.C. § 1350 (2006).

204. Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT'L L. & FOREIGN AFF. 81, 88–90 (1999).

205. *Id.* at 89–90; *see* Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

The statute provides, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[206] The ATS thus creates jurisdiction within the United States for aliens who have been made victims by a violation of the "law of nations" or a treaty of the United States by any person anywhere.[207] The meaning of the "law of nations" is therefore important in determining the potential scope of claims under the ATS. According to *American Jurisprudence*, "[a] violation of the law of nations arises only where there has been a violation by one or more individuals of those standards, rules, or customs that govern the relationships between states or between individuals and foreign states."[208] In *Filartiga*, the U.S. Court of Appeals for the Second Circuit found subject matter jurisdiction in the case of the Paraguayan police officer, holding that the "law of nations" was synonymous with present, established understandings of international law.[209] The ATS does not create a new cause of action; it only recognizes jurisdiction over cases involving extant law, including international law, statute, treaty, or common law.[210] The Second Circuit held that the international law of human rights prohibited torture.[211]

Private actors were brought within the scope of the ATS following another decision by the Second Circuit in *Kadic v. Karadžić*,[212] in which the court stated that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[213] The allegations against Radovan Karadžić included human rights violations of rape, forced prostitution, torture, and summary execution.[214] Therefore, individuals who commit acts of genocide or slave trading may be held liable for their actions in U.S. courts.

Unfortunately, it is unclear whether the ATS can be applied to hold private corporations liable for human rights violations.[215] In what would have been the first case to decide the question of corporate liability un-

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206. 28 U.S.C. § 1350.

207. *See id*.

208. 3C AM. JUR. 2D *Aliens and Citizens* § 2122 (2010).

209. *Filartiga*, 630 F.2d at 880–85.

210. Donaldson, *supra* note 149, at 401.

211. *Filartiga* 630 F.2d at 878. This aspect of the ATS's function may have been largely superseded by the Torture Victim Protection Act of 1991, which specifically provides a forum to hear claims based on the violation of human rights, particularly where the violation was committed by officials acting under color of the law of their office. Donaldson, *supra* note 149, at 400–01. Because this Act did not expressly repeal the ATS, the latter provision is still presumed to be a valid means for obtaining damages for violations of human rights and will still be necessary for crimes committed by private actors. *Id*. at 401.

212. 70 F.3d 232, 239 (2d Cir. 1995).

213. *Id*.

214. *Id*. at 236–37.

215. *See* Shanaira Udwadia, Note, *Corporate Responsibility for International Human Rights Violations*, 13 S. CAL. INTERDISC. L.J. 359, 366 (2004).

der the ATS, *Doe v. Unocal Corp.*,[216] a victim of human rights abuses in Myanmar sued Unocal for its complicity in the use of slave labor in building a gas pipeline that spans the length of Myanmar.[217] In 2002, the U.S. Court of Appeals for the Ninth Circuit denied Unocal's motion for summary judgment on the basis that the crime of forced labor does not require state action for liability under the ATS and that sufficient evidence existed to show that Unocal may have violated the "law of nations" by working with the military in Myanmar to construct the pipeline.[218] The decision allowed aliens to sue a corporation for the first time for international human rights violations.[219] In 2004, the case settled, leaving unanswered whether and how corporations will be held liable under the ATS.[220]

In contrast, the District Court for the District of Colombia held in *Ibrahim v. Titan Corp*. that the ATS does not apply to private actors, in response to a claim brought by the widows of Iraqi nationals who died while in custody of private contractors.[221] The court granted the defendant corporation's motion to dismiss, finding that the "law of nations" does not apply to private actors.[222] The court observed, however, that the Supreme Court has not yet decided the issue.[223]

The Supreme Court mentioned but did not decide the issue of private actor liability in *Sosa v. Alvarez-Machain* in 2004.[224] There, the Court stated that the ATS did not constitute a new cause of action; rather, the Court clarified that the ATS only provides jurisdiction to U.S. District Courts to hear causes of action brought under existing international law, treaty, statute, or common law.[225] Thus, to come within the jurisdiction of a district court, a claimant must show that the defendant's conduct was a tort committed in violation of (a) the law of nations, or (b) a treaty of the United States.[226]

That which constitutes a violation of the "law of nations" is particularly important for the purposes of this Note.[227] Generally, a breach of the "law of nations" has included: official murder, summary executions

216. 395 F.3d 932, 953 (9th Cir. 2002) (denying Unocal's summary judgment motion); Udwadia, *supra* note 215, at 364.

217. *Doe*, 395 F.3d at 936.

218. *Id*. at 946–47, 953.

219. *See id*. at 953.

220. *See* Mark D. Kielsgard, *Unocal and the Demise of Corporate Neutrality*, 36 CAL. W. INT'L L.J. 185, 189 (2005).

221. Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 12, 14–15 (D.D.C. 2005).

222. *Id*. at 14–15.

223. *Id*. at 14.

224. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004).

225. *See id*. at 712 ("Although we agree the statute is in terms only jurisdictional, we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.").

226. *See* 28 U.S.C. § 1350 (2006).

227. This Note focuses on violations of the "law of nations" because attempts to bring a cause of action under a treaty have been largely unsuccessful. This is because courts require the treaty to unambiguously grant an individual right to sue. *See* Donaldson, *supra* note 149, at 403.

without due process of law, "utter disappearance," and torture.[228] The law that governs in these suits is the law that applies where the tortious conduct occurred.[229] In a split among courts in deciding on proper sources of the "law of nations," some courts have adopted a strict interpretation of what amounts to the "law of nations," only allowing historically recognized international law.[230] Other courts, as represented by the court in *Kadic*, take a more expansive approach, incorporating modern views of international law into decisions brought under the ATS.[231]

The current status of the ATS litigation does not provide clear guidance on the potential applicability to PMCs. Corporations argue strenuously that they should not be sued in U.S. courts for alleged wrongs committed outside of the United States. The International Chamber of Commerce, as the representative of thousands of corporations and business organizations, has argued that the ATS is "an unacceptable extraterritorial extension of U.S. jurisdiction."[232] Even outside the context of PMCs, the U.S. government has been willing to argue on behalf of corporations that the use of the ATS has national security implications that make it improper for courts to hear these claims. For example, the U.S. Department of State supported Exxon Mobil's motion to dismiss in a case in which Indonesian plaintiffs alleged that Exxon benefitted from genocide and torture perpetrated by the Indonesian military while it protected Exxon's facilities in the area.[233] The Department of State wrote to the judge in the case, arguing that adjudication under the ATS placed important U.S. interests, such as the fight against terrorism, at risk.[234]

When the Supreme Court granted certiorari in the *Sosa* case, organizations representing the interests of multinational corporations such as the National Foreign Trade Council and the U.S. Chamber of Commerce submitted amicus briefs seeking to end the use of the ATS as a method of remedying human rights violations.[235] The organizations argued pri-

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228. *Id*. at 402.

229. *Id*. at 404–05.

230. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 720 ("Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations."); *see also* Zapata v. Quinn, 564 F. Supp. 23, 24 (S.D.N.Y. 1982); Cohen v. Hartman, 490 F. Supp. 517, 518 (S.D. Fla. 1980).

231. *See, e.g.*, Kadic v. Karadžić, 70 F.3d 232, 238–39 (2d Cir. 1995).

232. Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 LAW & SOC'Y REV. 635, 651 (2004) (internal quotation marks omitted).

233. *See* Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 22 (D.D.C. 2005) (describing plaintiffs' allegations). The D.C. District Court judge explained that he had requested the Department of State's input and that it had cautioned against adjudication of the case at that time. *Id*. at 22. The plaintiffs' ATS claims were subsequently dismissed. *Id*. at 21.

234. *Id*. at 22. The Department of State did not want to jeopardize U.S. relations with Indonesia; it included in its submission to the court a letter from the Indonesian ambassador arguing against jurisdiction over the case. *See id*.

235. Shamir, *supra* note 232, at 654.

marily that the ATS amounts to an assertion of legal imperialism over foreign countries.[236]

b. The ATS Applied to the Problem of PMC Sexual Abuse Against Women

This Subsection details a potential strategy for applying the ATS to PMC abuse against women and probable counterarguments. Courts should accept ATS petitions brought by sexual violence survivors, as PMC sexual abuse violates the human rights of female victims and therefore violates international customary law. Sexual violence against women is not currently among the causes of action recognized by U.S. courts as sufficient to trigger application of the ATS. The Supreme Court, however, tentatively opened the door in *Sosa* for courts to recognize new causes of action based on international laws that create personal liability.[237] The Court thus left room for the development of new norms under evolving concepts of international law. In determining the viability of a new claim, courts must compare the claim to current principles of international law.[238] Recognized causes of action likely include piracy, slavery, and war crimes.[239]

Lawyers and victim advocates in ATS cases will need to argue that rape is akin to recognized causes of action. The best option lies in arguing that rape is degrading treatment akin to torture. First, attorneys would need to show international consensus on the prohibition against rape. Second, there would need to be a showing that the prohibition is sufficiently specific.

Courts should follow the Second Circuit decision in *Kadic* and allow suits against PMCs, as they act under the color of state authority.[240] PMCs perform core government functions and benefit from U.S. protections in the form of SOFAs and BIAs. These facts, in combination with the evidence of government knowledge of crimes committed by PMCs, are enough to establish state sanction of PMC activities.

The benefits of this option should not be overstated, as there are several barriers to the success of ATS claims under the circumstances applicable here. First, claimants may have difficulty convincing courts to hear claims against private individuals when the crime in question was an "isolated" incident. In *Sosa*, the Court clearly expected courts to be wary

236. *Id*.

237. The Supreme Court opened the door *very* tentatively. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) ("Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.").

238. *See id*. at 733–34.

239. *See id*. at 732; *see also* 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987); Donaldson, *supra* note 149, at 402.

240. *See* Kadic v. Karadžić, 70 F.3d 232, 239 (2d Cir. 1995).

in allowing new claims onto court dockets.[241] Courts will likely resist the extension of jurisdiction over an unspecified number of claims.

Problematically, under *Kadic*, those who seek to bring ATS claims need to show that the abuse they suffered is sufficient to justify action against private actors.[242] Case law from other contexts involving torture suggests potential arguments by defendants. In the court martial of Specialist Charles Graner for abuses at Abu Ghraib, where victims alleged torture, the court appeared willing to accept as a defense the argument that the actions did not rise to the level of torture.[243] In this case, the defendant argued that the treatment was only humiliating and did not rise to the level of a universally accepted definition of torture.[244] The defense attorney for Specialist Graner compared the positioning of nude prisoners into a pyramid to cheerleaders in pyramids at sporting events.[245] Although Graner's defense was unsuccessful,[246] it indicates that plaintiffs will need to show that the acts perpetrated against them were more than just humiliating. This is particularly a concern in the context of sexual assault, where crimes against women have historically been minimized.

Second, although IHRL treaty bodies and courts have explicitly condemned rape as an unlawful violation of women's human rights, rape is undoubtedly a widespread practice, raising doubts as to whether the prohibition of rape is truly an internationally respected norm. Moreover, those international human rights treaties to which the United States is a party cannot be asserted against the United States or its employees, at least in U.S. courts.[247] Rather, they are only meant to reflect general principles agreed upon, or they are designed only to bind states, not to create a private cause of action. Thus, defendants may argue that no actual consensus has been reached on the question of whether individual acts of rape violate IHRL.

This argument, however, places defendants in the position of arguing the acceptability of rape. Although individual PMCs may have no problem making this argument, it is likely that their employers would hesitate in arguing this issue in court documents, much less in open court.

241. *See supra* note 237 and accompanying text.
242. *See Kadic*, 70 F.3d at 239–41 (explaining that private actors may be liable under the ATS for certain serious offenses that violate the law of nations).
243. *See Abu Ghraib Troops "Did Not Abuse,"* BBC NEWS (Jan. 11, 2005, 2:08 AM), http://news.bbc.co.uk/2/hi/americas/4155375.stm.
244. *See id*.
245. Rehman, *supra* note 4, at 509.
246. *Id*.
247. Matthew J. Jowanna, *Torture, American Style: A Recipe for Civil Tort Immunity* 41–44 (Univ. of Notre Dame, Ctr. for Civil & Human Rights, Working Paper No. 9, 2010), http://www.nd.edu/~ndlaw/cchr/papers/Matthew_J%20_Jowanna_wp_9_2010.pdf. For a list of human rights instruments signed or ratified by the United States, see United States Status of Treaties, U.N. HIGH COMM'R FOR HUMAN RIGHTS, http://www.unhchr.ch/tbs/doc.nsf/newhvstatusbycountry?OpenView&Start=1&Count=250&Expand=188#188 (last visited Mar. 5, 2011). The U. S. has ratified five of seventeen major human rights instruments in addition to the four Geneva Conventions of 1949. *Id*.

In this respect, rape shares in common with slavery, genocide, and torture, the fact of almost universal condemnation throughout the world.[248]

4. *Feminist Critiques of International Law*

Generally, IHRL agreements are undertaken by states and obligations are assumed with respect to other states.[249] Feminist legal scholars in particular criticize a state-centered conception of responsibility under international law as an unwelcome remnant of the public/private dichotomy that was a core feature of IHRL until relatively recently.[250] The distinction between crimes committed by state/public actors and those committed by private actors has been condemned as inherently sexist, permitting the continuation of widespread violence against women, such as domestic violence, within each state's sphere of control.[251]

A potential counterargument contends that isolated acts of sexual violence, even if occurring in great numbers, are not the concern of international law, which only speaks to the actions of governments, not individual criminal perpetrators.[252] Rapes committed by individual PMCs not at the behest of military or government officials, or, alternatively, not as part of a genocidal plan, are not sufficiently serious to warrant the attention of international law bodies, or so the argument goes. A statement by Professor Louis Henkin typifies the problem: "International law does not address some matters because they are not of sufficient international concern, and it is accepted that they are and should remain essentially 'domestic.'"[253]

Before the tribunals following the atrocities in Rwanda and the former Yugoslavia, IHRL had not imposed systematic prohibitions on rape, effectively leaving enforcement to domestic legal systems.[254] The elevation of rape to the status of war crime was an important step in the elimination of the public/private distinction, and the prosecution of participants in mass rapes in Bosnia and Rwanda largely cemented rape as an international human rights issue.[255] "Individual" acts of sexual violence, however, remain untouched by current mechanisms of accountability with IHRL.

Presently, international law requires proof of systematic sexual violence in the context of war to trigger state responsibility and the atten-

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248. *See* Louis Henkin, *Human Rights and State "Sovereignty,"* 25 GA. J. INT'L & COMP. L. 31, 37–38 (1996).

249. HENKIN ET AL., *supra* note 66, at 314–15.

250. *See* Ray, *supra* note 13, at 830–31.

251. *See id*. at 830–35.

252. *See* HENKIN ET AL., *supra* note 66, at 315.

253. *Id*. at 298–99.

254. *See* Karen Engle, *Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT'L. L. 778, 778–79 (2005). For a discussion of the ICC decisions in Rwanda and the former Yugoslavia, see *supra* note 153 and accompanying text.

255. *See* Engle, *supra* note 254, at 778–89.

tion of IHRL institutions such as the ICC.[256] To make any gains in the struggle against violence against women, international law must rethink questions of imputability and state responsibility. The next Part details three specific recommendations to address the problem of PMC sexual violence against women.

IV. RECOMMENDATIONS

PMCs are seen as a convenient way for the U.S. government to evade its legal obligations, including the responsibility to protect the human rights of civilians in war and peace, by allowing private individuals, rather than official state actors, to perform services on behalf of the U.S. military.[257] This Note seeks to prevent this evasion by placing responsibility for crimes committed by PMCs abroad on the U.S. government because of its persistent failure to punish and prohibit sex crimes that violate the human rights of women.

This Note makes three recommendations. First, the United States should be held to account for its failure to punish or prevent sexual violence against women by PMCs. Second, the U.S. government should implement a comprehensive system of accountability that remedies the numerous problems with current mechanisms articulated in Part III. Toward this end, this Note provides some suggested modifications to the current framework. Finally, litigation by individual victims of sexual abuse by PMCs should be brought in the United States under the ATS against individual PMCs and PMC firms.[258]

A. U.S. Accountability Under International Law

As discussed above, state liability for the wrongs of private actors is limited. For responsibility to follow, it must be shown that, "as a matter of state policy, [the state] required, encouraged, or condoned such private violations . . . ."[259] This Note proposes that where there is a nexus between the violation (PMC sexual abuse) and government inaction (failure to prosecute or punish), the state has effectively condoned the violation.[260] Despite the efforts of government officials to distinguish the acts of PMCs from the policies and approval of the U.S. military, viola-

256. *See, e.g.*, Rome Statute, *supra* note 162, art. 7(1).

257. Lehnardt, *supra* note 16, at 140.

258. Katherine M. Culliton recommended litigating cases of domestic violence survivors in the Americas under international human rights law in her article in the Harvard International Law Journal. Culliton, *supra* note 150, at 515.

259. 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. b (1987).

260. *See* Culliton, *supra* note 150, at 513; Meyersfeld, *supra* note 11, at 409–10 ("[S]tates are being held responsible for certain harmful conduct of their citizens. In this sense, the requirement of official involvement for international human rights violations has been broadened to include state compliance, complicity, or acquiescence. Such state liability for failure 'to take reasonable steps to prevent or respond to an abuse' has been framed as a 'failure to exercise due diligence . . . .'" (citation omitted)).

tions of IHRL by private actors can still be attributed to the state where there has been a failure to "take appropriate measures to prevent the violation of international law, or to ensure that the wrongdoer makes suitable reparation or is punished."[261] By allowing the jurisdictional gap to persist despite knowledge of participation by PMCs in sexually exploitative acts, the U.S. government bears responsibility for continued violations of the human rights of victimized women. The U.S. government should not be able to avoid human rights obligations by privatizing government services such as military operations.[262] To allow evasion of international obligations under these circumstances would be to privilege form over function.

Practically speaking, the United States can be guilty of violating international norms prohibiting violence against women even though it is not party to any international enforcement body that permits suit against a state.[263] For example, litigation of complaints can proceed for failure to prevent or punish sexual violence by PMCs through human rights courts such as the Inter-American Court of Human Rights, the European Court of Human Rights, or the African Court of Human Rights.[264] The court would issue a report if the United States were found to have violated international law.[265] In some cases, reparations would be ordered.[266] Although this may seem paltry, it should have the effect of shaming the U.S. government into action in order to remedy its failure to punish PMCs.

Before this can happen, however, to hold the human rights violators accountable under IHRL institutions, victims and advocates are required to exhaust domestic remedies.[267] They would therefore need to bring suit within their domestic legal system before attempting to use international mechanisms, such as the ICC or the Courts of Human Rights.[268] In the alternative, petitioners to IHRL courts can argue that domestic systems are "nonexistent, inadequate, or likely to be ineffective" in order to evade this requirement.[269] Persuasive arguments can be made that domestic legal systems, including that of the United States, are inhospitable to cases brought by women for isolated incidents of sexual assault.[270] To reiterate, criminal justice systems of the host country are often unwilling to bring actions against PMCs for a variety of reasons, including a gener-

261. Lehnardt, *supra* note 16, at 143.
262. *See* Minow, *supra* note 16, at 111.
263. *See* Culliton, *supra* note 150, at 510 (explaining that the United States is not party to any international enforcement bodies in which victims of domestic violence can sue the state).
264. *See id*. at 522.
265. *See* HENKIN ET AL., *supra* note 66, at 538.
266. *See id*.
267. Culliton, *supra* note 150, at 523.
268. *See id*.
269. *Id*.
270. *See id*. at 522.

al disregard for the plight of women impacted by sexual violence.[271] Therefore, international tribunals should hear complaints by victims of sexual assault by PMCs even if domestic remedies have not been exhausted.

Through its failure to implement accountability measures for PMCs, the U.S. government has revealed its indifference to the trauma suffered by women throughout the world. The government should take steps to remedy this wrong; in the meantime, victims of sexual abuse should bring litigation under the ATS.

B. Litigation Should Be Brought by Crime Victims in the United States Under the Alien Tort Statute

Litigation is necessary to provide redress to victims and survivors while arguments are advanced to change domestic and international legal responses to the problem.[272] Civil liability under the ATS can help to reduce the likelihood of successful escape by PMCs from liability for their crimes.[273] Scholars contend that litigation is central in "socializing" PMC firms by encouraging firms to implement their own accountability mechanisms.[274]

Furthermore, compensation for violence suffered can mitigate the cycle of victimization, as described by Amy E. Ray, who addressed the continuing effects of rapes suffered during the Bosnian war: "[M]ost prostituted women have been victims of sexual abuse before . . . . The simple truth is that sexual terrorism begets sexual terrorism."[275] This experience is transcultural, as many rape victims are permanently stigmatized by the event, often perceived as an invitation for further abuse by other abusers.[276]

Despite the impediments discussed in Part III, victims and their advocates should attempt to bring claims because litigation has the added benefit of bringing awareness to the problem.[277] By emphasizing the human rights implications of PMC sexual abuse of women, a dialogue regarding the broader question of state responsibility for widespread violence against women can progress. The United States must recognize singular incidents of sexual violence as human rights violations, and litigation under the ATS can begin to advance this argument. The next Section recommends a broader framework of liability in which to situate PMCs.

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271. *See supra* Part III.B.3.

272. *See* Culliton, *supra* note 150, at 514–15 (recommending litigation to raise visibility about and compensate victims for domestic abuse).

273. Ryngaert, *supra* note 91, at 1036–37.

274. *Id*. at 1035.

275. *See* Ray, *supra* note 13, at 829; *see also* Sadler et al., *supra* note 55, at 267.

276. *See* Ray, *supra* note 13, at 830.

277. *See* Culliton, *supra* note 150, at 514–15.

C. The United States Should Develop Comprehensive Legislation and Regulations to Address the Problem of PMC Crimes in Nonconflict Zones

The United States can and should take proactive steps to remedy the current jurisdictional gap that acts to remove or at least moderate liability for failing to punish human rights violators in breach of international law. Regulation of PMC crimes should ensure accountability regardless of whether PMCs accompany military forces in war or whether they are stationed in nonconflict zones. This next Section suggests some necessary changes to the current system.

1. Criminal Liability

Much could be achieved by making SMTJ and the MEJA applicable to *all* contractors regardless of the agency from which they get business. Realistically, the borders delineated by those mechanisms are the outer limits permissible under constitutional scrutiny.[278] Thus, simple reworking of the current instruments should take place. Additionally, the DOJ should be pressured to prosecute crimes of sexual violence despite the difficulties of proof that may exist.[279] Indictment of sexual abusers will send the message that the United States takes the human rights of women seriously, thus satisfying the requirements of international law.

2. Contract Mechanisms

Many suggestions have been made on improving government oversight of contracts.[280] This Note suggests some that will help to prevent continued violations of women's human rights around the world. Spending on contracts accounts for one third of the government's discretionary budget, making oversight of these contracts one of the most important responsibilities.[281] Therefore, government agencies should draft contract terms more carefully and ensure proper oversight with an eye to making sure contractors do not have less incentive to properly perform their duties than government agents would.[282] Aggressive management of these contracts should be a focus of government agencies employing PMCs and of the Government Accountability Office.[283] Additionally, the U.S. government should implement a licensing process that ensures that companies employing dangerous individuals be removed from approved con-

278. *See* Prystowsky, *supra* note 97, at 52–58.

279. *See supra* Part III.B.1–2.

280. *See, e.g.*, Nina A. Mendelson, *Six Simple Steps to Increase Contractor Accountability*, *in* GOVERNMENT BY CONTRACT, *supra* note 16, at 241, 243.

281. *See* Stan Soloway & Alan Chvotkin, *Federal Contracting in Context: What Drives It, How to Improve It*, *in* GOVERNMENT BY CONTRACT, *supra* note 16, at 192, 238.

282. *See* Mendelson, *supra* note 280, at 243.

283. *See id.* at 243–45.

tractor lists.[284] Although loss of a contract is not a sufficient deterrent to individual employees, it at least removes irresponsible firms from the scene.[285]

Scholars have also argued for applying the Freedom of Information Act to private contractors.[286] Required disclosure of operating procedures related to contact with civilian populations, training on international human rights norms, and reports of violations may spur oversight by political bodies within the government.[287] It may also induce PMC firms to develop and clarify these procedures. Similarly, the government contracting process should be made open to the public for comment.[288]

3. *International Human Rights Treaty Ratification*

Finally, the United States should ratify without reservation international human rights instruments such as the CEDAW to show the world its respect for the human rights of women.[289] The United States should also act to join the ICC and discontinue the use of BIAs to demonstrate its respect for the victims of crimes committed by U.S. citizens.[290] Ratification and support of international human rights instruments and enforcement bodies will help to restore the United States' credibility as a protector of human rights and the rule of law.[291] Moreover, it is difficult for the United States to be a credible advocate for the rule of law and human rights in Iraq and Afghanistan when its PMCs violate the law with impunity, which compromises U.S. counterinsurgency objectives.[292]

The author joins those calling for the application of international instruments prohibiting the violation of women's human rights, where a state systematically fails to punish or otherwise prevent sexual violence against women. International mechanisms, however, are notoriously

284. This Note recognizes the inevitability of private contractors. The provision of government services by private companies is highly controversial, but the author recognizes that complete eradication of the practice is unlikely to occur. For further discussion on the reasons to eliminate the practice, see Minow, *supra* note 16, at 123–27.

285. *See, e.g.*, U.S. DEP'T OF DEF., BOSNIA REPORT, *supra* note 12, at 3 (recommending contract clauses that prohibit human trafficking activities by contractor employees and require contractors to address employee violations).

286. *See, e.g.*, Craig D. Feiser, *Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Federal Law*, 52 FED. COMM. L.J. 21, 22–24 (1999); Mendelson, *supra* note 280, at 249–50, 254.

287. Mendelson, *supra* note 280, at 254.

288. *Id*. at 257.

289. For a discussion of CEDAW and the United States' failure to ratify it, see *supra* note 66 and accompanying text.

290. *See Bilateral Agreements*, *supra* note 197.

291. Another argument for better oversight of PMCs is that the United States undermines its own foreign policy objectives by allowing U.S. corporate actors to violate human rights across the globe with impunity. *See* JENNIFER K. ELSEA ET AL., CONG. RESEARCH SERV., RL 32419, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 13 (2008).

292. *See id*.

slow and difficult to navigate.[293] They are, therefore, necessary but insufficient responses to the problem of PMC sexual violence in nonconflict zones.

V. CONCLUSION

This Note examines current methods of holding PMCs and their employees accountable for sexual abuses perpetrated in nonconflict zones throughout the world. The systematic nature of PMC sexual violence against women calls for a more complex regulatory system at both the domestic and international level, in order to fully address the human rights implications of U.S. government contractors stationed in nonwar zones. This Note establishes the relationship between negative views of women learned in the military and subsequent PMC sexual violence against women. It also argues that sexual violence against women is a human rights issue that deserves national and international attention as a form of torture. Finally, because the U.S. government has failed to modify cultural misogyny within the military, and because it has failed to close the jurisdictional gap that exists with respect to PMCs, the United States should be held responsible for these lapses.

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293. *See, e.g.*, John R. Crook, *The International Court of Justice and Human Rights*, 1 NW. U. J. INT'L HUM. RTS. 2, 6 (2003).