
RUTHLESS MERCENARIES, DILIGENT PRIVATE SECURITY CONTRACTORS, OR VICTIMS OF LABOR TRAFFICKING?

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ABSTRACT

The private military industry has sparked great interest in the media and literature in the past thirty years. While debates on whether the industry should be regulated or abolished are extensive, little has been written about the mechanisms used to contract the employees within this massive industry. The few scholars who have focused on employees providing non-military labor have highlighted that these workers are systematically oppressed. On the other hand, most writers who focus on employees who provide military labor portray them as cold-blooded individuals who would do anything for material gain.

As this Note would argue, despite popular belief, Private Security Contractors (those who bear arms) are more vulnerable than they appear. For over twenty years, through multiple layers of contracting and subcontracting, the private military industry has been recruiting, transporting, transferring, and harboring contractors from developing countries for its military functions through deceptive, coercive, and forceful means for the purpose of exploitation. Even though the Palermo Protocol to Prevent, Suppress, and Punish Trafficking in Persons (“Trafficking Protocol”) forbids the commission of these acts, stereotypical views of victimization and harm obstruct the application of this legal instrument to such contractors. To debunk myths in the literature, this Note focuses specifically on the application of the Trafficking Protocol to contractors who provide military or security functions. By highlighting the progress already made in the fight against human trafficking, this Note presents the Trafficking

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Protocol as a promising international legal instrument that can address exploitation in the industry. This Note also considers the challenges that must be overcome to prevent trafficking, protect victims, and punish perpetrators.

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INTRODUCTION

In 2021, the private security company, the Counter Terrorist Unit Security, LLC (“CTU”) used at least thirteen Colombian veterans in a plot to assassinate the Haitian President, Jovenel Moïse.¹ The company did not recruit them specifically to assassinate the president; at least, that was not communicated to them during recruitment.² Instead, the company had them believe that they would be working for a long-term, legal and safe assignment providing security overseas.³ According to the recruiter, CTU was working under the U.S. Department of State and needed the “best-quality” security services to protect a prominent government agent.⁴ The recruiter emphasized the urgency of the mission to one of the veterans: “Talk about it with your family and if you are interested, see you tomorrow . . . because the flight is the day after tomorrow.”⁵ During one of the worst outbreaks of the COVID-19 pandemic and without many opportunities to find a well-paying job, the veterans agreed to travel.⁶ Several of their colleagues had found similar jobs in the private military industry.⁷ Therefore, protecting a government agent for \$2,500 a month seemed more than a legitimate job; it was a once-in-a-lifetime opportunity.⁸

It was not until after the veterans had been implicated in the assassination of the Haitian President that most of them realized the company had no

¹ Joe Parkin Daniels & Tom Phillips, *Why Were Colombian Guns for Hire Allegedly Key to Haiti Assassination Plot?* GUARDIAN (July 9, 2021, 5:22 PM), <https://www.theguardian.com/world/2021/jul/09/colombia-haiti-guns-for-hire-assassination> [https://perma.cc/F8MN-HGP2].

² Noticias Caracol, *Chats de WhatsApp de Algunos Militares (r) que Viajaron de Colombia a Haití*, YOUTUBE (July 11, 2021), <https://www.youtube.com/watch?v=31KDhrxMZ6w> [https://perma.cc/Y95W-GVES].

³ Revista Semana, Interview by Revista Semana with Giovanna Arelis Romero, Spouse of Former Soldier Mauricio Javier Romero, Habla la Esposa de Uno de los Exmilitares Colombianos Muertos en Haití | Vicky en Semana, YOUTUBE (July 12, 2021) https://www.youtube.com/watch?v=vn_s4IFyxkg&t=736s [https://perma.cc/V5A8-EL3J] [hereinafter *Semana Interview with Romero*].

⁴ *Id.*

⁵ Jean Marc Hervé Abélard, *The Assassination of Haiti’s President Exposes Role of Ex-Colombian Soldiers*, ASSOCIATED PRESS (July 22, 2021, 2:05 PM), <https://www.nbcnews.com/news/latino/assassination-haitis-president-exposes-role-ex-colombian-soldiers-rcna1491> [https://perma.cc/C2BP-WLLQ].

⁶ Adam Isacson, Opinion, *It’s Not Too Late for the Land of Mercenaries*, N.Y. TIMES (Aug. 5, 2021), <https://www.nytimes.com/2021/08/05/opinion/colombia-mercenaries-haiti.html> [https://perma.cc/58G4-FD4C].

⁷ *Semana Interview with Romero*, *supra* note 3.

⁸ Julie Turkewitz & Anatoly Kurmanaev, *Big Dreams and False Claims: How Colombians Got Embroiled in Haiti Assassination*, N.Y. TIMES (July 15, 2021), <https://www.nytimes.com/2021/07/13/world/americas/haiti-colombia-military-veterans.html> [https://perma.cc/3BQB-K2HS].

connection with the U.S. government, the so-called peace-keeping mission was suicidal, and the company would disappear once the short-lived mission was completed.⁹ Like many other private military companies, CTU was aware that once the veterans were labeled as “mercenaries,” they would be considered disposable human beings, and no one would consider them victims of a transnational crime.

The recruitment tactics that CTU used to hire the veterans may seem like an isolated incident of deception. Unfortunately, it is systemic and pervasive practice in the private military industry.¹⁰ By misrepresenting or hiding the nature of the work, the clientele of the company, and the location of the mission, private military and security companies hire thousands of contractors to provide armed services around the world.¹¹ These firms exploit existing vulnerabilities and continue proliferating their operations without any regard for individual rights or labor obligations, specifically targeting people from developing countries.¹²

Private militarization has grown exponentially over the last thirty years.¹³ The speed with which these companies have gained terrain in the international security market and the secrecy surrounding their operations has drawn the attention of many scholars.¹⁴ While there is widespread awareness of the lack of transparency and accountability in the industry, few scholars have focused on contractors providing military or security functions (“Private Security Contractors” or “PSCs”) as workers in a global marketplace.¹⁵ When PSCs are highlighted in the media, they are portrayed

⁹ See *id.*

¹⁰ See *Are Government Contractors Exploiting Workers Overseas? Examining Enforcement of the Trafficking Victims Protection Act: Hearing Before the H. Select Subcomm. on Tech., Info. Pol’y, Intergov’t Rel. and Procurement Reform of the Comm. on Oversight and Gov’t Reform*, 112th Cong. 73, 85–86 (2011) (statement of Rep. Gerry Connolly, U.S. Representative, Virginia) [hereinafter Hearing 1] (discussing deceptive practices); see *id.* at 129 (“We are not talking about isolated examples, we are talking about tens of thousands, if not multiple of that.”).

¹¹ See David Gauvey Herbert, *Uganda’s Top Export: Mercenaries*, BLOOMBERG BUSINESSWEEK (May 10, 2016), <https://www.bloomberg.com/features/2016-uganda-mercenaries/> [<https://perma.cc/N3LJ-MLMT>]; Maya Eichler, *Citizenship and the Contracting Out of Military Work: From National Conscription to Globalized Recruitment*, 18 CITIZENSHIP STUD. 600, 608 (2014).

¹² Eichler, *supra* note 11, at 608.

¹³ See, e.g., Eugenio Cusumano & Christopher Kinsey, *Advancing Private Security Studies: Introduction to the Special Issue*, 33 SMALL WARS & INSURGENCIES 1, 1 (2022).

¹⁴ See, e.g., *id.*

¹⁵ Compare Shannon Bosch & Matthew Kimble, *A New Way Forward for the Regulation of the Private Military and Security Industry*, 48 COMPAR. & INT’L L. J. S. AFR. 431 (2015), Renée de Nevers, *The Effectiveness of Self-Regulation by the Private Military and Security Industry*, 30 J. PUB. POL’Y. 219 (2010), LINDSEY CAMERON & VINCENT CHETAIL, *PRIVATIZING WAR: PRIVATE MILITARY AND SECURITY COMPANIES UNDER PUBLIC INTERNATIONAL*

as machines of lethal force or as perpetrators of human right abuses; when PSCs are highlighted in the literature, scholars focus on the legality of their activities.¹⁶ Rarely, however, PSCs have been seen as workers, much less as people who, due to their socio-political circumstances, end up defrauded, forced, and coerced into working in the industry. While the exploitation that workers endure in the private military industry is nothing new, few scholars have described the exploitation that low-ranking PSCs have endured.¹⁷ To address the gap, this Note isolates the experiences of PSCs from those who work in service roles for the military, such as kitchen and construction workers, applying each element of the Palermo Protocol to Prevent, Suppress, and Punish Trafficking in Persons (“Trafficking Protocol”) to PSCs. By doing so, this Note shows that the typical narrative that paints victims and perpetrators on opposite ends of a spectrum is simplistic and archaic. The Trafficking Protocol is an instrument that applies to any

LAW (2013), KATERI CARMOLA, *PRIVATE SECURITY CONTRACTORS AND NEW WARS: RISK, LAW, AND ETHICS* (2010), and Rain Liivoja, *Regulating the Private Military and Security Industry: A Quest to Maintain State Control and Preserve Public Values*, 25 LEIDEN J. INT’L L. 1019 (2012), with Amanda Chisholm, *Marketing the Gurkha Security Package: Colonial Histories and Neoliberal Economies of Private Security*, 45 SEC. DIALOGUE 349 (2014), Adam White, *Private Military Contractors as Criminals/Victims*, in THE PALGRAVE HANDBOOK OF CRIMINOLOGY AND WAR 191, 199 (Ross McGarry & Sandra Walklate eds., 2016), and Maya Mynster Christensen, *The Underbelly of Global Security: Sierra Leonean Ex-Militias in Iraq*, 115 AFR. AFFS. 23 (2016).

¹⁶ Compare *Libya: Russia’s Wagner Group Set Landmines Near Tripoli*, HUM. RTS. WATCH (May 31, 2022, 12:00 AM), <https://www.hrw.org/news/2022/05/31/libya-russias-wagner-group-set-landmines-near-tripoli> [<https://perma.cc/J5EF-UGA2>], Elliot Smith, *Russia’s Ukraine Offensive Now Relying on a Private Mercenary Group That’s Hiring Convicts, UK Says*, CNBC (July 18, 2022, 9:02 AM), <https://www.cnbc.com/2022/07/18/russia-relying-on-wagner-in-ukraine-that-is-hiring-convicts-uk-says.html> [<https://perma.cc/FW45-NZ5Y>], Matt Schierer, *Russian Paramilitary Wagner Group Activities in Mali, The Sahel Risk Bolstering Jihadi Groups as the Company’s Abuses Against Civilians Compound*, MEMRI (Aug. 31, 2022), <https://www.memri.org/reports/russian-paramilitary-wagner-group-activities-mali-sahel-risk-bolstering-jihadi-groups> [<https://perma.cc/HMU4-BU56>], and Sean McFate, *Mercenaries and War: Understanding Private Armies Today*, NAT’L DEF. UNIV. PRESS (Dec. 4, 2019), <https://ndupress.ndu.edu/Media/News/Article/2031922/mercenaries-and-war-understanding-private-armies-today/> [<https://perma.cc/3X53-QMZX>], with Stella Ageli, *Private Military Companies (PMCs) and International Criminal Law: Are PMCs the New Perpetrators of International Crimes?*, 8 AMSTERDAM L.F. 28 (2016), Sarah V. Percy, *Mercenaries: Strong Norm, Weak Law*, 61 INT’L. ORG. 367 (2007), Andreas Krieg, *The UAE’s ‘Dogs of War’: Boosting a Small State’s Regional Power Projection*, 33 SMALL WARS & INSURGENCIES 152 (2022), and Christopher Kinsey, *International Law and the Control of Mercenaries and Private Military Companies*, 52 CULTURES & CONFLICTS (2003).

¹⁷ See, e.g., AM. C. L. UNION & ALLARD K. LOWENSTEIN INT’L HUM. R. CLINIC YALE L. SCH., *VICTIMS OF COMPLACENCY: THE ONGOING TRAFFICKING AND ABUSE OF THIRD COUNTRY NATIONALS BY U.S GOVERNMENT CONTRACTORS* 21 (2012) [hereinafter *VICTIMS OF COMPLACENCY*].

individual who is recruited, transported, transferred, and harbored through deceptive, coercive, or forceful means for the purpose of exploitation regardless of gender, age, or industry.¹⁸ As a legal instrument that has been ratified by most countries in the world, understanding who qualifies as a victim of trafficking is an essential step to fulfill States' obligations in protecting victims, prosecuting traffickers, and preventing trafficking.¹⁹

As this Note will explain, one of the most difficult aspects of recognizing PSCs as victims is the conceptualization of victimhood. In other words, people who commit crimes, who are seen as tough, or who work in stereotypically masculine industries are less likely to be afforded the protections that are often given to victims who are seen as innocent, vulnerable, or feminine.²⁰ However, no one should be stripped of their basic human rights or should be considered less of a victim simply because of their attributes, actions, or the industry in which they work.²¹ While this Note acknowledges that some PSCs have been culpable of crimes under international and domestic law and that the actions of PSCs, even under the best circumstances, have negatively affected the countries in which these companies operate, anyone who considers the military as an essential function of the State should also consider that governments around the world are increasingly using more PSCs than public soldiers in warfare and that the practice will continue in prevalence.²² Therefore, highlighting the widespread exploitation within the industry is essential to understand the intricacies of the industry and to ensure that no victim of human trafficking is discounted or forgotten.

Part I of this Note provides a general background on the rise of private militarization and highlights some of the concerns raised regarding the expansion of the industry, including the exploitation of contractors working

¹⁸ See G.A. Res. 55/25, art. 3, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Nov. 15, 2000) [hereinafter Trafficking Protocol].

¹⁹ ANNE T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* 281–82 (2010).

²⁰ See discussion *infra* Part IV.A.3.c.

²¹ See International Covenant on Civil and Political Rights art. 10(1), Dec. 19, 1966, 999 U.N.T.S. 171; G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 1 (Dec. 10, 1948); Rome Statute of the International Criminal Court art. 67, July 17, 1998, 2187 U.N.T.S. 38544 (entered into force July 1, 2002) [hereinafter Rome Statute]; Maria Grazia Giammarinaro (Special Rapporteur on Trafficking in Persons, Especially Women and Children), *The Importance of Implementing the Non-Punishment Provision: The Obligation to Protect Victims*, ¶ 9, U.N. Hum. Rts. Special Procs. Mandate (July 30, 2020), <https://www.ohchr.org/sites/default/files/Documents/Issues/Trafficking/Non-Punishment-Paper.pdf> [<https://perma.cc/A46W-KAUX>].

²² See SEAN MCFATE, *THE MODERN MERCENARY: PRIVATE ARMIES AND WHAT THEY MEAN FOR WORLD ORDER* 8, 19 (2014); CHRISTOPHER KINSEY, *CORPORATE SOLDIERS AND INTERNATIONAL SECURITY: THE RISE OF PRIVATE MILITARY COMPANIES* 2–3 (2007).

in non-military operations. Part II presents international legal instruments that have been adopted to address the issue of mercenarism but have been unsuccessful in regulating the industry. Part III applies each element of the Trafficking Protocol to PSCs. Lastly, Part IV offers the most relevant developments in the fight against trafficking while acknowledging the challenges in applying the Trafficking Protocol to PSCs.

I. THE RISE OF PRIVATE MILITARIZATION

“Private Military and Security Companies” (“PMSCs”) is the broadest term for private companies that provide military and security services in a global marketplace.²³ These firms are sometimes categorized based on their services. Those that provide service in front-line combat may be considered “Private Military Companies” while those that provide security services for the State, private entities, or individuals may be referred to as “Private Security Companies.”²⁴ The term becomes amorphous, however, when private firms provide logistics, training, intelligence, or maintenance to armed forces, NGOs, or paramilitary groups.²⁵ While these firms were historically known as Private Military Companies or mercenary groups, after the 1960s, they began to be branded as Private Security Companies to be distinguished from mercenary groups.²⁶

A. Brief History of the Industry

Throughout history, the private military industry has played an intricate

²³ I chose the term “PMSCs” intentionally to encompass all private military and security companies, including “private military companies,” “private military firms,” “defense contracting firms,” “private security companies,” or “mercenary groups.” Differences exist in the size, structure, and services of these firms, and it may be argued that “private security companies” and “mercenary groups” are on opposite sides of a spectrum, regardless of their categorization. However, as shown on this Note, due to easy access to military equipment, lack of transparency in operations, and recruitment practices, if so desired, these companies may quickly change services, from providing security services to becoming mercenary groups. See Bernard Debusmann Jr., *Private Military Firms See Demand in Ukraine War*, BBC NEWS (Mar. 9, 2022), <https://www.bbc.com/news/world-us-canada-60669763> [https://perma.cc/CBP7-TACE] (discussing the difference between mercenaries and contractors, and quoting Sean McFate, “People talk about legitimacy and who the client is. None of that matters . . . If you can do one, you can do the other”).

²⁴ See KINSEY, *supra* note 22, at 2–3.

²⁵ See *id.* at 3; Peter W. Singer, *Corporate Warriors: The Rise of the Private Military Industry and Its Ramifications for International Security*, 26 INT’L SEC. 186, 193 n.18, 213 (2001).

²⁶ See, e.g., Elke Krahnmann, *From ‘Mercenaries’ to ‘Private Security Contractors’: The (Re)Construction of Armed Security Providers in International Legal Discourses*, 40 J. INT’L STUD. 343 (2012) (arguing that to legitimize the business, international legal discourses have shifted the categorization of PMSCs from mercenary groups to private security companies).

role in warfare.²⁷ However, the modern PMSCs date to the early 1990s after the end of the Cold War.²⁸ At the time, even though there was a period of downsizing in armies around the world, a general trend for outsourcing military functions emerged, particularly in the global superpowers.²⁹ Over the years, governments such as the U.S., Russia, and the U.K. became over-reliant on PMSCs to train, provide logistical support, and fight alongside military troops.³⁰ For example, in World War I, PSCs accounted for less than five percent of the total U.S. fighters deployed; in 2010 the U.S. government deployed a combination of 175,000 troops and 207,000 PSCs, specifically to Iraq and Afghanistan.³¹ Russia, on the other hand, has repeatedly denied connections with PMSCs operating abroad, though multiple reports suggest otherwise.³² Based on estimates from the United States Africa Command, in 2020, Russia was supporting around 3,000 fighters in Libya from the Wagner Group, an infamous PMSC.³³ In February 2022, as the Russian war against Ukraine ignited, Russia was linked once again to the Wagner Group, this time with efforts to assassinate the Ukrainian President.³⁴ As the war develops, the

²⁷ See CHRISTOPHER SPEARIN, PRIVATE MILITARY AND SECURITY COMPANIES AND STATES: FORCE DIVIDED 58 (2017).

²⁸ See Peter W. Singer, *Outsourcing War: Understanding the Private Military Industry*, BROOKINGS (Mar. 1, 2005), <https://www.brookings.edu/articles/outsourcing-war/> [https://perma.cc/L847-3R89].

²⁹ See *id.*

³⁰ See MCFATE, *supra* note 22, at 19; Singer, *supra* note 25, at 198.

³¹ See MCFATE, *supra* note 22, at 20.

³² See, e.g., Jalel Harchaoui, Commentary, *The Pendulum: How Russia Sways Its Way to More Influence in Libya*, WAR ON THE ROCKS: TEX. NAT'L SEC. REV. (Jan. 7, 2021), <https://warontherocks.com/2021/01/the-pendulum-how-russia-sways-its-way-to-more-influence-in-libya/> [https://perma.cc/D3TG-2JLC]; *Regular Russian Troops Stationed in Libya*, DAILY SABAH (July 23, 2021, 8:52 AM), <https://www.dailysabah.com/world/africa/regular-russian-troops-stationed-in-libya> [https://perma.cc/44AT-HS6W]; Paul Stronski, Commentary, *Implausible Deniability: Russia's Private Military Companies*, CARNEGIE ENDOWMENT INT'L PEACE (June 2, 2020), <https://carnegieendowment.org/2020/06/02/implausible-deniability-russia-s-private-military-companies-pub-81954> [https://perma.cc/QB26-C3XV]; Ilya Barabanov & Nader Ibrahim, *Wagner: Scale of Russian Mercenary Mission in Libya Exposed*, BBC NEWS (Aug. 11, 2021), <https://www.bbc.com/news/world-africa-58009514> [https://perma.cc/N8D9-PBY3]; Leonid Bershidsky, *Putin Wants to Win, But Not at All Costs*, BLOOMBERG (Dec. 6, 2017, 2:00 AM), <https://www.bloomberg.com/opinion/articles/2017-12-06/putin-wants-to-win-but-not-at-all-costs> [https://perma.cc/Y88J-43TR]; R. Kim Cragin & Lachlan MacKenzie, *Russia's Escalating Use of Private Military Companies in Africa*, INST. FOR NAT'L STRATEGIC STUD. (Nov. 4, 2020), <https://inss.ndu.edu/Media/News/Article/2425797/russias-escalating-use-of-private-military-companies-in-africa> [https://perma.cc/WQ29-NM8R].

³³ SEAN W. O'DONNELL ET AL., LEAD INSPECTOR GENERAL REPORT TO THE UNITED STATES CONGRESS: EAST AFRICA COUNTERTERRORISM OPERATION, NORTH AND WEST AFRICA COUNTERTERRORISM OPERATION 5 (2020), [https://perma.cc/5NGZ-2VZN].

³⁴ Max Colchester, *U.K. Says Russian Mercenary Group Aims to Assassinate Ukraine's*

Wagner Group continues providing military support to the Russian government.³⁵

B. *The Market Value of the Company*

While the end of the Cold War ignited the reemergence of the private military industry, the U.S. occupation of Iraq and Afghanistan expanded its business exponentially.³⁶ During the Afghanistan War, stocks in PMSCs “outperformed the stock market overall by 58 percent.”³⁷ From the perspective of the people who invested in these companies, the occupation of Afghanistan was not a failure, but a magnificent success.³⁸ Those who invested, for example, \$10,000 evenly divided among the top five PMSCs in 2001, reinvesting all dividends would have earned a profit of \$87,295 in 2021.³⁹ While in 2010, the market value of the industry was estimated to reach between \$20 billion to \$100 billion annually, in 2021, the industry was valued at around \$241 billion annually.⁴⁰ It is also estimated that by 2030 the

President, WALL ST. J. (Mar. 24, 2022, 12:04 PM), <https://www.wsj.com/articles/u-k-says-russian-mercenary-group-aims-to-assassinate-ukraines-president-11648137870> [<https://perma.cc/P5HY-5VTZ>].

³⁵ Stavros Atlamazoglou, *Russia’s Reliance on Wagner Group in Ukraine Is Wearing Down Putin’s Favorite Mercenary Group, the British Military Says*, BUS. INSIDER (Sep. 11, 2022, 6:31 PM), <https://www.businessinsider.com/wagner-group-role-in-ukraine-wearing-down-russian-mercenary-force-2022-9> [<https://perma.cc/3VQ4-FD3F>].

³⁶ See Edwin Lane, *The Rise of the UK’s Private Security Companies*, BBC NEWS (Nov. 2, 2010), <https://www.bbc.com/news/business-11521579> [<https://perma.cc/7C7S-FJCD>].

³⁷ Jon Schwatz, *\$10,000 Invested in Defense Stocks When Afghanistan War Began Now Worth Almost \$100,000*, INTERCEPT (Aug. 16, 2021), <https://theintercept.com/2021/08/16/afghanistan-war-defense-stocks/> [<https://perma.cc/QY4M-N46V>] (discussing Boeing, Raytheon, Lockheed Martin, Northrop Grumman, and General Dynamics). While not as infamous as other PMSCs, classified military programs and a history of outsourcing positions suggests Boeing might also engage in overseas private contracting of a similar nature. See *Boeing Reorganizes Defense, Space & Security Business Unit*, BOEING (Nov. 7, 2022), <https://boeing.mediaroom.com/2022-11-17-Boeing-Reorganizes-Defense.-Space-Security-Business-Unit> [<https://perma.cc/TA2E-8YLT>] (discussing some operations of Boeing Defense, Space & Security as “classified programs”); Timothy Egan, *At Boeing, a War Over Job Exodus*, N.Y. TIMES (Oct. 14, 1995), <https://www.nytimes.com/1995/10/14/us/at-boeing-a-war-over-job-exodus.html> [<https://perma.cc/TJF9-AA7Q>] (discussing Boeing outsourcing jobs overseas); see also *Contractors Are Cashing in on the War on Terror: Is What’s Good for Boeing and Halliburton Good For America?*, WORLD POL’Y INST. (Feb. 24, 2004), <https://www.corpwatch.org/article/contractors-are-cashing-war-terror> [<https://perma.cc/UZW3-2A7W>] (discussing multiple services contractors performing within these large corporations, including training the Saudi Arabian National Guard and the Iraqi armed forces, building military bases, and cooking and laundry services).

³⁸ Schwatz, *supra* note 37.

³⁹ *Id.*

⁴⁰ MCFATE, *supra* note 22, at 8, 19; *Private Military Security Services Market Size Worth USD 366.8 Billion By 2028*, VANTAGE MKT. RSCH. (June 22, 2022),

industry will be worth over \$450 billion.⁴¹ The war in Ukraine has only intensified the demand for PMSCs.⁴²

C. *The Market Value of Its Employees*

It is noteworthy to mention that many people associate PMSCs' contractors only with PSCs, however, due to the size of the industry, PMSCs offer starkly diverse forms of employment, ranging from upper-level management, legal affairs, or cybersecurity to domestic work and janitorial services.⁴³ Regardless of the position, the private military industry tends to seek talent across the globe, though not based on people's skills and experience; rather, as I will explain in Part II, these firms hire contractors based on the market value of their citizenship.⁴⁴ To give legitimacy to the industry and to build confidence in clients, these companies hire Americans for management and sophisticated military and security operations.⁴⁵ To keep the monetary, social, and political costs of its operations low, these firms hire PSCs from the Global South. Citizens of countries such as El Salvador, Nepal, India, and Sierra Leone are typically hired for lower military ranking operations.⁴⁶

II. DOCUMENTED ISSUES WITH THE EXPANSION OF THE PRIVATE MILITARY INDUSTRY

The moral, social, and legal issues of private militarization have been well

<https://web.archive.org/web/20221114202441/https://www.globenewswire.com/en/news-release/2022/06/22/2466892/0/en/Private-Military-Security-Services-Market-Size-worth-USD-366-8-Billion-by-2028-With-stunning-7-2-CAGR-Says-Vantage-Market-Research.html>.

⁴¹ *Private Military & Security Services Market to Total \$457.3 Bn in 2030*, ASD NEWS (Feb. 19, 2020), <https://www.asdnews.com/news/defense/2020/02/19/private-military-security-services-market-total-4573-bn-2030> [https://perma.cc/SR93-RM3V].

⁴² See Debusmann Jr., *supra* note 23.

⁴³ See, e.g., *Silent Professionals*, PRIV. SEC. JOB MKT., https://silentprofessionals.org/job_category/military-contractor-jobs/ [https://perma.cc/SSV5-99VW]; U.S. CONG., CONG. BUDGET OFF., CONTRACTORS' SUPPORT IN U.S. OPERATIONS IN IRAQ 7 (Aug. 2008), <https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/08-12-iraqcontractors.pdf> [https://perma.cc/2YWA-QX7E]; WORLD POL'Y INST., *supra* note 37.

⁴⁴ See *infra* Part II; see also Eichler, *supra* note 12, at 601.

⁴⁵ Ori Swed & Daniel Burland, *Contractors in Iraq: Exploited Class or Exclusive Club?*, 48 ARMED FORCES & SOC'Y 3, 8–9 (2020).

⁴⁶ See, e.g., Paul Higate, *Martial Races and Enforcement Masculinities of the Global South: Weaponising Fijian, Chilean, and Salvadoran Postcoloniality in the Mercenary Sector*, 9 GLOBALIZATIONS 35, 35 (2012); Chisholm, *supra* note 15 (discussing the racialized contracting of Gurkha private security contractors); Christensen, *supra* note 15 (discussing the racialized contracting of Sierra Leonean private security contractors); Hearing 1, *supra* note 10, at 2; Swed & Burland, *supra* note 45, at 11.

documented in the literature and the media, but governments' over-reliance on the industry has swept these concerns under the rug.⁴⁷ The main argument against the use of PMSCs is that fighting in hostilities for economic reasons is morally questionable.⁴⁸ While States and public soldiers garner respect because they are arguably motivated by worthy causes, such as nationalism, PSCs are considered greedy and less virtuous because they are arguably primarily interested in maximizing profit.⁴⁹ Also, States hold the monopoly on the use of force.⁵⁰ When nonstate groups, such as nongovernmental organizations, elites, or businesses hire PMSCs to protect their interests, non-state actors use force illegitimately.⁵¹ The coupling of the financial motivation with the illegitimate use of force depicts PSCs as criminals rather than private soldiers.⁵²

Another argument against the expansion of private militarization is that the use of PSCs has a devastating impact on developing countries. From a macro-perspective, nations that can afford delegating their military functions to corporations do not have to rely on people from their own country to enlist in the military because they can hire PSCs from anywhere in the world to fight for their causes.⁵³ If wars are fought based on wealth, then the market for force eschews, and if unrestricted, the most powerful nations are able to overtake small or newly established nations.⁵⁴ From a micro-perspective, the contractual relationship between PMSCs and their clients permits contractors to have more independence.⁵⁵ Unlike public soldiers PSCs are not part of the government apparatus nor bound by military laws and obligations.⁵⁶ When public soldiers commit crime, for example, the government may prosecute or punish them under military law.⁵⁷ For PSCs, no effective system of

⁴⁷ INST. FOR INT'L L. & JUST. AT N.Y.U. SCH. OF L., FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 33–34 (Simon Chesterman & Chia Lehnhardt, eds., 2007).

⁴⁸ *See id.* at 16.

⁴⁹ *See id.* at 15.

⁵⁰ *Id.* at 46; *see also* Comm. on Hum. Rts., *Rep. of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of People to Self-Determination*, ¶¶ 5, 35, 38, U.N. Doc. E/CN.4/2006/11 (Dec. 23, 2005) [hereinafter Working Group on Mercenaries].

⁵¹ *See* Dimitrios Machairas, *The Ethical Implications of the Use of Private Military Force: Regulatable or Irreconcilable?*, 13 J. MIL. ETHICS 49, 55 (2014).

⁵² *See id.* at 50, 55.

⁵³ *See id.* at 57.

⁵⁴ Krahmann, *supra* note 26, at 350.

⁵⁵ *See* PETER W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 48 (2003).

⁵⁶ *See id.* at 205.

⁵⁷ *See, e.g.*, 699. *Prosecution of Military Personnel*, U.S. DEP'T OF JUST. (Aug. 14, 1984), <https://www.justice.gov/archives/jm/criminal-resource-manual-669-prosecution-military->

accountability and oversight applies. Hence, when PSCs commit crimes in foreign countries, victims are left with no recourse.⁵⁸

Another issue with the expansion of private militarization, documented to a lesser extent, is the reinforcement of race, gender, and citizenship hierarchies. Feminist scholars have argued that the private military industry reinforces the “national identity of the American soldier” by hiring men from the Global South into service positions within military camps.⁵⁹ While citizens from India, Sri Lanka, and Nepal, for example, perform traditionally effeminate labor, such as tending beds, caring for gardens, and preparing meals for American soldiers through low-wage migrant labor, American soldiers earn a high-paying salary providing traditionally masculine labor, such as ground combat and military intelligence.⁶⁰ By outsourcing services that support the military to PMSCs, the monetary cost of war is maintained low while the “courage, patriotism, and selflessness” of the American soldier is kept high.⁶¹

III. INTERNATIONAL LAW AND ITS ECHO OF THE VICTIM — PERPETRATOR BINARY

These issues have played a role in the development of international law. The main international legal instruments against mercenarism, for example, have focused on discouraging voluntary mercenarism without addressing the issues that arise when civilians are recruited forcefully or coercively. As explained below, these instruments primarily focus on the immorality of fighting for private gain, the impact of private fighters on small or newly established nations, and the protection of the “ideal” victim. Healthy adult males who were coerced or forced into joining mercenary groups were traditionally left without protections.

A. *International Legal Instruments Against Mercenarism*

Around 1960, African leaders were worried their efforts of liberation and self-determination would be extinguished by mercenaries working for

personnel [<https://perma.cc/26WR-VVWX>].

⁵⁸ See Singer, *supra* note 25, at 239; see, e.g., Jose L. Gómez del Prado, *The Role of Private Military and Security Companies in Modern Warfare — Impacts on Human Rights*, BROWN J. WORLD AFFS. (Aug. 11, 2012), <https://archive.globalpolicy.org/pmscs/51834-the-role-of-private-military-and-security-companies-in-modern-warfare-impacts-on-human-rights.html> [<https://perma.cc/PFW6-K6N8>] (describing lack of justice for families of Afghan and Iraqi civilians murdered by private contractors).

⁵⁹ Isabelle V. Barker, *(Re)Producing American Soldiers in an Age of Empire*, 5 POL. & GENDER 211, 211 (2009).

⁶⁰ *Id.*

⁶¹ *Id.* at 217–18.

colonialist powers and foreign corporations.⁶² At the time, European countries hired mercenaries to protect their businesses and interests in African nations.⁶³ Concerned that the same mercenaries would be used against African efforts of liberation and self-determination, between 1968 and 1989, the United Nations created several legal instruments to prohibit mercenarism and the use of mercenaries under international law.⁶⁴ Among the most notorious instruments targeting mercenarism are the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, otherwise known as General Assembly Resolution 2465 (“G.A. Resolution 2465”),⁶⁵ the Additional Protocol (I) to the Geneva Convention (“Protocol I”),⁶⁶ and the U.N. Convention against the Recruitment, Use, Financing and Training of Mercenaries (“Convention Against Mercenaries”).⁶⁷

1. G.A. Resolution 2465

The G.A. Resolution 2465 was the first international legal instrument that criminalized mercenaries.⁶⁸ The resolution was groundbreaking in the sense that it criminalized the use of mercenaries when used “against movements for national liberation and independence,”⁶⁹ but it fell short in any other context.⁷⁰ While the resolution set into motion the principle that mercenaries ought to be outlawed, its narrow applicability and marginal acceptability make the resolution largely inapplicable to states who contract PMSCs.⁷¹ First, the resolution did not provide a clear definition of mercenarism nor did it criminalize PMSCs activities outside of anti-liberation contexts.⁷² Second,

⁶² Krahmman, *supra* note 26, at 349.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ G.A. Res. 2465 (XXIII), ¶ 8, (Dec. 20, 1968) [hereinafter G.A. Resolution 2465].

⁶⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

⁶⁷ International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, Dec. 4, 1989, 2163 U.N.T.S. 75 (entered into force Oct. 20, 2001) [hereinafter Convention Against Mercenaries].

⁶⁸ G.A. Resolution 2465, *supra* note 65; Edward Kwakwa, *The Current Status of Mercenaries in the Law of Armed Conflict*, 14 HASTING INT’L & COMPAR. L. REV. 67, 83 (1990).

⁶⁹ G.A. Resolution 2465, *supra* note 65, ¶ 8.

⁷⁰ See Kevin H. Govern & Eric C. Bales, *Taking Shots at Private Military Firms: International Law Misses Its Mark (Again)*, 32 FORDHAM INT’L L. J. 55, 74–75 (2008).

⁷¹ *See id.*

⁷² The resolution declared mercenaries as outlaws but did not include a definition of mercenary in the language of the text. *See* G.A. Resolution 2465, *supra* note 65; Govern & Bales, *supra* note 70, at 75

the resolution was adopted by only a slim majority of votes.⁷³ Therefore, most activities performed by PMSCs fall outside of its scope and the resolution cannot be considered customary law.⁷⁴

2. Protocol I

Protocol I, adopted in 1977, supplements the Geneva Conventions of 12 August 1949.⁷⁵ The Geneva Conventions provide standards of treatment and protections to civilians, prisoners of war, and soldiers who become sick or wounded.⁷⁶ While the Geneva Convention Relative to the Treatment of Prisoners of War (“GC III”) offers protections for prisoners of war, it does not mention whether mercenaries may qualify as such.⁷⁷ Article 47 of Protocol I clarifies this point by adding that anyone who meets the six-prong definition “shall not have the right to be a combatant or a prisoner of war.”⁷⁸ Under Protocol I, a mercenary is any person who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
- (c) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- (d) is not a member of the armed forces of a party to the conflict; and
- (e) 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.⁷⁹

Article 47 distinguishes mercenaries from combatants by emphasizing the

⁷³ Govern & Bales, *supra* note 70, at 75.

⁷⁴ *See id.*

⁷⁵ AP I, *supra* note 66, art. 1(3).

⁷⁶ *Geneva Conventions of 1949 and Their Additional Protocols*, INT’L COMM. RED CROSS (Jan. 1, 2014), <https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols> [https://perma.cc/4G5Q-PYFG].

⁷⁷ Commentary, *Convention (III) Relative to the Treatment of Prisoners of War of Geneva*, INT’L COMM. RED CROSS (Aug. 12, 1949), <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949> [https://perma.cc/U7XB-C44U]; *see also* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].

⁷⁸ AP I, *supra* note 66, art. 47(1).

⁷⁹ *Id.* art. 47(2).

association with a party to the conflict or its armed forces and the motivation to take part in hostilities.⁸⁰ It also establishes that, to be a mercenary, a person must be recruited to fight in an armed conflict *and* directly take part in hostilities.⁸¹ To be a mercenary, all six prongs must be established.⁸²

While Protocol I established a clear definition of mercenarism, modern PSCs are unlikely to fit this definition; critics have gone as far as to argue that anyone who does “deserves to be shot—and his lawyer with him.”⁸³ First, most PSCs are recruited to protect business interests, diplomats, or to provide security for military camps, not to fight in armed conflict.⁸⁴ Second, even if PSCs directly engage in hostilities seeking private gain, a comparison between a member of the armed forces and a mercenary would undoubtedly show that both engage in hostilities for private gain, and, most times, PSCs do not receive compensation in excess to that which members of the armed forces receive in similar ranks.⁸⁵ Also, PSCs are often nationals or residents of the party to the conflict.⁸⁶ As seen in the operations of PMSCs in Afghanistan and Iraq, personnel included nationals of both Afghanistan and Iraq.⁸⁷ Therefore, the definition of Article 47 is unworkable when applied to PSCs.⁸⁸

Even in the narrow circumstances where a person may fit the definition of a mercenary, Article 47 discourages mercenarism, but it does not expressly criminalize it.⁸⁹ Instead, it deprives mercenaries of protections afforded to combatants and prisoners of war, such as the right to directly participate in hostilities—hence, not subject to punishment for participating once under the control of the enemy.⁹⁰ By providing a clear distinction between combatants and mercenaries, Article 47 frowns upon the narrow set of people who may fit this description without equating mercenarism with a criminal act.⁹¹

3. The Convention Against Mercenaries

Twelve years after Protocol I was adopted, in 1989, the U.N. adopted the

⁸⁰ *See id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ GEOFFREY BEST, *HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICTS* 328, 374–75 n.83 (1980).

⁸⁴ KINSEY, *supra* note 22, at 123.

⁸⁵ *See* Govern & Bales, *supra* note 70, at 83.

⁸⁶ *Id.* at 84–85.

⁸⁷ *Id.*; Jose L. Gomez del Prado, *Private Military and Security Companies and the UN Working Group on the Use of Mercenaries*, 13 J. CONFLICT & SEC. L. 429, 437 (2008).

⁸⁸ Govern & Bales, *supra* note 70, at 84–85.

⁸⁹ *Id.* at 81.

⁹⁰ *See id.* n.202; GC III, *supra* note 77, art. 12.

⁹¹ Govern & Bales, *supra* note 70, at 81.

Convention Against Mercenaries—though it did not become effective until 2001.⁹² The Convention Against Mercenaries expanded upon the definition of mercenarism under Protocol I and allowed for its implementation under domestic law.⁹³ Under the Convention Against Mercenaries, not only do persons who fit the enumerated description become perpetrators of mercenarism, but also those who employ, use, finance, or train mercenaries, as well as those who attempt to commit the offense and are complicit to the offense.⁹⁴ The treaty provides two definitions of a “mercenary.” The first mirrors the definition under Protocol I, except that it removes the requirement of taking part in hostilities;⁹⁵ the second includes instances where no armed conflict existed, in the following circumstances:

A mercenary is a person who:

- (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
 - (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or
 - (ii) Undermining the territorial integrity of a State;
- (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
- (c) Is neither a national nor a resident of the State against which such an act is directed;
- (d) Has not been sent by a State on official duty; and
- (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.⁹⁶

Under the first definition, to be considered a mercenary, a person did not have to take direct part in hostilities; motivation to take part in hostilities for private gain when sent by a State not party to the conflict was enough to deserve the title of a mercenary.⁹⁷ Under the second definition, if the recruitment occurred under similar circumstances but for the purpose of a concerted act of violence directed towards the sovereignty of a state with the desire of obtaining “significant private gain,” the person was to be considered a mercenary.⁹⁸

⁹² Convention Against Mercenaries, *supra* note 67.

⁹³ *Id.* arts. 5–9.

⁹⁴ *Id.* arts. 2–5.

⁹⁵ *Id.* art. 1(1).

⁹⁶ *Id.* art. 1(2).

⁹⁷ *See id.* art. 1(1).

⁹⁸ *See id.* art. 1(2).

While the Convention Against Mercenaries includes a greater number of actors, expands the definition of mercenarism to instances where no armed conflict existed, and establishes responsibilities for States,⁹⁹ the Convention received little support from Member States. To date, of the 193 Member States, only thirty-seven nations are parties to the treaty.¹⁰⁰ When only nineteen percent of states have ratified the treaty and permanent states of the Security Council act contrary to its provisions, the treaty cannot be said to constitute customary international law.¹⁰¹ At the same time, the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination (“Working Group Against Mercenaries”)—formed in 2005 with the purpose of monitoring mercenary activities and analyzing the evolution of this phenomenon—declared in 2007 that PMSCs were distinguishable from mercenaries because, even though they performed similar activities, PMSCs were legitimate, registered, and licensed businesses, which did not align with the definition of a mercenary.¹⁰² By announcing that private companies were different from mercenaries simply because they were legitimate businesses, the Working Group Against Mercenaries legitimized the use of PMSCs and allowed their proliferation.¹⁰³

IV. COMPELLED MERCENARISM

The three main international legal instruments against mercenarism focus on mercenaries as individuals with agency and who are willing to commit the offense for private gain, but the legal instruments overlook or ignore instances in which people may be recruited uninformed or against their will for the purposes of mercenarism.¹⁰⁴ By defining “mercenary” as anyone who is recruited into mercenarism, regardless of recruitment practices, these instruments deprive civilians recruited under coercive, deceptive, or fraudulent practices from protections afforded to civilians.¹⁰⁵ At the same

⁹⁹ *Id.* arts. 2–5.

¹⁰⁰ 6. *International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, Status of Treaties, Depositary*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-6&chapter=18&clang=_en [<https://perma.cc/L449-XBYN>].

¹⁰¹ Govern & Bales, *supra* note 70, at 88.

¹⁰² Krahnmann, *supra* note 26, at 359; *see also* Working Group on Mercenaries, *supra* note 50, ¶ 2.

¹⁰³ Krahnmann, *supra* note 26, at 359.

¹⁰⁴ Protocol I Article IV prohibits specifically the recruitment of children into the armed forces or “groups”; therefore, even though the drafters had forced recruitment in mind, it can be inferred that they chose not to include forced recruitment of adults. G.A. Res. 54/263, art. 4, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (May 25, 2000).

¹⁰⁵ *See* AP I, *supra* note 66, art. 47(1).

time, while international legal instruments prohibit the forced recruitment of protected civilians, such as children, prisoners of war, or combatants *hors de combat* into armed forces or groups, they fail to protect healthy adult males against involuntary mercenarism.¹⁰⁶ The perception that all people working in mercenary groups do so voluntarily coupled with the rigid distinction between the protections afforded to healthy adults and vulnerable individuals has made it difficult for the international community to make sense of labor trafficking of PSCs.¹⁰⁷

A. The Trafficking Protocol

The Trafficking Protocol was one of three documents that supplemented the 2000 Convention Against Transnational Crime and the first international legal instrument to define and criminalize human trafficking and establish protections for its victims.¹⁰⁸ By providing standards for the definition of trafficking, mandating States to prosecute it under domestic law, and suggesting social benefits and protections for victims, the Trafficking Protocol provides tools for States to combat labor and sexual exploitation.¹⁰⁹ The Trafficking Protocol is to be considered in conjunction with a series of international legal instruments that address exploitation, directly or indirectly.¹¹⁰ The Trafficking Protocol does not constrict any rights or obligations arising from other legal instruments.¹¹¹ On the contrary, it adds and amplifies as provided in the text of the treaty.¹¹² Through ratification of the Trafficking Protocol, States bind themselves to the instrument, demonstrating their commitment to combating human trafficking internationally and domestically.¹¹³

1. Elements of the Trafficking Protocol

The Trafficking Protocol defines human trafficking of adults as following:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or

¹⁰⁶ Rome Statute, *supra* note 21, art. 8.2(v).

¹⁰⁷ *See infra* Part IV.A.3.c.

¹⁰⁸ *See* Trafficking Protocol, *supra* note 18, pmb1.; U.N. OFFICE ON DRUGS AND CRIME [UNODC], LEGISLATIVE GUIDE FOR THE PROTOCOL TO PREVENT, SUPPRESS, AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, ¶ 84 (2020) [hereinafter 2020 LEGISLATIVE GUIDE], https://www.unodc.org/documents/human-trafficking/2020/TiP_LegislativeGuide_Final.pdf [https://perma.cc/5UB9-MV4H].

¹⁰⁹ *See* Trafficking Protocol, *supra* note 18, arts. 2–5.

¹¹⁰ 2020 LEGISLATIVE GUIDE, *supra* note 108, ¶ 54.

¹¹¹ *Id.* ¶ 55.

¹¹² *Id.*

¹¹³ Trafficking Protocol, *supra* note 108, art. 16.

of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum . . . forced labour or services, slavery or practices similar to slavery, [or] servitude.¹¹⁴

Thus, human trafficking requires three elements (i) the act, (ii) the means, and (iii) the purpose. To be considered a victim of labor trafficking, a person must have been (i) recruited, transported, transferred, harbored or received, (ii) through the means of coercion, abduction, fraud, deception, or through the abuse of power or vulnerability, payments or benefits to achieve the consent of a person having control over another person (iii) for the purpose of exploitation, where exploitation includes at a minimum forced labor or services, slavery or practices similar to slavery.¹¹⁵ Even if the person initially consented to their employment, when any of the means are used for the intended exploitation, the person is still considered a victim of labor trafficking.¹¹⁶

Key terms in the definition of human trafficking were left intentionally vague to achieve greater consensus among States in defining and criminalizing a wide range of labor violations.¹¹⁷ Terms such as “coercion,” “abuse of power,” or “exploitation,” while vague, still signaled the power dynamics between the perpetrator and the victim and the coercive component of the act required for the commission of the crime.¹¹⁸ The *travaux préparatoires*, the U.N. Office on Drugs and Crime (“UNODC”) Model Trafficking Law, and the operational indicators by the International Labor Organization (“ILO”) and the European Commission were later written to unify and further elaborate on the definition of these terms, thus providing further guidance for practitioners and scholars in identifying and measuring the crime of trafficking in persons.¹¹⁹

a. The Act

In trafficking, the “act” is the first part of the *actus reus*.¹²⁰ The terms included are understood in their general definition.¹²¹ Recruiting involves the enlisting of a person into an organization or group.¹²² Transporting is defined as moving someone to a different location through air, land, or water, whether

¹¹⁴ *Id.* art. 3(a)

¹¹⁵ *Id.*

¹¹⁶ *Id.* art. 3(b).

¹¹⁷ GALLAGHER, *supra* note 19, at 32.

¹¹⁸ *Id.*

¹¹⁹ *See id.*

¹²⁰ *Id.* at 29.

¹²¹ 2020 Legislative Guide, *supra* note 108, ¶ 91.

¹²² *Id.* ¶ 92.

willingly or coercively. Transferring is defined similarly as transporting or as the passing over from person to person to exchange control over another.¹²³ Harboring includes housing a person or providing shelter, and receipt of persons includes accepting control of a person after she has been transported or transferred.¹²⁴

The mechanisms PMSCs use in contracting PSCs meet the first element of trafficking when PSCs are recruited, transported, transferred, and harbored across countries.¹²⁵ Governments or multinational PMSCs rarely employ PSCs from developing nations directly; instead, PMSCs use multiple layers of contracting and subcontracting where, for example, governments hold massive contracts with multinational PMSCs, such as the infamous KBR or Amentum (formerly known as DynCorp, Inc.), and these companies in turn employ small PMSCs.¹²⁶ For sophisticated operations, multinational PMSCs may hire U.S. corporate magnates or retired military personnel specialized in combat and security operations, but for lower ranking positions, they contract smaller PMSCs which hold contracts with even smaller PMSCs or third-party recruitment agencies.¹²⁷ Rather than recruiting people from different regions of the world based on their skill set, these companies target countries such as Nepal, Pakistan, Sierra Leone, El Salvador, or Colombia.¹²⁸ By recruiting people from nations that have endured decades of internal conflict, PSCs become valuable *vis-à-vis* their citizenship.¹²⁹ Colombians are typically hired because they are known as ex-military personnel trained by U.S. armed forces, “battle-tested” to fight rebels in jungles, and members of “paramilitary death squads.”¹³⁰ Nepalis are often described as loyal, “brave,”

¹²³ *Id.* ¶¶ 93–94.

¹²⁴ *Id.* ¶¶ 95–96.

¹²⁵ See Trafficking Protocol, *supra* note 108, art. 3(a).

¹²⁶ VICTIMS OF COMPLACENCY, *supra* note 17, at 21; see also *id.* at 15, 43; *Amentum Closes DynCorp International Acquisition*, AMENTUM (Nov. 16, 2020), <https://www.amentum.com/2020/11/16/amentum-closes-dyncorp-acquisition/> [<https://perma.cc/EZ4J-W5W7>].

¹²⁷ See Craig Whitlock & Nate Jones, *UAE Relied on Expertise of Retired U.S. Troops to Beef Up Its Military*, WASH. POST (Oct. 18, 2022, 6:00 AM), <https://www.washingtonpost.com/investigations/interactive/2022/uae-military-us-veterans/> [<https://perma.cc/APJ9-JQUZ>]; Sean McFate, *America’s Addiction to Mercenaries*, ATLANTIC (Aug. 12, 2016), <https://www.theatlantic.com/international/archive/2016/08/iraq-afghanistan-contractor-pentagon-obama/495731/>; VICTIMS OF COMPLACENCY, *supra* note 17, at 21.

¹²⁸ Hearing 1, *supra* note 10, at 2; Luis Jaime Acosta & Julia Symmes Cobb, *Why Were Colombian Ex-Soldiers in Haiti? Experts Say They Are Popular Mercenaries*, REUTERS (July 9, 2021, 8:52 PM), <https://www.reuters.com/world/americas/why-were-colombian-ex-soldiers-haiti-experts-say-they-are-popular-mercenaries-2021-07-09/> [<https://perma.cc/NEV4-FB27>]; Christensen, *supra* note 15, at 24.

¹²⁹ Eichler, *supra* note 12, at 606.

¹³⁰ See Emily B. Hager & Mark Mazzetti, *Emirates Secretly Sends Colombian*

“having a childlike playful innocence,” and as “natural military companion” to British military personnel.¹³¹ The global stereotype that the men in these countries have been trained to fight wars by colonial powers, which is often reproduced in the media, paired with the lack of employment opportunities in their home countries make them special targets for private military recruitment.¹³²

The next phase of the recruitment process is the transfer or transportation across different countries or regions.¹³³ After people are recruited as “security guards,” they either travel on their own or are transported to specific locations where they are supposed to work.¹³⁴ Sudanese men have traveled in groups to the United Arab Emirates where recruiters had supposedly secured them a job providing security for large businesses.¹³⁵ It is often during transit, however, that newly hired PSCs learn that the job is not what was promised.¹³⁶ PMSC personnel, who wait for PSCs at the airport, may immediately transfer them to a different location or force them to wait for weeks or months in confined conditions and without pay.¹³⁷ During transit, PSCs have been forced to undergo extensive military training,¹³⁸ stay in crowded residences,¹³⁹ or turn over their passports to PMSC personnel.¹⁴⁰

The final step of the recruitment process is the receipt of PSCs in the

Mercenaries to Yemen Fight, N.Y. TIMES (Nov. 25, 2015), <https://www.nytimes.com/2015/11/26/world/middleeast/emirates-secretly-sends-colombian-mercenaries-to-fight-in-yemen.html> [<https://perma.cc/B5Z2-GBCL>].

¹³¹ Amanda Chisholm, *Perspectives on Private Security: The Myth, the Men and the Markets*, in HANDBOOK ON THE INTERNATIONAL POLITICAL ECONOMY OF GENDER 196, 198 (Juanita Elias & Adrienne Roberts eds., 2018).

¹³² Higate, *supra* note 46, at 37; Richard Godfrey et al., *The Private Military Industry and Neoliberal Imperialism: Mapping the Terrain*, 21 ORGANIZATION 106, 116 (2014); see Hager & Mazzetti, *supra* note 130; Peter Suci, *Gurkhas: The World’s Most Famous Mercenaries (Known as Savage Soldiers)*, NAT’L INT. (July 11, 2020), <https://nationalinterest.org/blog/buzz/gurkhas-world’s-most-famous-mercenaries-known-savage-soldiers-164636> [<https://perma.cc/7MEK-QFD9>] (stating that Gurkhas motto is to “better die than be a coward”).

¹³³ See Trafficking Protocol, *supra* note 108, art. 3(a).

¹³⁴ See Hiba Zayadin, *Recruited as Security Guards in the UAE, Deceived into Working in Conflict-Ridden Libya Instead*, HUM. RTS. WATCH (Nov. 1, 2020), <https://www.hrw.org/news/2020/11/01/recruited-security-guards-uae-deceived-working-conflict-ridden-libya-instead> [<https://perma.cc/MA7B-Q7TE>].

¹³⁵ *Id.*

¹³⁶ See, e.g., *id.*

¹³⁷ See, e.g., *id.*

¹³⁸ See, e.g., *id.*

¹³⁹ See, e.g., VICTIMS OF COMPLACENCY, *supra* note 17, at 24.

¹⁴⁰ See, e.g., Darryl Li, *Offshoring the Army: Migrant Workers and the U.S. Military*, 62 UCLA L. REV. 124, 142 (2015).

country or region of destination.¹⁴¹ Once PSCs arrive at the final destination, these companies often provide shelter adjacent to the employment site but under substandard living conditions and with few opportunities to return to their home countries.¹⁴² PSCs have been confined in “dilapidated military compound[s],”¹⁴³ “overcrowded shipping containers,”¹⁴⁴ and camping tents “susceptible to [rocket-propelled grenades] shrapnel and debris.”¹⁴⁵ Because of the myriad of contracting and subcontracting, the company that harbors PSCs may be different than the one that transferred them or initially recruited them, which typically leads to diffusing or neglecting responsibility.¹⁴⁶ However, as shown above, PMSCs commit the “act” of trafficking in every layer of the recruitment process.

b. The Means

The “means” is the second part of the *actus reus*, and it relates to the tactics that perpetrators of trafficking use to convince their victims to provide labor.¹⁴⁷ The “means” include both physical and psychological methods.¹⁴⁸ The use of force or use of abduction is considered a physical or direct means while methods such as fraud, deception, abuse of power or abuse of vulnerability are considered psychological or indirect methods.¹⁴⁹ The Trafficking Protocol does not define ambiguous terms, such as abuse of power or abuse of a position of vulnerability, giving nations leeway to define them according to national laws.¹⁵⁰ However, the inclusion of the abuse of a position of power or of vulnerability in the Trafficking Protocol brings subtle tactics of trafficking within the scope of the definition.¹⁵¹ Later guides have further clarified that abuse of power or of a position of vulnerability is the abuse that males exercise in a male/female relationship in certain cultures or the power that a parent may exercise over a child.¹⁵² In such situations, the

¹⁴¹ See Trafficking Protocol, *supra* note 85, art. 3(a).

¹⁴² See, e.g., VICTIMS OF COMPLACENCY, *supra* note 17, at 24.

¹⁴³ Zayadin, *supra* note 134.

¹⁴⁴ Li, *supra* note 140, at 144.

¹⁴⁵ NOAH COBURN, UNDER CONTRACT: THE INVISIBLE WORKERS OF AMERICA’S GLOBAL WAR 30 (2018).

¹⁴⁶ See CELLINE COLE & RESY VERMELTFOORT, U.S. GOVERNMENT CONTRACTORS AND HUMAN TRAFFICKING: TWO CASE STUDIES OF IRAQ AND BOSNIA-HERZEGOVINA 3–4 (2018).

¹⁴⁷ See Trafficking Protocol, *supra* note 108, art. 3(a); GALLAGHER, *supra* note 19, at 31.

¹⁴⁸ See GALLAGHER, *supra* note 19, at 31.

¹⁴⁹ See *id.* at 32.

¹⁵⁰ *Id.*

¹⁵¹ UNODC, ABUSE OF A POSITION OF VULNERABILITY AND OTHER “MEANS” WITHIN THE DEFINITION OF TRAFFICKING IN PERSONS 2 (2012), https://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf [<https://perma.cc/QH69-L3RB>].

¹⁵² *Id.* at 17.

exercise of control in the relationship and the position of vulnerability of the victim makes it impossible for them to escape the exploitation.¹⁵³

PMSCs commonly use fraud and deception to lure people into working as PSCs.¹⁵⁴ During recruitment, the location, nature, and conditions of employment is often misrepresented or hidden from the contractor.¹⁵⁵ For instance, PSCs have been lured into working as security guards for oil facilities or military bases in countries like Iraq, Yemen, or Libya after they were told they were recruited to work as security guards in malls or hotels in the United Arab Emirates.¹⁵⁶ While the title of their jobs may be the same, the skills required to guard a mall in a wealthy country may be completely different from those needed to guard a military base in a war zone. At the same time, people are relatively more willing to work in a relatively safe job in a wealthy nation than in a dangerous job in the middle of a conflict zone. Consequently, through fraud and deception, PMSCs continue to compel people to work these jobs.

Another way in which PMSCs misrepresent the conditions of employment is by promising a much higher wage than the PSC will actually earn.¹⁵⁷ At the time they accept their jobs, PSCs are promised two or three times more what they will earn.¹⁵⁸ These promises encourage them to acquire loans at high interest rates to pay for the documents required to travel and to subsidize their trips.¹⁵⁹ In addition, recruitment agencies often require people to pay exorbitant fees in exchange for securing a job overseas.¹⁶⁰ With their misguided belief in earning enough to cover all the trip expenses and the recruitment fee, PSCs obtain quick loans from unscrupulous lenders who, once eventually left unpaid, threaten the PSCs or their families with violence.¹⁶¹ Since impunity for crimes is often rampant in their home countries, the newly hired PSCs are subject to debt bondage and forced to

¹⁵³ *Id.* at 17–18.

¹⁵⁴ See Trafficking Protocol, *supra* note 108, art. 3(a); see, e.g., Adhikari v. KBR, Inc., No. 1:15-cv-1248, 2016 WL 4162012, at *3–4 (E.D. Va. Aug. 4, 2016) (discussing KBR’s “deceptive practices in recruitment” of Jordanian and Nepali men to work on U.S. military bases).

¹⁵⁵ See, e.g., VICTIMS OF COMPLACENCY, *supra* note 17, at 22.

¹⁵⁶ See *id.* at 15, 16, 22, 39; Zayadin, *supra* note 134.

¹⁵⁷ See Trafficking Protocol, *supra* note 108, art. 3(a) (including “forms . . . of fraud” and “deception” in defining the means by which “trafficking in persons” occurs).

¹⁵⁸ See Eichler, *supra* note 12, at 608; see also VICTIMS OF COMPLACENCY, *supra* note 17, at 6 (discussing laborer promised \$800 per month salary trafficked onto U.S. military base and paid \$150 per month).

¹⁵⁹ See Eichler, *supra* note 12, at 608; RAY JUREIDINI, INT’L LABOUR ORG., WAYS FORWARD IN RECRUITMENT OF LOW SKILLED MIGRANT WORKERS IN THE ASIA-ARAB STATES CORRIDOR 6 n.e (2016).

¹⁶⁰ See VICTIMS OF COMPLACENCY, *supra* note 17, at 6.

¹⁶¹ See *id.* at 26.

work until the debt is paid.¹⁶² While this may seem like an issue pertaining only to recruitment agencies, PMSCs have received kickbacks from recruiting fees.¹⁶³

PMSCs also abuse their position of power or the PSCs' position of vulnerability by confiscating PSCs' passports and belongings and threatening deportation, dismissal, or violence against their families.¹⁶⁴ Like any other migrant working abroad, PSCs are isolated from their social networks while being subject to immigration laws.¹⁶⁵ Without anyone to rely on and most times with linguistic or cultural challenges, PSCs become dependent on their employer to provide for the security and assistance they need.¹⁶⁶ Moreover, while some PMSCs are companies worth multi-billions of dollars with contacts in different regions of the world, PSCs are typically recruited from impoverished neighborhoods or towns with few resources to use to mobilize from one country to the next.¹⁶⁷ By seizing PSCs' passports, threatening them with calling the authorities, and otherwise abusing PSCs' condition as migrants, PMSCs exercise complete control over PSCs through prohibited "means," which infringe upon PSCs' right of mobility, security, and livelihood.¹⁶⁸

c. The Purpose

The *mens rea* of trafficking is the "purpose" of exploitation.¹⁶⁹ As defined in the Trafficking Protocol, exploitation includes "at a minimum . . . forced labour or services, slavery or practices similar to slavery, [or] servitude."¹⁷⁰ Since exploitation manifests differently depending on the circumstances, the Trafficking Protocol left the definition of exploitation intentionally unspecified to give room for countries to include the many instances in which exploitation may occur.¹⁷¹ Trafficking is a crime of specific intent, in which

¹⁶² *See id.*

¹⁶³ James Sinclair, *Outsourcing and Bonded Labour in Military and Diplomatic Security Services*, in PUBLIC PROCUREMENT AND HUMAN RIGHTS 151, 153 (Olga Martin-Ortega & Claire Methven O'Brien eds., 2019). *See generally* JUREIDINI, *supra* note 159.

¹⁶⁴ *See* Trafficking Protocol, *supra* note 108, art. 3(a) (including "threat or use of force or other forms . . . of the abuse of power or of a position of vulnerability" to define the means by which "Trafficking in persons" occurs).

¹⁶⁵ *See* UNODC, THE ROLE OF RECRUITMENT FEES AND ABUSIVE AND FRAUDULENT RECRUITMENT PRACTICES OF RECRUITMENT AGENCIES IN TRAFFICKING IN PERSONS 6–7 (2015), https://www.unodc.org/documents/human-trafficking/2015/Recruitment_Fees_Report-Final-22_June_2015_AG_Final.pdf [<https://perma.cc/YG8Z-75H6>].

¹⁶⁶ *See id.* at 7.

¹⁶⁷ *See, e.g.*, COBURN, *supra* note 145, at 26–27.

¹⁶⁸ *See* 2020 Legislative Guide, *supra* note 108, ¶ 268.

¹⁶⁹ GALLAGHER, *supra* note 19, at 34.

¹⁷⁰ Trafficking Protocol, *supra* note 108, art. 3(a).

¹⁷¹ GALLAGHER, *supra* note 19, at 38.

the perpetrator does not need to complete the exploitation for trafficking to occur.¹⁷² If the perpetrator intended or knew of the exploitation purpose, the *mens rea* of trafficking or the “purpose” is satisfied.¹⁷³

One of the enumerated forms of exploitation in the Trafficking Protocol is “forced labour.”¹⁷⁴ The 2020 Legislative Guide for the Trafficking Protocol explains that forced labor and human trafficking may be interrelated, but they are not necessarily the same because some forms of trafficking may not raise to the level of forced labor while some forms of forced labor may not raise to the level of human trafficking.¹⁷⁵ Related international instruments to the Trafficking Protocol, such as the Convention Concerning Forced and Compulsory Labour of 1930 (“Convention Concerning Forced Labor”) and the Convention Concerning the Abolition of Forced Labour of 1957 (“Treaty for the Abolition of Forced Labor”) are useful in conceptualizing forced labor.¹⁷⁶

According to Article 2 of the Convention Concerning Forced Labor, the definition of forced labor has three elements: (1) “all work or service” (2) “exacted from any person under the menace of any penalty,” (3) “for which the said person has not offered himself voluntarily.”¹⁷⁷ Element (1) includes almost any work or service regardless of industry, sector, or legality of activity.¹⁷⁸ Work or services that a State imposes as part of civic duty, such as compulsory military service, communal service, or work resulting from a conviction—as long as it is supervised by public authorities—are exempted from the definition.¹⁷⁹ Element (2) refers to penalties that may compel people to work against their will, such as threats, violence, wage theft, or threats of deportation.¹⁸⁰ Element (3) refers to the willingness of the employee to enter into a contract with the employer for the services announced and their freedom to leave their jobs, if they so desire.¹⁸¹ As in trafficking, indicators used in compelling a person for work or services can point to the existence of forced labor.¹⁸²

The work of PSCs in the private military industry falls within the definition

¹⁷² *Id.* at 34.

¹⁷³ Trafficking Protocol, *supra* note 108, art. 5(1) (mandating criminalization of conduct defined under Article 3 “when committed intentionally”).

¹⁷⁴ *Id.* art. 3(a).

¹⁷⁵ 2020 Legislative Guide, *supra* note 108, ¶ 125.

¹⁷⁶ *See id.* ¶ 126.

¹⁷⁷ Convention Concerning Forced or Compulsory Labour art. 2(1), June 28, 1930, 39 U.N.T.S. 55 [hereinafter Convention Concerning Forced Labor].

¹⁷⁸ *Id.* art. 2(2).

¹⁷⁹ *Id.*

¹⁸⁰ *See* 2020 Legislative Guide, *supra* note 108, ¶ 129.

¹⁸¹ *Id.* ¶ 130.

¹⁸² *Id.* ¶ 131.

of “forced labor” as laid out in the Convention Concerning Forced Labor.¹⁸³ First, working as a security guard fits the definition of “work or services,” because the work or services of PSCs are not imposed by States as part of civic duty.¹⁸⁴ Instead, PMSCs are private companies that are not part of the government or owned by the government. Second, threats of violence and deportation, deprivation of food and water, wage theft and wage discrimination, which are methods PMSCs often use, fall within the category of “penalties” that compel people to work against their will.¹⁸⁵ Third, PSCs are unable to enter or leave the industry willingly when they are deceived, defrauded, and subjected to debt bondage; their passports are taken away, they are underpaid, their wages are stolen, and they are threatened with violence and deportation if they disobey orders, try to leave their jobs, or join strikes to fight for their rights.¹⁸⁶ Because the three elements in the definition are met, the work that PSCs do is considered forced labor.¹⁸⁷

Another treaty related to the Trafficking Protocol that may help conceptualize forced labor within the private military industry is the Treaty for the Abolition of Forced Labor.¹⁸⁸ Article 1 requires the abolition of forced labor in five enumerated areas, including political, economic, labor discipline, punishments for participating in strikes, and “as a means of racial, social, national or religious discrimination.”¹⁸⁹

In the private military industry, forced labor is used as a means of racial and national discrimination.¹⁹⁰ Not only are PSCs recruited, transported, transferred, and harbored through deceptive and abusive means and conditions, but they are also exposed to the most dangerous jobs based on racialized hierarchies.¹⁹¹ As explained by Noah Coburn, in U.S. military bases in Afghanistan, for example, racial and national hierarchies were “rigidly enforced.”¹⁹² In the inner layers of the military compounds were the Americans, Europeans, and South Africans who worked in positions of authority with the highest paying jobs.¹⁹³ Serbians, Romanians, and other Eastern Europeans were situated in more technical positions.¹⁹⁴ In the outer layers of the compounds were Nepalis running security, followed by darker-

¹⁸³ See Convention Concerning Forced Labor, *supra* note 177, art. 2(1).

¹⁸⁴ See *id.*

¹⁸⁵ See 2020 Legislative Guide, *supra* note 108, ¶ 131.

¹⁸⁶ See *id.*

¹⁸⁷ Convention Concerning Forced Labor, *supra* note 177, art. 2.

¹⁸⁸ Abolition of Forced Labor Convention, June 25, 1957, 1959 U.N.T.S. 291.

¹⁸⁹ *Id.* art. 1.

¹⁹⁰ See *id.* art. 1(e).

¹⁹¹ See COBURN, *supra* note 145, at 31.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

skin sub-Saharan and Eastern Africans, and in the most dangerous positions were the Afghans, “guarding the most dangerous gates with the oldest weapons and least training.”¹⁹⁵

The placement of security guards by citizenship and race may seem to some as “unfortunate but inevitable” due to global inequalities and needs of the market.¹⁹⁶ However, those in positions of authority within military compounds are paid fairly, provided with government benefits, and compensated when injured or killed while those in the periphery of the compounds are underpaid, required to sign contracts waiving their rights, subjected to debt bondage, provided with little safety equipment, threatened, and abused while being subjected to the most dangerous jobs.¹⁹⁷ Because PMSCs produce and reinforce global inequalities and white supremacy through forced labor, the work performed by PSCs is prohibited under the Treaty for the Abolition of Forced Labor.

2. Developments in the Fight of Human Trafficking in the Private Military Industry

Unlike regulations and conventions against mercenarism, the Trafficking Protocol presents a high level of endorsement. Of the 193 U.N. member states, 181 states have ratified the treaty, with 131 parties having fully compliant legislation.¹⁹⁸ While there is no consensus on whether the prohibition of human trafficking, as a form of slavery or slavery-like practices, has achieved a *jus cogens* status, over the past two decades the fight against human trafficking has gained traction worldwide.¹⁹⁹ Some of the most

¹⁹⁵ *Id.*

¹⁹⁶ Chisholm, *supra* note 15, at 352.

¹⁹⁷ See *id.*; NOAH COBURN, THE GUARDS, COOKS, AND CLEANERS OF THE AFGHAN WAR: MIGRANT CONTRACTORS AND THE COST OF WAR 6 (2017).

¹⁹⁸ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319; 12. *A Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Status of Treaties, Depository*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsq_no=XVIII-12-a&chapter=18 [<https://perma.cc/T6WD-RNY7>]; UNODC, GLOBAL REPORT ON TRAFFICKING IN PERSONS 31 (2022), https://www.unodc.org/documents/data-and-analysis/glotip/2022/GLOTiP_2022_web.pdf [<https://perma.cc/M5M3-VHD8>].

¹⁹⁹ Compare Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT'L L. 609, 611 (2014), and Anne Gallagher, *Using International Human Rights Law to Better Protect Victims of Human Trafficking: The Prohibition on Slavery, Servitude Forced Labor and Debt Bondage*, in THE THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW: ESSAYS IN HONOR OF M. CHERIF BASSIOUNI 397, 409 (Leila Sadat & Michael Scharf eds., 2008), with Prosecutor v. Ongwen, ICC-02/04-01/15, Observations on the Crimes of Sexual Slavery, Enslavement and Trafficking in Persons, and

important advances in combatting human trafficking are discussed below.

a. Creation of an Oversight Mechanism

To date, one of the most significant tools to encourage countries into addressing human trafficking has been the Trafficking in Persons (“TIP”) Report, understood as an oversight mechanism that encourages all countries to take proactive steps into addressing trafficking.²⁰⁰ Through the TIP Report, the U.S. Secretary of State informs the international community which countries are complying with minimum standards, efforts made by countries combating trafficking, and suggestions for next steps in addressing any existing gap.²⁰¹ By classifying countries on a three-tier scale, the U.S. government allows its president to restrict international assistance funding and limit support from international financial institutions.²⁰² By threatening States with economic sanctions, the U.S. has mobilized other countries into making significant efforts in prosecuting perpetrators of trafficking and protecting victims.²⁰³

b. Increasing Criminalization of Human Trafficking

Although the law on human trafficking is relatively new, there has been a general upward trend in the criminalization of human trafficking. The UNODC, for example, collects data on countries that enact domestic anti-trafficking laws and the number of convictions obtained. According to the 2020 Global Report on Trafficking in Persons, the number of convictions of perpetrators of trafficking nearly tripled since 2003, when the Trafficking Protocol entered into force.²⁰⁴ Additionally, reports show that the longer the

on the Grounds for Excluding Criminal Responsibility, ¶ 3 (Jan. 21, 2022), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_00285.PDF [<https://perma.cc/KB4S-WPJJ>], and Nicola Jägers & Conny Rijken, *Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations*, 12 NW. J. INT’L HUM. RTS. 47, 65 (2014).

²⁰⁰ Brianna Gehring, *What Is the Trafficking in Persons Report?*, HUM. TRAFFICKING INST. (July 19, 2022), <https://traffickinginstitute.org/what-is-the-trafficking-in-persons-report/> [<https://perma.cc/RA2Z-AEFC>]. It is noteworthy to mention that the TIP Report has been controversial. It is often argued that the U.S. has used the TIP Report as a tool to combat prostitution—not trafficking—and as a megaphone to attack countries that do not adhere to the same views on prostitution. See GALLAGHER, *supra* note 19, at 485.

²⁰¹ Gehring, *supra* note 200.

²⁰² Tier One: States that are fully compliant with minimum standards; Tier Two: States that may not be in full compliance but are making efforts to be compliant; Tier Two Watch List: States with special scrutiny; and Tier Three: States that are not fully compliant nor making significant efforts in to be so. *Id.*

²⁰³ GALLAGHER, *supra* note 19, at 485.

²⁰⁴ UNODC, GLOBAL REPORT ON TRAFFICKING IN PERSONS 16 (2020), https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTiP_2020_15jan_web.pdf [<https://perma.cc/A7DL-YY8S>].

statute has been in effect, the higher the number of successful prosecutions. European countries, which generally enacted domestic anti-trafficking laws prior to 2003, continue reporting higher conviction rates than other parts of the world, but those with newly established anti-trafficking laws show the steepest climb in prosecutions.²⁰⁵

c. Greater Protection for Victims

Human rights advocates have criticized the focus of the Trafficking Protocol on prosecution and its vague reference to remedies. However, over the years, subsequent international legal instruments have clarified and expanded the rights of victims and the obligations upon States in creating an effective law enforcement response.²⁰⁶ One example is the Recommended Principles and Guidelines of Human Rights and Human Trafficking crafted by the U.N. High Commissioner for Human Rights. Principle 7 is known as the “non-punishment principle,” which provides that “[t]rafficked persons shall not be detained, charged or prosecuted . . . for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.”²⁰⁷ The principle recognizes that victims of trafficking often engage in illegal conduct as a result of their victimization.²⁰⁸ By providing additional protections, the non-punishment principle ensures that victims are not criminalized for conduct they would have not committed but for their victimization.²⁰⁹

3. Challenges of the Trafficking Protocol

Anne T. Gallagher has rightfully stated that “[t]he Trafficking Protocol makes an easy target for attack.”²¹⁰ Despite the progress made since the Trafficking Protocol was adopted, several weaknesses prevent it from being applied in different sectors.²¹¹ In the context of the private military industry, three areas are of main concern: (1) the Trafficking Protocol has an overemphasis in protecting “women and children,” so the application of trafficking to PSCs is challenging as most are men; (2) to criminalize

²⁰⁵ *Id.* at 16–17.

²⁰⁶ See Anne T. Gallagher, *Two Cheers for the Trafficking Protocol*, 4 ANTI-TRAFFICKING REV. 14, 19–20 (2015).

²⁰⁷ U.N. Off. of the High Comm’r for Hum. Rts., *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, ¶ 7, U.N. Doc. E/2002/68/Add. 1 (May 20, 2002).

²⁰⁸ INTER-AGENCY COORDINATION GRP. AGAINST TRAFFICKING IN PERSONS, NON-PUNISHMENT OF VICTIMS OF TRAFFICKING 1 (2020), https://icat.un.org/sites/g/files/tmzbd1461/files/publications/19-10800_icat_issue_brief_8_ebook_final.pdf [<https://perma.cc/EV3J-7A76>].

²⁰⁹ *Id.*

²¹⁰ Gallagher, *supra* note 206, at 14.

²¹¹ *Id.* at 15.

trafficking, it is not enough that each element of trafficking is met; instead, all elements must be met in conjunction; (3) since PSCs are seen as “mercenaries,” the concept of the “ideal victim” makes it difficult for the international community to grasp the victimization of this group.

a. Protecting Women and Children

The overemphasis in protecting women and children has been one of the main criticisms of the Trafficking Protocol.²¹² During negotiations in its drafting, the definition of trafficking was one of the key contested issues.²¹³ Initially, proposals called for the trafficking protocol to focus only on women and children; however, during the negotiations, most States expressed a preference for including all persons instead of just women and children.²¹⁴ Unlike previous legal instruments addressing sexual exploitation where the focus was solely on women and girls, there was a greater recognition that men could also be victims of trafficking.²¹⁵ Despite this awareness, it was agreed during negotiations that the protection of women and children would be a focus of the protocol.²¹⁶ While over the years, despite recognition that men can also be victims of labor and sex trafficking, stereotypes of victimization and the expressed emphasis on protecting “women and children” have channeled enforcement efforts into identifying, protecting, and rescuing this specific group.²¹⁷

b. A Crime of Specific Intent

A crime of specific intent is one where the defendant committed the *actus reus* while intending to achieve a desired outcome.²¹⁸ This Note applied each element of the Trafficking Protocol to PSCs to demonstrate the different ways in which PSCs are exploited;²¹⁹ however, human trafficking is a crime of specific intent.²²⁰ In other words, to obtain a conviction of human trafficking, it is not enough to prove each element on its own.²²¹ Rather, it

²¹² See GALLAGHER, *supra* note 19, at 26.

²¹³ *Id.*

²¹⁴ *Id.* at 25–26.

²¹⁵ *Id.* at 20.

²¹⁶ *Id.*

²¹⁷ See Saskia Blume, *Masculinity and the “Ideal Victim” in the U.S. Trafficking Discourse* 4 (Univ. of Oxford, Working Paper, 2015), https://www.compas.ox.ac.uk/wp-content/uploads/WP-2015-124-Sassen_Masculinity_Ideal_Victim.pdf [<https://perma.cc/U7X7-GKRZ>].

²¹⁸ Daphne Demetriou, *The Mens Rea of Human Trafficking: The Case of Migrant Domestic Workers*, 29 INT’L CRIM. J. REV. 262, 267 (2019).

²¹⁹ See *supra* Part IV.A.1.

²²⁰ Demetriou, *supra* note 218, at 267.

²²¹ *Id.*

must be demonstrated that a perpetrator committed the “act” of trafficking through the stipulated “means” for the *purpose* of exploitation.²²²

In the context of private militarization, proving specific intent is particularly challenging. Oftentimes, the recruitment agency in the country of origin does not have a direct link to the employer in the country of destination, but the recruitment agency holds the debt that bounds the worker to the employer.²²³ In these cases, even if the worker is being subjected to indentured servitude or other forms of exploitation by PMSCs, holding the recruitment agency accountable for trafficking would require proving that the recruitment agency recruited the PSC through one of the “means” for the specific intent or knowledge that the PSC would be subjected to exploitation.²²⁴

While some recruiters charge exorbitant fees to pay for travel expenses or connect the PSC with the PMSC, recruiters may argue that they are not doing so with intent or knowledge that the worker would be exploited.²²⁵ Instead, they may argue that the fee was charged at such a rate because the person did not have collateral or the loan was requested in urgency.²²⁶ While exorbitant fees may imply bad faith, it is difficult to prove that the act rose to the level of trafficking when the recruiter was unaware of the conditions of labor at the destination country.²²⁷ Similarly, the employer in the country of destination may be subjecting the worker to substandard conditions of employment while being aware of the debt the person incurred to obtain the job, however, if the conditions of employment do not rise to the level of “slavery-like” practices and the employer did not intend to subject the worker to debt bondage, then trafficking cannot be proven.²²⁸ Therefore, the longer the chain of contracting and subcontracting, the more difficult it is to prove that trafficking occurred.²²⁹

c. Private Security Contractors and the “Ideal Victim”

Another difficulty in applying the Trafficking Protocol to PSCs is the myth of innocence and helplessness around victimization.²³⁰ Adam White explains that “‘victimhood’ is not an objective assessment of sustained harm [but] rather a socially constructed process reflecting a particular view of the

²²² *Id.*

²²³ See Godfrey et. al., *supra* note 132, at 116.

²²⁴ See Demetriou, *supra* note 218 at 266.

²²⁵ See *id.* at 266–67.

²²⁶ See *id.*

²²⁷ See *id.* (discussing how knowledge of exorbitant debt might meet “menace of a penalty element”).

²²⁸ See *id.*

²²⁹ See *id.* at 270.

²³⁰ White, *supra* note 15, at 199.

world.”²³¹ In other words, a victim is not simply a person who has endured harm, but one whom society views and accepts as a victim. In 1986, Nils Christie defined this socially constructed image of a victim, as the “ideal victim.”²³² Christie explained that to elicit sympathy, a victim is expected to be innocent, vulnerable, helpless, and submissive.²³³ Kathleen Cavanaugh applied the concept of the “ideal victim” to victims of rendition, explaining that the State, attempting to control the narrative (and avoid responsibility), dichotomizes “victims” and “terrorists.”²³⁴ On one side is the “ideal victim,” as a “powerless, helpless innocent” figure, and on the other side are the “terrorists” who have committed such horrific violations that they could not possibly be human.²³⁵

In applying the concept of the “ideal victim” to the context of trafficking of PSCs, it is easy to see why PSCs are rarely considered victims. Whenever PSCs are highlighted in the media, they are sensationalized as “soldiers of fortune,” “war dogs,” or “mercenaries.”²³⁶ Through this lens, PSCs are seen as people who are driven solely by money and do in fact earn large sums of money; who lack restraint or are excessively violent; and who are criminals under international law.²³⁷ Since PSCs are seen as healthy adult males who are ready for war no matter the consequences, the concepts of innocence, vulnerability, helplessness, and submissiveness are not applicable to them. Therefore, in spite of the systemic exploitation they experience, in the public eye, PSCs are “terrorists” who cannot possibly be victims of a transnational crime.

CONCLUSION

The methods used to recruit Colombian veterans to assassinate the Haitian President, Jovenel Moïse, resemble the same methods that have been used to recruit PSCs to work in other regions of the world. If true that CTU (1) recruited the Colombian veterans (2) through deceptive and fraudulent methods regarding the nature and conditions of employment, abusing the veterans’ position of vulnerability during the worst phase of the COVID-19 pandemic, (3) for the purpose of forced labor or extermination, CTU subjected the veterans to labor trafficking. At the same time, by (1) specially recruiting foreign fighters abroad, (2) for the purpose of participating in a

²³¹ *Id.*

²³² Nils Christie, *The Ideal Victim*, in FROM CRIME POLICY TO VICTIM POLICY: REORIENTING THE JUSTICE SYSTEM 17, 18 (Ezzat A. Fattah ed., 1986).

²³³ *Id.*

²³⁴ Kathleen Cavanaugh, *Unspoken Truths: Accessing Rights for Victims of Extraordinary Rendition*, 47 COLUM. HUM. RTS. L. REV. 1, 10–11 (2015).

²³⁵ *Id.*

²³⁶ See MCFATE, *supra* note 16, at 9, 15.

²³⁷ See *id.* at 9.

concerted act of violence (i) aimed at overthrowing a government (3) while motivated essentially by the desire for significant private gain and being prompted by the promise or payment of material compensation, the chain of individuals who contracted and subcontracted the veterans, as laid out in the Convention Against Mercenaries, committed mercenarism.

Like hundreds of other recruiting agencies and small PMSCs, CTU lied about their clientele, profited off the PSCs' exploitation, and induced their contractors to perform tasks they would not do but for the exploitative situation. While many details of the investigation remain uncertain, the similarities between the latest publicized atrocities and the thousands of other cases that have occurred since the end of the Cold War are not a coincidence.

The assassination of the Haitian President is a clear example of the harm that labor trafficking causes, not only to its victims, but to countries that are already politically and economically destabilized. While the world has moved on from Haiti and news headlines are now sensationalizing "mercenaries" in Ukraine, Haiti is still enduring the consequences of the assassination of its president. In the meantime, the private military industry continues proliferating with the same secrecy and lack of accountability. If governments continue to ignore their duty to address labor trafficking in the private military industry and the public continues to believe that every case of exploitation is an isolated incident, the plot to assassinate the Haitian President may not be the last time an impoverished country will face the consequences of labor trafficking in the private military industry.