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THESIS

**CONTRACTED LOGISTICS SUPPORT IN OPERATIONAL
ENVIRONMENTS: THE LEGAL ISSUES AND THEIR
EFFECTS ON THE DECISION TO OUTSOURCE**

by

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December 2001

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OUTSOURCE**

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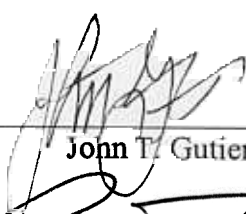
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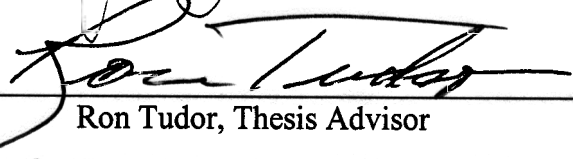
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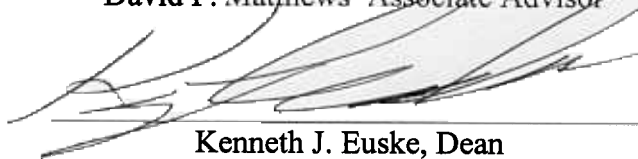


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ABSTRACT

Since the birth of the republic, the United States has relied on contractors on the battlefield to meet the shortfalls of the military's logistical system. The use of contractors has proven to be an integral part of the U.S. Armed Forces' warfighting capability. With the demise of the Soviet Union, the world has dynamically changed. No longer is the world in a bipolar power struggle over political ideologies. The post-Cold War environment has changed the geopolitical landscape and an environment now exists in which many Governments are trying to establish themselves as regional powers. As a result, the United States has undergone a radical change in its force structure and doctrine. America's Armed Forces are now deployed in greater frequency and length, than at the height of the Cold War. As a result of this phenomenon and other related factors, the U.S. Military is now more reliant than ever on Contracted Logistics Support.

A series of legal issues accompany the use of contractors in operational environments. This thesis analyzes the primary legal issues associated with using Contracted Logistics Support in contingency and/or combat operations. These legal issues are: 1) The U.S. Military does not possess the capability or authority to discipline contractors; 2) The U.S. Military cannot command and control contractors in the same way that it commands and controls military units and military personnel; 3) Commanders must ensure that contractors maintain their noncombatant status; and 4) Commanders must determine core capabilities versus those functions that can be outsourced, as well as, consider the risk of contractor non-performance. Each of these factors affects the commander's decision to use Contracted Logistics Support based on the operational environment. Therefore, this thesis will also analyze the decision-making process of determining the use of Contracted Logistics Support using the Recognition-Primed Decision Model. This research offers several recommendations and conclusions on how the use of Contracted Logistics Support can be improved from a legal standpoint. Recommendations include revising current U.S. law to address the current jurisdictional gap that exists, redefining contractors who accompany the force as combatants, and revising doctrine to reflect the recommended changes to U.S. law and the Law of War.

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I. INTRODUCTION

A. PREFACE

Contracted logistics is indisputably a force multiplier. It can provide a commander the benefit of having a robust logistics capability and can reduce the number of military personnel in foreign areas. Contracting support services is not a new concept. Contractors have supported the military since the Revolutionary War. Additionally, contractors have provided logistical support for military operations during the Mexican War, the American Civil War, both World Wars, the Vietnam War, the Korean War and the Persian Gulf War. However, the role of contractors, as well as, the role of our nation's military changed with the end of the Cold War.

The post-Cold War environment has reshaped our nation's military. The global bipolar power struggle ended with the United States emerging as the world's only superpower. This created an environment in which many Governments are now trying to establish themselves as regional powers. Additionally, the end of the Cold War caused the United States to undergo a radical change in its force structure and doctrine. First, America's bases and assets decreased after the Cold War and became more CONUS based, vice forward deployed. Also, the number of deployments increased. In addition, the U.S. Armed Forces have been deployed with greater length and frequency than at the height of the Cold War. Three factors have contributed to the increased role and use of contractors in a contingency/combat environment:

- Downsizing of the U.S. Military after the Cold War,
- Growing reliance on contractors to support high-tech weaponry and to provide initial or lifetime support of weapon systems,
- Privatizing functions that can be performed outside of the military.

Owing to these factors, the United States is more dependent than ever on civilian contractors to fill its logistical needs. These assets can clearly be beneficial in terms of cost and in terms of manpower. The Government has taken the initiative to develop Contracted Logistics Support, and now it must address the serious legal issues surrounding the use of contractors on the battlefield.

There are a number of existing regulations that provide guidance when employing civilian personnel in an overseas contingency mission. Title 10, section 129a, of the U.S. Code authorizes the Secretary of Defense to use civilian contracting if it is financially beneficial and if it is consistent with military requirements. The Department of Defense (DoD) Directive 1100.4, "Guidance for Manpower Programs," authorizes civilian personnel to be used in positions that do not require military personnel. Additionally, the U.S. Army has published FM 100-21: "Contractor Support on the Battlefield," as a reference to assist commanders and contracting officers in the use of contractors. Although the Government has addressed the use of contractors in a contingency/combat environment, many issues are still unclear. For instance, the command and control of contracted personnel still remains nebulous. In addition, legal jurisdiction over these personnel has raised concerns.

Recently, the Government changed the jurisdictional authority over contracted civilians accompanying the force. Previously, contractor personnel who supported U.S. forces during a declared war were subject to the provisions of the Uniform Code of Military Justice (UCMJ). Without this declaration of war, these contractors were only subject to the laws of the nation they occupied. This lack of application of U.S. criminal law outside U.S. special maritime and territorial jurisdiction, combined with the reluctance of some host countries to prosecute Americans (particularly for crimes committed against fellow Americans), made civilians virtually untouchable despite the commission of what would be serious crimes within the United States. At times, political pressure could be applied on a host nation forcing it to prosecute. Of course, if no host nation existed, this could not be done. In addition, if contractors committed an offense while supporting a military operation in a country hostile to the United States, turning them over to the enemy to be prosecuted was inconceivable. Additionally, as in the case of Somalia or Afghanistan, what would happen if no Government existed? A contractor who is there to support the U.S. national interest, could murder, rape, pillage, and plunder with complete impunity [Ref. 1:p. 8].

Under all conditions other than a declared war, contractors were not subject to the UCMJ. Thus, in most instances, authority over contractor personnel rested within the contractor's organization. The commander and contracting personnel could exercise

administrative control through the contractor's employer-employee agreements and the terms of the contract. Yet, little could be done to contractors who violated a commander's guidelines. Furthermore, a commander had no authority to discipline a contractor for refusing to perform as contracted. In an extreme situation, a contracted employee could be removed from the area, but this might be the limit to which a contractor could be punished. With the Government relying on Contracted Logistics Support more than ever, such refusal could seriously degrade the mission and could even jeopardize the lives of troops.

Indeed, as the General Accounting Office (GAO) and other sources indicate, the jurisdictional authority over contracted civilians must be improved. For instance, a study conducted in 1999 by the U.S. Army Combined Arms Support Command (CASCOM) addressed concerns that commanders did not have adequate control over all contractors, and that the commanders lacked clear legal jurisdiction over contracted civilians. Other concerns also surfaced. For instance, the existing regulatory guidance and policy regarding the legal status of contractors was not clear to most staffs and commanders.

To rectify these deficiencies, the Military Extraterritorial Jurisdiction Act (MEJA) was signed into law in November of 2000 and seemingly closed the previously existing jurisdictional gap. This new law extended Federal criminal jurisdiction to persons employed by or accompanying the Armed Forces outside of the United States. However, this law did not extend any form of UCMJ jurisdiction over such persons. Thus, in most instances, commanders and contracting personnel still have no authority over contractors who refuse to perform as contracted. A 1997 GAO report on contingency operations addressed the need for the Army to:

- Develop doctrine and guidance for implementing Contracted Logistics Support that would identify how to use the contractor effectively, how to establish a management structure, and how to control finances, achieve oversight, and plan missions;
- Provide training to commanders on how to employ Contracted Logistics Support and to explain their relative roles and responsibilities [Ref. 2].

Thus, the Government will need to improve current methods of contracting for Contracted Logistics Support in several ways.

B. RESEARCH OBJECTIVE

Given the increased significance of Contracted Logistics Support in current military operations, this research will evaluate the legal issues associated with the use of Contracted Logistics Support in a contingency environment. It will consider what laws govern contracted civilians in an operational environment and the legalities associated with using Contracted Logistics Support in a contingency/combat environment. Finally, this thesis will examine the contract support plan and how legal issues may affect a commander's decision to outsource or to use organic military logistics capabilities. This analysis will lead to conclusions and recommendations for improving the future use of contracted civilians accompanying a force.

C. RESEARCH QUESTIONS

The primary research question is, "What are the primary legal issues associated with using Contracted Logistics Support in contingency/combat operations, and what principal factors would affect the decision to outsource or to use organic military logistics capabilities?" The subsidiary questions are:

- Does current U.S. law adequately address these legal issues?
- Will MEJA adequately provide the U.S. Military with the authority over civilian contractors during contingencies/combat situations?
- How can a Status of Forces Agreement (SOFA) affect contracted civilians accompanying the U.S. Military?
- How does the Law of War apply to civilians who support combat/contingency operations?
- How can the overall use of Contracted Logistics Support be improved from a legal standpoint?

D. SCOPE, LIMITATIONS, AND ASSUMPTIONS

The scope of this thesis will be to present the historical evolution of Contracted Logistics Support, to examine the legislative history of MEJA, and to present the legal issues associated with Contracted Logistics Support within an operational environment. Additionally, this thesis will consider the contract support plan and the planning process involved in determining contractor involvement in an area of operations. Finally, this thesis will provide a thorough analysis of how these legal concerns can effect a commander's decision on whether to outsource or to rely on organic military logistics capabilities.

This research is limited to analyzing the legal issues involved in using Contracted Logistics Support during contingency/combat operations and what effects these legal issues might pose on the decision to outsource or to rely on internal logistics capabilities. Moreover, the historical evolution of Contracted Logistics Support will be limited to the American Revolutionary War, the Mexican War, the American Civil War, World War I, World War II, the Korean War, the Vietnam War, Operation Desert Storm, Operation Restore Hope and the current Balkans missions. Furthermore, this research is limited to the issues involved with the UCMJ and the MEJA of the U.S. Code, SOFAs, and International/Operational Law of War (the Hague Conventions and the Geneva Conventions).

The researcher assumes that the reader has a general understanding of the Federal procurement, U.S. Marine Corps, and U.S. Army force structure, terminology, and doctrine. Additionally, the researcher assumes that the reader has a basic knowledge of American history, and the reasons the United States has faced the conflicts. It is also assumed that the reader is familiar with contingency contracting, military training exercises and the operational and logistical requirements associated with these operations.

E. METHODOLOGY

The methodology used in this thesis includes a thorough literature search of prior research, books, periodicals, CD-ROM systems, applicable Department of Defense Inspector General (DoDIG) and General Accounting Office reports, other library resources about contingency contracting, the Uniform Code of Military Justice, Constitutional Law, and International/Operational Law of War, and other topics related to this thesis. Further information was obtained by interviews from contracting officers, contract administrators, program managers, officials from Brown and Root (a corporation that specializes in providing Contracted Logistics Support), Government contract law attorneys, and Judge Advocates from the Army, Navy, and Marine Corps. Additionally, data were collected during a visit to the Balkans Support Contract Award Fee Board and subsequent meetings at Headquarters, U.S. Army Europe and Seventh Army.

F. BENEFITS OF RESEARCH

This thesis primarily benefits the DoD in its contracting for, and managing of, Contracted Logistics Support. The research will facilitate DoD contracting decision-making regarding the most effective means of employing Contracted Logistics Support in a Contingency/Combat environment, thus benefiting operational forces and aiding in their decision making.

G. ORGANIZATION OF THE STUDY

Chapter I introduces the objective of the research, the primary and subsidiary research questions, the scope, limitations, and assumptions of the research, the research methodology, the benefits of the research, and the organization of the study. Chapter II defines the following terms: contingency contracting, contracting officer, declared contingency, declared war, humanitarian or peacekeeping operations, major regional conflict, and non-declared contingency. Next, Chapter II examines the historical use of civilians during combat operations and their use in recent humanitarian missions. Finally, it quantifies a trend in the use of Contracted Logistics Support and evaluates this phenomenon. Chapter III presents the primary legal issues associated with using Contracted Logistics Support and the history of the Government seeking jurisdiction of civilian contractors. Chapter III also discusses the laws that govern contracted civilians in operational environments. Finally, Chapter III examines the contract support plan and how a commander decides to outsource or to use organic military logistics capabilities. Chapter IV analyzes the legal issues governing contracted civilians on the battlefield in operational environments. Additionally, it analyzes how these issues can affect the contract support plan and the decision to outsource or to use internal logistics capabilities. Chapter V provides conclusions and recommendations based on research presented in earlier chapters. Moreover, Chapter V offers areas of further research to enhance the use of contracted civilians in operational environments.

II. DEFINITIONS AND BACKGROUND

A. INTRODUCTION

The employment of contracted civilians to provide logistics support to the Armed Forces in times of war and in peacekeeping/humanitarian missions has evolved to an unprecedented level since the birth of the nation. With this evolution, the Government has made a series of attempts to employ Contracted Logistics Support effectively and to define the role of contractors on the battlefield.

This chapter will present a series of definitions relevant to this thesis. Next, it will examine the historical use of civilians during combat operations and their use in recent humanitarian missions. Finally, it will quantify a trend in employing Contracted Logistics Support and will evaluate the relationship between U.S. troops and civilians in time of war.

B. DEFINITIONS

Contingency Contracting: The process by which essential supplies and services needed to sustain deployed forces are obtained on behalf of the United States Government. Contingency Contracting includes emergency contracting within the United States or outside the continental United States to support mobilizing and deployed units [Ref. 3:pp. 1-2].

Contracting Officer: An official with the legal authority to enter into, administer and/or terminate contracts. A contracting officer is appointed in writing through a warrant (SF1402) by a Head of Contracting Activity (HCA) or a Principal Assistant Responsible for Contracting (PARC) [Ref. 3:pp. 1-3].

Declared Contingency: A DoD contingency operation declared by either the Secretary of Defense when members of the Armed Forces may become involved in military actions against an enemy of the United States or declared by the President or Congress when uniformed forces are called on active duty under Title 10, United States Code or under any provision of law during a declared war or national emergency [Ref. 4:pp. 2-6].

Declaration of War: A formal announcement of hostile intentions by one country to another. In most nations, the power to declare war belongs to the executive or sovereign. The United States Constitution, in Article I, Section 8, vests this power in Congress, but the Supreme Court has held that the president may recognize a “state of war” by a foreign power or by domestic insurgents initiated against the United States [Ref. 5].

Humanitarian or Peacekeeping Operation: A military operation providing humanitarian or foreign disaster assistance or supporting a peacekeeping operation under Chapter VI or VII of the Charter of the United Nations [Ref. 4:pp. 2-7].

Major Regional Conflict: A conflict in which hostilities are ongoing, imminent or likely or in which a substantial commitment of U.S. Military forces exists [Ref. 4:pp. 2-7].

Non-Declared Contingency: Any contingency operation of the DoD other than declared contingencies [Ref. 4:pp. 2-7].

C. EARLY AMERICAN USE OF CONTRACTED LOGISTICS SUPPORT

1. Revolutionary War (1775-1783)

During the Revolutionary War, Congress appointed a number of posts to support General George Washington's Continental Army. Congress created the Quartermaster General and the Commissary General of Stores and Provisions Posts to provide the bulk of logistical support to Washington's forces. A series of inadequacies, primarily a lack of food and transportation to support the Continental Army, jeopardized the mission of this newly established supply system. This compelled Congress to grant the Board of War the authority to make contracts in 1781 and to authorize the use of contractors to provide logistical support to augment this unseasoned system [Ref. 6:p. 246]. For example, Congress specifically discouraged the use of soldiers as wagon drivers to avoid diminishing the strength of the line [Ref. 7:p. 30]. As a result, Washington was then able to use contractors to transport troops and provisions to West Point and Yorktown. Further uses of civilian manpower during the Revolutionary War included contracting engineering services to construct fortifications and defenses [Ref. 8:pp. 37-39]. Additionally, the Continental Army depended completely on hired surgeons to staff their medical facilities and to serve in forward areas [Ref. 7:pp. 33-34].

2. Mexican War (1846-1848)

During the Mexican War, the most significant problem for the U.S. Military logistical system was a lack of manpower. As a result, the military hired several thousand men to perform basic logistical functions. Most of these contracts were for the purchase or charter of vessels or for the transportation of specified troops or supplies [Ref. 8:p. 130]. Thus, because the U.S. Military lacked a uniformed transportation corps, Contracted Logistics Support provided the bulk of the transportation support to the

American Army. This transportation included wagons, drivers, pack mules, and maintenance personnel. Although some senior officers felt that soldiers should conduct these support functions, most officers believed civilians should be used [Ref. 8:pp. 154–156]. Employing civilians provided more troops for combat. However, the Army soon realized that retaining contractors beyond six months was difficult. It further recognized that this lack of retention threatened the Army. Consequently, Brigadier General Thomas S. Jesup, the Quartermaster General, with the support of the Secretary of War, strongly encouraged establishing a corps of workers, who would be subject to the laws of the Army and who would be provided with the same advantages of troops on the line [Ref. 8:p. 133]. However, this action did not take place and Congress did not feel the need to address this issue after the war.

3. Civil War (1861–1865)

Throughout the Civil War, Union soldiers often worked in support billets, for example, serving as wagon drivers. This use significantly reduced the combat strength of the line regiments and diminished their warfighting capabilities. However, in most other areas, the Union augmented itself with contracted civilians to sustain its forces. For instance, to support their field armies, the Union created a small military staff and civilian staff of about 25,000 civilians who were responsible for operating 2,100 miles of captured or constructed telegraph lines [Ref. 8:p. 170]. At this point, communications had evolved into a very important asset for the military commander. Therefore, the U.S. Military Telegraphs were structured for exclusive use of military traffic under the Secretary of War. Most of the organization's operators and linemen were civilian. The Union's extensive contracting of medical personnel was another example of outsourcing. For instance, nearly half of the Union Army's surgeons were contracted civilians [Ref. 7:p. 34]. Additionally, the Union's Military Division of the Mississippi remained civilian throughout the war, for many senior military officer's preferred that civilians perform construction, engineering, maintenance, and other similar duties because these civilians were more skilled than average soldiers [Ref. 8:p. 170].

Quartermasters easily procured rations in local areas. Thus, supplying food to the Union forces presented few problems. This was due to businessmen known as Sutlers, who would follow the force and sell food directly to units. Sutlers enjoyed legal status

under military law, but were theoretically subject to price controls. The use of Sutlers was certainly controversial, and indeed many of these individuals exploited the Army and individual soldiers, yet the Sutlers were instrumental in supplementing normal supply trains [Ref. 9:p. 28]. In fact, the Sutlers enabled the Army to discourage the age-old practice of foraging. During this period, to curtail the abuses that some Sutlers perpetrated, Congress took a series of steps making the Sutlers subject to military law and, if indicted for fraud, subject to court martial [Ref. 10:p. 74].

In contrast, Confederate forces were constantly plagued by supply shortages and lacked effective logistical support, especially throughout the Gettysburg Campaign. Overall, Confederate forces were ill-fed and poorly equipped. Southern Quartermasters were not able to purchase many critical items when they were forward deployed. This was because the Confederate currency was virtually worthless and the Confederates lacked support from the local vendor base [Ref. 11]. This situation helped weaken General Lee's capability to wage an effective offensive campaign.

Nevertheless, Confederate forces, while in the Dixie states, were generally able to forage and purchase supplies from sympathetic vendors. Even though Confederate logistics were managed more poorly than their Union counterparts; Southern forces had an advantage, for they were closer to their bases. However, this advantage did not endure through this war of attrition and eventually contributed to the demise of the Confederate forces. Despite the limitations of Southern industry and agriculture, despite Confederate losses of logistically critical areas, despite indifferent management of the Confederate armies' supply systems, despite the gradual breakdown of the Confederacy's internal transportation system, and despite the Union blockade, the Confederacy did not lose a battle or campaign from a shortage of supplies until the end. Then, supply failures converged with numerous other calamities to disintegrate the Confederate armies [Ref. 12:p. 132].

D. USE OF CONTRACTED LOGISTICS SUPPORT IN OVERSEAS CONFLICTS

1. World War I (1917–1918)

The military's reliance on contractors in the field declined during World War I. This was due, in large part, to the sheer numbers of soldiers deployed. On October 31,

1918, the American Expeditionary Forces had 1,118,000 officers and men in the theatre of operations and another 855,600 in the rear. In addition, 47,400 civilian workers and 35,000 prisoners of war were used as laborers to support the Army effort [Ref. 13:p. 437]. Throughout the war, the Army's Service of Supply (SOS) branch faced serious problems acquiring and employing service troops. After several weeks of study in the summer of 1917, General Pershing's staff prepared a Service of the Rear Project, which categorized the number of service troops considered necessary: a total of 329,653 for an army of 1,328,448 men, or not quite 25 percent [Ref. 8:p. 365]. In order to meet this demand, the Army considered relying on contracted civilians for construction, depot operations, and communications within the SOS.

However, the Army believed that the problems of administering and controlling these civilians would be too complicated. Therefore, it did not pursue this option and endured a shortage of personnel throughout the war [Ref. 8:p. 365]. With the advent of the truck and the Motor Transport Corps during this conflict, more than half of all drivers during this conflict were service members. The Army Transport Service managed about 1,000 miles of French railroads, using 2,200 French civilian crewmen as well as U.S. railroad troops [Ref. 7:p. 31]. The U.S. Army employed 34,000 civilian engineers and had 77,000 troops working on base construction projects, depots, ports, and roads. After the American Expeditionary Force contracted to use existing French and British telephone cables, they brought more than 250 civilian switchboard operators into the theatre. About 1,600 civilian personnel with the American Red Cross, serving as volunteers in France, provided supplemental medical care, such as convalescence. In addition, the Army completely depended on civilian crews to man both Army-owned and chartered vessels. When the U.S. entered World War I, the Army could not retain these crews. Civilian merchant seamen were leaving these positions for higher-paying jobs on other vessels. As a result, the Navy replaced the civilians with sailors.

2. World War II (1941-1945)

As in World War I, the United States used fewer civilians on the battlefield in World War II. Again, this decrease was largely due to the sheer number of service members deployed. However, even with the large force structure, the Government was forced to seek contracted civilians to meet its manpower deficiencies. For instance, by

the end of World War II, the Army owned, chartered, or otherwise employed 1,706 oceangoing ships and 33,846 civilian seamen. Once again, the military faced disciplining, commanding and controlling civilians. This raised such serious concerns that the Chief of Transportation considered proposals for militarizing crews. However, he concluded that hiring or contracting civilians was more effective because experienced and competent workers were needed. Moreover, he did not want to draw off soldiers required for combat duties. In order to stabilize crew strength, these civilians were exempt from the draft.

The Army increasingly used air transport during World War II as a means of deploying troops and supplies. Originally, military resources provided this transportation method. However, as the Services required more air transportation, the Government relied on contracted commercial aircraft to meet this need. The Services also heavily relied upon contractors for other means of transportation services. For example, with several battalions of railroad troops, the Military Railway Service supervised and directed the use of French railroads. The French civilian contractors provided the bulk of manpower to operate and to maintain the trains. Prior to the Normandy invasion, the General Contracting Agent estimated that 50,000 civilians could be hired in France by D+41 and 273,000 by D+240. The first civilians employed in France occurred on D+1, when the Provisional Engineer Special Brigade hired 37 civilians to help gather scrap materials. In liberated countries, civilian employment grew rapidly, reaching 237,000 by VE Day [Ref. 7:p. 32]. Port rehabilitation was extremely important for adequate logistical support, for which over 1,500 civilians were employed. A mobile engineering force of civilians organized into companies with military cadres grew to over 20,000. In Italy, 110,000 civilians were employed, mostly in base and port operations. In the Pacific a total of 292,000 civilians were employed in engineering roles. In contrast, by the end of the war, inside the China-Burma-India theatres, 174,000 civilians were employed mostly in engineering roles [Ref. 7:p. 32].

During World War II, and throughout the 20th century, military equipment became more complex. Thus, maintenance was a critical activity for which the Armed Forces relied on both civilians and service members. An example of this was during 1944 when the supply of tank engines became critically low in the European Theatre. To

solve this crisis, the Army contracted with two French firms [Ref. 7:p. 33]. Additionally, during this same period, the U.S. Government began hiring civilians to maintain combat vehicles. Just as in World War I, contractors were hired to operate and to repair communications equipment. For instance, in France, the Army depended on the French PPT (Postes Telegraphes et Telephones) system; in fact, the contracted French system carried twice as much military telephone traffic than any other military lines [Ref. 7:p. 32].

3. Korean War (1950–1953)

Military readiness declined between World War II and the Korean War. When hostilities began in Korea, the United States was unprepared to support a major overseas conflict. Once again, the country turned to civilian contractors to meet the logistical deficiencies of the American war machine. However, unlike both World Wars, which were unlimited wars, the Korean War was a limited war with external constraints on the U.S. Military's resources and manpower. The reason for such a civilian presence was the limited number of troops available due to ceiling strength restrictions [Ref. 7:p. 35]. Thus, employing civilians in place of soldiers was essential. For example, the G-4 of the Japan Logistics Command estimated that if soldiers had conducted all the supply and service functions in the Korean War, an additional 250,000 troops, which the Army did not have in the force structure, would have been required [Ref. 7:p. 35].

As the U.S. Military had done during previous conflicts, during the Korean War, it began using civilian contractors to assist in transporting supplies. For instance, more than 50,000 Koreans were organized as A-Frame porters to carry supplies for the American Army [Ref. 7:p. 31]. Later these civilian personnel were militarized into the Korean Service Corps to give military leaders more control over the civilians' actions. Once again, the Armed Forces contracted transportation support. Under the direction of the Navy's Military Sea Transport Service, chartered or Government shipping delivered or deployed most troops, equipment, and supplies [Ref. 7:p. 31]. In addition, the Korean War saw the first use of commercial aircraft for military transport to the Far East. Civilian-operated railroads provided rail support under a contract worth \$4,500,000 per month [Ref. 7:p. 32]. Furthermore, contracted civilians were the primary source of engineering support for this conflict. These contractors provided construction, road and

bridge repair, and port rehabilitation and operations. For example, the 36th Engineer Group in mid-1951 employed 1,700 troops and 2,000 civilians to work on 172 construction projects. Also, over 10,000 Korean and Japanese civilians were employed at Pusan for port operations. In the Japan Logistics Command, about one service member was reassigned to regular duties for every two civilians employed. Moreover, it was estimated that about 100,000 civilian contractors were working for Army service units in Korea [Ref. 8:p. 646].

4. Vietnam War (1964–1973)

In Vietnam, the United States was engaged in another limited Asian war. Again, the U.S. Military logistical system augmented their capabilities with contractors. The absence of deployable military logistics support units created a need for competent manpower that only contractor and civil service personnel could meet. They were used in great numbers for construction, transportation, maintenance, and other logistics support services. Early in the Vietnam buildup, it became apparent that the Government would have to rely on Contracted Logistics Support to meet the traditional support that military personnel provided [Ref. 14:p. 341]. Construction requirements exceeded the limits of the U.S. Military, forcing it to rely on contractors. U.S. contractors employed thousands of civilian personnel, bringing them to Vietnam for construction work. Additionally, both Third–World contractors from outside Vietnam and local Vietnamese contractors filled the needed requirements. Thus, civilian contractor support was heavily concentrated in base construction and facilities support. For example, about 51,000 civilians worked on all engineering projects during the buildup phase in 1966 [Ref. 7:p. 32].

In addition to construction, the U.S. Armed Forces depended upon contractors for other materials and services for the Vietnam War effort. The military's entire POL system was contracted to Shell, Esso, and Caltex; between 1965 and 1969 these companies shipped, stored, and delivered over 15 million tons of POL [Ref. 7:p. 31]. Transportation was another service that required outsourcing to contractors. Commercial truck companies were contracted in great numbers because of a shortage of military units. During this conflict, trucks provided the primary means of supply throughout the theatre

of operations. Commercial contracts handled as much as 60 percent of the truck transport in Vietnam [Ref. 9:p. 320].

5. Persian Gulf War (1990–1991)

On August 7, 1990, military forces from Iraq invaded the Republic of Kuwait. The United States responded immediately and initiated the largest contingency deployment of troops, supplies, and equipment ever undertaken by the U.S. Military. Logisticians faced challenges unparalleled since World War II [Ref. 9:p. 205]. The first thirty days of Desert Shield demonstrated this when the U.S. Military landed and processed over 38,000 troops, compared to 29,839 troops during the first thirty days of World War II [Ref. 15:p. 7]. Even though the U.S. Armed Forces executed a brilliant logistics campaign that moved an unprecedented volume of personnel and material, shortfalls that required Contracted Logistics Support still occurred. The United States relied substantially on contractors for transportation support. For example, the U.S. Marines operated well inland with a line of supplies stretching from the port of Al Jubal in Saudi Arabia, 250 miles across the desert to Kuwait City. This enormous supply line resulted in a shortage of transportation equipment. This shortage was alleviated only by commercial transportation support. Additionally, contracted civilians assumed most billeting, food service, sanitation, and maintenance duties. This conflict also saw many U.S. units actively contracting for commercially available supplies, such as tires, batteries, and other items that were not available through normal DoD supply channels.

Traditionally, the tooth-to-tail ratio of combat troops to support troops has been roughly 1 to 3. For Desert Shield and Desert Storm, the ratio increased to 1 to 5 due to the distances involved and the duration of the operation [Ref. 16:p. 1]. Again, as in past conflicts, U.S. forces lacked the necessary manpower to meet this requirement. As a result, they relied even more heavily on contractors to meet this shortfall than ever before.

E. RECENT USES OF CONTRACTED LOGISTICS SUPPORT

1. Operation Restore Hope (1992)

In the fall of 1992, President George Bush ordered American troops to deploy to the African nation of Somalia to support Operation Restore Hope. The troops' mission was to protect international relief workers from the rampant clan violence within the

region. Using all means necessary, including military force, the U.S. led a United Nations' multi-national coalition, which was tasked to protect humanitarian operations and to create a secure environment for eventual political reconciliation.

Operation Restore Hope required contractors to support the U.S. Military in a peacekeeping environment. However, at this point, the military adopted an improved concept, known as the Logistics Civil Augmentation Program (LOGCAP), which used contracted civilians, employed in the theatre of operations. In 1985, the Army initially established LOGCAP to augment the logistical shortfalls of troops deployed overseas. Under this design, each Army component of the unified command individually planned and contracted for its own requirements. However, the program changed in 1992 and evolved into a centrally managed worldwide planning and services contract. The new contract met the requirements of the other Services. The 1992 LOGCAP contract required the contractor: (1) to develop a worldwide management plan and 13 regional plans; (2) to participate in planning and exercises; and (3) to execute the plans upon notification. The worldwide management plan was a general description of the equipment, personnel, and supporting services required to support a force of up to 20,000 troops in five base camps for 180 days, and for as many as 50,000 troops beyond 180 days [Ref. 2:p. 4].

In 1992, the U.S. Army Corps of Engineers awarded a Cost-Plus-Award-Fee (CPAF) contract to Brown and Root Services Corporation (BRSC) for one basic and four option years. This contract has since supported six contingencies (it is still supporting Operation Joint Endeavor) and its estimated contract value to date is \$4 billion. In 1997, the U.S. Army Material Command awarded the follow-on LOGCAP contract to DynCorp Aerospace Technology. This contract was also a CPAF type contract with one basic and four option years. However, it contained fixed-price line items for planning efforts. LOGCAP provided on-call worldwide logistical and engineering assistance for U.S. forces. The Statement of Work is very general and allows any type of troop support that can be paid with general funds. This broad generalized wording allowed the contracting officer, either the Procuring Contracting Officer (PCO) or Administrative Contracting Officer (ACO) to issue specific work requirements to the contractor in the form of "task orders" [Ref. 17:p. 7]. Although it is a cost-reimbursement contract, the contractor's fee

is based on the negotiated price for each task order. If the contractors exceed the negotiated price, the Government reimburses the contractors fully for their costs, but they are not paid any profit above their excess costs. The amount of their award fee may be reduced if they consistently have cost over-runs.

Brown & Root provided such services and products as power generation, food service, well drilling, repairs to existing buildings, waste disposal, fabrication of shower and latrine facilities, local labor for camp maintenance, language interpretation, bottled water, and fresh fruit and vegetables. All labor services were tasked and awarded through the LOGCAP contract. Field ordering officers initially contracted for services and then converted them to LOGCAP-employed Somalis. LOGCAP continued to be the largest employer and most important favorable economic influence on Somalia throughout the U.S. and the UN commitment of forces. For example, at the conclusion of Operation Restore Hope, the LOGCAP contract provided services that exceeded \$62,000,000 [Ref. 18:p. 6].

2. Balkan Theatre of Operations (1992–Present)

The United States has been providing forces to the Balkans Theatre since 1992. Major American Military involvement in the Balkans Theatre began upon the commencement of Operation Joint Endeavor when a NATO task force consisting of U.S. personnel was deployed to Bosnia to enforce the Dayton Peace Accords. These personnel were organized into an Implementation Force and were tasked with ending hostilities, implementing peace, and enabling and enforcing the freedom of movement. With this liberty, the economy could recover through the freedom of commerce. Additionally, the National Command Authority realized that U.S. Forces contributing to the local economy could accomplish its objective of economic recovery. This would be achieved through their purchases of supplies and services from local vendors. Later, to support Operation Joint Guardian, the United States deployed troops to Kosovo as part of the NATO Kosovo Force (KFOR). This mission shared many of the same objectives as Operation Joint Endeavor and focused on stabilizing the country by ending hostilities and by fostering peace and economic recovery.

The Army decided to use the LOGCAP contract in December 1995 to augment its forces that were part of the Bosnian peacekeeping mission. The LOGCAP contract was

structured to provide a range of logistics and engineering services. Examples of these services included troop housing and facilities, food service and laundry operations, base camp and equipment maintenance, and finally, cargo handling services throughout the area of operations. The Department of Defense has increasingly relied on contractors rather than soldiers to provide logistical services in the Balkans as force-level ceilings have been reduced. Furthermore, over \$2 billion of the \$13.8 billion spent on Balkan operations through March 2000 was for support services [Ref. 18:p. 3]. This contract eventually evolved to become the largest service–support contract in the history of the U.S. Armed Forces.

The benefits of using contractor support were evident in Operations Joint Endeavor, Joint Guard, and Joint Forge. BRSC provided the bulk of contractor support, which supplied troops with water, POLs, and laundry services. Using these contractors to free military personnel from these tasks resulted in great savings. The military workforce was then assigned military–specific duties.

Regarding the numbers of soldiers displaced through the use of contractor logistics support, several studies quantified and qualified the capabilities that contractors brought to Task Force Eagle in northern Bosnia. One study concluded that to replace the BRSC alone (not considering any other contractors), the Army needed approximately the equivalent of a reinforced–corps support group and two engineer battalions capable of vertical and horizontal construction [Ref. 17:p. 4].

Even though the BRSC significantly contributed to the success of the mission in the Balkans, some problems arose. For instance, a substantial amount of misunderstanding occurred regarding the scope and capabilities of the existing LOGCAP contract. As a result, the BRSC’s standards for performing the contracted services differed from the standard of the deployed commanders and soldiers. This miscommunication led to some diminished cooperation and capabilities [Ref. 19:p. 76]. The problems the military experienced with LOGCAP and the Balkans Support Contract initiated a series of audits and studies by numerous agencies, such as the General Accounting Office (GAO) and the Army Material Command (AMC). These studies raised questions about the legal status of contractors and the applicability of current

doctrine regarding command and control of these personnel. Thus, a move to improve the current use of Contracted Logistics Support in the Balkans and in future applications now exists.

F. CHAPTER SUMMARY

This chapter provides a historical prospective on the use of Contracted Logistics Support on the battlefield and its evolution to its current status. In addition, this chapter shows that the military has depended upon contracted civilians since the birth of the nation. As previously stated, the role of contractors and our nation's military changed after the Cold War. Operational commitments have increased while the military's force structure has decreased; thereby increasing the U.S. Armed Forces' need to outsource basic logistical functions.

War	Number of Civilians	Number of Soldiers	Ratio
Revolution	1,500	9,000	1:6
Mexican	6,000	33,000	1:6
Civil	200,000	1,000,000	1:5
WW I	85,000	2,000,000	1:20
WW II	734,000	5,400,000	1:7
Korea	156,000	393,000	1:2.5
Vietnam	70,000	359,000	1:6

Table 1. Civilian Participation in Combat [From Ref. 7:p. 34]

The data in Table 1 compares civilian contractors to soldier ratio for each war. The data quantifies the trend of U.S. forces relying on contracted logistics support to augment their warfighting capabilities. A trend appeared during the 19th century that indicates approximately one contractor supported six soldiers during these conflicts. During the 20th century this statistical correlation vanished. This phenomenon may be explained by the fact that both limited and unlimited wars were fought during the 20th

century. For instance, the higher ratio of soldiers to civilians during both World Wars may be attributed to the country's vast level of mobilization during these unlimited wars. In contrast, limited wars, such as Korea and Vietnam did not have the same level of mobilization and therefore required more civilian contractors to meet the military's shortfalls.

In more recent times, the use of contracted civilians during the Persian Gulf War and the numerous peace keeping/humanitarian missions has continued. For instance, 1 in 10 Americans deployed for NATO peacekeeping operations in Bosnia is a civilian. By contrast, 1 in 50 Americans deployed for the Persian Gulf War was a civilian [Ref. 20:p. 24]. (Note that these figures are for contractors deploying with troops and should not be compared with the figures in Table 1.) The number of civilian contractors will continue to rise as long as deployments increase while the total force structure decreases. Furthermore, as seen in many peacekeeping operations (i.e., Bosnia), ceiling-strength limits are imposed on forces deployed. This further increases the reliance on contractors because, in the case of the Balkans, the U.S. Armed Forces are not affected by the limits of troop strength. Clearly, Contracted Logistics Support has always played a role in operational environments and will continue to do so in the future.

III. LEGAL ISSUES, LAWS GOVERNING CONTRACTED CIVILIANS, THE CONTRACT SUPPORT PLAN

A. INTRODUCTION

Although Contracted Logistics Support provides a commander with a robust logistics capability without employing additional support troops, a variety of legal issues complicate the decision to use this resource. Since the 1990's, the U.S. Military has gradually addressed these concerns to guide contracting officers and commanders.

This chapter reviews the history of the Government's attempt to secure jurisdiction of civilian contractors. Next, it surveys the issues and laws that govern contracted civilians in operational environments. Finally, it examines the contract support plan and how a commander determines the necessity to outsource or to use organic military logistics capabilities.

B. HISTORY OF GOVERNMENT SEEKING JURISDICTION OF CIVILIAN CONTRACTORS

Since the 1957 Supreme Court ruling in *Reid v. Covert*, 354 U.S. 1, the military has sought legislation to reverse the court's decision to restrict the military's ability to court-martial civilians. For years, the Senate and House of Representatives passed legislation to give the military authority to court-martial civilians, but the legislation was never enacted. Until the late 1950's, the Government had the authority to prosecute American civilians accompanying the force. This jurisdictional authority was derived from the Articles of War, which Congress passed in 1775 and which remained in effect until 1949. The Articles of War established court-martial jurisdiction over retainers to the camp and over all persons accompanying or serving with the armies of the United States, and in time of war all such persons when in the field, both within and without the territorial jurisdiction [Ref. 21]. The Uniform Code of Military Justice (UCMJ), adopted in 1950, superceded the Articles of War. This new system extended jurisdiction over all persons accompanying the Armed Forces of the United States in time of war [Ref. 22].

In 1957, the U.S. Supreme Court issued a ruling that dramatically altered the military's court-martial authority over civilians accompanying the force. In *Reid v.*

Covert, a civilian, Clarice Covert, was accused of killing her husband, a U.S. Air Force sergeant stationed in England. As a dependent spouse residing with her husband on the base, she was tried by a court-martial for murder under Article 118 of the UCMJ. The court-martial asserted jurisdiction over Mrs. Covert under Article 2 (11) of the UCMJ and the military tribunal convicted her of murder and sentenced her to life imprisonment. During the appellate process, her counsel petitioned the district court for a writ of habeas corpus on the grounds that the Constitution prohibited trying her by military court-martial. The district court issued the writ and ordered her release from custody. This decision was immediately appealed to the U.S. Supreme Court. The Supreme Court ruled that civilians accompanying the military overseas are not subject to military jurisdiction except during a war [Ref. 23].

The court held that military court-martial jurisdiction was unconstitutional when applied to civilians during peacetime. Additionally, this decision allowed court-martial jurisdiction to continue in times of war, but the U.S. Court of Military Appeals further limited that jurisdiction to a congressionally declared war, in its ruling in *United States v. Averette* [Ref. 24]. Thus, these decisions created a jurisdictional gap whenever a civilian accompanying the force committed a crime during peacetime.

In 2000, the U.S. Court of Appeals for the Second Circuit issued a ruling that highlighted this problem. In *United States v. Gatlin*, 216 F.3d 207, the defendant was a civilian charged with sexually abusing his teenaged stepchild, the daughter of his active-duty wife, while living in military housing in the Federal Republic of Germany. Milton Gatlin, appealed a district court judgment, which convicted him following a guilty plea of sexually abusing a minor within the special maritime and territorial jurisdiction of the United States. The defendant argued that the district court lacked jurisdiction over his crime, which was committed on a U.S. Military installation in Germany. The court of appeals reversed the district court's judgment and dismissed the indictment against the defendant. The court noted that as a civilian, the defendant was not subject to the military law of the United States because the military installation was not under the special maritime and territorial jurisdiction of the United States [Ref. 25].

Senator Jeff Sessions (Republican–Alabama) first introduced the Military Extraterritorial Jurisdiction Act (MEJA) on April 13, 1999 as Senate Bill 768 [Ref. 26]. This bill had two general provisions. The first provision of the act extended the UCMJ during overseas contingency operations (both declared and non–declared) and extended extraterritorial application of U.S. Federal criminal laws, under Title 18 of the United States Code (U.S.C.), to anyone serving with, employed by or accompanying the Armed Forces of the United States. The second provision of Senate Bill 768 was to extend UCMJ jurisdiction to declared contingency operations overseas. Though the DoD supported extending Title 18 jurisdiction to crimes, such as felonies, it opposed expanding the UCMJ jurisdiction, particularly during contingency operations. The DoD's rationale for this reluctance included public concerns and constitutional questions, which could result in protracted litigation. The Government was also concerned that civilians might be subject to disparate disciplinary treatment, which would detract rather than enhance morale and the interests of justice. Finally, the DoD believed that expanding the extraterritorial application of the U.S. criminal laws overseas sufficiently met the needs of military commanders [Ref. 27].

While *United States v. Gatlin* proceeded through the courts, Congress responded to this jurisdictional issue. On November 16, 1999, Congressman Saxby Chambliss (Republican–Georgia) introduced HR 3380, which only sought to extend Title 18 U.S.C. jurisdiction to such crimes and excluded expanding UCMJ jurisdiction. Because this bill paralleled the DoD's position, the House viewed it more favorably than the broader S. 768. Less than six weeks after the Gatlin decision was issued, the House passed H.R. 3380, its version of Senate Bill 768. This bill was presented to the president and nine days later, on November 22, 2000 President Clinton signed the Military Extraterritorial Jurisdiction Act of 2000 (MEJA) into law [Ref. 28:p. 2].

The spirit of the law was meant to close the jurisdictional gap that had existed since the 1950's. The new law established Federal jurisdiction for crimes committed by civilians who accompany military forces outside the United States, under Title 18 U.S.C. Section 3261. However, jurisdiction to prosecute would remain under U.S. Article III courts and not with courts-martial [Ref. 29:p. 446]. U.S. Article III courts are those courts outlined in Section I, Article III of the U.S. Constitution. This section states:

The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office [Ref. 30].

C. LEGAL ISSUES OF CONTRACTED LOGISTICS SUPPORT

The challenges or issues generated from increased reliance on contractors to perform combat support functions are not new to the DoD. Repeated studies, audits, and articles have highlighted the U.S. Military's reliance on contractors. Additionally, they have stated the issues and risks involved in relying on Contracted Logistics Support during times of crisis. Both commanders and contracting personnel must consider key legal factors and risks when planning for Contracted Logistics Support. These factors, cited below, include the applicability of U.S. Code (Titles 10 and 18), Status of Forces Agreements and Operational/International Law of War:

1. Title 10, United States Code, Uniform Code of Military Justice

a. Applicability

Article I, Section 8 of the U.S. Constitution grants Congress the power to raise and support armies and a navy, to suppress insurrections, and repel invasion among other military related Governmental roles. Additionally, Congress has the authority to make rules and regulations for land and naval forces. Thus, the main source of legal authority in this area is Federal law. Congress' control over formation, organization, and authority over the military is unlimited and exclusive [Ref. 31].

The purpose of military law is to strengthen the national security of the United States and to provide the means for the military to maintain good order and discipline, enabling the military to be efficient and effective. Military law includes jurisdiction exercised by courts-martial and the jurisdiction commanders exercise with respect to non-judicial punishment. Military law consists of the UCMJ and other statutory provisions for the Government of persons in the Armed Forces, the unwritten common law of military service, as well as, any regulations authorized by the Commander-in-Chief of the Armed Forces under Title 10, Section 121, U.S.C. [Ref. 32].

Under Chapter I, Section 802, Article 2 of the UCMJ, persons that are subject to military law are defined as:

- (1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in the armed forces, from the dates when they are required by the terms of the call or order to obey it.
- (2) Cadets, aviation cadets, and midshipman.
- (3) Members of a reserve component while on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal Service.
- (4) Retired members of a regular component of the armed forces who are entitled to pay.
- (5) Retired members of a reserve component who are receiving hospitalization from an armed force.
- (6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.
- (7) Persons in custody of the armed forces serving a sentence imposed by a court-martial.
- (8) Members of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces.
- (9) Prisoners of war in custody of the armed forces.
- (10) In time of war, persons serving with or accompanying an armed force in the field. (Author's note: time of war is defined as a Congressionally declared war in *United States v. Averette*).
- (11) Subject to any treaty or agreement which the United States is or may be a party to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

(12) Subject to any treaty or agreement to which the United States is or may be a party to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

b. Non-Judicial Punishment

Article 15 of the UCMJ authorizes Non-Judicial Punishment (NJP) in the U.S. Armed Forces. This disciplinary measure is more serious than administrative measures, but less serious than trial by court-martial. The purpose of NJP is to provide commanders with an essential and prompt means of maintaining good order and discipline. Additionally, NJP promotes positive behavior in service members without the stigma of a court-martial conviction. The *Manual for Courts-Martial* defines a minor offense for NJP purposes as "ordinarily an offense which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than one year if tried by a general court-martial." [Ref. 33]. The statute governing NJP is provided in section 518 of title 10, U.S. Code and states:

(a) Under such regulations as the President may prescribe, and under such additional regulations as may be prescribed by the Secretary concerned, limitations may be placed on the powers granted by this article with respect to the kind and amount of punishment authorized, the categories of commanding officers and warrant officers exercising command authorized to exercise those powers, the applicability of this article to an accused who demands trial by court-martial, and the kinds of courts-martial to which the case may be referred upon such a demand. However, except in the case of a member attached to or embarked in a vessel, punishment may not be imposed upon any member of the armed forces under this article if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment. Under similar regulations, rules may be prescribed with respect to the suspension of punishments authorized by regulations of the Secretary concerned, a commanding officer exercising general court-martial jurisdiction or an officer of general or flag rank in command may delegate his powers under this article to a principal assistant.

(b) Subject to subsection (a) any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one or more of the following disciplinary punishments for minor offenses without the intervention of a court-martial—

(1) upon officers of his command—

(A) restriction to certain specified limits, with or without suspension from duty, for not more than 30 consecutive days;

(B) if imposed by an officer exercising general court-martial jurisdictions or an officer of general flag rank in command—

(i) arrest in quarters for not more than 30 consecutive days;

(ii) forfeiture of not more than one-half of one month's pay per month for two months;

(iii) restriction to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;

(iv) detention of not more than one-half of one month's pay per month for three months;

(2) upon other personnel of his command—

(A) if imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for not more than three consecutive days;

(B) correctional custody for not more than seven consecutive days;

(C) forfeiture of not more than seven days' pay;

(D) reduction to the next inferior pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction;

(E) extra duties, including fatigue or other duties, for not more than 14 consecutive days;

(F) restriction to certain specified limits, with or without suspension from duty, for not more than 14 consecutive days;

(G) detention of not more than 14 days' pay;

(H) if imposed by an officer of the grade of major or lieutenant commander, or above—

(i) the punishment authorized under clause (A);

(ii) correctional custody for not more than 30 consecutive days;

(iii) forfeiture of not more than one-half of one month's pay per month for two months;

(iv) reduction to the lowest or any intermediate pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction, by an enlisted member in a pay grade above E-4 may not be reduced more than two pay grades;

(v) extra duties, including fatigue or other duties, for not more than 45 consecutive days;

(vi) restriction to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;

(vii) detention of not more than one-half of one month's pay per month for three months. Detention of pay shall be for a stated period of not more than one year but if the offender's term of service expires earlier, the detention shall terminate upon that expiration. No two or more of the punishments of arrest in quarters, confinement or bread and water or diminished rations, correctional custody, extra duties, and restriction may be combined to run consecutively in the maximum amount impossible for each. Whenever any of those punishments are combined to run consecutively, there must be an apportionment. In addition, forfeiture of pay may not be combined with detention of pay without an apportionment. For the purpose of this subsection, "correctional custody" is the physical restraint of a person during duty or noonday hours and may include extra duties, fatigue duties, or hard labor. If practicable, correctional custody will not be served in immediate association with persons awaiting trial or held in confinement pursuant to trial by court-martial.

(c) An officer in charge may impose upon enlisted members assigned to the unit of which he is in charge such of the punishment authorized under subsection (b)(2)(A)-(G) as the Secretary concerned may specifically prescribe by regulation.

(d) The officer who imposes the punishment authorized in subsection (b), or his successor in command, may, at any time, suspend probationally any

part or amount of the unexecuted punishment imposed and may suspend probationally a reduction in grade or forfeiture imposed under subsection (b), whether or not executed. In addition, he may, at any time, remit or mitigate any part or amount of the unexecuted punishment imposed and may set aside in whole or in part the punishment, whether executed or unexecuted, and restore all rights, privileges and property affected. He may also mitigate reduction in grade to forfeiture or detention of pay. When mitigating–

(1) arrest in quarters to restriction;

(2) confinement on bread and water or diminished rations to correctional custody;

(3) correctional custody confinement on bread and water or diminished rations to extra duties or restriction, or both; or

(4) extra duties to restriction; the mitigated punishment shall not be for a greater period than the punishment mitigated. When mitigating forfeiture of pay to detention of pay, the amount of detention shall not be greater than the amount of the forfeiture. When mitigating reduction in grade to forfeiture or detention of pay, the amount of the forfeiture or detention shall not be greater than the amount that could have been imposed initially under this article by the officer who imposed the punishment mitigated.

(e) a person punished under this article who considers his punishment unjust or disproportionate to the offense may, through proper channels, appeal to the next superior authority. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment adjudged. The superior authority may exercise the same powers with respect to punishment imposed as may be exercised under subsection (d) by the officer who imposed the punishment. Before acting on appeal from a punishment of–

(1) arrest in quarters for more than seven days;

(2) correctional custody for more than seven days;

(3) forfeiture of more than seven days' pay;

(4) reduction of one or more pay grades from the fourth or a higher pay grade;

(5) extra duties for more than 14 days;

(6) restriction for more than 14 days; or

(7) detention of more than 14 days' pay; the authority who is to act on the appeal shall refer the case to a judge advocate or a lawyer of the Department of Transportation for consideration and advice, and may so refer the case upon appeal from any punishment imposed under subsection (b).

(f) The imposition and enforcement of disciplinary punishment under this article for any act or omission is not a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by the accuse upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

(g) The Secretary concerned may, by regulation, prescribe the form of records to be kept under this article and may also prescribe that certain categories of those proceedings shall be in writing.

c. Courts–Martial

The Armed Forces do not possess permanently established trial courts for prosecuting military members. Authorities convene military criminal trial courts, known as courts–martial when the need arises. Through the UCMJ, Congress has specified which commanders and officials possess the authority, known as “convening authority,” to convene a court–martial. The statute governing courts–martial is provided in Section 817 of Title 10, U.S. Code and states:

Article 16, Court–Martial Classified

The three kinds of courts-martial in each of the armed forces are—(1) general courts-martial, consisting of—(A) a military judge and not less than five members; or (B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves; (2) special courts-martial, consisting of—(A) not less than three members; or (B) a military judge and not less than three members; or (C) only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed in clause (1)(B) so requests; and (3) summary courts-martial, consisting of one commissioned officer.

Article 17, Jurisdiction of Courts–Martial in General

(a) Each armed force has court-martial jurisdiction over all persons subject to this chapter. The exercise of jurisdiction by one-armed force over

personnel of another armed force shall be in accordance with regulations prescribed by the President.

(b) In all cases, departmental review after that by the officer with authority to convene a general court-martial for the command which held the trial, where that review is required under this chapter, shall be carried out by the department that includes the armed force of which the accused is a member.

Article 18, Jurisdiction of General Courts–Martial

Subject to section 817 of this title (article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. General courts-martial also have jurisdiction to try any person who by the Law of War is subject to trial by a military tribunal and may adjudge any punishment permitted by the Law of War. However, a general court-martial of the kind specified in section 816(1)(B) of this title (article 16(1)(B)) shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as no capital case.

Article 19, Jurisdiction of Special Courts–Martial

Subject to section 817 of this title (article 17), special courts-martial have jurisdiction to try persons subject to this chapter for any non-capital offense made punishable by this chapter and, under such regulations as the President may prescribe, for capital offenses. Special courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dishonorable discharge, dismissal, confinement for more than six months, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than six months. A bad-conduct discharge may not be adjudged unless a complete record of the proceedings and testimony has been made, counsel having the qualifications prescribed under section 827(b) of this title (article 27(b)) was detailed to represent the accused, and a military judge was detailed to the trial, except in any case in which a military judge could not be detailed to the trial, the convening authority shall make a detailed written statement, to be appended to the record, stating the reason or reasons a military judge could not be detailed.

Article 20, Jurisdiction of Summary Courts–Martial

Subject to section 817 of this title (article 17), summary courts-martial have jurisdiction to try persons subject to this chapter, except officers, cadets, aviation cadets, and midshipman, for any noncapital offense made punishable by this chapter. No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto. If objection to trial by summary court-martial is made by an accused, trial may be ordered by special or general court-martial as may be appropriate. Summary courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, hard labor without confinement for more than 45 days, restrictions to specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay.

Article 21, Jurisdiction of Courts–Martial Not Exclusive

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the Law of War may be tried by military commissions, provost courts, or other military tribunals [Ref. 33].

d. Core Logistics Capabilities

The Federal Government deems a function inherently governmental if the public interest mandates the performance of that function by Government employees. Examples of inherently governmental functions include commanding combat troops, administering contracts, and conducting foreign relations. Outsourcing is defined as the transfer of a function previously performed in-house to an outside provider [Ref. 34:p. 3]. With the capabilities that Contracted Logistics Support can provide, it appears that private industry can be contracted for any task. However, to ensure effective support for deployed forces, the Armed Services are legally required to maintain a core logistics capability. The term “core logistics capability” is defined in Section 2464 of Title 10, United States Code:

(a) Necessity for core logistics capabilities

(1) It is essential for national defense that the DoD maintains a core logistics capability that is Government-owned and Government-operated....

(2) The Secretary of Defense shall identify core logistics capabilities....

(3) That are necessary to maintain and repair the weapons systems and other military equipment in consultation with the Chairman of the Joint Chiefs of Staff, as necessary to enable the Armed Forces to fulfill strategic and contingency plans prepared by the Chairman of the Joint Chiefs of Staff under section 153(a) of this title.

(b) Limitations on contracting

(1) Except as provided in paragraph (2), performance of workload needed to maintain a logistics capability identified by the Secretary under subsection (a)(2) may not be contracted for performance by non-Government personnel under the procedures and requirements of the Office of Management and Budgeting (OMB) Circular A-76 or any successor administrative regulation or policy.

(2) The Secretary of Defense may waive paragraph (1) in the case of any logistics capability For conversion to contractor performance in accordance with OMB circular A-76. Any such waiver shall be made under regulations prescribed by the Secretary and shall be based on a determination by the Secretary that Government performance of the workload is no longer required for national defense reasons. Such regulations shall include criteria for determining whether Government performance of any such workload is no longer required [Ref. 35].

2. Title 18, United States Code, Military Extraterritorial Jurisdiction Act

The Military Extraterritorial Jurisdiction Act of 2000 (see Appendix A) extends Federal jurisdiction to the following circumstances: 1) criminal conduct under U.S. law occurring in special maritime and territorial jurisdiction, 2) criminal felony-level offenses that are punishable for more than one year, and 3) criminal actions that occur outside of the United States. Personnel that are subject to MEJA are defined as former military members who commit such crimes while members of the Armed Forces overseas, but who cease to be subject to UCMJ court-martial jurisdiction (e.g. discharged from the service) and have not previously been court-martialed for such offenses. Additionally, MEJA applies to those civilians while “employed by the Armed Forces.” This term is defined as when a civilian is present or residing outside the U.S. in connection with such employment. This definition applies to civilian employees of the DoD, contractors (including subcontractors at any tier), and employees of a contractor

(including a subcontractor at any tier). However, MEJA is not applicable to those persons who are nationals of a host nation or who ordinarily reside in that host nation.

The Act provides for the Secretary of Defense to authorize certain DoD law enforcement personnel to arrest suspected offenders. It also provides procedures for pretrial detention and for extraditing such persons to the United States. Finally, of import to all concerned, the Act provides that if any initial proceeding is conducted when an accused is outside the United States, and the accused is entitled to have counsel appointed for purposes of such a proceeding, the cognizant Federal magistrate may appoint qualified military counsel to represent the individual, but only for the limited purpose of these overseas initial appearance proceedings.

3. Part 37, Federal Acquisition Regulation, Service Contracting

A host of laws regulate the employment of either temporary or intermittent experts and consultants, by the Government. The use of such personnel is defined in Section 3109, Chapter 31, Part III of Title 5 U.S.C.:

When authorized by appropriation or other statute, the head of an agency may procure by contract the temporary (not in excess of one year) or intermittent services of consultants or an organization thereof ...

This portion of the U.S. Code is further expanded in FAR part 37.104 relating to contracting for personal services.

(a) A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel. The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract.

(b) Agencies shall not award personal services contracts unless specifically authorized by statute (e.g., 5 U.S.C.3109) to do so.

(c) (1) An employer-employee relationship under a service contract occurs when, as a result of

(i) the contract's terms or

(ii) the manner of its administration during performance, contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee. However, giving an order for a specific article or service, with the right to reject the finished product or result, is not the type of supervision or control that converts an individual who is an independent contractor (such as a contractor employee) into a Government employee.

(2) Each contract arrangement must be judged in the light of its own facts and circumstances, the key question always being: Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract. The sporadic, unauthorized supervision of only one of a large number of contractor employees might reasonably be considered not relevant, while relatively continuous Government supervision of a substantial number of contractor employees would have to be taken strongly into account (see (d) below).

(d) The following descriptive elements should be used as a guide in assessing whether or not a proposed contract is personal in nature:

(1) Performance on site.

(2) Principal tools and equipment furnished by the Government.

(3) Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.

(4) Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.

(5) The need for the type of service provided can reasonably be expected to last beyond 1 year.

(6) The inherent nature of the service, or the manner in which it is provided, reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order to --

(i) Adequately protect the Government's interest;

(ii) Retain control of the function involved; or

(iii) Retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.

(e) When specific statutory authority for a personal service contract is cited, obtain the review and opinion of legal counsel.

(f) Personal services contracts for the services of individual experts or consultants are limited by the Classification Act. In addition, the Office of Personnel Management has established requirements which apply in acquiring the personal services of experts or consultants in this manner (e.g., benefits, taxes, conflicts of interest). Therefore, the contracting officer shall effect necessary coordination with the cognizant civilian personnel office.

4. Status-of-Forces Agreements

Status-of-forces agreements (SOFA) may cover a wide range of issues impacting the use of contractors in military operations. SOFAs were created between the United States and host nations to define the rights, immunities, and duties of the force, its members, and family members [Ref. 36:p. 140]. These agreements established the legal obligations to be followed when operating within or in-transit through a particular nation. SOFAs can establish legal obligations independent of contract provisions and apportion criminal jurisdiction between the United States and the receiving nation. In addition, these agreements can address civil jurisdiction, claims, taxes, duties, services provided to each party, and procuring supplies and local employees [Ref. 37:p. 702]. Moreover, SOFAs can also define the legal status (e.g., host nation criminal and civil jurisdiction) and legal obligations (e.g., taxes, customs, etc.) of contractors and contractor personnel in a host nation.

SOFAs divide criminal jurisdiction according to which nation's laws have been violated—U.S. law, the host nation's law or both. When the violation strictly breaks a host nation's law, the host nation has sole criminal jurisdiction. However, host nations cannot exercise exclusive jurisdiction over U.S. Military personnel. This is because the UCMJ is structured to make this situation improbable. By violating a host nation's law, a service member's conduct brings discredit upon the armed forces—a violation of Article 134 of the UCMJ. When the violation is of both nations' laws, a concurrent criminal jurisdiction exists. Consequently, in the absence of these agreements, U.S. policy requests that host nations waive their primary jurisdiction over U.S. service members, family members, and civilians employed by the military [Ref. 38:p. 23]. In 1990, the Judge Advocate General of the Army reported 13,128 concurrent jurisdiction offenses

over which the host nation had the primary right to prosecute. In 11,751 of these cases, U.S. Military authorities obtained a waiver of foreign jurisdiction, for a worldwide waiver rate of 89 percent [Ref. 39]. With the U.S. Armed Forces being deployed around the globe, the Government currently has 105 SOFAs with 101 foreign countries [Ref. 38:p. 23].

5. Operational/International Law of War

Law-of-war treaties, such as the Hague and the Geneva Conventions, attempt to establish and to clarify the status of contractors when supporting military operations. In order to protect the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population when they are engaged in an attack or in a military operation preparing for an attack [Ref. 40:p. 108]. The distinction between combatant and noncombatant is important for planners to consider. This difference will determine the treatment of contractors in time of war and is illustrated in Table 2.

Category	Military Target	POW Status	War Criminal
Combatants	Yes	Yes	No
Noncombatants	No	Yes	No
Illegal Combatants	Yes	No	Yes

Table 2. Combatant versus Noncombatant [From Ref. 41:p. 15]

Both the Hague and the Geneva Conventions are applicable to the Law of War and to defining the status of contractors on the battlefield. Additionally, these treaties entitle contractors to be treated as prisoners of war.

a. *The Hague Conventions*

Section 1, Chapter 1, of the Hague Conventions 18 October 1907, entitled “The Qualifications of Belligerents,” defines combatants as follows:

Article 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: to be commanded by a person responsible for his subordinates; to have a fixed distinctive emblem recognizable at a distance; to carry arms openly; and to

conduct their operations in accordance with the laws and customs of war [Ref. 42].

Additionally, Section 1, Chapter 2, of the Hague Conventions 18 October 1907, entitled “Prisoners of War,” provided:

Article 13. Individuals who follow an army without directly belonging to it, such as ... contractors, who fall into the enemy’s hands and whom the latter thinks fit to detain, are entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they were accompanying [Ref. 42].

b. The Geneva Conventions

Article 43 of Protocol I of the Geneva Conventions defines combatants as follows:

The armed forces of a party to a conflict consist of all organized armed forces, groups and units that are under a commander responsible to that party for the conduct of its subordinates ... Such armed forces will be subject to an internal disciplinary system that, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict [Ref. 43: p. 29].

In 1949, the Geneva Convention Relative to the Treatment of Prisoners of War (Article 4) provided that prisoner-of-war status upon capture was extended to:

Persons who accompany the armed forces without actually being members thereof, such as ... contractors, who fall into the hands of the enemy, and whom the latter think fit to detain, shall be entitled to be treated as prisoners of war, provided they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card...[Ref. 44].

D. PLANNING FOR CONTRACTOR SUPPORT

1. Contract Support Plan

Planning for contractor support is an integral part of the planning process for any operation or contingency. Decision makers must consider several critical issues concerning the integration of contractors, combat support and combat service support. The Contract Support Plan (CSP) ensures that contracting personnel conduct advanced planning, preparation and coordination to support deployed forces, and that contracting plans and procedures are known and included in the overall plans for an operation.

The CSP is an integral part of the mission commander's logistics plan and can contribute to the overall success of the operation. A contracting support plan is the mechanism for planning the contracting support for a military operation. It begins at the senior theater command and is included at each successive lower level. Figure 1 illustrates where contract-support planning fits in the planning process.

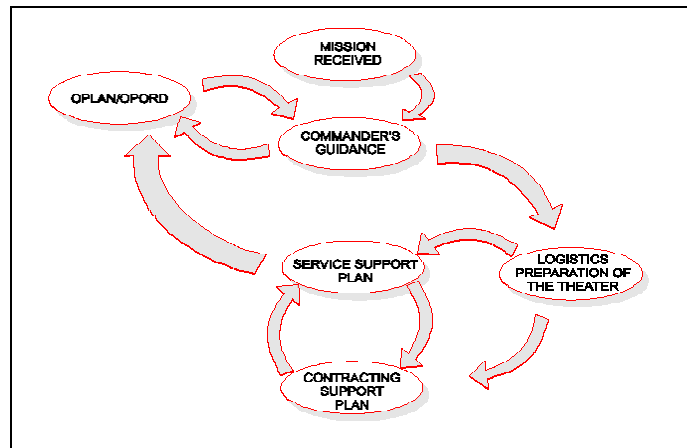


Figure 1. Contract Support Planning [From Ref. 3:p. 3–13]

Planning allows rapid, coordinated action by staffs and other elements of the command. Planning also permits the command to respond to rapidly changing situations. Adequate and practical planning is essential to the success of contracted support and is an essential part of the environment of both the operational planner and the contracting officer. Operational planners at all levels must actively involve contracting officers in the planning process to ensure that contracting support is a considered support option, and when used, contracting will meet the needs of the command. Success requires advance knowledge of expected support requirements so that a commander can respond by developing and by identifying potential sources to meet operational needs. Planning for contracting support follows the same process as other planning and is part of both the deliberate and the crisis planning processes. Properly included in the planning process, contingency contracting personnel locate vendor bases within and near the mission area, identify supplies, services and equipment available from the local economy, and advise the commander on how to leverage this commercially available support. This allows planners to maximize available airlift and sealift assets. Contracting officers also help

commanders avoid basing their plans on false assumptions about the availability or suitability of commercial support [Ref. 3:p. 3–1].

The CSP ensures that commanders and their staffs know contracting plans and procedures, and these personnel know that they are included in the overall plans for an operation. Additionally, the CSP ensures contracting plans and procedures are implemented, reviewed, and conducted to support deployed U.S. or allied forces rapid deployment support; and humanitarian support and disaster relief efforts. The CSP must be an integral part of both the deliberate and the crisis–action planning process and should be included in all Operational Plans (OPLANS) as an appendix to the logistics annex [Ref. 3:p. 3–14]. Organic Logistics assets, Host Nation Support (HNS), and Contracted Logistics Support are coordinated in the logistics annex of the OPLAN or Operational Order (OPORD). This coordinated approach integrates contracting into the logistics portion of the OPORD and ensures that all assets are properly included and time–sequenced throughout the exercise or operation. The plan should consider the following:

- Contracting support to the supported units;
- Planning for contract requirements established by the units being supported;
- Designating, deploying, and augmenting contracting, finance and legal elements;
- Communicating contracting procedures, authorities, and deviations;
- Including contracting personnel in site surveys, exercises, and predeployment training;
- Ensuring that contracting, resource management, legal, and finance support are included in OPLANS/Campaign Plans;
- Command and control relationships;
- Location and structure of the contracting elements in the theater, to include a list of units and activities that will be supported by each contract;

- Types of supplies, services, and construction capabilities commercially available within the mission area;
- A list of special prioritization or control measures that apply for scarce commodities or services;
- Concept of contracting operations, which is phased and synchronized with the supported plan;
- Procedures for legal review;
- Description and assessment of HNS agreements, customs, laws, culture, language, religion, and business practices which impact on contracting operations;
- Specific statutory and regulatory constraints or exemptions that apply to the supported operation;
- Procedures for defining, validating, processing and satisfying supported unit requirements;
- Procedures for budgeting and making payments to contractors and vendors;
- Procedures for appointing, training, and employing ordering officers, contracting officer representatives, paying agents, and GCPC holders;
- Manpower, equipment and supplies required for contracting support and the deployment sequence;
- Procedures for closing out contracting operations and redeployment;
- Security requirements and procedures for contracting and contractor personnel [Ref. 3:pp. 3–13–3–14].

Additional points that commanders and staffs must consider when considering using contractors are

- Contractors do not replace force structure; they exist to augment current sources.
- Commanders are legally responsible for protecting contractors within their area of operations.
- Contractors must have a sufficient amount of personnel to meet the current requirements.

- Contractors must be integrated into overall support plan.
- Contingency plans must be in place if the contractor fails to perform.
- Contractors cannot be responsible for carrying out military specific duties [Ref. 45].

2. Deciding to Use Contracted Logistics Support

Commanders and their staffs begin planning for contractual support with a mission analysis, which determines the mission requirements, including the contracting officer's understanding of the OPLAN and Time-Phased Force and Deployment Data (TPFDD). Commanders will determine whether or not to use contracting support. This decision making process starts during the planning phase when support requirements are identified for a particular operation. As planners match requirements with capabilities, they determine if the normal supply system or organic support can provide the support requested. If it can, then the requirement is passed to the appropriate support unit; if not, the review continues to determine if other sources of support are available and can meet the requirement. The review process determines the source that best meets the requirement. When other sources are not available or cannot meet the requirement within the timeframe required, and if funding is available, contracting support may be selected. Thus, the purpose of contracting support during an operation or exercise is to fill the logistical needs that traditional means (e.g., U.S. Military supply channels or HNS) do not meet. Mission commanders and their staffs undergo a series of steps to identify their support requirements for the operation. Figure 2 illustrates the processes involved in determining if Contracted Logistics Support is required.

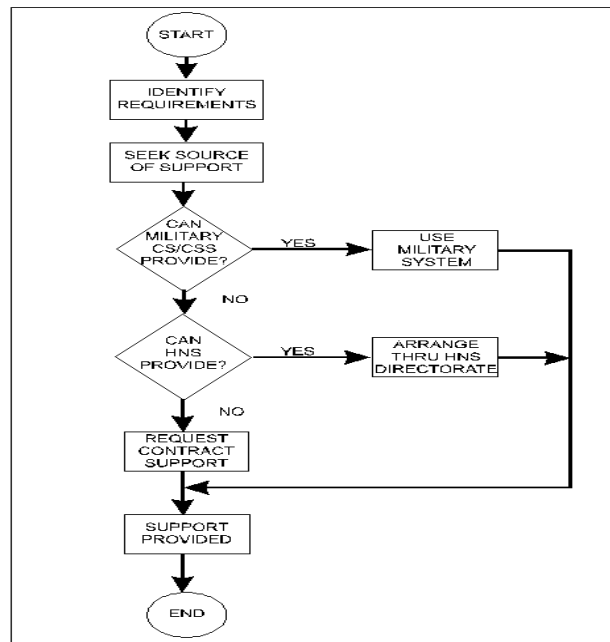


Figure 2. Deciding to Use Contracted Logistics Support [From Ref. 3:p. 4–3]

Planners assess if the operational environment will permit contractors, if there are restrictions placed on the use of civilian contractors and how support will be provided to contractors. They also determine the command relationship with contractors. Depending on the operational situation—mission, enemy, terrain, troops, time available and civilian considerations (METT-TC) and its associated risks, contractors can potentially provide or augment a wide variety of support functions on the battlefield.

Once Contracted Logistics Support has been determined to be the appropriate mechanism to meet the mission requirements, planners will consider a variety of factors. For example, commanders and contracting personnel must consider the legal issues of contractors on the battlefield. They must also consider how these legal issues relate to command and control of contracted employees. Additionally, it is imperative that commanders and contracting personnel examine the associated risks and impacts of contractors failing to perform as contracted. Moreover, determining core capability and risk assessment is integral in the planning process. All functions other than those inherently governmental in nature (such as, combat operations, command and control of military and government civilians, and government contracting), or functions covered by HNS agreements, may be suitable for contractor support. Many of these are functions that are not uniquely military and are readily and commercially available. However,

maintaining the status of contractors as non-combatants is an important issue for the commander in determining the extent of how contractors are used and where they should be permitted within the theater of operations. Commanders planning the use of external support contractors (i.e., US or third country nationals) must consider including them in SOFAs. In addition to personnel status, customs, taxes, and documentation of technical expert status must also be considered. Status-of-forces negotiations may also involve countries that must be transited to reach the area of operations.

3. Recognition-Primed Decision (RPD) Model

Decision making models offer a means by which to evaluate the decision making process. Models act as vehicles that can allow individuals to predict the possible outcomes stemming from a decision. However, because of unforeseen events, models cannot always predict an accurate outcome.

The Recognition-Primed Decision (RPD) Model describes how choices are made without comparing options: by perceiving a situation as typical, and by evaluating the potential barriers to accomplishing the action. An evaluation allows the decision maker to improve the options and also to reject them, if necessary. Experienced decision makers are not searching for the optimal options. They only want to find an option that works, a strategy called “satisficing” [Ref. 46:p.20].

The RPD Model fuses two processes: the way decision makers evaluate the situation to determine which course of action is reasonable, and how the decision makers evaluate that course of action hypothetically by envisioning the process and deciding how it will be accomplished.

The RPD Model suggests that experienced decision makers

- Focus on assessing the situation and judging its familiarity, not on comparing options;
- Look for the first workable option they can find, not the best option;
- Do not have to generate a large set of options to be sure they get a good one, since the first option they consider is usually workable;

- Generate and evaluate options one at a time and do not bother to compare the advantages and disadvantages of alternatives;
- Can spot weaknesses by imagining the option being conducted and find ways to avoid these weaknesses, thereby making the option stronger;
- Are poised to act rather than being paralyzed until they have completed all the evaluations;
- Use experience to recognize the key aspects of the situation, and react rapidly;
- Use the power of simulation, by running an action through their minds. If a potential problem is spotted, they move to the next option until they find one that works;
- Use a strategy called the “singular evaluation approach,” evaluating each option on its own merits, even if the decision makers must cycle through several possibilities [Ref. 46:p. 30].

4. Variations

There are three types of variation to consider when choosing a strategy to assess a situation:

- Variation 1 describes a simple match for assessing a situation.
- Variation 2 diagnoses the situation.
- Variation 3 evaluates a course of action.

Variation 1 describes a basic strategy. Decision makers identify the situation as typical and familiar. A typical garage fire, apartment fire, or factory fire can be recognized as a typical and familiar situation to a fire fighter. The decision makers understand what types of goals are reasonable (the priorities are set), which cues are important (there is not an overload of information), what to expect next (they can prepare themselves and prepare for surprises), and what the typical manner of responding in a given situation must be. By perceiving a situation as typical, they also recognize a course of action that is likely to be successful. Variation 1 is basically an “if ... then” reaction, an antecedent followed by the rule-based response [Ref. 46:p. 24]. The expertise entails being able to recognize when the antecedent condition has been met.

Variation 2 describes a strategy that is best used in situations that are more difficult and complex to assess. This variation occurs when the decision maker has to devote more attention to diagnosing the situation, since the information may not match a typical case or may be intertwined with more than one typical case. The decision maker may need to gather more information in order to make a diagnosis. Another complication is that the decision maker may have misinterpreted the situation but does not realize it until some “expectancies” have been violated. In these cases, decision makers will respond to the anomaly or ambiguity by checking which interpretation best matches the features of the situation. They may try to “build a story” to account for any inconsistencies. Variation 2 takes the form, “if (???) ... then,” with the decision maker deliberating about the nature of the situation [Ref. 46:p. 26].

Variation 3 explains how decision makers evaluate single options by imagining how the course of action will play out. A decision maker who anticipates difficulties may need to adjust the course of action, or maybe reject it and seek another option. To help explain this variation, Klein describes a Christmas fire in the Midwest:

Dotted around the Midwest are oil tank farms: large complexes of storage tanks filled with oil piped in from the Texas and Oklahoma fields and held at these farms before being pumped to specific points in the Midwest. On Christmas night in the middle of a bitterly cold winter, one of the tanks bursts open; oil comes pouring out and then ignites. A large oil tank instantly turns into a giant torch and sets fire to another tank. The fire departments of the surrounding areas report to the call. These departments are staffed by volunteer firefighters who are used to putting out barn fires, garage fires, and a house or two in a year. They have never seen anything like this in their lives. They have no resources for fighting the fire and no understanding of what to do. For two days they remain uncertain about how to proceed. On the third day, the volunteer fire chiefs finally take organized action. They choose not to try anything and let the fire burn while they devote all their energies to planning. They ask themselves what their options are, and what the advantages and disadvantages are of each. They try two options; both of them fail. The fire fighters give up, abandon their pride, and call in some consultants. From that point on, under the direction of the experts, the fire operation goes smoothly. The fire is distinguished extinguished within the next two days [Ref. 46:p. 21].

From these types of scenarios, decision makers learn that there are times for deliberating about options. Usually there are times when experience is inadequate and logical thinking is a substitute for recognizing a situation as typical. Although the commanders in this example had been firefighters for a long time, they had no experience with a fire of this magnitude. Deliberating about options is sensible for novices who have to think their way through the decision, even if it means starting from scratch. Variation 3 takes the form “if ... then (???)” as the decision maker ponders the outcome of a reaction [Ref. 46:p. 26].

E. CHAPTER SUMMARY

A number of laws govern contractors while they participate in combat and contingency operations. Both commanders and contracting personnel must consider the legal issues associated with Contracted Logistics Support before contractors are employed in an operational environment. This chapter presented the history of the Government seeking jurisdiction of civilian contractors. Additionally, it examined the laws that govern contracted civilians in operational environments. Finally, this chapter surveyed the contract support plan and how a commander decides to outsource or to use organic military logistics capabilities, using the RPD Model. Chapter IV will analyze the laws that govern contracted civilians on the battlefield and the legal issues associated with the use of Contracted Logistics Support.

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IV. ANALYSIS OF THE LEGAL ISSUES SURROUNDING THE USE OF CONTRACTED LOGISTICS SUPPORT

A. INTRODUCTION

This chapter analyzes the laws, presented in Chapter III, that govern contractors in an operational environment as they relate to discipline, command and control, and contractor status. Furthermore, it studies the risks of contractor non-performance, as these risks relate to Contracted Logistics Support. Finally, this chapter analyzes the decision-making process of determining the use of Contracted Logistics Support on the battlefield.

B. DISCIPLINE

The primary difference between civilian contractors and military logisticians is the applicability of military law. Members of the U.S. Armed Forces are subject to the Uniform Code of Military Justice (UCMJ), at all times and locations. Because of the Supreme Court's decision in *Reid v. Covert*, 354 U.S. 1, the U.S. Military does not possess the capability or authority to discipline contractors. Only in the event of a congressionally declared war does the military possess the right to exercise UCMJ authority over civilians accompanying the force.

Since the purpose of military law is to provide a means for the military to maintain good order and discipline, military law is vital to the effectiveness of every military unit. As George Washington noted in 1759, "Discipline is the soul of an army. It makes small numbers formidable; procures success to the weak, and esteem to all" [Ref. 47:p. 139]. Without this legal tool, a commander is devoid of any power to modify the behavior of contractors that violate rules and regulations that are not covered in the Military Extraterritorial Jurisdiction Act (MEJA). For instance, a contractor could conceivably commit a misdemeanor and a commander would not be authorized to exercise any legal jurisdiction over this individual. This contractor would not be subject to any provisions of the UCMJ or MEJA. Thus, a jurisdictional void exists in this situation. As previously stated, the UCMJ is only applicable during a congressionally declared war and MEJA only applies in the following cases:

- For conduct that is a crime under U.S. law in special maritime and territorial jurisdiction
- For felony-level offenses—punishable by imprisonment for more than one year
- When the above provisions are committed outside the United States

This jurisdictional void breeds an environment where contractor discipline can erode and the U.S. Military can do nothing to curtail its deterioration. Thus, when faced with such contractors, commanders can do little more than revoke the individual's exchange privileges, ask the contractor to remove the individual from the area of operations, bar the employee from military facilities, and/or (where available) revoke the employee's status under the SOFA [Ref. 48].

The Armed Forces believe in training in a manner that accurately simulates actual combat. This fosters unit cohesion and esprit de corps. Since the concept of Contracted Logistics Support entails integrating contractors with their active duty counterparts, thereby creating a “partnering relationship,” a contractor's behavior could have serious consequences on the total force. If one of these contracted members of the total force commits a misdemeanor or commits another malicious act not covered under the MEJA, and they are not punished in the same manner as a service member, it can potentially damage the trust between the military members and the contracted employees. The erosion of contractor discipline could then spread to military personnel, jeopardizing readiness and the mission itself. Ultimately, this could result in wide-spread disorderly conduct and could affect national strategy and policy.

As stated in Chapter III, the purpose of military law is to give commanders a means to maintain good order and discipline, to promote efficiency and effectiveness, and to strengthen national security. Current U.S. law permits a jurisdictional void between the UCMJ and the MEJA; this lapse of jurisdiction among the “total force” degrades a commander's ability to maintain good order and discipline. As stated in Chapter I, many commanders have voiced concerns that they do not have adequate control over all contractors and that legal jurisdiction still remains unclear. These issues stem from the

Supreme Court's decision in *Reid v. Covert* and the Court of Military Appeals' decision in *United States v. Averette*, 19 U.S.C.M.A. 363.

In *Reid v. Covert*, the court relied on three provisions of the U.S. Constitution to remove civilians from peacetime military jurisdiction: Section 2 of Article III, the Fifth Amendment and the Sixth Amendment [Ref. 23]. The court's Article III and Sixth Amendment concerns were the guarantee of a trial by jury, even in those cases that arose beyond state boundaries and were thus subject to Congressional action to determine venue [Ref. 23:pp. 7-8]. Under the UCMJ, commanders possess convening authority and have the power to convene a military court when the need arises. Thus, this court-martial would meet the Constitutional need to have a sufficient jury. Additionally, impartiality would be guaranteed under Article 41 of the UCMJ, which mandates that court-martial panels are to be impartial. In *United States v. Averette*, the Court of Military Appeals deliberated on the military's limited jurisdiction over civilians. However, the *Averette* case was limited in that it only dealt with the applicability of military law over dependants; the *Averette* case never held that jurisdiction over contractors during hostilities was unconstitutional.

The MEJA does close the criminal jurisdictional gap that existed prior to its inception on November 22, 2000. As stated in Chapter III, the military has been prohibited from prosecuting by courts-martial civilians accompanying the Armed Forces who commit criminal offenses overseas in peacetime. Many Federal criminal statutes lacked extraterritorial application, including those perpetrating rape, robbery, burglary, and child sexual abuse. In addition, many foreign countries declined to prosecute crimes committed within their nation, particularly those involving U.S. property or a victim who was a U.S. citizen. Owing to these factors, the result was an environment in which civilians accompanying the force could commit serious criminal offenses with impunity.

The MEJA gives commanders the authority to exert Federal jurisdiction over contractors who commit felonies while accompanying the force. Furthermore, the MEJA applies to employees and contractors at all levels, including civilian employees of the DoD, DoD contractors (including subcontractors at any tier) and employees of a DoD contractor (including a subcontractor at any tier). Therefore, the MEJA allows

commanders to maintain discipline among those contractors who would have previously gone unscathed. However, areas of this new law still do not address all situations. For example, if a German contractor, employed by the U.S. Government, were to commit a crime in Bosnia, what laws would apply? In response to this question, Lieutenant Colonel Denise R. Lind, Chief, International Law, Office of the U.S. Army Judge Advocate General,” stated:

MEJA may apply, depending on the crime. In order for a country to exercise jurisdiction in such a case, there must be an international law basis for jurisdiction (jurisdiction over the territory, nationality of offender, nationality of victim, protection of interest of the nation, or universality (piracy, war crimes) and a national basis for jurisdiction – e.g. the crime must have extraterritorial effect. In the U.S., crimes are presumed not to have extraterritorial effect unless the statute expressly says so or extraterritorial effect is implied due to the nature of the crime. In this example, if the German contractor filed false claims against the U.S., the international law basis would be the protection of the interest of the nation and the national basis would be that the statute was enacted to protect the government and had extraterritorial effect independent of MEJA. If the German contractor raped an American accompanying the force in Germany, there may be an international basis (nationality of victim) and MEJA would supply the national basis. If the German contractor raped a Bosnian woman, the MEJA would probably not apply [Ref. 49].

C. COMMAND AND CONTROL

Command and control over contractors does not end with criminal or UCMJ jurisdiction. Under conditions other than a congressionally declared war, the term “command and control” relative to Contracted Logistics Support is misleading. The military does not command and control contractors in the same way that it commands and controls military units and military personnel. This restriction comes from Title 5 U.S.C. and Part 37 of the Federal Acquisition Regulation. Contracted civilians are managed through the terms and conditions of their contracts. Contractors are only required to perform those services delineated in their contracts and any deviations from this arrangement can result in contract modifications. One other key point to consider is that only Contracting Officers or Contracting Officers Representatives have the legal authority to direct contractors. For contractor employees, command and control is tied to the terms and conditions of the Government contract and their supervisors.

Contracted employees are not under the direct supervision of military personnel in the chain of command. The Contracting Officer is the designated liaison for implementing contractor performance requirements [Ref. 50:p. 1–1]. Direct supervision of contractors resides within their host organization. However, this does not prohibit a commander from having some control over contractors. For instance, commanders can potentially exercise indirect control through contract terms and conditions by inserting of command directives into employer–employee agreements and by attaching contractors (with special reporting procedures) to a specific military unit [Ref. 51]. Nevertheless, this leaves a commander in a nebulous position of not truly commanding contractor personnel.

This lack of clear command and control authority over contracted civilians poses some serious problems. For instance, commanders are accountable for all personnel and activities that occur in their area of responsibility. However, they are unable to dictate that contractors perform their duties according to the commander’s direction. Commanders must influence the contractors’ actions and performance through the Contracting Officer and in accordance with the conditions of the contract. While this influence may function well in peacetime, it restricts a commander’s initiative when speed and efficiency are of the essence in combat or contingency operations. Even if a commander were authorized to issue contractors a “direct order,” no legal recourse exists for a commander to pursue if a contractor or contracted employee refuses. In this situation, the commander is powerless to have a contractor submit to his will. In contrast, a member of the U.S. Armed Forces that disobeys a direct order faces prosecution under the UCMJ or Non–Judicial Punishment (NJP).

Command and control of service members on a daily basis is typically enforced through NJP rather than a court–martial. The MEJA is akin to courts–martial as it applies to civilians accompanying the force; however, no equivalent to NJP applies to contractors on the battlefield. As stated in Chapter III, courts–martial serve as a vehicle to convene a military trial court. The MEJA also allows Federal prosecutors to take legal action against those who commit felonies and who are accompanying the force under Title 18 U.S.C. Non–Judicial Punishment, which gives commanders a disciplinary measure that is more serious than administrative measures, but is less serious than trial by court–

martial, does not exist for contractors. Furthermore, the speed of NJP, which enables commanders to enforce good order and discipline promptly, does not exist in the contractor system. Thus, without NJP authority, or its equivalent, over civilian contractors, the commander is handicapped and does not possess any means to punish contracted employees in the same manner as service members. The end result is that commanders have no ability to command and control contractors, they are unable to impose their will on these individuals and this lack of authority can jeopardize a commander's ability to rely on these contractors during critical times.

D. MAINTENANCE OF NON-COMBATANT STATUS

One of the greatest challenges associated with using Contracted Logistics Support in operational environments is maintaining the civilian status of contractors. Most Status of Forces Agreements fail to refer to contracted employees or fail to include them within the definition of terms such as “the civilian component.” Many of the locations the U.S. Armed Forces have deployed to in recent years do not have SOFAs with the United States. Consequently, contractors and their employees entering these nations may be subject to host nation immigration laws, import duties, limits on doing business, taxation, criminal jurisdiction, or other laws that can negatively affect their ability to support forces in the field. For instance, Hungary is the only Balkan nation that has a SOFA agreement with the United States [Ref. 38].

International law has not advanced in the area of contractor status and therefore has little to offer. Neither the Hague Conventions nor the Geneva Conventions define civilian contractors as combatants. For instance, Article 43 of Protocol I of the Geneva Conventions requires personnel to be “subject to an internal disciplinary system” [Ref. 44:p. 29]. As indicated in Chapter III, current U.S. legislation bans civilians from being subject to the UCMJ unless there is a congressionally declared war. Thus, in every military action since World War II, contractors accompanying the force would have been considered noncombatants in the eyes of the Laws of War. Also, because contracted personnel are not subordinate to a military commander, they are excluded from being defined as combatants. For instance, Section 1, Chapter 1, Article 1 of the Hague Conventions states, “the rights of war apply to ... militia and volunteer corps, to be commanded by a person responsible for his subordinates” [Ref. 43].

Every person who falls into the hands of the enemy must have some status under international law [Ref. 44:p. 29]. Contractors accompanying the force should be entitled to “prisoner-of-war” status under Section 1, Chapter 2, of the Hague Conventions, which entitles contractors who fall into the hands of the enemy to be granted legal status as prisoners of war as long as they are in possession of a military-issued certificate [Ref. 43]. Likewise, Article 4 of the Geneva Conventions Relative to the Treatment of Prisoners of War should guarantee that contractors who fall into the hands of the enemy are entitled to legal status as prisoners of war, provided they are issued an identification card from the armed force they accompany [Ref. 45]. Problems can arise for contracted personnel accompanying the force that are not properly documented as contractors. This situation could adversely affect their international status and leave these individuals without any legal protection.

The provisions of the Hague Conventions distinguish civilians accompanying the force from private citizens. This is significant because if private citizens are engaged in combat they can be considered illegal combatants or “unprivileged belligerents.” If contractors violate either of the Law of War treaties—the Hague Conventions or the Geneva Conventions—they run the risk of being considered illegal combatants. If contractors are categorized as illegal combatants, they can be classified as war criminals and be prosecuted in an international court of law or fall subject to an enemy nation’s law. This is where a commander’s clear command and control over contractors comes into play. The clearer it is that a commander has control over contractors under Section 1, Chapter 1, Article 1 of the Hague Conventions, the greater likelihood that contractor employees will have prisoner-of-war status. In this regard, applying some form of NJP to contractors, enhances their being considered under the command and control of the Armed Forces. However, this status does not convert contractors from merely accompanying the force into combatants.

Under the Law of War, civilians are prohibited from being targeted (see Table 2). However, given the modern battlefield, differentiating between combatants and noncombatants is difficult. The concept of fighting wars along a well-defined battlefield, such as the forward edge of the battle area, has given way to an asymmetrical battle space. No longer are there rear-areas, where a threat environment can be considered

safe. For example, during the Gulf War, service troops in the “rear” were frequently subject to Iraqi scud missile attacks. Therefore, even though contractors are not classified as a “military target” under the Law of War, their duties of direct logistical support put them in harm’s way, making them subject to targeting. Thus, although they are not combatants, they may be killed or wounded because of legitimate collateral damage.

Even though contractors support the Armed Forces, commanders must ensure that contractors are not performing functions that are in direct support of hostile or combat operations. They must ensure that they are not performing a purely military function. For instance, they cannot participate in attacks on an enemy nor can they occupy defensive positions to secure a unit’s perimeter. Only combatants are entitled by the Law of War to conduct combat operations. Combatants can knowingly and deliberately kill opposing soldiers. No civilian ever has this right. If soldiers kill during a conflict and are subsequently captured, they can only be held as prisoners-of-war. A civilian who kills during warfare and is captured can be held, tried, and punished as a war criminal [Ref. 52]. Thus, the primary reason that commanders must ensure that contractor status is not violated is to protect these personnel in times of war. It is a difficult balancing act between controlling them enough to entitle the contractors prisoner-of-war status in the event they are captured, and isolating them from active combat to prevent them from becoming combatants.

E. RISKS OF CONTRACTOR NON-PERFORMANCE

In an ideal operational environment there would be no civilians. However, as previously indicated, the U.S. Armed Forces have relied on Contracted Logistics Support since the birth of the nation. Furthermore, as the total force has decreased while operational commitments have increased, the U.S. Military is growing more reliant upon contractors than ever before. Owing to these factors, commanders and contracting officers are obligated to consider the distinction between those functions that can be outsourced and those that must be performed by the Government. As detailed in Chapter III, the Military Services must retain core logistics capabilities in areas such as armed conflict, contracting, and command and control.

Since contractors are not subject to military law and commanders have no direct authority over these personnel, a risk assessment of contractor non-performance must be thoroughly conducted. The term “Core Logistics Capability,” as defined in Chapter III, does not specifically define what can and cannot be contracted out. Therefore, this legal requirement is subjective and contains both functional and quantitative aspects. It is not enough to determine what functions must be contracted out; the military must determine, for each contemplated operation, how much of each function can be contracted [Ref. 45:p. 15]. When determining core capabilities versus those functions that can be contracted out, risk assessment must be the primary consideration. Risk assessment for using Contracted Logistics Support must consist of the risk of contractor non-performance and the risk to contracted civilians.

When commanders decide to use Contracted Logistics Support, rather than military Combat Service Support (CSS), they assume a degree of risk of contractor non-performance. Since the military does not have “command” authority over contracted civilians, commanders and their staffs must understand that there are different standards applicable to civilians. Contracted civilians can refuse to perform as contracted, meaning they can refuse to deliver goods or perform services in dangerous areas, or they can refuse to enter or remain in a hostile area. When commanders are evaluating the risks of contractor non-performance, they must consider any factors that might degrade the mission. They must also consider any increase in the time needed to perform the mission. Moreover, they must consider the impact on service members that are depending on goods and services provided by Contracted Logistics Support. Ultimately, commanders must ask themselves, “What is the worst-case scenario that can occur with my reliance on contractors and can I accept the risks associated with their use?”

Risk assessment will vary depending on the theatre threat level. Additionally, as hostilities increase, the risks associated with relying on Contracted Logistics Support will also increase.

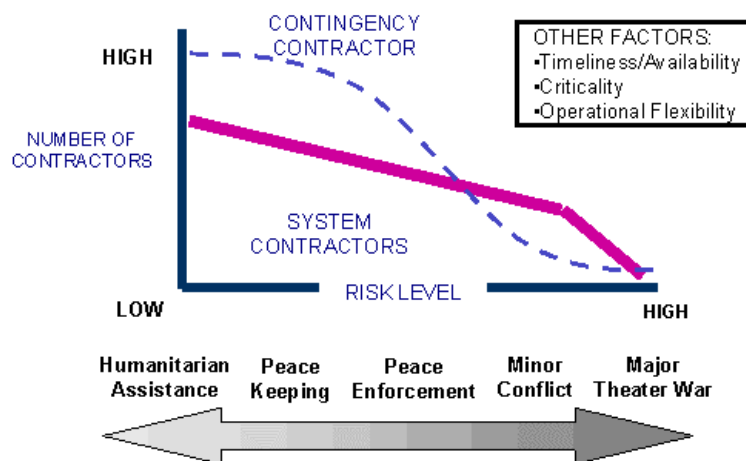


Figure 3. Changes in Contractor Augmentation [From Ref. 53:p. 7-2]

Figure 3 illustrates the changes to contractor augmentation as changes in threat increase. A phenomenon is depicted as the threat level or risk level increases, the number of contractors will decrease. This observation is consistent with the historical observations presented in Chapter II. For example, the data in Table 1 illustrated a trend that the ratio of soldiers to civilians during both World Wars may have been attributed to the country's vast level of mobilization during these unlimited wars. In contrast, limited wars, such as Korea and Vietnam, did not have the same level of mobilization and therefore required more civilian contractors to meet the military's shortfalls. However, another way to explain this trend could be as risk level increases, the number of contractors on the battlefield will decrease. On the lowest levels of risk, there is a low probability that services will be interrupted. Thus, the military will be more likely to rely on contractors to fill their logistical needs, with a low threat of contractor non-performance. As the threat level increases to a state of medium risk, contractors will more than likely continue their services. However, commanders and their staffs will not be as apt to rely on contractors to perform more critical logistical functions. At this point, commanders and contracting personnel may view "core capabilities," as including functions such as maintenance or weapons systems sustainment. As the risk level increases even more, the military will be in a situation where "core capabilities" are re-evaluated and where the majority of all positions in a theatre of operations will be military.

As highlighted in Chapter I, history has demonstrated that in most instances contracted personnel continue to perform their jobs during hostilities. However, a Logistics Management Institute published a study in 1993 on the Persian Gulf War that stated:

It was questionable whether the civilians would have remained when the bullets started flying. There were a few instances of contractors and/or Department of the Army Civilians wanting to leave the theatre because of the dangers of war. However, many people have doubts about how long they would have stayed if the operations had been costly in lives [Ref. 54:p. 4].

There have been instances where contractors have demonstrated unwillingness to assume the risks associated with being in hostile environments. For example, in South Korea in the wake of the 1976 tree-cutting incident in the demilitarized zone, emergency-essential civilian contracting personnel fled their posts at the prospect of imminent hostilities [Ref. 55:p. 3]. Thus, commanders must position themselves where they can react if contractors are unable or unwilling to perform as contracted. For instance, they must develop contingency plans in the event of contractor non-performance. These contingency plans must minimize degrading the mission and putting service members at risk.

F. DECISION PROCESS OF DETERMINING THE USE OF CONTRACTED LOGISTICS SUPPORT

This analysis focuses on the Recognition-Primed Decision (RPD) Model outlined in Chapter III. This section is based on a paper that was co-authored by the author; Major Tim Hannon, U.S. Army; and Captain Rey Estrada, U.S. Marine Corps, in MN 3105 at the U.S. Naval Postgraduate School. The researcher has deemed that the RPD Model is appropriate because it predominately relies on a commander's experience and assumes that a commander must act under time constraints. One of the key aspects of the RPD Model is the way a decision maker assesses the situation at hand and judges it as familiar. Additionally, this individual does not compare options. In a rapidly changing environment, like a battlefield, decision makers do not have the luxury to make comparisons between various courses of action. The combat leader relies on prior experiences to identify patterns and similarities with the situation at hand. This knowledge allows the decision maker to judge quickly. The RPD method is efficient and

effective and works very well for ground commanders because of their immense time pressure [Ref. 46:p. 20]. Based on this assumption, optimization models and other operations research methods are not as appropriate. While these models focus on finding the best strategy, they are difficult and time consuming to implement.

Using Variation 1 of the RPD Model, a commander would judge a situation as typical or familiar and apply a “simple match” to diagnose the situation. For instance, the use of Contracted Logistics Support in a low-threat environment would seem standard or routine to commanders. Applying their experience, commanders could implement goals based on the use of contractors. Additionally, commanders understand which types of cues to expect in this environment. For instance, contractor performance and presence in a theatre of operations, with a low-threat environment might appear transparent. Under this situation, a commander would have little or no significant interaction with contractors. Finally, a commander would know how to respond based on this typical situation and implement a course of action to use contractors throughout an area of operations. When recognizing a situation and implementing a course of action, commanders have determined that the situation is typical and recognize a course of action that is likely to succeed.

When using Variation 2 of the RPD Model, a commander is diagnosing a situation. This variation occurs in more complex circumstances. For instance, if a contractor were attacked in a theatre of operations, a commander would not likely perceive this event as typical. Therefore, a commander would have to devote more time to diagnose the situation because the attack would be an anomaly. Commanders may require more information about the circumstances of the incident; this would serve to clarify the anomaly that had occurred. The commander might have misinterpreted a situation but might not realize the mistake until the expectancies have been violated [Ref. 46:p. 26]. The commander would then respond to the ambiguity by trying to apply his experience to the situation. In essence, he is “story building” to account for the inconsistencies associated with the incident. This tenant of the RPD Model allows decision makers to imagine the option or event being carried out so that they can spot and avoid weakness. Commanders might place themselves in the contractor’s position and apply the circumstances that lead to the attack. The decision makers will continue this

process until they can perceive the situation as typical. At this point, the commander will implement a course of action.

When using Variation 3 of the RPD Model, the decision maker is evaluating courses of action. He imagines how a course of action will play out and make adjustments based on any difficulties that he perceives. A commander might imagine the effects of contractors as the risk level increases. For instance, he could consider what would happen in the following scenario: When Task Force Leatherneck enters the country of Sofialia, they will be heavily relying on contractors to provide combat service support in the theatre of operations. The commander will then make predictions about events that could happen in the future. For instance, if an environment were to change from a peacekeeping/humanitarian operation to a full-scale combat operation, the decision maker would visualize a series of outcomes on how this change would affect Contracted Logistics Support. For instance, the commander might envision that contractors would continue to perform under such conditions. In this event, the commander could take one of two actions. First, the combat leader might choose to implement a course of action that would include contractors in the Contract Support Plan (CSP). This CSP might include a large number of contractors to augment the force's logistics component. The second option might include contractors to provide combat service support but at a limited capacity. Furthermore, this CSP would most likely include contingency plans in the event that the contractors failed to perform.

The RPD Model provides an effective method of breaking down the decision-making process into critical components. For decision makers under severe time constraints, the model generates an adequate option to deal with the situation at hand based on prior experiences and on recognizing familiar patterns. When applied to determining the use of Contracted Logistics Support, the RPD Model can produce the correct course of action. The variations of the RPD Model have been integrated into one model, as illustrated in Figure 4.

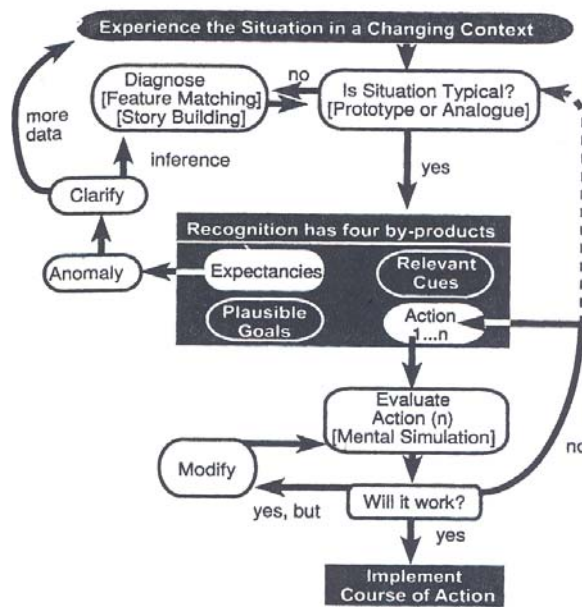


Figure 4. Integrated Version of the RPD Model [From Ref. 46:p. 91]

Using an integrated RPD Model allows the decision maker to:

- Have a basis for expecting certain events to occur but not others;
- Pay attention to cues relevant to the diagnosis;
- Have an understanding of what goals are plausible to achieve;
- Know which types of actions are likely to succeed [Ref. 46:p. 91].

The following hypothetical scenario is assumed in the analysis of the integrated RPD Model. Task Force Leatherneck has received an order from higher headquarters to deploy to the country Sofialia within the next 72 hours. The Task Force is limited to deploying no more than 45,000 uniformed personnel into Sofialia. However, there is no constraint on the number of non-uniformed personnel that can provide logistical support to the force. Task Force Leatherneck's mission is to provide humanitarian aid, in the wake of recent floods. At the present time, the threat environment is considered low. However, Sofialia has endured an eight-year war with the bordering nation of Samlornistan. This war recently ended with both sides agreeing to a cease-fire. Both sides possess large numbers of armed military forces with modern equipment. Additionally, the United States has historically supported the government of Sofialia in

its conflict against Samlornistan. The task force commander has the option of using contractors to provide all levels of combat service support. Thus, the commander must determine how to use Contracted Logistics Support.

The decision maker will begin analyzing the utility of Contracted Logistics Support by judging the situation as typical or atypical. In the given scenario, the combat leader will determine that the situation is typical. At this point, the commander will possess expectancies about the capabilities that contractors could provide. The commander will construct a mental image of how the contractors will perform. Additionally, the commander will examine relevant clues about the operational environment and its effects on Contracted Logistics Support. For instance, the commander would be sensitive to intelligence reports about any changes in the threat environment. Based on these two factors, the leader would establish plausible goals that the contractors could attain in this environment. Based on the given threat scenario, a goal for contractors could be to provide first and second echelon maintenance support to all tactical vehicles for Task Force Leatherneck. The decision maker would then visualize contractors providing maintenance support to the task force. This support would enable uniformed personnel to focus on humanitarian assistance rather than maintenance. Thus, the presence of contractors would be a force multiplier and would allow the task force to operate more efficiently and effectively. Based on this diagnosis, the combat leader would then evaluate the action of augmenting contractors with the force. This evaluation would include how the operational environment would affect the issues of discipline, command and control, contractor non-combatant status and the risks of contractor non-performance. At this point, the decision maker would determine if the Contract Support Plan (CSP) should include contractors and if so, the extent of their use. If the combat leader determined that the risks of using contractors were acceptable, a course of action would be set to include their augmentation into the “total force.” If the commander determined that it would be useful to augment the task force with contractors but with some reservations, the CSP would most likely contain a contingency plan. This plan would address any concerns that the commander had and any legal issues that arose while the contractors performed their duties. Once again, the decision maker would evaluate the contractors augmenting the force. However, while evolving the integrated

RPD Model, the combat leader would have a contingency plan to meet unexpected complications. Thus, in this scenario the commander would implement a course of action that integrating Contracted Logistics Support into the CSP.

Using the same scenario and the same decision-making process, let us assume that the contractors have been integrated into Task Force Leatherneck. These contractors are providing the bulk of all logistical support to Task Force Leatherneck. However, today the commander has learned that Samlornistan has launched an aggressive offensive campaign against Sofialia. Additionally, Samlornistan has made statements that American troops will be attacked if they contribute to Sofialia's war effort. The task force commander has learned that contractor morale is rapidly deteriorating. These civilians are concerned about operating in a combat environment, since a contractor was killed while directly supporting the Task Force. The decision maker would re-evaluate the decision to use Contracted Logistics Support by examining his expectancies. This new situation would be an anomaly, and the combat leader would need to clarify the situation before going any further. To diagnose the new scenario, the commander would "build a story" of the new operational environment. No longer would the decision maker imagine contractors providing first and second echelon maintenance support to all tactical vehicles for Task Force Leatherneck. Rather, the commander would be required to modify this story and would incorporate safeguards for the "total force." The decision maker may still visualize contractors providing maintenance support to the task force but at a limited capacity.

Another "story" that the commander might build could include how the legal issues associated with using Contracted Logistics Support could effect the situation. For instance, the decision maker might imagine contractors providing maintenance support to the task force. He might also imagine what would happen if contractors refused to perform. Knowing that he could not impose any form of discipline on the contractors and that he lacks clear "command and control," nothing would prevent this non-performance from happening. Thus, the commander might envision the Task Force's vehicles being seriously affected because of the contractor's, lack of maintenance support. This action could seriously degrade the mission and in the most extreme circumstances could lead to injury or death of task force members. He would once again judge if the new scenario

was typical or atypical. In this situation, the commander would determine the situation as atypical. With this conclusion, the decision maker's expectancies of contractors would be diminished. Additionally, the goals that the commander would set for contractors in the CSP would be limited. The clues that would alert the combat leader would be the declining morale among contractors. Once again, he would evaluate contractors augmenting the force. However, the commander would likely rely less on Contracted Logistics Support than he would have prior to the recent hostilities. Finally, the decision maker might set a course of action that would include the limited integration of Contracted Logistics Support into the CSP.

A commander's decision to use Contracted Logistics Support might be different, if the situation were changed and the following hypothetical scenario were assumed in the analysis of the integrated RPD Model. Task Force Leatherneck has received an order from higher headquarters to deploy to the country Sofialia within the next 72 hours. The task force is limited to deploying no more than 45,000 uniformed personnel into Sofialia. However, there is no constraint on the number of non-uniformed personnel that can provide logistical support to the force. Task Force Leatherneck's mission is to provide humanitarian aid in the wake of recent floods. At the present time, the threat environment is considered high. The country of Sofialia is currently engaged in a total war with the bordering nation of Samlornistan. Both sides possess large numbers of armed military forces with modern equipment. Additionally, the United States has historically supported the government of Sofialia in its conflict against Samlornistan. Moreover, the government of Samlornistan has threatened to direct hostilities against American Forces if they aid the Sofialia war effort. The task force commander has the option of using contractors to provide all levels of combat service support. Thus, the commander must determine the application of using Contracted Logistics Support.

In this new scenario, the commander will analyze the utility of Contracted Logistics Support in a hostile environment by judging the situation as typical or atypical. The decision maker would most likely judge this environment as atypical and attempt to "build a story" to diagnose the situation. The commander might build a mental image that would incorporate contractors performing in a hostile environment. This might include how contractors might react to hostilities being directed at their location. The

commander might envision contractors failing to perform as contracted and/or having contractors violate force protection measures. Additionally, the combat leader might envision a scenario in which contractors would be accompanying a force that was directly participating in humanitarian assistance. He might determine that the government of Samlornistan could see this as civilians participating in a direct military action and consider the contractors illegal combatants. Thus, the commander might conclude that this risk is unacceptable to both the contractors and the task force. The decision maker might then implement a course of action that did not rely on Contracted Logistics Support into the CSP. Thus, the commander would decide to rely on the task force's organic combat service support capabilities.

There is a Somali saying that states, "An enemy shows his weakness through his strength." The weakness of the RDP Model is its strength: it generates a fast option that is not always the most optimal option. Commanders do not necessarily compare all the available options. There is no means by which the first option that is chosen is compared to any other options. The most critical factor with using the RPD Model lies with the experience base of the decision maker. If the decision maker possesses broad experience and is accustomed to making decisions under the fog of war (e.g., stress, friction, uncertainty and time) then the decision will be appropriate. If this is not the case, the decision made can be unfavorable.

G. CHAPTER SUMMARY

This chapter has analyzed the areas of discipline, command and control, contractor status, risk assessment and the decision process of determining contractor support. This analysis has revealed that these factors must be considered before planning for Contracted Logistics Support, and that these factors impact both the extent and the capacity in which contractors will be used. Additionally, this chapter has examined the application of the RPD Model in determining if one should outsource or should use organic military logistics capabilities. The above analysis provides the basis for the conclusions and recommendations in the following chapter.

V. CONCLUSIONS AND RECOMMENDATIONS

A. INTRODUCTION

The purpose of this thesis was to identify and to analyze the primary legal issues associated with using Contracted Logistics Support in contingency/combat operations. Additionally, this thesis has examined the principal factors that affect the decision to outsource or to use organic military logistics capabilities. This chapter provides the reader with conclusions regarding the legal issues that surround the use of Contracted Logistics in operational environments, and the decision-making process that commanders use in determining the extent of contractor support on the battlefield. This chapter further provides recommendations to improve the laws that govern contractors in operational environments and to improve current doctrine regarding the overall use of Contracted Logistics Support on the battlefield.

B. CONCLUSIONS

The analysis of Chapter IV identified and discussed several of the key legal issues associated with using Contracted Logistics Support in operational environments and examined the decision-making process associated with incorporating contractors into the Contract Support Plan (CSP). Conclusions summarizing these issues are listed below:

1. Current U.S. Law Does Not Address the Legal Issues Associated with Using Contracted Logistics Support

Under most circumstances, contractors accompanying the force are not subject to any military legal system or Federal law. Under all conditions other than a declared war, contractors are not subject to the Uniform Code of Military Justice (UCMJ). Additionally, the military cannot command and control contractors in the same way that it commands and controls military units and military personnel. This restriction comes from Title 5 U.S.C. and Part 37 of the Federal Acquisition Regulation. Thus, in most instances, authority over contractor personnel rests within the contractor's organization. Commanders and contracting personnel can only exercise administrative control through the contractor's employer-employee agreements and the terms of the contract. Yet, little can be done to contractors who violate a commander's guidelines. Furthermore, a commander has no authority to discipline a contractor for refusing to perform as

contracted. In an extreme situation, a contracted employee could be removed from the area, but this might be the limit to which a contractor could be punished. However, with the Government's reliance on Contracted Logistics Support growing, such a refusal could result in serious consequences. The end result could ultimately be a serious disintegration of the mission and in the most extreme cases result in a loss of life.

2. The Military Extraterritorial Jurisdiction Act Does Not Provide the U.S. Military Authority over Contractors

The Military Extraterritorial Jurisdiction Act (MEJA) does not adequately provide the U.S. Military with the authority over civilian contractors during contingencies and/or combat situations. Since the purpose of military law is to provide a means for the military to maintain good order and discipline, it is vital to the effectiveness of every military unit. Current U.S. law breeds an environment wherein a commander is devoid of any power to modify the behavior of contractors. While the MEJA does extend Federal law over civilians who commit felonies while accompanying the force, it does not extend Federal law to those who commit minor offenses. For instance, a contractor could conceivably commit a misdemeanor and a commander would not be authorized to exercise any legal jurisdiction over this individual. This contractor would not be subject to any provisions of the UCMJ or MEJA. Thus, a jurisdictional void exists in this situation. Those contractors who accompany the force are only subject to the law of the nation they occupy. Additionally, current U.S. policy requests that host nations waive their primary jurisdiction over civilian contractors. Moreover, when there is no host government, there is no local jurisdiction to prosecute their actions. Consequently, an environment exists in which contractors can commit crimes and remain unscathed by the rule of law.

3. Status-of-Forces Agreements are Insufficient

Status-of-forces agreements (SOFAs) cover a wide range of issues impacting contractors in military operations. These agreements establish the legal obligations of military personnel and contractors when operating within or in-transit through a particular nation. Moreover, SOFAs can define the legal status (e.g., host nation criminal and civil jurisdiction) and legal obligations (e.g., taxes, customs, etc.) of contractors that accompany the force. Some SOFAs do define these points, however, SOFAs often fail to address the status of contractors who accompany the force. Because of the structure of

current laws and policies, contractors are quite often protected from being prosecuted by foreign governments. Thus, once again contractors employed by the U.S. Government are not subject to the rule of law. Moreover, in recent years, in some countries where the Armed Forces have been deployed, no SOFA agreements exist.

4. The Law of War is Inadequate

The Law of War defines the status of civilians that support combat and/or contingency operations. However, international law has not evolved with current trends in warfare and offers little protection to contractors accompanying the force. At best, contractors may receive prisoner-of-war status if captured. Given the modern asymmetrical battlefield, and ill-defined battle lines, an enemy commander cannot easily differentiate between contractors and combatants. If contractor personnel are captured, the enemy commander may consider them illegal combatants. This status would place contractor employees in a grave position. The enemy could prosecute them as war criminals, and they would lose any protection offered by the Law of War. Instead, by subjecting them to an internal disciplinary system similar to Courts-martial and Non-Judicial Punishment (NJP), and making them subordinate to a military commander under the same conditions as combatants, they clearly receive the protection of the Laws of War.

5. The Legal Issues Associated with Using Contracted Logistics Support Affect a Commander's Expectancies and Perceptions

The primary legal issues associated with using Contracted Logistics Support in contingency and/or combat operations are: 1) the U.S. Military does not possess the capability or authority to discipline contractors, 2) the U.S. Military cannot command and control contractors in the same way that it commands and controls military units and military personnel, 3) commanders must ensure contractors maintain their noncombatant status, and 4) commanders must determine core capabilities versus those functions that can be contracted out and must consider the risk of contractor non-performance. Each of these factors affects the commander's decision to use Contracted Logistics Support based on the operational environment. In an operational environment, commanders rely on experience as a foundation to make most decisions under time constraints, but decision makers use pattern recognition to assess a situation. Given the high operational tempo of the modern battlefield, commanders do not have time to conduct an in-depth analysis on

incorporating contractors into the “total force.” Rather, commanders rely on their past experience and their perceptions of the effectiveness and reliability of contractors on the battlefield.

D. RECOMMENDATIONS

As the U.S. Military continues to rely more on Contracted Logistics Support to fill its logistical needs, the legal issues that surround the use of this dynamic resource must be addressed. Only then, will contractors be seamlessly employed in an operational environment without many of the reservations that currently exist. Recommendations, which could improve this proven combat–multiplier, are listed below:

1. That Current U.S. Law Be Revised to Address the Jurisdictional Gap That Exists

The current jurisdictional gap could be avoided if military law were extended to contractors accompanying the force. This would meet the purpose of military law, which gives commanders a means to maintain good order and discipline, to promote efficiency and effectiveness, and to strengthen national security. Extending military law to contractors would also maintain the purpose of these laws and allow commanders to maintain discipline, command and control, among the “total force.” While the MEJA allows commanders the ability to discipline contractors who commit serious crimes, it does not give commanders the means to command and control. This can only be possible by allowing commanders to have NJP authority over civilians accompanying the force in contingency or combat situations. Non–Judicial Punishment gives commanders a disciplinary measure that is more serious than administrative measures, but is less serious than trial by court–martial. If NJP were extended to cover contractors accompanying the force, it would minimize the risks associated with relying on contractors in critical situations. It would also enable commanders and their staffs to integrate contractors into the Contract Support plan without reservation. However, the modified UCMJ authority should be limited to contractors accompanying the force overseas.

The MEJA should be modified to cover foreign contractors that are employed by the U.S. Government outside of their host nation. This would allow prosecutors the authority and ability to exert Federal jurisdiction to foreign contractors who commit felonies while accompanying the force. The MEJA would apply in the hypothetical case

of a German contractor, employed by the U.S. Government, raping a Bosnian woman. Thus, this individual would be subject to U.S. law and would meet the original spirit of the law, to close the jurisdictional gap that allowed contractors to commit crimes with complete impunity.

2. That the Law of War Redefine Contractors Accompanying the Force as Combatants

The Law of War should redefine the status of civilians that support combat and/or contingency operations as combatants. This action would protect contractors more than current international law. For instance, if UCMJ jurisdiction were broadened to include contractors accompanying the force, they would be classified as combatants according to both the Hague Conventions and Geneva Conventions. An expansion of the UCMJ would subject contractors to an internal disciplinary system, and they would be subordinate to a military commander. Even though it is illegal to target noncombatants, this restriction is irrelevant on the modern battlefield. Most importantly, if contractors were afforded combatant status, they could not be classified as illegal combatants. Thus, if these contractors were in direct support of an armed force, engaged in active combat, they would maintain their combatant status. Therefore, in the event of their capture, these contractors would not face prosecution by the enemy's government as a war criminal. Additionally, if contractors were classified as combatants they could provide their own "force protection" and be an added asset to perimeter defense. In the end, redefining contractor status would offer commanders more flexibility and allow them to use Contracted Logistics Support more efficiently.

3. That Doctrine Be Revised to Reflect the Recommended Changes to U.S. Law and the Law of War

Current doctrine should be revised to incorporate the recommended changes to U.S. law and the Law of War. This doctrine could clarify many of the uncertainties that exist among commanders and contracting personnel associated with using Contracted Logistics Support. As indicated in Chapter I, there is some confusion regarding existing policy concerning the legal status of contractors. This doctrine would address a course of action for commanders and contracting personnel in the event of contractor non-performance. Above all, this doctrine would require that contingency plans be incorporated into the CSP. Currently, contingency plans for contractor non-performance

do not exist, and if contractors fail to perform then troops must assume these duties. However, in many instances the equipment that contractors service is of a highly technical nature and troops could not adequately replace these personnel. This situation would place mission accomplishment and troop safety in question [Ref. 56]. This doctrine would be implemented throughout the Services and would be incorporated in unit-level training. Only then would it enable commanders to have a first-hand account of the capabilities and limitations that Contracted Logistics Support offers. Finally, a commander's experience base grows only through improved doctrine and frequent training, which includes contractors. As demonstrated, it is this experience that allows commanders to make effective decisions under the most arduous conditions.

E. AREAS FOR FURTHER RESEARCH

1. A Comparative Analysis of the Services' Contracted Logistics Support Contracts

With the exception of the U.S. Marine Corps, each Service possesses its own engineering and logistics contract for employing contractors in operational environments. For instance, the U.S. Army's version of this contract is known as the Logistics Civil Augmentation Program, the U.S. Air Force's version of this contract is known as the Air Force Contract Augmentation Program and the U.S. Navy's version of this contract is known as the Construction Capabilities Contract Program. In 1997, a General Accounting Office report on contingency operations addressed the need for the DoD to determine if one Service could act as a manager for all Contracted Logistics Support contracts efficiently and effectively. Thus, developing a Joint Civilian Augmentation Program (JCAP) contract could potentially prevent individual Service program redundancies, while eliminating possible competition among the Services and improve efficiency in personnel resources and program costs. Furthermore, it is possible that the development of JCAP could improve doctrine and could reduce the ambiguities of using Contracted Logistics Support in operational environments. A comparative analysis of each Service's engineering and logistics contract could be conducted to determine if a joint engineering and logistics services contract would provide any benefit over current practices.

2. A Study of Current Marine Corps Doctrine for Contracted Logistics Support for Contingency/Combat Operations

Current U.S. Marine Corps doctrine does not sufficiently augment Contracted Logistics Support into Operation Orders. For instance, there is no requirement for any type of Contract Support Plan for contingencies, training exercises or any type of operation. However, contracting personnel at the Marine Expeditionary Force and Force Service Support Group levels frequently participate in deliberate planning [Ref. 57]. An analysis of the current use of Contracting Officers in the Fleet Marine Force could be conducted to determine if there is a need to develop a doctrine similar to FM 100–20 *Contractors on the Battlefield* or FM 100–10–2 *Contracting Support on the Battlefield*

3. An Examination of the Force Protection Issues Involved in Using Contracted Logistics Support on the Battlefield

Force protection in operational environments is always a key concern during military operations. This issue is complicated by the use of contractors on the battlefield. The Government is obligated to provide force protection to contractors. This is based on three factors: 1) There is a legal responsibility to provide a safe workplace; 2) There is a contractual responsibility stipulated in most contracts; and 3) Force protection enables contractors to perform their duties [Ref. 58:p. 5]. Obviously, allowing contractors to carry weapons for self-protection could jeopardize their status as noncombatants according to the Laws of War. Furthermore, as seen in the Balkans, there is not always sufficient manpower in a theatre of operations to enable the military to provide armed escorts. For instance, in the Bosnia area of operations, Brown and Root Services logged nearly one million miles a month without a dedicated military escort [Ref. 58:p. 6]. An analysis of the military's current policy on providing force protection to contractors on the battlefield could be conducted to determine the need for improved doctrine.

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APPENDIX A

Public Law 106–523

SECTION 1. SHORT TITLE.

This Act may be cited as the “Military Extraterritorial Jurisdiction Act of 2000.”

SECTION 2. FEDERAL JURISDICTION.

CERTAIN CRIMINAL OFFENSES COMMITTED OUTSIDE THE UNITED STATES

Title 18, United States Code, is amended by inserting after Chapter 211 the following new chapter:

CHAPTER 212—MILITARY EXTRATERRITORIAL JURISDICTION

Sec. 3261. Criminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States

Sec. 3262. Arrest and commitment

Sec. 3263. Delivery to authorities of foreign countries

Sec. 3264. Limitation on removal

Sec. 3265. Initial proceedings

Sec. 3266. Regulations

Sec. 3267. Definitions

Sec. 3261. Criminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States

(a) Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States—

(1) while employed by or accompanying the Armed Forces outside the United States; or

- (2) while a member of the Armed Forces subject to Chapter 47 of Title 10 (the Uniform Code of Military Justice), shall be punished as provided for that offense.
- (b) No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity), which function of approval may not be delegated.
- (c) Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the Law of War may be tried by a court-martial, military commission, provost court, or other military tribunal.
- (d) No prosecution may be commenced against a member of the Armed Forces subject to Chapter 47 of Title 10 (the Uniform Code of Military Justice) under this section unless-
- (1) such member ceases to be subject to such chapter; or
 - (2) an indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to such chapter.

Sec. 3262. Arrest and commitment

- (a) The Secretary of Defense may designate and authorize any person serving in a law enforcement position in the Department of Defense to arrest, in accordance with applicable international agreements, outside the United States any person described in section 3261(a) if there is probable cause to believe that such person violated section 3261(a).
- (b) Except as provided in sections 3263 and 3264, a person arrested under subsection (a) shall be delivered as soon as practicable to the custody of civilian law enforcement authorities of the United States for removal to the United States for judicial proceedings in relation to conduct referred to in such subsection unless such person has had charges brought against him or her under Chapter 47 of Title 10 for such conduct.

Sec. 3263. Delivery to authorities of foreign countries

(a) Any person designated and authorized under section 3262(a) may deliver a person described in section 3261(a) to the appropriate authorities of a foreign country in which such person is alleged to have violated section 3261(a) if-

(1) appropriate authorities of that country request the delivery of the person to such country for trial for such conduct as an offense under the laws of that country; and

(2) the delivery of such person to that country is authorized by a treaty or other international agreement to which the United States is a party.

(b) The Secretary of Defense, in consultation with the Secretary of State, shall determine which officials of a foreign country constitute appropriate authorities for purposes of this section.

Sec. 3264. Limitation on removal

(a) Except as provided in subsection (b), and except for a person delivered to authorities of a foreign country under section 3263, a person arrested for or charged with a violation of section 3261(a) shall not be removed-

(1) to the United States; or

(2) to any foreign country other than a country in which such person is believed to have violated section 3261(a).

(b) The limitation in subsection (a) does not apply if-

(1) a Federal magistrate judge orders the person to be removed to the United States to be present at a detention hearing held pursuant to section 3142(f);

(2) a Federal magistrate judge orders the detention of the person before trial pursuant to section 3142(e), in which case the person shall be promptly removed to the United States for purposes of such detention;

(3) the person is entitled to, and does not waive, a preliminary examination under the Federal Rules of Criminal Procedure, in which case the person shall be removed to the United States in time for such examination;

(4) a Federal magistrate judge otherwise orders the person to be removed to the United States; or

(5) the Secretary of Defense determines that military necessity requires that the limitations in subsection (a) be waived, in which case the person shall be removed to the nearest United States military installation outside the United States adequate to detain the person and to facilitate the initial appearance described in section 3265(a).

Sec. 3265. Initial proceedings

(a)(1) In the case of any person arrested for or charged with a violation of section 3261(a) who is not delivered to authorities of a foreign country under section 3263, the initial appearance of that person under the Federal Rules of Criminal Procedure-

(A) shall be conducted by a Federal magistrate judge; and

(B) may be carried out by telephony or such other means that enables voice communication among the participants, including any counsel representing the person.

(2) In conducting the initial appearance, the Federal magistrate judge shall also determine whether there is probable cause to believe that an offense under section 3261(a) was committed and that the person committed it.

(3) If the Federal magistrate judge determines that probable cause exists that the person committed an offense under section 3261(a), and if no motion is made seeking the person's detention before trial, the Federal magistrate judge shall also determine at the initial appearance the conditions of the person's release before trial under chapter 207 of this title.

(b) In the case of any person described in subsection (a), any detention hearing of that person under section 3142(f)-

(1) shall be conducted by a Federal magistrate judge; and

(2) at the request of the person, may be carried out by telephony or such other means that enables voice communication among the participants, including any counsel representing the person.

(c)(1) If any initial proceeding under this section with respect to any such person is conducted while the person is outside the United States, and the person is entitled to have counsel appointed for purposes of such proceeding, the Federal magistrate judge may appoint as such counsel for purposes of such hearing a qualified military counsel.

(2) For purposes of this subsection, the term “qualified military counsel” means a judge advocate made available by the Secretary of Defense for purposes of such proceedings, who-

(A) is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; and

(B) is certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.

Sec. 3266. Regulations

(a) The Secretary of Defense, after consultation with the Secretary of State and the Attorney General, shall prescribe regulations governing the apprehension, detention, delivery, and removal of persons under this chapter and the facilitation of proceedings under section 3265. Such regulations shall be uniform throughout the Department of Defense.

(b)(1) The Secretary of Defense, after consultation with the Secretary of State and the Attorney General, shall prescribe regulations requiring that, to the maximum extent practicable, notice shall be provided to any person employed by or accompanying the Armed Forces outside the United States who is not a national of the United States that such person is potentially subject to the criminal jurisdiction of the United States under this chapter.

(2) A failure to provide notice in accordance with the regulations prescribed under paragraph (1) shall not defeat the jurisdiction of a court of the United States or provide a defense in any judicial proceeding arising under this chapter.

(c) The regulations prescribed under this section, and any amendments to those regulations, shall not take effect before the date that is 90 days after the date on which the Secretary of Defense submits a report containing those regulations or amendments (as the case may be) to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate.

Sec. 3267. Definitions

As used in this chapter:

(1) The term “employed by the Armed Forces outside the United States” means-

(A) employed as a civilian employee of the Department of Defense (including a no appropriated fund instrumentality of the Department), as a Department of Defense contractor (including a subcontractor at any tier), or as an employee of a Department of Defense contractor (including a subcontractor at any tier);

(B) present or residing outside the United States in connection with such employment; and

(C) not a national of or ordinarily resident in the host nation.

(2) The term “accompanying the Armed Forces outside the United States” means-

(A) a dependent of-

(i) a member of the Armed Forces;

(ii) a civilian employee of the Department of Defense (including a no appropriated fund instrumentality of the Department); or

(iii) a Department of Defense contractor (including a subcontractor at any tier) or an employee of a Department of Defense contractor (including a subcontractor at any tier);

(B) residing with such member, civilian employee, contractor, or contractor employee outside the United States; and

(C) not a national of or ordinarily resident in the host nation.

(3) The term “Armed Forces” has the meaning given the term “armed forces” in section 101(a)(4) of title 10.

(4) The terms “Judge Advocate General” and “judge advocate” have the meanings given such terms in Section 801 of Title 10.

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