

Thinking about Logistics

Contractors on the Battlefield
Logistics Transformation

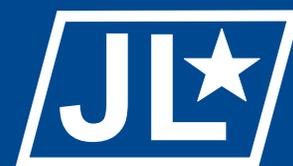
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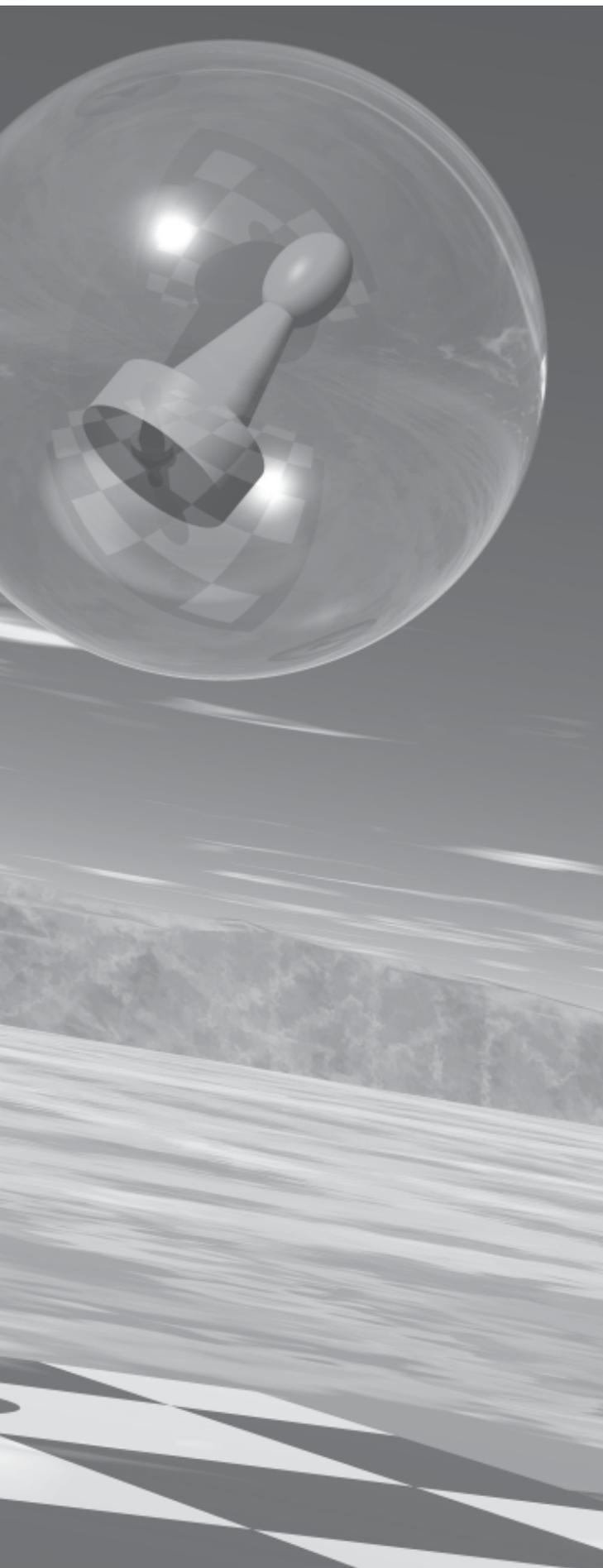
Lieutenant Colonel Stephen M. Blizzard, USAF

Increasing Reliance on

Contractors on the Battlefield

How Do We Keep
from Crossing
the Line?





Introduction

Contractors are no longer restricted to acquisition and logistics but are found nearly everywhere, and their presence on the battlefield is a reality.¹

Since the end of the Cold War, US Armed Forces have increased their reliance on support contractors in contingency situations. Factors that have led to this increased reliance include post-Cold War reductions in the size of military forces, increases in the operations and missions undertaken by the military, and increased complexity and sophistication of new weapon systems. The concept of civilian contractors supporting military operations is nothing new. Throughout history, contractors have deployed with the military and performed various logistical and support functions. What is new is the expanding use of contractors in operational roles



traditionally performed exclusively by uniformed military personnel. These new contractor roles are encroaching on what could be interpreted to be direct participation in hostilities. The impact of this expanding role has blurred the distinction between contractors performing as civilians accompanying the force and contractors engaging in hostilities.

The Expanding Use of Contractors

Never has there been such a reliance on nonmilitary members to accomplish tasks directly affecting the tactical successes of an engagement.²

Joint Publication 4-0, *Doctrine for Logistic Support of Joint Operations*, defines three types of contractors used in contingency situations: theater support, external theater support, and systems support.³

Theater support contractors assist deployed operational forces under prearranged contracts through host-nation and regional businesses and vendors. These contracts provide goods, services, and minor construction—usually from the local vendor base or nearby offshore sources—to meet immediate needs of the local commanders. External contracts, such as the Army Logistics Civilian Augmentation Program and Air Force Capability Assessment Program, provide support for deployed operational forces that is separate and distinct from theater and systems support contractors.⁴ These may be US or third-party businesses and vendors. These types of contracts usually provide road and airfield construction, transportation services, mortuary services, billeting, and food services. System contractors support deployed, operational forces under existing weapon system contracts. These contractors “support specific systems throughout

their system's life cycle (including spare parts and maintenance) across a range of military operations."⁵ For example, the F-117A stealth fighter, reconnaissance aircraft, and Global Hawk unmanned aerial vehicle rely on system contractors for maintenance and logistics support. Contractors must deploy with the military, since organic support is limited or nonexistent.

Since theater support contractors are used primarily for commodities purchase and traditional civilian roles, the nature of which has not changed, the focus of this discussion will be on external support contractors and system contractors.

Deploying contractor employees to support military operations is not a new phenomenon. History shows that contractors supported military operations as far back as the 16th century. Martin van Crevald notes in *Supplying War* that early commanders realized the need to furnish their armies with supplies beyond what they could plunder. Sutlers, with whom the army would sign contracts, helped supply the army with "the most elementary needs."⁶

The US military has relied on civilian support during military operations since its existence. General George Washington's Continental Army relied on civilians for transportation, carpentry, engineering, food, and medical services. Civilians performed these services, freeing soldiers to focus on fighting.⁷ It seemed only logical to use civilians since these logistical

"Specialists in field maintenance checking on performance of battlefield equipment dodged Vietcong attacks on military bases at DaNang and Pleiku."¹² Contractors were no longer safely behind the lines of battle, and they were not performing only logistics and support functions.¹³ "There might have been a time in the past when the site of military operations was an exclusive club for those in uniform, but those days are waning."¹⁴ Beginning with Vietnam, the tools the military uses in combat have become so complex that the military does not have—or could not afford to have—the expertise required to provide maintenance and technological support. This fact, coupled with the use of contractors for other logistical functions within the *zones of occupation*, has brought contractors perilously "within sound of the guns."¹⁵

Since 1990, the trend toward using contractors in theater to perform support; logistics; and increasingly and more important, combat functions has increased and will continue to do so for the foreseeable future.¹⁷ Increasing contingency operations from Desert Shield and Storm to Somalia and Haiti to Bosnia, Kosovo, Afghanistan, and Iraq, coupled with military downsizing, privatization of many support functions, omnibus base operating support contracts, and the growing complexity of weapon system hardware and software has caused contractor deployments to grow.¹⁸ Table 1 provides a historical look at contractor deployment in theater.

Currently, the military relies on contractors for the maintenance of 28 percent of its weapon systems. The Bush administration would like to see this figure rise to 50 percent.

functions were either "too menial for soldiers or were well-established or specialized in commercial industry."⁸ This philosophy remained relatively unchanged throughout the history of warfare up to the Vietnam conflict. In the wars prior to Vietnam, contractors continued to provide basic logistics functions in support of soldiers, primarily in the rear areas away from the dangers of the battlefield.⁹

The contractor support philosophy began to change with the Vietnam conflict. *Business Week* referred to Vietnam as a "war by contract."¹⁰ "More than ever before in any US conflict, American companies are working side by side with troops. One big reason is that military equipment has become so complex."¹¹

War/Conflict	Civilians/Contractors	Military	Ratio
Revolution	1,500 (est)	9,000	1:6 (est)
Mexican/American	6,000 (est)	33,000	1:6 (est)
Civil War	200,000	1,000,000	1:5 (est)
World War I	85,000	2,000,000	1:24
World War II	734,000	5,400,000	1:7
Korean Conflict	156,000	393,000	1:2.5
Vietnam Conflict	70,000	359,000	1:5
Desert Shield/Storm	5,200	541,000	1:104
Balkans	20,000	20,000	1:1

Table 1. Civilian Participation in Combat¹⁶

The General Accounting Office (GAO) reported "nearly 5,200 contractor personnel voluntarily deployed to support the military forces during the Gulf War."¹⁹ In Bosnia, "Our Army uniform presence was 6,000 supported by 5,900 contractors."²⁰ The Brookings Institute estimates that the ratio of military to contractors in Operation Iraqi Freedom is 10 to 1.²¹ Currently, the military relies on contractors for the maintenance of 28 percent of its weapon systems. The Bush administration would like to see this figure rise to 50 percent.²²

The trend toward the use of contractors in a theater can be attributed to four factors: deep cuts in military personnel; greater emphasis on privatization of functions that can be performed more efficiently outside the military; increased reliance on contractors because of the growing complexity and sophistication of weapon systems; and the lack of core military expertise, training, and flexibility gained by deploying contractors into theaters that have congressional, legislative, or host country-mandated troop ceilings.²³

Since the end of the First World War, the American public has "historically demanded a peace dividend at the conclusion of each war or conflict."²⁴ The end of the Cold War was no exception. The fall of the Soviet Union led US taxpayers to call for major cutbacks in defense spending in order to "reap the benefits of winning the Cold War."²⁵ Since 1991, service force structures have been reduced by more than 30 percent, Department of

Article Highlights

Defense (DoD) budgets have dropped 40 percent, and weapon system acquisitions have fallen 70 percent.²⁶ Additionally, the United States has withdrawn two-thirds of the ground forces and three-fourths of the air forces formerly forward deployed in Western Europe, leaving a large gap in the logistics infrastructure available for overseas operations.²⁷ These cuts occurred without any reduction in operational requirements.

In fact, since the end of the Cold War, US military commitments abroad have increased greatly. The operations tempo of all the Services has increased significantly over the last 12 years while operating with one-third fewer forces. For example, the Air Force has more than 35,000 airmen deployed, performing various missions around the world.²⁸ Thirteen years ago, the average was around 2,000.²⁹ “The Army has had a 300-percent increase in mission commitments during the last several years, and they do not appear to be tapering off.”³⁰ This increase in commitments has not gone unnoticed by Congress. In his statement before the Senate Armed Services Committee, Senator Carl Levin noted:

Our military forces are stretched thin. Over 180,000 are fighting the war in Iraq or supporting it from Kuwait and other Persian Gulf states. Another 10,000 are conducting combat and stability operations in Afghanistan. At the same time, we are helping maintain the peace in Liberia, Bosnia, and Kosovo. And of course, we have thousands of troops deployed in South Korea, dedicated in war plans to the defense of that nation in a region that is becoming ever volatile with the North Korean drive to develop nuclear weapons. We read in the paper this morning that thousands of National Guard and Reserve troops in Iraq and the Gulf area are going to have their tours of duty extended to a year.³¹

The Guard and Reserves have had their numbers reduced by nearly 48 percent while performing 13 times more man-days a year than previously done.³² Furthermore, the DoD civilian rolls have been cut by more than 300,000 since 1989.³³ These budget and manpower reductions are forcing the DoD to look at demilitarizing core functions, those previously performed exclusively by military personnel, via privatization or contracting out to stretch limited dollars and free up military personnel for warfighting duties.³⁴

Contractors have been used to fill the void created by the drawdown in troop strength. Use of contractors in support and logistics functions has allowed commanders to better utilize military forces in combat positions. The immense budgetary pressures, both inside and outside the DoD, demand that we get *more bang for the buck* in order to deal with the increasing military commitments. The drastic cuts in military spending, competition between funding modernization and other internal service programs, and a steadily declining military infrastructure and readiness have led Congress to order the DoD to develop ways of cutting costs without cutting (and in some cases increasing) services (doing more with less). To do this, the DoD has turned to reengineering, competitive sourcing, and privatization of increasingly military functions.³⁵ Office of Management and Budget Circular A-76 mandates that the Government obtain commercially available goods and services from the private sector when it makes economic sense to do so. Those functions, termed *commercial activities*, are the only functions eligible to be performed under contract.³⁶

However, every commercial-type function is not automatically a contracting candidate. There could be several valid reasons to exempt an otherwise commercial activity from being performed by contract and, conversely, valid conditions to convert a

The US military increasingly deploys with and relies more on contractor personnel during military operations. This article examines their employment under international and US law, joint doctrine, and DoD and Service regulations. It discusses the major issues involved in using contractor services in support of combat operations to include the manner in which contractor personnel may operate on the battlefield without being considered unlawful combatants. It then takes the four defined requirements for being a combatant and discusses each in terms of several key issues—the civilian nexus to combat, command and control of contractors, the bearing of arms, and uniform wear. Colonel Blizzard outlines the increasing use of contractor personnel in performing tasks formerly considered core military functions. Of note in this discussion are the sections that demonstrate that the increasing presence of contractors during combat operations is placing them dangerously close to being considered unlawful combatants under international law. The implications of becoming an unlawful combatant are discussed, including potential war crimes accountability under the International Criminal Court. The article concludes with a discussion of alternatives to eliminate or mitigate the problems associated with contractors operating in the combat environment.

government function into one that is contractor-operated.³⁷ The Government is allowed to perform an otherwise commercial function if the function is determined to be a core capability. A core capability is defined as:

A commercial activity operated by a cadre of highly skilled employees, in a specialized, technical, or scientific development area, to ensure that a minimum capability is maintained. The core capability does not include the skills, functions, or full-time equivalent (FTE) that may be retained in house for reasons of national defense, including military mobilization, security, rotational necessity, or patient care or research and development activities.³⁸

Previously, the Services defined core functions as “those requiring military or organic capability because it was combatant in nature, required potential deployment into harm’s way, or required the capability to be expanded (surged) in times of crisis.”³⁹ Today, the focus is moving away from specific tasks toward a big picture approach of looking at service core competencies. For example, instead of taking a function-by-function approach, one can look at the issue from a broad Air Force core competency approach of “Air and Space Superiority, Precision Engagement, Information Superiority, Global Attack, Rapid Global Mobility, and Agile Combat Support.”⁴⁰ Using this approach, functions previously exempt from privatization or contracting—such as aircraft and munitions maintenance, communications, weapons calibration, and weapon system software maintenance—are now prime candidates.⁴¹ The main advantage in using contractors to perform these missions is their lower cost. The GAO estimates that the average civilian support employee costs about \$15K less than a comparably graded military person.⁴² The Air Force estimates that it has saved \$500M annually through privatization. DoD-wide cost savings were projected to be between \$7B and \$12B annually by fiscal year 2002.⁴³

The preeminence of advanced technology and cutting-edge weapon systems is further exacerbating the military’s reliance on contractor support. The high-tech weapon systems used to such devastating effect in Afghanistan and Iraq are so complex that combat units in the field have no choice but to depend on contractors to maintain and, in some cases, operate them. Many weapon systems—such as the F-117A stealth fighter, M1-A tank, Patriot missile, and Global Hawk—are contractor-dependent.⁴⁴ The operation and maintenance of state-of-the-art systems require technical expertise neither available in the military nor cost-effective for the military to develop in house.⁴⁵ For example, a new Marine Corps truck was designed to be at least partially contractor supported because the limited number of assets made contractor support more cost effective. Similarly, the Army’s Guardrail surveillance aircraft is entirely supported by contractors because it was not cost-effective to develop an organic maintenance capability.⁴⁶ In the latest Iraqi conflict, the military used recently fielded systems or systems still under development that had unique technical requirements for which the Services could not develop timely training courses or train personnel. For instance, contractors recently deployed with the 3rd Infantry Division to Iraq to support the high-tech digital command and control systems still under development. Similarly, when the Air Force deployed the Predator unmanned aerial vehicle, contractor support was required because the vehicle was still in development, and Air Force personnel had

not been trained to maintain the Predator’s data link system. With limited expertise in these new high-tech weapon systems, the military is forced to rely on contractor support in operational situations.

Finally, the use of contractors is beneficial in areas where countries impose *force caps*, limiting the number of military members allowed. For example, DoD has limited US troops to 15 percent of the North Atlantic Treaty Organization forces in Kosovo, and the Philippine government limited the number of US troops participating in a recent deployment to 660.⁴⁷ Since contractors are not included in most force caps, they have been substituted for military personnel to meet mission requirements usually met by using military personnel. In Bosnia, for example, the Army used contracted security guards to provide gate and base perimeter security. In Kosovo, the Army replaced its firefighters with contractors. There are several other examples of the military’s relying on contractor support to perform traditionally military functions and maximize the limited combat forces in an area. As a result of the military’s increased reliance on contractor support, contractors are providing a wide range of services (Table 2) at deployed locations around the world, as shown in Figure 1.

Deployment Issues

*The citizen must be a citizen not a soldier...war law has a short shrift for the noncombatant who violates its principles by taking up arms.*⁵⁰

The use of contractors to perform noncombat duties is advantageous to commanders in terms of freeing up uniformed military personnel to project combat power. However, while working to build a cohesive total force, commanders must remember that, while contractors provide many functions formerly performed by military members and commanders often become comfortable with their support contractors (almost to the point of referring to them as *my people*), contractors are not military members. As such, contractors deployed in theater present the commander with a myriad of potentially complex issues. One of the most important issues a commander faces is the question of what duties a civilian contractor should perform for an armed force in theater, termed *nexus to combat*. The line between allowable combat support roles and unallowable military combat roles is also an important issue.⁵¹

The increasing scope in which the US military is continuing to employ contractors to perform functions formerly performed exclusively by military personnel is moving dangerously closer to this line. The evolving trend toward employing contractors directly into military operations could lead to serious consequences. Commanders must take extreme caution in using contractors in roles that could be interpreted as mirroring combatant roles. Commanders usually have the ability to issue orders and exert command influence over personnel assigned or attached to their unit. However, since contractors are not military personnel, a commander’s abilities to do this are limited, even as they direct contractors to perform legally assigned functions.⁵²

In past conflicts, the philosophy regarding in-theater employment of civilians was “the closer the function to the sound of battle, the greater the need to have soldiers perform the function because of the greater need for discipline and control.”⁵³ The Vietnam conflict started a trend where increasing reliance on contractors and the changing nature of conflicts positioned

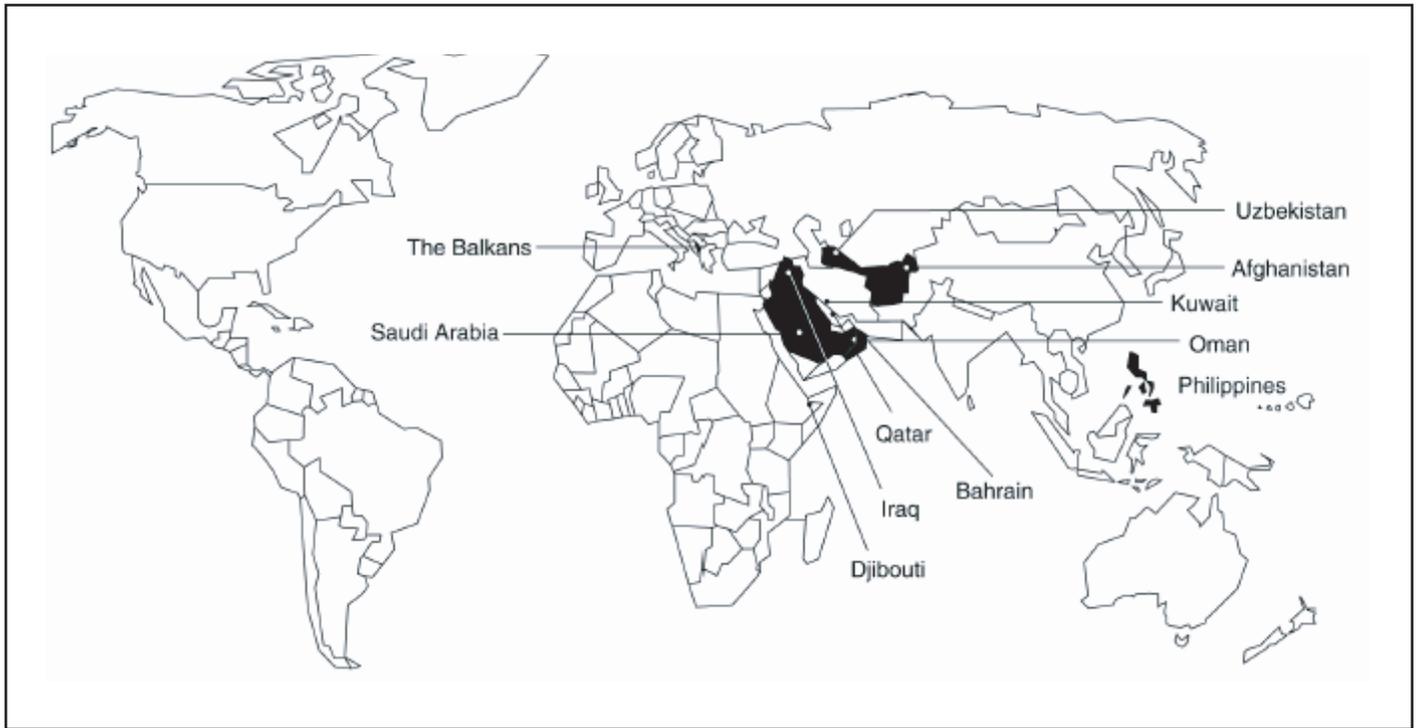


Figure 1. Selected Countries Where Contractors Are Supporting Deployed Forces⁴⁸

Service	Balkans	Southwest Asia	Central Asia
Weapons and systems support	X	X	X
Intelligence analysis	X	X	X
Linguists	X	X	X
Base operations support	X	X	X
Logistics support	X	X	
Prepositions equipment support		X	
Nontactical communications	X	X	
Generator maintenance	X	X	X
Biological/chemical detection systems		X	X
Management and control of government property	X	X	X
Command, control, communications, computers, and intelligence	X	X	X
Continuing education	X		X
Fuel and materiel transport	X	X	X
Security guards	X	X	
Tactical and nontactical vehicle maintenance	X	X	
Medical service		X	
Mail service	X		

Table 2. Selected Services Provided by Contractors in Deployed Locations⁴⁹

them closer and closer to the sound of battle.⁵⁴ The increased reliance on contractors and today's nonlinear battlespace have contractors performing roles formerly performed exclusively by military members in areas "physically and functionally closer to the battlespace than ever before."⁵⁵ In addition to traditional support-type functions, contract personnel now perform actual mission tasks such as inter- and intratheater airlift and

maintenance of vital weapon systems—such as the Joint Surveillance Target Attack Radar System, Patriot, Global Hawk, and Predator—and operate and support intelligence and information systems.⁵⁶ This evolution of contractor roles in battlefield operations puts employees at risk of crossing the line between lawful noncombatants and unlawful direct participation in hostilities under the Law of Armed Conflict (LOAC).

LOAC is “that part of international law that regulates the conduct of armed hostilities.”⁵⁷ The purpose of LOAC is to limit the effects of conflict, protect combatants and noncombatants from unnecessary suffering, safeguard the fundamental rights of combatants and noncombatants, prevent the conflict from becoming worse, and make it easier to restore the peace when the conflict ends.⁵⁸ LOAC applies to armed conflict even when a state body has not been declared.⁵⁹ However, many LOAC provisions of LOAC are not binding under international law “during intrastate ‘civil wars’ or conflict between nonstate actors” as frequently experienced in military operations other than war scenarios like Operation Enduring Freedom.⁶⁰ It is US policy to follow the provisions of LOAC, even in situations where it may not be binding under international law. Chairman of the Joint Chiefs of Staff (CJCS) Instruction 5810.01A, *Implementation of the DoD Law of War Program*, states that military forces will “comply with law of war during all armed conflicts, however such conflicts are characterized, and, unless otherwise directed by competent authorities, will comply with the principles and spirit of the law during all other operations.”⁶¹

LOAC is derived from two main sources: “Customary international law arising out of the conduct of nations during hostilities and binding upon all nations” and “treaty law arising from international treaties (also called conventional law) that only binds the nations that have ratified a particular treaty.”⁶² LOAC treaty law is divided into two areas: Hague Law (from the treaty negotiations conducted at The Hague, Netherlands), concerned with means and methods of warfare, and Geneva Law (from treaty negotiations held at Geneva, Switzerland), which is concerned with protecting persons involved in conflicts. LOAC classifies persons involved in armed conflict as either combatants or noncombatants.

Article 4, Geneva Convention III, Treatment of Prisoners of War, 12 August 1949, prescribes the following conditions to combatants: that of being commanded by a person responsible for subordinates; of having a fixed distinctive sign recognizable at a distance, of carrying arms openly, and of conducting their operations in accordance with the laws and customs of war.⁶³ Persons who do not meet the above description are classified as noncombatants. DoD contractors are, therefore, noncombatants. The reasons contractors cannot be considered combatants and cannot bear arms against an enemy are the contractor is not subject to the military commander’s internal discipline system (Uniform Code of Military Justice [UCMJ]), “is not trained to conduct operations in compliance with armed conflict,”⁶⁴ and “is not subordinate to a field commander.”⁶⁵

LOAC historically has recognized the right of noncombatants to be in the battlefield and to “even be aboard combat aircraft, vessels, and vehicles on operational missions. They may provide technical support and perform logistics functions.”⁶⁶ However, contractors are not exactly noncombatants in the true sense. They are something in between; they are “civilians authorized to accompany the force.”⁶⁷ In this status, contractors are entitled to “some but not all protections afforded combatants and some but not all the protections afforded to noncombatants.”⁶⁸ As such, contractors cannot be targeted deliberately as individuals, but they can be targeted as a part of a system. If the system (or function) is targeted and contractor personnel are wounded or killed, LOAC will regard them as legitimate collateral casualties.⁶⁹

The Air Force and the Army realize the danger civilians face from uncertainty under LOAC.

Civilians who take part in hostilities may be regarded as combatants and are subject to attack and/or injury incidental to attack on military objectives. Taking part in hostilities has not been clearly defined in the law of war but generally is not regarded as limited to civilians who engage in the actual fighting. Since civilians augment the Army in areas in which technical expertise is not available or is in short supply, they, in effect, become substitutes for military personnel who would be combatants.⁷⁰

Therefore, if a contractor is performing F-117A maintenance and the enemy decides to bomb the fighter maintenance facility, any collateral injury to or death of the contractor resulting from the attack is considered legitimate. The danger of contractors’ being attacked while performing their duties is very real as documented in Desert Storm, United Nations peacekeeping missions in Angola, and antidrug operations in Colombia.⁷¹ More recently, during Iraqi Freedom, two contractor employees from EOD Technology Incorporated were killed by an improvised roadside explosive device as they were returning from assisting the Army Corps of Engineers defuse bombs and destroy munitions left over from the old Iraqi regime.⁷² As of November 2003, 9 civilians working for the Government had been killed, 29 had been wounded, and many have had close calls.⁷³

To avoid LOAC violations, contractors must take great care to ensure they do not conduct themselves in a manner that is inconsistent with their status. According to LOAC, only the combatant has the *honor* to conduct war and deliberately kill the enemy (direct action). A noncombatant or “civilian authorized to accompany the force” who engages and kills the enemy could be seen as a murderer.⁷⁴ If a soldier kills in war and is captured, he is considered a prisoner of war (POW) and must be treated accordingly. A noncombatant who kills and is captured can be subject to trial and punishment as a criminal. As long as contractor employees do not violate LOAC, they are entitled to POW status if captured.⁷⁵

LOAC becomes nebulous when defining direct participation in hostilities. Direct action in warfare is considered those circumstances that, by their nature, are likely to cause some sort of physical harm or destruction of property. Direct action also includes “functioning as a guard, lookout, or intelligence agent for an armed force.”⁷⁶ Therefore, a strict interpretation of *direct part in hostilities* on the part of other members in the international community could render the contractor Global Hawk pilot or F-117A maintainer as an *unlawful* combatant subject to prosecution for war crimes.⁷⁷

The current use of more than a dozen private military companies in Iraq should be cause for concern. Armed contract employees guard Baghdad airport, man checkpoints in the same manner as military soldiers, provide armed protection for the Coalition Provisional Authority, and train Iraq’s police. “Some soldiers said privately that the soldiers for hire walk around Iraq with their weapons in full view as if they belong to a coalition army.”⁷⁸ In this situation, one taking a strict interpretation of LOAC could determine these contractor employees to be taking a direct part in hostilities.

The above example brings to mind two additional considerations in the LOAC area: whether to allow the contractor to wear a military uniform or carry weapons. Decisions on both of these areas must be made with the consideration of protecting

the contractor's noncombatant status since the wearing of uniforms and the carrying of weapons can create the appearance of being a combatant.

In accordance with LOAC, combatants must distinguish themselves from noncombatants in order to protect the noncombatants. Wearing a distinctive military uniform usually does this. However, in today's environment, contractors frequently wear military-type uniforms in performance of their duties. In this case, the uniform may include "utilities, chemical warfare protective clothing, and similar combat outerwear."⁷⁹ The commander's decision to allow contractor employees to wear a military uniform is based on the determination that "there is an actual or threatened outbreak of hostilities, involving war, major civil disturbance, or the deployment necessitates the wearing of uniforms in specifically defined geographic areas."⁸⁰ While commanders may allow contractors to wear military uniforms, Air Force policy generally advises against issuing military garments (for example, BDUs) to contractor employees. Exceptions to this policy may be made because of compelling reasons such as a need for chemical warfare gear when the contract requires the Government to issue the equipment rather than forcing the contractor to purchase and provide it to their employees. Caution must be used, however, since wearing the uniform exposes contractor employees to the risk of being accused of being an unlawful combatant. To help reduce this risk, commanders must ensure that if contractors wear the uniform they wear markings (for example, distinctively colored patches, armbands, and headgear) clearly identifying themselves as civilians.⁸¹ Commanders should ensure the contractor employees

bringing to justice individuals who "commit the most serious violations of international humanitarian law; namely, war crimes, crimes against humanity, genocide, and once defined, aggression."⁸³ Even though the United States has not ratified the ICC, more than 139 countries have ratified it.⁸⁴ Thus, it is possible that contractor activities could be interpreted as crossing the line between lawful support and unlawful direct action, inviting indictment in the ICC. Therefore, it is incumbent upon the commander to ensure contractor employees are not engaging in activities that would compromise or create the appearance of compromising their status as noncombatants.

As discussed earlier, in combat situations, commanders generally feel more comfortable having direct command and control of the personnel assigned to them. Since contractor personnel are not under the direct control of the commander but governed by the contract, command and control over contractor employees continues to be a key challenge to deployed commanders.⁸⁵ Since contractor employees are not military members, they are, by definition, not subordinate to the commander or subject to the commander's internal discipline system, known as the UCMJ. Contractor employees are only subject to the UCMJ during a declared war, something we have not had since World War II. Lack of command and limited direct control over the contractor can provide challenges to the commander.

The contractor's effort is governed by the terms and conditions of the contract. As such, the contractor cannot be under a commander's chain of command and cannot be ordered to perform functions outside the scope of the contract. Additionally,

A strict interpretation of *direct part in hostilities* on the part of other members in the international community could render the contractor Global Hawk pilot or F-117A maintainer an *unlawful* combatant.

understand the possible risks, in terms of LOAC, associated with uniform wear.

The *legality*, under LOAC, of civilians carrying weapons is not clear. Army Field Manual 100-21 allows civilian use of firearms for self-defense provided three conditions are met: commander approval; contractor company policy, which approves carrying of firearms by their employees; and the employee's volunteering to carry the firearm.⁸² By carrying sidearms, contractor employees run the risk of being seen as unlawful combatants. In some areas, such as Iraq or Bosnia, the line between self-defense and direct participation in a military action could be extremely narrow and could depend upon through whose lens the contractor employee's actions are viewed. Aside from the contractor status concerns, the commander should review the status of forces agreement to ensure there are no host-nation prohibitions against arming civilians for self-defense.

The 2002 Rome Statute of the International Criminal Court (ICC) has increased the risk of contractor employees being tried on an individual basis for LOAC violations. The ICC is the first permanent, independent court capable of investigating and

contractor employees cannot be placed in the position where they appear to have a direct supervisor and subordinate relationship with a military commander (or any government employee for that matter). Only the contracting officer or the contracting officer's representative may direct the contractor within the scope of the contract, and only the contracting officer can make changes to the contract.

The use of private military companies in Iraq creates a serious command and control issue, especially where commanders have instituted strict rules of engagement for forces under their command. Unless this rule of engagement or some condition requiring the contractor to follow the local commander's rule of engagement is included in the contract, contractor employees will not be obligated to operate within the rules of engagement. In this situation, soldiers "worry that the private-sector soldiers might not be constricted by the same rules of engagement and that any rogues among them could kill or hurt Iraqis and bring reprisals on all foreign forces."⁸⁶ One coalition military commander, when asked, "What are the rules of engagement for the private companies? Are they civilian or are they military?"

replied, “I don’t know who they are, and I don’t want to go anywhere near them.”⁸⁷ This type of situation should be of grave concern to commanders who have private military companies operating in their area of responsibility since the ability to control their actions directly will be limited if not nonexistent.

Another issue that causes concern is the fact that contractor employees may refuse to enter what they consider to be a dangerous situation. In this situation, the commander does not have the authority to order a contractor employee to perform. This proved problematic in Iraqi Freedom where contractor *no shows* led to an Army unit’s “living in the mud, heat, and dust since the unit had no core support capability and had shifted to reliance on contractor support.”⁸⁸ This point drives home a major concern voiced by Army Field Support Command officials, “You cannot order civilians into a war zone. People can sign up for that, but they also can back out.”⁸⁹ Contractors leaving the theater at one time meant no hot food or limited support services. Now, because of the military’s increased reliance on contractors, it could mean the loss of a core competency task such as aircraft maintenance or the loss of mission effectiveness of an entire platform like Global Hawk or Predator.⁹⁰

In this situation, it is up to contractor management to take action against the employee and make adjustments to continue performance. If the contractor does not perform, the only recourse

contractor employees in the event of hostilities.⁹⁴ Guidance on the use of contractors to support deployed forces varies widely.⁹⁵ Commanders often have contractors supporting several different services, under several different contracts, each with different requirements and contract terms and conditions, operating within their area of responsibility. A recent GAO audit found that no overall DoD guidance regarding the use of contractors to support deployed forces exists. At the service level, only the Army has developed comprehensive guidance and formulated policies and doctrine for using contractors in deployment situations. Army regulations and field manuals provide comprehensive and detailed direction to commanders, contracting personnel, and contractors on their roles and responsibilities.⁹⁶ However, the other services have not matched the Army’s fidelity in developing guidelines for using contractors in deployment situations.

Additionally, where there is guidance, at either the joint or service level, it is inconsistent and, in some cases, contradictory. These differences and contradictions can complicate the ability of the commander to execute that guidance and cause great confusion.⁹⁷ The rules regarding force protection of contractor employees provide an excellent example. Joint Publication 4-0, Chapter V, describes force protection as the responsibility of the contractor, unless stated otherwise in the contract.⁹⁸ Army Field

Perhaps the best approach would be to turn questionable civilians into combatants. There are two approaches: requiring contractors to hire employees with military obligations and the sponsored reserve concept.

the Government may have is to terminate the contract for default and remove the contractor from the theater. This does the commander who is trying to execute a combat mission little good. In anticipation of this type of contingency, it is imperative for the commander to plan for a contractor’s default by providing military to perform the function in the interim until the contracting officer can find another contractor.⁹¹

Since contractor employees are not military personnel, they are not, unless Congress has declared war, subject to the UCMJ. Without a declaration of war, contractors, like any other US citizen who is visiting a country (a tourist for example), are subject to the laws of the country.⁹² An exception to this rule would be if contractor employees were covered under the status of forces agreement between the US Government and the host nation. The lack of applicability of US law or UCMJ, coupled with the hesitation of some host nations to prosecute Americans for certain offenses (especially if committed against other Americans), creates a situation where the contractor employee may be immune from prosecution despite the commission of a serious crime. In addition, in a country with no government, like Somalia, a contractor in a country supporting US efforts “could murder, rape, pillage, and plunder with complete legal unaccountability.”⁹³ In these instances, there is little the commander can do other than seek remedy under the contract.

To compound this issue, there is little common understanding among the Services as to the Government’s responsibility to

Manual 3-100.21 places the responsibility for contractor force protection on the commander.⁹⁹ Air Force policy states that force protection commensurate with that provided to DoD civilians may be offered under the terms and conditions specified in the contract and in accordance with host-nation laws.¹⁰⁰ The need for clear guidance is obvious in order to allow commanders to focus on the task at hand, not the rules they need to apply for contractors in their area of responsibility.

The above discussion, while far from comprehensive, identifies areas of concern associated with the increased reliance on contractors in deployment operations.

Potential Alternatives

The closer the function to the sound of battle, the greater the need to have soldiers perform the function because of a greater need for discipline and control.¹⁰¹

There are several possible solutions for alleviating the concerns created by the contractor’s quasi-combatant status, mitigating the risks of using contractors in an inappropriate manner, and resolving command and control issues: curtailing or eliminating the use of contractors in roles that could cast doubt as to their status under LOAC; temporarily discontinuing the usage of contractors while attempting to clarify their quasi-combatant status under LOAC; realizing the risks involved and pressing ahead in the hope that no contractor employee is captured and

put on trial as a war criminal; or turning those contractors who perform questionable roles into combatants.¹⁰²

The United States could decide not to use contractor support in roles where there is a possibility of crossing—or being interpreted by others as crossing—the line between indirect and direct participation in hostilities. This approach likely would be politically and publicly unacceptable. Eliminating contractor support in certain functions would decrease military effectiveness. This is because of the complexity of the systems employed in battle and the increased reliance on contractors to perform support functions. If contractors were taken out of these positions, the mission would be impacted since there would be limited to no military people available to perform those functions. Transferring positions back to the military also would be cost prohibitive.¹⁰³

The United States temporarily could suspend contractor participation in questionable functions while attempting to sponsor changes to international law, clarifying the contractor's quasi-combatant status. The length of time required to present the US case, coordinate with the world community, and negotiate to get other countries to agree would make this alternative unattractive in the short to medium term.¹⁰⁴

Another alternative simply could be to use the complexity of the law as an excuse to continue with business as usual and hope no contractor employee is captured, accused, and tried as a war criminal (that is, hope for the best). The problem with this alternative is that the United States prides itself on its support and adherence to international law and the conventions upon which LOAC is based. Taking this approach could expose the United States to embarrassment and criticism if a case went to trial and, thus, lower its standing in the international community. It would be difficult to expect other countries to take the *high ground* in terms of international law, in general, and LOAC, specifically, if the United States did not. Contractors would be leery of this approach since, if one of their employees were accused and convicted of war crimes, it could reflect badly on their standing in the international community and would be bad for foreign business. The companies and their executive leadership could run the risk of being held criminally or civilly liable for any damages attributed to their employees' contract performance. Additionally, it could be considered unethical to expect contractor employees to bear the personal risk associated with this approach. Also, contractor employees would be unlikely to go along voluntarily with this position once they understood the risks.¹⁰⁵

Given the difficulties associated with the previous alternatives, perhaps the best approach would be to “turn questionable civilians (in this case contractor employees) into combatants.”¹⁰⁶ There are two approaches to doing this: requiring contractors to hire employees with military obligations and the sponsored reserve concept.¹⁰⁷

The Army Materiel Command already is exploring the possibility of including contract language requiring the contractor to hire retirees and reservists for potentially dangerous tasks.¹⁰⁸

For very dangerous situations, the contract may require the contractor to hire personnel with a military obligation, including retirees, individual reservists, and members of troop program units. The military chain of command can bring those personnel onto active duty through temporary active-duty tours or mobilize them

involuntarily to ensure continuation of essential services. Of course, such action risks loss of contractor personnel to a callup or mobilization for other duties. Activation or mobilizations are last resorts. They will be used to ensure continuity of essential services, when civilian employees are evacuated.¹⁰⁹

Many contractors already are looking to do this on their own to avoid a potential breach of contract in the event employees choose to terminate their employment rather than perform in a dangerous environment.¹¹⁰

While this may go a long way in solving the concerns previously noted, there is a new, creative, and more promising concept that takes this a step further: sponsored reserve.¹¹¹ Sponsored reserve is a nontraditional method that strikes a balance between maintaining needed military capacity and gaining the efficiencies of privatization and the skills available in the commercial marketplace.¹¹²

The sponsored reserve concept originated from the British *Regular/Reserve Forces Mix Study* of 1992. The study recommended exploring the feasibility of using civilians with reserve status for operational support functions. The results of this study led to the passage of the 1996 Sponsored Reserve Act, which required defense contractors to have a specified number of employees participate as military reservists. Service-specific implementation regulations were finalized in 1999 following in-depth coordination with industry and trade union representatives.

Sponsored reserve is enacted through a contractual agreement between the Government and the contractor and requires a specified portion of the contractor's workforce supporting a contract be members of a military reserve component.¹¹³ Under this arrangement, sponsored reservists are mobilized and deployed to a contingency operation as uniformed military members vice contractor employees.¹¹⁴ Military commanders, not the contractor, are responsible for determining suitability of an individual to serve under sponsored reserve. Sponsored reservists are assigned either to active duty or reserve component units for training and deployment. Military commanders establish military requirements for the sponsored reservist. When a sponsored reservist is on active duty, the military commander assumes responsibility for work products and services. In peacetime, this responsibility falls on the contractor.¹¹⁵

The use of sponsored reserve personnel is appropriate under the following conditions: reserve component personnel are an acceptable alternative to active-duty personnel, it is acceptable for civilians to perform in peacetime, it is cost-effective for civilians to perform the task rather than active-duty personnel, and it is likely that civilians who perform the task will be deployed.¹¹⁶

Under the British model, the terms and conditions of service for sponsored reservists are the same as those that apply to a normal reservist but are amended to reflect the commercial basis of the relationship. Sponsored reservists undertake the same training required by their parent force and are subject to the same disciplinary acts when serving in active status. They are provided the necessary military training (including basic military training for employees with no previous military active-duty or reserve experience) to enable them to be called out for any level of operation, but the extent of their training is related specifically to the contracted service they provide.¹¹⁷ Additionally, callup conditions for sponsored reservists are independent of those for

ordinary reservists in that they are called up specifically to accomplish the task for which their employer is on contract.

The sponsored reserve concept offers advantages to all parties: government, contractor, and individual employee.

The advantage to the contractor may be entry into lines of business previously unavailable to them or expansion in the scope of existing business. The advantage to the employee may come in the form of additional pay, benefits, and job opportunities, as well as the protection that serving in a military status provides in a foreign theater or combat zone. The advantage to the military is the ability to deal with force reductions, privatization, and recruiting/training/retention challenges while retaining a military presence and status to seamlessly support peacetime, contingency, and wartime requirements.¹¹⁸

Under sponsored reserve, the issues identified PREVIOUSLY become moot, since contractor employees will be in active military status while deployed in theater. Contractor employees who perform aircraft maintenance functions in peacetime could perform the same functions in active military status during contingency operations. Therefore, rather than having the problem of determining the status of these employees, they clearly would be combatants. This type program also could alleviate other predeployment concerns, such as vaccinations and chemical warfare training.

Sponsored reserve presents another advantage in that when employees are called up to active status for deployment, they provide the same services under operational circumstances as that contracted out to their employer under peacetime conditions. Using the above example, if it is the employees' day-to-day job

integrated logistics support for the Royal Navy's newest multirole hydrographic and oceanographic survey ships, *HMS Echo* and *HMS Enterprise*. The sponsored reserve concept has allowed the Royal Navy to recruit hydrographic and oceanographic specialists and highly focused personnel that otherwise might not have been available.¹²²

One of the more interesting British uses of sponsored reserve is the proposed plan to have a contractor provide the next-generation RAF air-refueling and transport capabilities. Under this plan, the contractor will be able to use "dual civil/military registered aircraft" for its private revenue-earning operations when not required by the RAF. The contractor will employ aircrew and maintenance personnel as sponsored reserves, enabling them to be converted to military roles when required.¹²³ This plan, if incorporated, could free up air and maintenance crews for combat aircraft or other direct combatant roles.

The sponsored reserve concept has drawn interest from the Air Force as a potential tool to help mitigate critical manpower shortages. The Air Force Directorate of Strategic Planning currently is conducting a test program, based on the British model, to validate the effectiveness of the sponsored reserve concept within the Air Force and identify policy and legislative changes that would be needed to incorporate sponsored reserve.¹²⁴ The test program's goals include:

...developing appropriate policies for future implementation, analyzing adjustments to US law that would have to be made for the most effective implementation of the concept through coordination of specific test memorandums of agreement and using the test as a tool to further enhance public-private partnerships.¹²⁵

Increased reliance on contractor employees to perform functions formerly performed exclusively by military personnel and the nonlinear nature of the modern battle constantly places contractor employees in harm's way.

to provide maintenance services under a contract with the Government and they are called up to active military status to perform this function in support of a contingency, there is, theoretically, no void created if the employees are not physically present in the employer's location. Therefore, long-term deployments would be less stressful on the employer and the employee in terms of lost production and potential loss of employee benefits.¹¹⁹

The British currently have several sponsored reserve units providing a variety of functions. The Mobile Met Unit provides meteorological support to United Kingdom (UK) and allied forces operating in contingency locations where indigenous meteorological support is deemed inadequate to support the mission. The members of this unit are civil service employees in peacetime and special members of the Royal Air Force (RAF) Reserve.¹²⁰ A Halliburton-led consortium, FASTTRAX, provides heavy equipment transporter services to the British Army, mainly transportation of the Challenger main battle tank, in both peacetime and conflict scenarios. This contract frees up 92 heavy equipment transporter crews for other functions within the British Army.¹²¹ Vosper Thornycroft Shipbuilding employees provide

There are numerous challenges that must be resolved before the Air Force can implement sponsored reserve. The Air Force will have to determine the best method to integrate sponsored reserve into the present Air Force Reserve structure. Specifically, the Air Force will either have to establish a traditional Air Reserve Technician relationship with a commercial sector employee vice a government civilian employer or develop some other method.¹²⁶ Contracting and legal issues, such as the proper employee monetary and nonmonetary (benefits) compensation method (that is, contractor pay all compensation ala the British approach or some other combination), contract terms and conditions that would specify the relationship between them, and the responsibilities of the parties under sponsored reserve will need to be developed. If the commercial contracts involved require union membership, the concept must be discussed and negotiated with labor unions, and any issues must be resolved.¹²⁷ Resolution of these issues could prove challenging but not insurmountable and should not, in theory, prevent the sponsored reserve concept from being adopted.

The Air Force identified the following skill sets as initial candidates for sponsored reserve under the test program:

intelligence; space and satellite operations; information operations; unmanned aerial vehicle, unmanned combat aerial vehicle, and airborne laser operations; logistics and base infrastructure support; air traffic control; and engineer, science, and computer specialists.¹²⁸ As demonstrated in the RAF next-generation air-refueling and transport capabilities, the Air Force could explore the use of sponsored reservists to perform tanker and transport aircrew and aircraft maintenance duties in the future.

The increased reliance on contractor employees to perform tasks traditionally performed exclusively by military members, coupled with the nonlinear nature of today's battlefield, has created a situation where contractor employees are performing functions that cause them to encroach upon a thin line between combatants and noncombatants. In this type situation, contractor employees need the same type protections provided to military personnel under the Law of Armed Conflict. The ability of the commander to have direct command and control of personnel under this direction is crucial. Converting contractor employees, who are performing functions that call their LOAC noncombatant status into question, into active military personnel seems to be the best method to allay both concerns. The sponsored reserve concept shows great promise as the best method to accomplish this conversion.

Conclusions

Deploying contractors in the battlefield creates a unique set of issues for the commander. The increased reliance on contractor employees to perform functions formerly performed exclusively by military personnel and the nonlinear nature of the modern battle constantly put contractor employees in harm's way and have caused the line between contractors acting as civilians accompanying the force and civilians as combatants to narrow. The growing demands on the US military, increasing complexity and technology of weapon systems, and requirement to reduce the tail-to-tooth ratio to maximize the number of military people performing combat functions ensures more military functions will result in even more reliance on contractor personnel and a further narrowing, if not actual crossing, of the line.

It is extremely important for commanders at all levels to understand the status of civilian contractors under the Law of Armed Conflict and take special care to ensure the line is not breached. Contractor employees who are performing roles functionally similar to those normally performed by military personnel in a hostile area, while wearing uniforms and openly carrying weapons, run the risk of being seen as taking a direct role in hostilities. This could lead to several untenable personal risks, including increased targeting, physical harm, or indictment as a war criminal under the Law of Armed Conflict. The former two concerns have been readily seen in Iraqi Freedom as former regime loyalists, and other opposition fighters deliberately have attacked and killed contractor employees without regard for their status under the Law of Armed Conflict.

The increased role of contractors on the battlefield has created a command and control concern for commanders. Generally, the closer to an area of conflict, the more control commanders need to have over forces in their area of responsibility. Currently, unless specifically spelled out in the contract, the commander has either limited or no authority over the actions of contractor

employees. The recent employment of professional military companies in Iraq highlights this concern as their employees perform combat-type functions absent the direct command and control of local military commanders and their specified rules of engagement.

The alternatives for alleviating these concerns range from limiting the reliance on contractors to ignoring the problem inherent in using them in questionable roles. Perhaps the best alternative is to turn contractor employees who perform questionable functions into combatants. The sponsored reserve concept seems to be the most promising method to make this conversion. Deploying contractor employees into theater in military status renders the LOAC status and command and control issues moot. This concept has been implemented successfully by the United Kingdom and currently is being tested by the Air Force. Air Force implementation of sponsored reserve will no doubt be challenging, as many legal, contractual, and military policy issues will have to be overcome. However, the benefits provided by alleviating the concerns noted in this article and erasing the line between noncombatant and combatant will prove beneficial.

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Lieutenant Colonel Donovan is the chief of the Pacific Command Section, Intelligence, Surveillance, and Reconnaissance Division at the US Strategic Command, Offutt AFB, Nebraska. At the time of writing of this article, he was a student at the Air Command and Staff College, Maxwell AFB, Alabama. 

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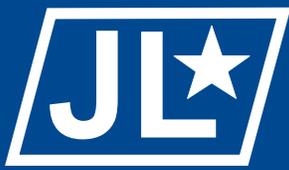
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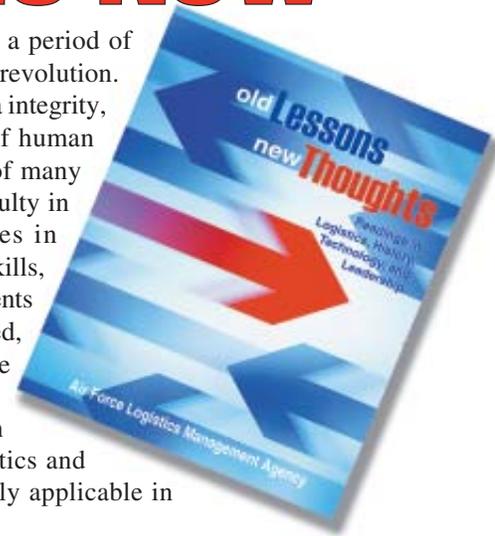
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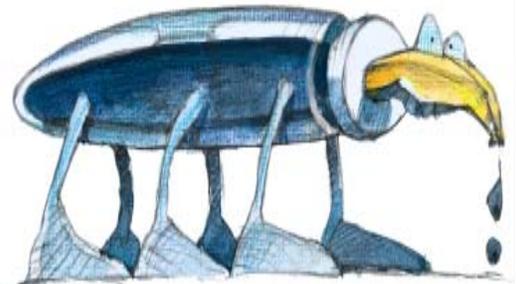
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