AIR WAR COLLEGE

AIR UNIVERSITY

CONTRACTOR SUPPORT TO MILITARY OPERATIONS: HOST NATION LEGAL BARRIERS TO MISSION ACCOMPLISHMENT

by

Ronald R. Ratton, Lt Col, USAF

A Research Report Submitted to the Faculty

In Partial Fulfillment of the Graduation Requirements

17 February 2006

[Cleared for public release]

DISCLAIMER

The views expressed in this academic research paper are those of the author(s) and do not reflect the official policy or position of the US government or the Department of Defense. In accordance with Air Force Instruction 51-303, it is not copyrighted, but is the property of the United States government.

Abstract

Since the end of the Cold War, the U.S. military has increasingly relied on private contractors to accomplish its missions overseas. It does so for a number of reasons, most prominently, a perceived financial savings. Contractors, however, face a number of host-nation legal barriers the U.S. government doesn't have to contend with when acting on its own. This is seen in a wide range of controversies that arise on a recurring basis, involving everything from the exercise of criminal jurisdiction to exemptions from customs, taxes, licenses, and immigration rules. These barriers arguably lead to degraded performance and increased costs to the government – costs that were not considered when the Department of Defense started its rush to outsource and privatize many of the functions previously performed by active-duty personnel. Combined with other significant policy, operational, and legal issues raised by the use of contractor support, these status-related problems call into question the wisdom of increasing our reliance on private means to effect public ends.

Contents

Page

Chapter 1

Introduction

"Frankly, I'd like to see the government get out of war altogether and leave the whole field to private industry."[1]

Lieutenant Milo Minderbinder's tongue-in-cheek commentary from *Catch-22* may not come true anytime soon, but it is clear that civilian contractors have become a pervasive and significant feature in America's military landscape. As the Cold War ended, the military dramatically downsized. At the same time, security threats and "bad externalities"[2] were emerging from the political disorder of the third world, culminating in the terrorist attacks of September 11, 2001.[3] As a result, the United States has been involved in numerous combat, peacekeeping, and humanitarian missions around the globe, and the Department of Defense (DOD) has increasingly relied on contractors to meet many of its logistical and operational support needs.

While there have been some cautionary notes, particularly regarding contractor operations in Iraq, the use of contractors to support military operations shows no sign of abating.[4]

---

[1] JOSEPH HELLER, CATCH-22 254 (1955).
[2] James D. Fearon & David D. Laitin, *Neotrusteeship and the Problem of Weak States*, INT'L SEC., Spring 2004, at 9. Fearon and Laitin use the term "bad externalities" to describe the costs imposed on the international community by failed or failing states, such as terrorism, refugee flows, health threats, and drug smuggling.
[3] *Id.* at 5.
[4] *See, e.g.*, STANLEY HOFFMAN, GULLIVER UNBOUND: AMERICA'S IMPERIAL TEMPTATION AND THE WAR IN IRAQ 109 (2004) (calling outsourcing a "form of abuse" and lamenting the trend toward "entrusting what used to be public responsibilities to private, profit-seeking entrepreneurs").

Consequently, over the past several years, commentators have analyzed many of the policy, legal, and operational issues in books and academic journals.[5] Congress and the Executive branch have also recognized the need to address these issues.[6] Indeed, the Department of Defense recently attempted to deal with many of the consequences of using private firms to provide military support services by updating the Defense Federal Acquisition Regulation Supplement (DFARS) and publishing a new instruction.[7]

These documents provide guidance on numerous issues, including contractor participation in hostilities, continuation of contractor services, wear of military clothing, and carrying of weapons. The former also requires contractors to be familiar with and comply with host country laws.[8] The latter alerts commanders that difficulties may arise by operation of international or foreign law, and specifically advises component commanders to ascertain how host nation laws may affect contract support.[9]

This paper focuses on those host nation laws and the barriers they present to contractors' abilities to support United States' forces operating abroad. It ultimately concludes that the costs

---

[5] *See, e.g.*, P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY (2004); Michael J. Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 PUB. CONT. L.J. 233 (2000); Major Lisa L. Turner & Major Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1 (2001); Major Michael E. Guillory, *Civilianizing the Force: Is The United States Crossing the Rubicon?*, 51 A.F. L. REV. 111 (2001); Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L LAW 511 (2004); Major Karen L. Douglas, *Contractors Accompanying the Force: Empowering Commanders with Emergency Change Authority*, 55 A.F. L. REV. 127 (2004).

[6] GEN. ACCT. OFF., REP. NO. GAO-03-695, *Military Operations: Contractors Provide Vital Services to Deployed Forces but Are Not Adequately Addressed in DOD Plans* (June 2003) [hereinafter GAO-03-695]; CONG. BUDGET OFFICE, LOGISTICS SUPPORT FOR DEPLOYED MILITARY FORCES (Oct. 2003).

[7] U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. (June 2005), at 252.225-7040 [hereinafter DFARS]; U.S. DEP'T OF DEFENSE INSTR. 3020.41, October 3, 2005, CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY THE U.S. ARMED FORCES (Oct. 3, 2005) [hereinafter DODI 3020.41]. The Defense Acquisition Regulations Council has also been working on a change to the Federal Acquisition Regulation to cover contractors employed by non-DOD agencies and thus not covered by the new DFARS clause.

[8] DFARS, *supra* note 7, at 252.225-7040.

[9] DODI 3020.41, *supra* note 7, at 6.1.2 (noting that "[l]imiting factors may include workforce and hour restrictions; medical, life, and disability insurance coverage; taxes, customs and duties; cost of living allowances; hardship differentials; and danger pay").

imposed by the operation of host nation law on contractor activities will, in many cases, outweigh the benefits of privatization. Thus, the DOD should reduce its reliance on outsourcing.

To support this thesis, chapter two will set out the first factual premise: that the U.S. military relies on contractor support and that it does so for a number of reasons, most prominently, a belief that outsourcing will, in the long run, save the government money.

After establishing those facts, chapter three will discuss how host nations treat contractors differently from the way they treat sovereign entities. The heart of that chapter will discuss the impact of host nation law on contractor-provided support arrangements under the most common scenario, when U.S. forces are present with the consent of the receiving state.[10] This chapter will discuss the applicability of Status of Forces Agreements and will analyze the most common legal issues that arise in that context. It will also show how that differing treatment results in a cost, however imprecise, to the United States government.

The war in Iraq provides another context for examining contractor-provided support to military operations. Thus, chapter three will also examine the status of contractors when the U.S. Forces are present without the consent of the host nation. Rather than being concerned with the application of host nation law, one must consider how the international law of belligerent occupation applies to the operations of the occupying power. As is the case with respect to host nation law, contractor activities may bump up against the international law of occupation in such a way as to impose unexpected costs.

Having catalogued the potential costs of using contractors to support military operations overseas, chapter four points out that policy makers have not generally considered these barriers

[10] This paper will use the terms "receiving state" and "host nation" interchangeably. "Sending state" and "receiving state" are commonly used terms in Status of Forces Agreements denoting the country stationing forces abroad and the country hosting those forces.

to contractor performance. Furthermore, these costs, when combined with other risks and drawbacks, will often outweigh the benefits of outsourcing. Thus, in the end, this paper recommends steps to ensure the costs imposed by international and foreign law are considered before outsourcing military support functions and suggests a need to reverse the current trend towards increased reliance. Before plotting the future of outsourcing, however, it is necessary to look at the history of private actors operating in the military realm.

Chapter 2

U.S. Military Reliance on Contractors

RANDAL: *"A construction job of that magnitude [building the Death Star] would require a helluva lot more manpower than the Imperial army had to offer. I'll bet there were independent contractors working on that thing: plumbers, aluminum siders, roofers."*

DANTE: *"Not just Imperials, is what you're getting at?"*

RANDAL: *"Exactly. In order to get it built quickly and quietly they'd hire anybody who could do the job. Do you think the average Storm Trooper knows how to install a toilet main? All they know is killing and white uniforms."*[11]

A. The History of Military Contractors

The United States military has used private contractors since the Revolutionary War. George Washington's army relied on civilian wagon drivers to haul military supplies, and the United States used contractors in both world wars, Korea, and Vietnam.[12] In the first Gulf War, one out of every thirty-six personnel deployed was a contractor. That ratio increased to one in ten during the peacekeeping operations in Bosnia and Kosovo.[13] After the terrorist attacks of September 11, 2001, contractors deployed with U.S. forces to Afghanistan to maintain combat equipment and provide logistical support. As of July 2004, over 150 companies had been

[11] CLERKS (View Askew 1994) (a film directed by Kevin Smith, in which two convenience store employees discuss the Star Wars movie, *Return of the Jedi*).
[12] Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 369, 373 (2004); *See also* Davidson, *supra* note 5, and Lourdes A. Castillo, *Waging War with Civilians: Asking the Unanswered Questions*, AEROSPACE POWER J. (Fall 2000).
[13] Turner & Norton, *supra* note 5, at 7 (citation omitted); Other writers have reported slightly different ratios. *See, e.g.*, Vernon, *supra* note 12, at 374.

awarded contracts for Afghanistan and Iraq totaling $48.7 billion.[14] One firm, Kellogg, Brown and Root, had been awarded contracts valued at $11.4 billion.[15] One writer estimates the number of contractor personnel in Iraq to be up to 125,000.[16] Indeed, U.S. military planners "no longer even envisage the possibility of a large-scale intervention taking place without Brown & Root or one of its business competitors providing the logistics."[17] This, of course, begs the question: what is driving this accelerating trend towards outsourcing functions once thought to be the exclusive preserve of the sovereign? The next section reviews many of the factors involved.

B. Factors Contributing to the Growing Reliance on Contractors

There appear to be a number of reasons for the explosive growth in the use of contractors to support military operations. The most cited basis for outsourcing duties performed by military personnel to civilian corporations is to save money.[18] There are two aspects to this assertion. First, civilian contractor personnel are presumed to be less costly than military personnel, primarily because of low overhead. Unlike military personnel, civilian contractors do not require frequent moves, extensive support infrastructure, health care, and generous retirement plans.

---

[14] The Center for Public Integrity, *Post-War Contractors Ranked by Total Contract Value in Iraq and Afghanistan from 2002 through July 1, 2004*, available at http://www.publicintegrity.org/wow/resources.aspx?act=total (visited Oct. 31, 2005).

[15] *Id*.

[16] Deborah Avant, *Private Security Companies*, 10 NEW POL. ECON., 121, 129 n.3 (2005). There is no central registry of contractors operating in Iraq, therefore estimates of the number of personnel vary widely. Schmitt, *supra* note 5, at 512 n.4. The estimates become more confusing because many commentators focus only on contractors providing armed security. In May 2004, Secretary of Defense Rumsfeld estimated that there were 20,000 personnel with 60 private firms providing security in Iraq. *See* Letter from Donald H. Rumsfeld, Secretary of Defense, to The Honorable Ike Skelton (May 4, 2004), available online at http://www.house.gov/skelton/5-4-04_Rumsfeld_letter_on_contractors.pdf (visited Feb. 4, 2006). That estimate did not include firms helping to train the Iraqi army such as MPRI and Vinnell, or providing interrogators (CACI). Avant, *supra*. More recent industry estimates put the number of security contractors at around 25,000. Jonathon Finer & Ellen Knickmedyer, *U.S. Military Probing Video of Road Violence*, WASH. POST, Dec. 9, 2005, available at http://ebird.afis.mil/ebfiles/e20051209406109.html (visited Dec. 9, 2005).

[17] Singer, *supra* note 5, at 137.

[18] Ryan Kelty, Military Outsourcing: A Case Study of the Effects of Civilianization on Sailor's Retention Intentions (Oct. 2005) (unpublished manuscript submitted to the Inter-University Seminar on Armed Forces and Society Biennial meeting).

Second, policy makers have assumed that the competitive free market can provide these services more efficiently, at a lower cost, and with a higher quality than the public sector could.[19] According to one estimate, the Army can cut logistics costs by up to twenty percent by using contractors.[20] Even more optimistically, in 1996 the Defense Science Board concluded that the Department of Defense could save up to forty percent of logistics costs via outsourcing.[21] The board opined that public sector savings from outsourcing would outstrip similar initiatives in private industry because of government inefficiency. Thus, the DOD would save about $30 billion per year by outsourcing support functions.[22] The General Accounting Office, while skeptical of the size of the savings, nonetheless agreed that the DOD could save money by outsourcing logistics activities.[23]

This argument is not universally accepted. For example, Peter Singer of the Brookings Institution, citing private and government reports, concludes that "it is not clear that outsourcing always saves money, either in general industry or specific to military services."[24] Reflecting on the truism that "mission creep toward state building is practically inevitable," one writer commented that "[c]ontracting services to civilian companies might relieve some of this burden,

---

[19] Singer, *supra* note 5, at 7. This aspect reflects one of the three primary causes identified by Singer for the growth of the military services industry: the global privatization revolution, which he describes as a "belief in the superiority of the marketplace in fulfilling organizational and public needs." *Id*. at 66. The other two causes identified by Singer are the "security gap" created by downsizing at the end of the Cold War and transformations in the nature of warfare. *Id*. at 49.
[20] Castillo, *supra* note 12.
[21] GEN. ACCT. OFF., REP. NO. GAO/NSIAD-98-48, *Outsourcing DOD Logistics: Savings Achievable But Defense Science Board's Projections Are Overstated* (Dec. 1997) [hereinafter GAO/NSIAD-98-48].
[22] *Id*.
[23] *Id*.
[24] Singer, *supra* note 5, at 157. *See also* PBS Frontline, *Private Warriors*, available at http://www.pbs.org/wgbh/pages/frontline/shows/warriors/faqs/ (visited Sept. 26, 2005) (stating that no definitive studies on the cost-effectiveness of military outsourcing have been done yet).

but these activities have come under fire from the General Accounting Office for their costliness and inefficiency and suffer from the same limitations as other civilian agency operations."[25]

The fact that a relatively small number of contractors dominate the market, and that many contracts are awarded on a cost-plus basis, also indicates that normal market forces are not operating to impose cost savings.[26] Even when market forces are functioning normally, it may sometimes be more expensive to outsource, such as when a huge demand for security services creates a seller's market.[27] Others have suggested that the transaction costs of managing contracts and taking legal action for contract failures offset any cost savings.[28] Nonetheless, the expectation that outsourcing will be cheaper in the long run persists.

The second factor is related to the first -- the military's desire to focus on its core competency: warfighting.[29] Particularly in an era of downsizing, it makes sense to reduce the military's support and logistics tail so it can target its training on combat-specific capabilities. Outsourcing may also provide the military with a surge capability to employ specialized, but little-used, capabilities without having to continuously maintain such skills. Outsourcing may also provide an avenue for the Department of Defense to provide a constabulary and nation-building function that is not a traditional military strength.

A third reason for the expansion of the privatized military industry is the need to compensate for low troop levels in the face of increased commitments overseas. After the fall of the Berlin Wall, the United States and its allies rushed to cash in the "peace dividend" by sharply

---

[25] Conrad C. Crane, *Phase IV Operations: Where Wars are Really Won*, MIL. REV., May/Jun. 2005, at 26.
[26] Avant, *supra* note 16**,** at 127. *See also* GAO/NSIAD-98-8, *supra* note 21, (noting that estimates of substantial cost savings relied on private industry data involving highly competitive markets, whereas most DOD contracts were awarded on a sole-source basis).
[27] Avant, *supra* note 16, at 127.
[28] Stephen L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL'Y REV. 549, 554 n.11 (2005).
[29] Kelty, *supra* note 18.

drawing down military forces. Thus, the United States reduced its forces and budget by roughly forty percent, but the number of deployments actually increased as new threats emerged from corners of the globe previously contained by bipolar, superpower politics.[30] For example, from the end of the Cold War to the end of 2003, the army had deployed some thirty-five times, versus ten times during the course of the entire Cold War.[31] By using civilian contractors in support roles, military personnel are freed to perform combat missions, thus avoiding "a straight-line relationship between reduced numbers and reduced combat effectiveness."[32] That need to outsource has increased as U.S. military forces have been stretched thin by operations in Afghanistan and Iraq, in addition to continuing commitments in the Balkans and supporting existing operations plans for Korea and elsewhere.

A fourth factor contributing to the expansion of military privatization is that the increased complexity of new weapons systems and other military equipment requires on-going contractor support. Indeed, training military personnel to master these systems may seem foolhardy, since they then become more marketable and prone to leave the service for the civilian workplace.[33] Most current weapons system contracts make the contractor responsible not just for developing and building the system, but also for its long-term maintenance, operation, and modernization.[34] During Operation Iraqi Freedom, private contractors provided support for the B-2, F-117, and U-2 aircraft, Global Hawk UAV, M-1 tank, Apache helicopter, and many navy ships.[35]

---

[30] Christopher Spearin, *American Hegemony Incorporated: The Importance and Implications of Military Contractors in Iraq*, 24 CONTEMP. SEC. POL'Y 26, 28 (2003).
[31] *Id*. at 29.
[32] Schmitt, *supra* note 5, at 517. Singer notes that since the first Gulf War, "reductions in military forces coupled with high mission requirements and the unlikely prospect of full mobilization, mean that the requirement for outside support has seen exponential growth, multiplying by a factor of five." Singer, *supra* note 5, at 16.
[33] Spearin, *supra* note 30, at 30.
[34] Vernon, *supra* note 12, at 377-78.
[35] Avant, *supra* note 16, at 124.

Fifth, outsourcing may also be a way for the government to partially externalize the political costs of intervention.[36] Peter Singer rhetorically asks with respect to Kosovo, "[h]ow could the U.S. military find a way to provide logistics for its forces, without calling up reserves or the National Guard, while at the same [time] helping to deal with the humanitarian crisis that the war had provoked? . . . Instead of having to call up roughly 9,000 reservists, Brown & Root Services was hired."[37] Arguably, the current administration is proceeding according to a similar logic, choosing to employ thousands of contractors rather than raise troop levels in Iraq.[38] To date, over 400 contractors have been killed in Iraq, but they are rarely mentioned in calls to "bring the troops home" from that war.[39] Some have argued that by lowering the political costs of action, using contractors encourages a more adventurous foreign policy.[40] As America strikes a more unilateral stance, contractors can also take the place of traditional allies, allowing the United States to avoid the "political baggage that often accompanies the forces of allied states."[41]

Sixth, using contractors allows the DOD to flexibly manage troop ceilings imposed by Congress, the Executive branch, or the host nation, since civilian contractors may not count against the force cap.[42] Indeed, DOD policy encourages such use.[43] In recognition of the

---

[36] Avant, *supra* note 16, at 126.
[37] Singer, *supra* note 5, at 6.
[38] PBS Frontline, *Private Warriors*, available at http://www.pbs.org/wgbh/pages/frontline/shows/warriors/interviews/schooner.html (visited Nov. 2, 2005) (opining that in the court of public opinion, the government has artificially deflated the military's involvement in Iraq).
[39] T. Christian Miller, *Private Security Guards in Iraq Operate with Little Supervision*, L. A. TIMES, Dec. 4, 2005, available at http://ebird.afis.mil/ebfiles/e20051204405386.html. *See also* http://icasualties.org/oif/Civ.aspx for a partial list of contractor casualties by name, nationality, and company; *See also* PBS Frontline, *Private Warriors*, *supra* note 24 (noting that "while the public reads about military fatalities on a regular basis in the newspaper, there's almost no coverage whatsoever on contractor fatalities"). One case that did draw significant press attention was the grisly killing and mutilation of four Blackwater employees who were guarding a convoy in Fallujah. Avant, *supra* note 16, at 126.
[40] Avant, *supra* note 16, at 128.
[41] Spearin, *supra* note 30, at 34-35.
[42] Vernon, *supra* note 12, at 375-76. *See also* Castillo, *supra* note 12 (citing examples from Bosnia and Vietnam), and GAO-03-695, *supra* note 6 (noting that the military uses contractor services in Bosnia and Kosovo because there are limits on the number of U.S. military personnel who can be deployed to the region).

diplomatic sensitivities in Latin America, Congress limits both the number of U.S. military personnel and U.S. citizen contractor personnel operating in Colombia.[44] In that country, DOD awarded MPRI a $4.3 million contract to advise the Colombian armed forces, while the Department of State contracted with Dyncorp to supply spray plane pilots, mechanics, search and rescue, and other personnel.[45]

Finally, some officials see outsourcing as a force retention tool. As the number of overseas commitments continues to rise, replacing military members with contractors allows the military to decrease the frequency with which it deploys service members, reducing the strain on service members and their families.[46]

C. Roles Played by Military Contractors

Peter Singer, in his book *Corporate Warriors: The Rise of the Privatized Military Industry*, divides military firms into three categories based on how close to the "tip-of-the spear" a company operates. The first category, "Military Provider Firms," also called Private Military Companies (PMCs), are those that engage in actual fighting. These firms, with names like Executive Outcomes and Sandline, are most closely identified with traditional mercenary work. Next in line are "Military Consulting Firms." These companies provide advisory and training services, such as MPRI's preparation of the Croatian Army for its 1995 offensive against Serbian

---

[43] DEP'T OF DEFENSE, JOINT PUB. 4-0, *Doctrine for Logistic Support of Joint Operations*, Apr. 6, 2000 [hereinafter JP 4-0] (stating "using civilian contractors is particularly effective when a military ceiling is placed on the size of a deployed force"); *See also* U.S. DEP'T OF ARMY, FIELD MANUAL 3-100.21, *Contractors on the Battlefield* (Jan. 3, 2003) (stating "when military force caps are imposed on an operation, contractor support can give the commander the flexibility of increasing his combat power by substituting combat units for military support units").

[44] The Fiscal Year 2005 National Defense Authorization Act raised the cap on military personnel from 400 to 800 and for civilian contractors from 400 to 600. CONG. RES. SERV. REP. NO. RL32337, *Andean Counterdrug Initiative (ACI) and Related Funding Programs: FY2005 Assistance* (May 10. 2005).

[45] Adam Isacson, *The U.S. Military in the War on Drugs*, *in* DRUGS AND DEMOCRACY IN LATIN AMERICA 15, 43-44 (Coletta A. Youngers & Eileen Rosin eds., 2005).

[46] GAO-03-695, *supra* note 6, at 9.

forces that hastened the signing of the Dayton Accords.[47] Finally, "Military Support Firms" are those such as Kellogg, Brown and Root Services that provide logistical support to the military.

Most DOD contractors fit into Singer's last category and are further classified into three types in Joint Publication 4-0: systems support, external theater support, and theater support contractors.[48]

Systems support contractors provide operational support to military systems throughout the system's lifecycle and across the range of military operations. This type of support can include, for example, on-site maintenance of weapons and information systems. Contractor employees typically possess high levels of technical expertise.

External theater support contractors provide contingency support in a wide range of areas, such as transportation, supply, base maintenance and construction, laundry, and food service. Headquarters outside the theater of operations award these contracts.[49] The most notable example of this type of contract is the Army's Logistics Civil Augmentation Program (LOGCAP) for global logistics support.[50]

Finally, internal theater support contractors are local firms hired by in-country contingency contracting officers. These vendors perform local support services such as transportation, linguist, security, food, water, minor construction, and lodging.[51]

---

[47] Peter Singer discusses MPRI at length in his discussion of Military Consulting Firms, noting that MPRI even has a contract to run Army ROTC detachments on college campuses. Singer, *supra* note 5, at 119-35. MPRI has also been active in Iraq, having received $11.4 million in contracts up to July 2004. Center for Public Integrity, *Windfalls of War: Winning Contractors*, available at http://www.publicintegrity.org/wow/resources.aspx?act=total (visited Nov. 2, 2005). It also received an initial contract to retrain the Iraqi Army. Michael R. Gordon, *Catastrophic Success*, N.Y. TIMES, Oct. 19, 2004 (noting that MPRI received a contract for $625,000).

[48] Joint Pub. 4-0, *supra* note 43, at V-1.

[49] *Id*.

[50] *See generally* DEP'T OF ARMY, REG. 700-137, LOGISTICS CIVIL AUGMENTATION PROGRAM (1985).

[51] Joint Pub. 4-0, *supra* note 43, at V-2.

Clearly, policy makers have opted to turn over a wide variety of military support tasks to private industry, and the DOD has become increasingly reliant on contractor support to accomplish its missions overseas. That reliance, however, raises a number of significant legal issues.

Chapter 3

The Costs of Contractor Support Overseas

DANTE*: "All right, so even if independent contractors are working on the Death Star, why are you uneasy with its destruction?"*

RANDAL: *"All those innocent contractors hired to do a job were killed - casualties of a war they had nothing to do with."*[52]

The expanding use of contractors to support military operations exposes a number of unique legal issues. Numerous articles have been written discussing contractors' status under international law and the application of the Law of Armed Conflict to contractors integrated into the battlefield.[53] Other commentators have pointed out problems related to command and control and continuation of essential services.[54]

As noted above, the new DFARS clause and DOD Instruction attempt to address these matters. With respect to issues related to the application of host nation law to contractor activities, however, contract clauses and regulations do little more than exhort planners and contracting officers to maintain situational awareness. This chapter seeks to provide a better

[52] CLERKS (View Askew 1994).
[53] *See, e.g.,* Schmitt, *supra* note 5; Turner & Norton, *supra* note 5; Guillory, *supra* note 5; and Vernon, *supra* note 12. For example, one question is about the contractor employee's status upon capture, *e.g.,* whether he is a Prisoner of War in accordance with the Geneva Convention. Geneva Convention III Relative to the Treatment of Prisoners of War, adopted Aug. 12, 1949, entered into force Oct. 21, 1950, 6 U.S.T. 3316, 75 U.N.T.S. 135. A second key question is whether an employee is a combatant (lawful or unlawful) or a noncombatant. Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 3, 36 Stat. 2277, 205 Consol. T.S. 277.
[54] Vernon, *supra* note 12. *See also* Spearin, *supra* note 30, at 41 (noting that there is nothing to prevent contractor employees from walking away should the danger level become personally intolerable and citing examples from both Gulf Wars).

understanding and appreciation of the "second and third order effects" related to contractor support to United States forces operating overseas.

A. Status of Forces Agreements – An Overview

The United States armed forces must be able to operate in numerous countries overseas. The ability to do so is, in general, facilitated by the negotiation of status agreements. Without such agreements, visiting forces, and their contractors, would be fully subject to host nation law.

The most common type of agreement is known as a Status of Forces Agreement, or SOFA.[55] SOFAs define the rights, immunities, privileges, and duties of a force, its members, and accompanying dependents. Thus, SOFAs create an exception to the general rule that a host nation can exercise exclusive jurisdiction over foreigners present in their territory.

SOFAs are intended to "establish a framework of basic rules and procedures that avoid (or at least minimize) conflicts between sovereigns."[56] They are premised on two broad principles. The first is the sharing of criminal jurisdiction so that the sending state can "apply military discipline which takes into account status, custom, and military needs."[57] The second is "acceptance of the legal fiction that members of the force and their dependents are not to be considered permanently present within the territory of the host country. They remain part of the visiting force and do not acquire incidents of residence. Hence, they are not obligated to comply with many local laws . . . such as work permits and taxation."[58]

---

[55] Colonel Richard J. Erickson, *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, 37 A.F. L. REV. 137, 141-44 (1994). The other kinds of status arrangements are granting administrative and technical staff status under the Vienna Convention on Diplomatic Relations of April 18, 1961, 22. U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95, and a "mini-SOFA." *Id.* These two vehicles are generally used for short-term operations where only a small number of forces are to be present in the host nation. The former is the most generous (excepting Diplomatic Status) in that it provides for full immunity from criminal jurisdiction and immunity from civil jurisdiction to the extent that the act giving rise to the action was done in the performance of official duty.

[56] *Id.* at 153.

[57] *Id.* at 140.

[58] *Id.*

Without a status agreement, "military operations could be difficult, if not impossible."[59] Unfortunately, with respect to civilian contractors, the United States is, in effect, operating without a SOFA.

B. Most Status of Forces Agreements Do Not Cover Contractors

The NATO SOFA was signed in 1951 and it became the model for all future SOFAs.[60] Despite the United States' experience with using contractors in significant support roles, the NATO SOFA conspicuously neglected to cover this category of "civilian employee."

The negotiation of the NATO SOFA predated the "breakup of [the] public monopoly of the military profession."[61] Peter Singer argues that from the 1700s, most things military had become the purview of the bureaucratic state.[62] With the fall of the Berlin wall, however, the global trend toward privatization or outsourcing gathered momentum, as governments found it expedient to transfer more of their public responsibilities to the private sector. The military sector, for the first time in centuries, was subject to being sourced from the marketplace.

Unfortunately, neither the existing SOFAs nor most newly negotiated agreements anticipated or kept pace with this development.[63] Thus, only five SOFAs to which the United States is a party addresses contractors.[64]

---

[59] *Id.* at 153; *See also* Frank Camm & Victoria A. Greenfield, *How Should the Army Use Contractors on the Battlefield? Assessing Comparative Risk in Sourcing Decisions*, Rand Corporation, at 58 (2005) (arguing that unless the Army makes progress improving SOFA coverage, the use of contractors would pose high risks to mission success and resource cost).

[60] Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO SOFA]; SOFAs are not identical, but most closely track the NATO version. Erickson, *supra* note 55, at 141.

[61] Singer, supra note 5, at 8.

[62] Singer, *supra* note 5, at 31. Singer writes: "by the time the state had been accepted as the dominant means of government, the service side of war was understood to be the sole domain of government. In fact, providing for national, and hence their citizens', security was one of the most essential tasks of a government." *Id*. at 7. Singer connects this with the development of the military as a distinct profession. *Id*. at 8.

[63] Unfortunately, government contracts sometimes purport to extend privileges such as the use of exchanges and commissaries that require host nation agreement. As Department of the Army Pamphlet 715-16 points out, if there is a "contradiction between the SOFA and an employer's contract with the U.S. Government, the terms and conditions

The NATO SOFA defines the civilian component as "the civilian personnel accompanying a force of a Contracting Party who are in the employ of an armed service of that Contracting Party . . . ."[65] During negotiations, drafters rejected the idea of including civilians in the definition of armed force in part because "they are not subject to the same close discipline and control as the uniformed members of the force they accompany."[66] The same rationale may have informed the drafters to restrict the civilian component to personnel directly employed by the sending state. Thus, the general rule is that "technical representatives and contract technicians, contractors and contract employees . . . cannot be deemed members of the civilian component . . . ."[67]

It is worth noting, however, that the United States has sought to broaden the definition of civilian component to include more personnel categories when negotiating supplementary agreements.[68] Thus, when analyzing the impact of host nation law on contractor operations, it is important to review more than the SOFA text. One must look for implementing arrangements and specialized agreements, some of which may be unpublished or classified.[69] Furthermore,

---

of the SOFA will take precedence." DEP'T OF ARMY PAM. 715-16, CONTRACTOR DEPLOYMENT GUIDE, Feb. 27, 1998, at 9-1. Absent an agreement between the U.S. and the host nation, the law of that nation where performance takes place governs the U.S. government contractor and its employees.

[64] *See, e.g.*, Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, Jan. 19, 1960, 11 U.S.T. 1652, T.I.A.S. 4510, 373 U.N.T.S. 248, art. XIV. The United States is a party to 105 SOFAs. *See* listing at https://aflsa.jag.af.mil/GROUPS/ALL_FLITE/INTERNATIONAL/usafe/sofalist.html.

[65] NATO SOFA, *supra* note 60, at art. I, para 1(b).

[66] SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 85 (1971).

[67] *Id.* at 89 (citation omitted).

[68] LAZAREFF, *supra* note 66, at 90.

[69] *See, e.g.*, The Annex in Implementation of the Mutual Defense Cooperation Agreement Between the Government of the United States of America and the Government of the Hellenic Republic, Jul. 8, 1990, T.I.A.S. No. 12321 (effective Nov. 6, 1990); Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, July 9, 1966, T.I.A.S. No. 6127, 17 U.S.T. 1677, 674 U.N.T.S. 163 (entered into force Feb. 9, 1967); Agreement Regarding the Status of United States Forces in Romania, Oct. 30, 2001, T.I.A.S. No. Pending (entered into force June 10, 2002) [hereafter Romanian SOFA Supplement]; Agreement of 3 August 1959, as Amended by the Agreements of 21 October 1971, 18 May 1981, and 18 March 1993, to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces

one must carefully parse the language of those supplements and theater-specific regulations to see whether a particular class of contractor is covered. Also, supplementary agreements that deal with contractors typically grant some sort of "civilian component" status to some contractor employees, but do not extend any kind of favorable treatment to the employee's company. Thus, an employee may be able to purchase duty-free goods at the base exchange, but his company will not be permitted to import supplies duty-free. Finally, if the United States is participating in a United Nations peacekeeping operation, one must refer to the SOFA for that operation. The UN model SOFA accords contractor employees some protections as "experts on mission.[70] What follows, then, is a general review of the specific legal difficulties one may face with respect to contractor support overseas.

C. A Framework for Determining the Costs of Contractor Activities Overseas

Status of Forces Agreements broadly cover the range of controversies that arise on a recurring basis between sending and receiving states. Thus, they provide a convenient

---

stationed in the Federal Republic of Germany, Aug. 3, 1959, 1 U.S.T. 531, 481 U.N.T.S. 262 (effective Mar. 29, 1998) [hereinafter German SOFA Supplement]**;** Memorandum of Understanding Between the Ministry of Defense of the Republic of Italy and the Department of Defense of the United States of America Concerning Use of Installations/Infrastructure by U.S. Forces in *Italy, Feb. 2, 1995, U.S.-Italy, 1995 WI. 149275* [hereinafter Italian SOFA Supplement]; DODI 3020.41, *supra* note 7, at para. 6.1.7 directs planners and contracting officers to "review applicable SOFAs and related agreements to determine their effect on the status and use of contractors . . . ." The Romanian Supplemental Agreement to the NATO SOFA includes "contractors exclusively serving the United States forces in Romania" as having the status of members of the civilian component for all but claims purposes. The Greek supplement extends civilian component status to a subset of contractors: those who are "employees of non-Greek and non-commercial organization who are nationals of or ordinarily resident in the United States and who, solely for the purpose of contributing to the welfare, morale or education of the force, are accompanying those forces in Greece, and non-Greek persons employed by United States contractors directly serving the United States forces in Greece."

[70] The model SOFA provides that the Convention on the Privileges and Immunities of the United Nations applies to peacekeeping operations and grants "civilian personnel other than United Nations officials" experts on mission status. *Model Status-of-Forces Agreement for Peace-Keeping Operations: Report of the Secretary-General*, 44th Sess., Agenda Item 76, U.N. Doc. A/45/594 (1990), § VI; This status means personnel are free from arrest, detention, and prosecution. Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15; Additionally, the 1994 Convention on the Safety of UN and Associated Personnel also covers contractors working on UN non-Chapter VII operations. It provides for universal criminal jurisdiction for those committing serious offenses against UN personnel and requires UN personnel to be promptly released if

framework for distinguishing how receiving states treat private companies and their employees differently from how they might treat the sending state and its personnel. The following sections track a typical SOFA and demonstrate how host nation legal barriers lead to degraded performance and increased contract costs.

1. Entry into the Host Nation

SOFAs exempt military members and members of the civilian component from normal immigration procedures. Generally, military members need only show their identification card and a copy of their travel orders to enter the country. Civilians require a passport that identifies them as either members of the civilian component or dependents.[71] Civil service employees normally receive an "official" passport, while dependents receive a "regular (no-fee)" passport.[72] The former is distinguished by its maroon color, while the latter appears to be what is commonly referred to as a "tourist" passport, but contains language indicating that the bearer is accompanying the U.S. Armed Forces. In both instances, the receiving state usually waives the need to obtain a visa.[73]

In the absence of a controlling agreement like a SOFA, a contractor may be unable to gain entry into a foreign country or, if permitted to enter, may be treated as a foreign corporation subject to local regulation, taxation, and customs restrictions. Similarly, contractor employees may be unable to enter, or, if permitted entry, may be subject to restrictions imposed on foreign labor.

---

captured. The Convention on the Safety of United Nations and Associated Personnel, G.A. Res. 49/59, U.N. GAOR, 49th Sess., Agenda Item 141, U.N. Doc. A/RES/49/59 (1994), *reprinted in* 34 I.L.M. 482 (1995).

[71] NATO SOFA, *supra* note 60, at art. III(3).

[72] Employees of Non-appropriated Fund Instrumentalities normally receive a no-fee passport as well.

[73] But not always. Italy requires civilians to obtain a "*missione*" visa from an Italian consulate. See Dep't of Defense Directive 4500.54-G, Electronic Foreign Clearance Guide, at https://www.fcg.pentagon.mil/fcg/cfm.

Many SOFA supplements will provide for contractor employees, but this is only part of the battle.[74] As noted above, not all contractors are treated alike. For example, in Italy and Germany, a contractor employee must satisfy the definitions of a "technical representative"[75] or "technical expert"[76] respectively.

Furthermore, most agreements that address contractors exclude local civilians who are recruited or hired in the host nation or who are residents of the host nation. That is, they must not be "ordinarily resident" in the receiving state. Unfortunately, "ordinarily resident" is not defined in any SOFA and thus subject to varying interpretations.[77]

Also, it should be noted that contractors are generally not entitled to official or no-fee passports.[78] They must obtain their own regular ("tourist") passport and then obtain an appropriate visa from a servicing consulate. If they are not accorded "SOFA status" under a supplemental agreement, they would need to obtain a normal business or work visa in accordance with the immigration laws of the host nation.

Just as one can't assume that a contractor employee can enter the receiving state with the same ease as a member of the force or civilian component, one must be aware of the differing treatment accorded contractor-owned aircraft versus sovereign United States aircraft. For

---

[74] *See, e.g.*, Romanian SOFA Supplement, *supra* note 69, at art. II (stating that visas are not required for members of the civilian component, who are also exempt from registration and control as aliens).

[75] DOD contractor employees who are accredited as technical representatives may be afforded "civilian personnel" status under the Italian SOFA Supplement, *supra* note 69. "Civilian personnel" are exempt from payment of Italian income tax and are eligible for individual logistic support such as exchange and commissary privileges. *See* USEUCOM Policy Memorandum 04-04 (Civilian Personnel Accreditation in the Republic of Italy, Aug. 24, 2004; COMUSNAVEURINST 5840.2E / USAREUR Reg. 550-32 / USAFEI 36-101, Tri-Component Directive for Italy on Personal Property, Rationed Goods, Motor Vehicles and Drivers' Licenses, Civilian Component and Technical Representative Status, Feb. 20, 2004, with Annex, "Civilian Personnel Accreditation Procedures in the Republic of Italy," July 12, 2004 [hereinafter Tri-component Directive].

[76] German SOFA Supplement, *supra* note 69, at art. 73.

[77] LAZAREFF, *supra* note 66, at 93-94. For contrasting definitions of "ordinarily resident," *compare* Tri-component Directive, *supra* note 75, *with* USAREUR Reg. 690-333, CINCUSNAVEURINST 12301.3a, and USAFE Supp. 1 to FPM Ch. 301.

[78] DEP'T OF ARMY PAM. 715-16, Contractor Deployment Guide (1998), at 6-3.

example, over-flight and landing rights agreements may be limited to U.S. state aircraft, or contractor-owned aircraft may be prohibited from using military airfields.[79] In one case, the Navy's Military Sealift Command arranged for contractor-owned and operated helicopters to perform a number of operations in support of military vessels, such as logistical support, search and rescue, and medical evacuation. Unfortunately, non-state aircraft could not obtain diplomatic clearance for landing at military and civilian airfields in Italy and were subject to landing fees, customs inspection, and search and seizure.[80] Consequently, the United States had to raise the matter through diplomatic channels. In the end, the Government of Italy agreed to allow the aircraft fly into and out of Italian military airfields and be granted the same privileges as U.S. military aircraft.[81]

2. Residency Requirements

Another aspect of immigration law not applicable to military members is residency controls. Military members are typically exempt from host nation laws and regulations regarding the registration and control of aliens. Civilian component members and dependents, when not completely exempt, are accounted for in such a way as to preserve their "non-resident" status.[82] Civilian component members do not need to obtain a work visa or permit, nor do they need to obtain a host nation driver's license.[83] Contractor employees who are not covered by a status agreement will not have these privileges. Thus, they will likely need to register with government

[79] If allowed to land, they will not be exempt from landing fees as state aircraft would. This additional cost would be passed on to the government.
[80] State aircraft, as sovereign instrumentalities, are exempt from duties and taxation, search, seizure, and inspections, or other exercises of jurisdiction by the host nation over the aircraft, personnel, equipment, or cargo on board. *See generally* Thomas A. Geraci, *Overflight, Landing Rights, Customs, and Clearances*, 37 A.F.L. REV. 155 (1994).
[81] Diplomatic Note No. 17, Embassy of the United States of America, Rome, Jan. 11, 2001.
[82] For example, Italian authorities issue civilians residence permits (*permesso di soggiorno*) which identify the holder as having SOFA status.
[83] NATO SOFA, *supra* note 60, at art. IV.

officials as temporary residents, obtain work permits from the labor ministry, and take an exam to receive a driver's license – tasks made all the more difficult by language barriers.

3. Criminal Jurisdiction

Criminal jurisdiction is one of the most critical and contentious issues handled in Status of Forces Agreements. For the host nation, the right to exercise criminal jurisdiction is a visible manifestation of its sovereignty. For the sending state, exercising disciplinary control is an important component of operational readiness.

With respect to DOD contractors, criminal jurisdiction is a subset of the larger issue of discipline and control. One of the weaknesses of using contractors is that they "are not subject to the overall military disciplinary scheme that commanders may envision for their forces."[84] Rather, "the war fighter's link to the contractor is through the contracting officer . . . ."[85] Commanders must rely on contracting officers to enforce contractor discipline, and all too often, the contracting officer is not on site.[86]

As an initial matter, absent an agreement to the contrary, the host nation will have criminal jurisdiction over any contractor employee. This may be inconvenient for the employee, and, depending on the country, this may raise concerns within the U.S. government as to whether its citizens are treated fairly. It may not, however, impose much in the way of a legal barrier to contract performance or mission accomplishment. Indeed, from a cost perspective, the cost to the U.S. government rises when it is able to obtain and exercise jurisdiction rather than letting the host nation dispose of the matter.

---

[84] Major Joseph R. Perlak, *The Military Extraterritorial Jurisdiction Act of 2000: Implications for Contractor Personnel*, 169 MIL. L. REV. 92, 119 (2001).
[85] JP 4-0, *supra* note 43, at V.1.c.
[86] Schooner, *supra* note 28, at 557.

What then, is the nature of the barrier to mission accomplishment that arises as a result of host nation criminal jurisdiction over contractor employees? The answer is two-fold. First, contractors who commit crimes in a receiving state will undermine host nation support for the U.S. presence. Unlike military members, there are limited disciplinary options available to the commander to deal with problems, and thus limited assurances to give to local community and foreign government leaders. Second, if the United States is unable to exercise jurisdiction, American public support may weaken over concerns that U.S. citizens are subject to the uncertainties of foreign justice. Indeed, the U.S. Senate was similarly motivated when it made ratification of the NATO SOFA contingent on Department of Defense promises to maximize jurisdiction in all cases.[87] Therefore, it will generally be in the interest of the United States government to exercise criminal jurisdiction over contractors.

That task is not easy, however. Despite the policy concerns expressed above, the United States can rarely retain exclusive jurisdiction, even over its military members stationed overseas. Where there is a SOFA, the standard foreign criminal jurisdiction formula is as follows.[88] The sending state retains exclusive jurisdiction over offenses against sending state law that do not violate the law of the receiving state. Similarly, the receiving state has exclusive jurisdiction over offenses solely against receiving state law. Between these two poles lies the area of concurrent jurisdiction. In that region, the sending state has the primary right over offenses committed by members of its armed forces or civilian component that are solely against the property or security of the sending state, solely against the person or property of another member

[87] Status of Forces of the North Atlantic Treaty: Supplementary Hearings Before the Senate Comm. on Foreign Relations, 83d Cong., 1st Sess. 42 (1953).
[88] *See, e.g.,* Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan [hereinafter US-Japan SOFA], art. XVII; NATO SOFA, *supra* note 60, at art. VII.

of the force or civilian component or of a dependent, or arising out of any act or omission done in the performance of official duty. The receiving state has the primary right of jurisdiction over all other offenses.

Unfortunately, over the years, a "jurisdictional gap" opened in the foreign criminal jurisdiction structure. A series of Supreme Court cases, starting with *Reid v. Covert*,[89] virtually eliminated the ability of the United States to exercise jurisdiction over civilian employees accompanying the U.S. forces overseas. The gap was substantially closed with the passage of the Military Extraterritorial Jurisdiction Act (MEJA) in 2000.[90] Numerous commentators heralded the passage of this law as the closure of the jurisdictional gap.[91]

As discussed below, MEJA covers contractor employees. This closes, in theory, the jurisdictional gap with respect to them as well. However, as we have seen, SOFAs generally do not cover contractors. Some supplemental agreements give contractor employees certain rights and privileges, such as the right to import household goods duty free. They rarely, however, include contractor employees in the criminal jurisdiction provisions. This results in a different kind of gap. Because the SOFA criminal jurisdiction formula is inapplicable, the contractor employee is just like any other United States citizen that commits a crime on the host nation's

---

[89] 354 U.S. 1 (1957) (holding that military court-martial jurisdiction was unconstitutional when applied to civilians during peacetime). *See generally* Mark J. Yost & Douglas S. Anderson, *Current Development: The Military Extraterritorial Jurisdiction Act of 2000: Closing the Gap*, 95 A.J.I.L. 446 (April 2001).

[90] Military Extraterritorial Jurisdiction Act, 18 USC §§ 3261-3267 (2000) [hereinafter MEJA]. The law was hastened into passage by another court case. In *United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000), a civilian dependent sexually abused his stepchild in military family housing at an army base in Germany. He was prosecuted for violating 18 U.S.C. § 2243(a). The Second Circuit Court of Appeals held that an overseas military housing area was not within the special maritime and territorial jurisdiction of the United States. However, the court took the unusual step of providing copies of its decision to Congress, urging its action to close the gap in jurisdiction. *See* Captain Glenn R. Schmitt, *The Military Extraterritorial Jurisdiction Act: The Continuing Problem of Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad - - Problem Solved?* ARMY LAW., Dec. 2000, at 1.

[91] *See generally* Andrew D. Fallon & Captain Theresa A. Keene, *Closing the Legal Loophole? Practical Implications of the Military Extraterritorial Jurisdiction Act of 2000*, 51 A.F. L. REV. 271 (2001); Yost & Anderson, *supra* note 89; Schmitt, *supra* note 90.

territory. In such cases, if the United States wishes to exercise criminal jurisdiction, it must first convince the host nation to relinquish its jurisdiction.[92] In order to increase the odds of the host nation choosing not to indict, the United States can offer its readiness to prosecute based on the following measures.

First, in those cases where the contractor employee is a military retiree, the United States may recall the person to active duty and prosecute him under the Uniform Code of Military Justice. Given the nature of the employment, it is not uncommon for an employee to also be a retired member of the U.S. armed forces. This option is also not unprecedented. In 1991, Saudi Arabia suspected a U.S. Army civilian employee in Riyadh, Mr. Earnest Sands, of murdering his wife. The United States did not have a SOFA with Saudi Arabia and was concerned that Mr. Sands would be exposed to capital punishment without the benefit of Western due process rights. The accused, however, was a retired Army noncommissioned officer. Thus, the Army recalled him to active duty to face a court-martial and Saudi Arabia agreed not to exercise its jurisdiction.[93] The UCMJ is also available in those rare instances where Congress declares war.[94]

[92] While practitioners will often refer to this as a "waiver" of jurisdiction, because the host nation has exclusive jurisdiction the U.S. is actually seeking a commitment by the host nation not to indict under the circumstances. Waiver requests are for concurrent jurisdiction cases where the host nation has the primary right, whereas in cases of host nation exclusive jurisdiction, the United States asks the host nation to abstain from indicting. *See* JOSEPH M. SNEE, S.J. & A. KENNETH PYE, STATUS OF FORCES AGREEMENTS AND CRIMINAL JURISDICTION 31(1957) (noting that "[a] waiver in such case, however, is rather a *nolle prosequi* granted at the request of the sending State").
[93] Major Steven J. Lepper, *A Primer on Foreign Criminal Jurisdiction*, 37 A.F. L. REV. 169, 181 (1994). One speculates that although Saudi Arabia had primary jurisdiction, it did not have a strong interest in prosecuting the case since the victim was not a Saudi national and the alleged murder occurred in the U.S. Military Training Mission compound. Thus, it was willing to forgo exercising its jurisdiction once the United States was able to extend its jurisdiction over the accused.
[94] 10 U.S.C. § 802 (2005).

Second, some crimes in the federal code are, by their statutory terms, extraterritorial in reach.[95] Unfortunately, the list of criminal statutes with such effect is quite small, which contributed to the jurisdictional gap noted above. One noteworthy crime with extraterritorial effect is the War Crimes Act of 1996.[96]

Third, as noted above, MEJA extends federal jurisdiction over persons employed by or accompanying the U.S. Armed Forces overseas and certain uniformed personnel, such as separated personnel whose crimes were not discovered prior to discharge.[97] Initially, the act applied only to DOD contractors. However, in 2005, Congress amended MEJA to extend jurisdiction to contractors of other agencies to the extent that their employment relates to supporting DOD missions overseas.[98] The statute created a new federal crime that makes punishable conduct occurring overseas that would have been a felony had the conduct occurred within the United States.[99] Under MEJA, DOD may detain and charge such civilians and then turn them over to the Department of Justice for prosecution.

Fourth, the USA PATRIOT Act of 2002 extended the territorial jurisdiction of the United States to include the "premises of the United States diplomatic, consular, military, or other United States government missions or entities in foreign States" with respect to offenses

[95] Jerry Markon & Josh White, *Contractor Charged in Baghdad Badge Scam*, WASH. POST, Sept. 21, 2005, at 19 (DynCorp employee charged under fraud statute with distributing access badges for Baghdad's Green Zone to unauthorized persons).
[96] 18 U.S.C. § 2441 (2005).
[97] 18 U.S.C. § 3261(a) (2005).
[98] H.R. 4200, National Defense Authorization Act for FY 2005, sect. 1088, Military Extraterritorial Jurisdiction Over Contractors Supporting Defense Missions Overseas, amended 18 U.S.C. § 3267(1)(A) to include a contractor of any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas.
[99] Section 3261 uses the jurisdictional phrase "if committed within the special maritime and territorial jurisdiction of the United States," however, conduct that would be a federal crime regardless of where it takes place in the United States, such as Title 21 drug crimes, also fall within the scope of MEJA. Schmitt, *supra* note 90, at 3.

committed by or against a national of the United States.[100] While envisioned as an antiterrorism measure, it has been used to prosecute a U.S. contractor for crimes committed overseas.

On June 17, 2004, a federal grand jury in North Carolina indicted David A. Passaro for assaulting an Afghan detainee on a U.S. base in Afghanistan.[101] At the time of the alleged assault, Passaro was working as a contractor for the CIA. At the time, MEJA did not cover non-DOD contractors, so prosecutors turned to the PATRIOT Act out of necessity.[102]

For serious crimes, then, there are now several possible avenues for the United States to exercise jurisdiction over civilian contractor employees, if it can convince the host nation to relinquish its exclusive jurisdiction or in the few instances where contractor employees fall under the SOFA criminal jurisdiction formula. This may mitigate the barrier to mission accomplishment resulting from the host nation's exercise of its jurisdiction, at least for felony-level crimes. For less serious offenses, however, MEJA and the other federal criminal code provisions noted above do little for the commander. Even minor misconduct such as being late to work is punishable under the UCMJ, thus enabling the commander to preserve discipline over military personnel and operational readiness.[103] The commander does not have a similar ability to manage the contractor force, imposing a different type of barrier to mission accomplishment.[104]

---

[100] 18 U.S.C. § 113 (2005) and 18 U.S.C. § 7(9) (2005).
[101] Farah Stockman, *CIA Contractor is Charged in Beating of Afghan Detainee*, BOSTON GLOBE, June 18, 2004, available at http://www.boston.com/news/nation/articles/2004/06/18.htm.
[102] David Kravets, *CIA Contractor is Charged Under the Patriot Act in Novel Use of Anti-Terrorism Law*, DETROIT NEWS, June 19, 2004, available at http://www.detnews.com/2004/nation/0406/19/nation-188432.htm.
[103] 10 U.S.C. § 892 (2005).
[104] Section of Public Contract Law of the American Bar Association, *Contractors in the Battle Space* (Oct. 12, 2005), available at http://www.abanet.org/contract/federal/regscomm/home.html [hereinafter ABA White Paper].

4. Civil Jurisdiction

Status of Forces Agreements generally do not address the question of civil jurisdiction over sending state forces and their personnel.[105] The general rule of international law is that a state has jurisdiction over persons present in its territory.[106] However, a sovereign is immune from the jurisdiction of a foreign state except in cases where the action is based upon a commercial activity.[107] This "restrictive" theory of sovereign immunity replaced the absolute theory that immunized states irrespective of nature of activities.[108] In the United States, this theory has been codified in the Foreign Sovereign Immunities Act.[109] Futhermore, "[i]t is generally recognized that a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly."[110] Of course, a sovereign may waive its immunity and consent to the jurisdiction of a foreign state.[111]

Normally, individual members of a force and the civilian component and dependents are subject to local civil jurisdiction for their private acts. But, if an action arises out of an official act, either the SOFA claims provisions would be invoked or the United States would substitute itself for the defendant and seek dismissal of the case on the grounds of sovereign immunity. Contractors and their employees, however, are fully subject to the civil jurisdiction of the

---

[105] LAZAREFF, *supra* note 66, at 246; DIETER FLECK, ED., THE HANDBOOK OF THE LAW OF THE VISITING FORCES 131 (2001). Article VIII, paragraph (5)(g), however, exempts a member of a force or civilian component from any proceedings for the enforcement of any judgment given against him in the receiving state in a matter arising from the performance of his official duties. NATO SOFA, *supra* note 60, at art. VIII.

[106] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 421 (1986) (noting that "a state's exercise of jurisdiction to adjudicate with respect to a person or thing is reasonable if . . . the person or thing is present in the territory of the state . . . .") The Restatement addresses the complementary jurisdictions to prescribe (legislate) and enforce in sections 402 and 431.

[107] The restrictive theory of sovereign immunity holds that assertion of the sovereign immunity defense is inappropriate in matters of an essentially commercial nature (*ius gestionis*) as opposed to public acts of state (*ius imperii*).

[108] *See* The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 3 L.Ed. 287 (1812).

[109] 28 U.S.C. § 1330 *et seq*. (1988).

[110] Chuidian v. Philippine National Bank, 912 F.2d 1095 (9th Cir., 1990).

[111] 28 U.S.C. §§ 1605(a)(1) & 1610 (2005).

receiving state. Thus, they could be liable under foreign law for tort, contractual, and other claims by third parties for injury, death, or loss or damage of property, for private or "public acts."[112]

To handle pecuniary claims for damages, contractors are generally required to carry liability insurance, thus partially insulating the government. The cost of insurance, however, is an allowable cost of the contract. Furthermore, if liability exceeds the insurance, the standard contract clause provides for the government to reimburse the contractor.[113] If the standard clause is not used, the contractor may still seek indemnification from the government under federal law.[114] Thus, if the contractor decides to self-insure itself against losses, the U.S. government will reimburse the total cost of the claim.

Aside from pecuniary liability and insurance costs, a potentially greater impact to mission accomplishment is the fact that a company doing work for the DOD is subject to judicial enforcement actions, such as injunctions or seizures of assets. For example, a host nation court could force a contractor to cease certain activity pending final adjudication of a suit claiming damages to the plaintiff's property, or its machinery may be seized to satisfy a judgment. Thus, once again, use of contractor rather than government personnel may impose unexpected costs on the DOD or hinder mission accomplishment.

---

[112] U.S. contractors could also, of course, be sued in United States' courts. In that event, the company may be able to raise the Government Contractor Defense for damages resulting from contract performance. Boyle v. United Technologies Corp., 487 U.S. 500 (1988).

[113] GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 52.228-7 (hereinafter FAR).

[114] 50 U.S.C. § 1431 *et. seq*. (2005). *See* James J. McCullough & Abram J. Pafford, *Contractors on the Battlefield: Emerging Issues for Contractor Support in Combat & Contingency Operations*, Briefing Papers No. 02-7 (June 2002), at 10.

5. Carrying of Arms

As a general rule, contractor personnel are not authorized to possess or carry firearms when performing under a DOD contract.[115] However, the Combatant Commander may authorize the arming of contractor personnel for individual self-defense[116] or in order to provide security services "for other than uniquely military functions."[117] Commanders considering arming contractor personnel must, however, consider relevant status agreements and host nation law. Many countries impose legal restrictions on the issuance of firearms to civilians. For example, although the NATO SOFA permits military personnel to carry arms, Italian law requires civilians to undergo a strict screening and licensing process in order to do so. There are no exemptions, even for civilian employees accompanying U.S. forces in Italy. Consequently, even when desirable, it may not be feasible to authorize civilians to carry arms.

Where civilians are authorized to carry arms, as in Iraq, contractors may incur additional costs with respect to bringing those weapons into the host nation. As an initial matter, if the weapons are to be exported from the United States, the contractors need export permission from the U.S. Department of State Directorate of Defense Trade Controls.[118] Then, the host nation will need to grant permission to import the weapons. The administrative, licensing, and customs charges associated with these processes will be a legitimate cost of the contract.[119]

---

[115] DODI 3020.41, *supra* note 7, at 6.2.7.8.
[116] *Id.* at 6.3.4.1.
[117] *Id*. at 6.3.5.
[118] The Directorate of Defense Trade Controls (DDTC), Bureau of Political-Military Affairs, administers the licensing provisions in accordance with the Arms Export Control Act, 22 U.S.C. § 2778 *et seq*. (2005), and the International Traffic in Arms Regulations, 22 C.F.R. §§ 120-130 (2005).
[119] The registration cost with DDTC is currently $1,750 per year. *See* http://www.pmdtc.org/registration.htm (visited Feb. 3, 2006).

6. Claims

After criminal jurisdiction, the most important provisions negotiated in status of forces agreements deal with claims. Whereas the criminal jurisdiction clauses reflect each country's desire to protect its sovereignty, the claims provisions ensure that the inhabitants of the host nation are compensated for damages suffered as a result of a foreign presence. For claims against the U.S. forces, two statutes, the Foreign Claims Act (FCA)[120] and the International Agreement Claims Act (IACA),[121] provide the basis for paying claimants. These two statutes "operate as an important, if little noticed, element in the relationships among the United States and its allies and friends across the world. . . . Without these statutes and the artfully drafted claims provisions in basing agreements, the United States could not have maintained large force contingents in allied countries . . . without becoming an unwelcome ally or guest."[122]

When there is a SOFA, contracting parties are liable to third parties for acts or omissions of a member of a force or civilian component in the performance of official duties under the doctrine of *respondeat superior* or when "legally responsible" under the law of the receiving state.[123] The host nation adjudicates and pays the claim and then seeks partial reimbursement from the U.S. government, which pays the host nation pursuant to the IACA. In countries where the United States does not have a SOFA, or where there is a SOFA but the claim arises out of the tortious acts or omissions of a member of the force or civilian component when not in the performance of official duty, the United States adjudicates and pays the claims in accordance with the FCA.

---

[120] 10 U.S.C. § 2734 (2005).
[121] 10 U.S.C. § 2734a & 2734b (2005).
[122] Lieutenant Colonel David P. Stephenson, *An Introduction to the Payment of Claims Under the Foreign and the International Agreement Claims Act*, 37 A.F. L. REV. 191 (1994).

Thus, the FCA and the IACA permit the U.S. government to compensate claimants who have suffered losses at the hands of U.S. personnel assigned overseas, regardless of the existence of a SOFA. "U.S. personnel," however, means service members and civilian employees. It does not include dependents or contractors.[124] Indeed, contractors are excluded from SOFA claims provisions even in the most generous of supplementary agreements.[125]

Consequently, there is no direct cost to the U.S. government as a result of the tortious acts of contractor employees.[126] It has an interest, however, in ensuring that contractors compensate persons who suffer losses as a result of contractor actions. Indeed, local nationals are not likely to distinguish between the U.S. forces and their contractors, and will expect equally prompt compensation regardless of the status of the tortfeasor. In Iraq, with the proliferation of private security companies employing aggressive tactics, this has proven to be problematic.[127] While some contractors have established compensation programs, they are nothing like the robust claims programs administered by the U.S. military.[128]

As noted above, the "artfully crafted" claims provisions of SOFAs have played a key role in promoting and keeping friendly relations between the United States and foreign countries where her troops are stationed. That goodwill now depends to a large degree on the ability and willingness of private companies to pay meritorious claims.

---

[123] NATO SOFA, *supra* note 60, at art. VIII. *Respondeat superior* is the common law doctrine that a principal is liable in certain cases for the wrongful acts of his agent. BLACK'S LAW DICTIONARY 1311 (1990).
[124] Stephenson, *supra* note 122, at 191 n.3.
[125] Romanian SOFA Supplement, *supra* note 69, at art. I.
[126] The U.S. government ability to avoid paying third-party claims for damages caused by contractors denies contractor employees one important benefit – maximizing criminal jurisdiction in favor of the United States. This benefit accrues because in many jurisdictions, the local prosecutor may be willing to drop or reduce charges if the complainant has been compensated for his damages. Even when the host nation retains jurisdiction, the payment of compensation can be an important factor in sentencing. *See* discussion in Stephenson, *supra* note 122, at 208.
[127] T. Christian Miller, *Private Security Guards in Iraq Operate with Little Supervision*, L.A. TIMES, Dec. 4, 2005, available at http://ebird.afis.mil/ebfiles/e20051204405386.html.
[128] *Id.*

Finally, contractor employees may suffer losses that result in increased costs to the United States' government. For example, the families of four contractors from Blackwater Security Consulting who were killed in Fallujah filed a wrongful death suit against the company in North Carolina in 2004.[129] The cost of damages awarded in these types of cases will likely be passed on to the DOD in the form of higher fees.

7. Taxes

Perhaps the most prominent host nation legal barrier to contractor performance is taxation. For example, many contractors will assume that all of their "official" purchases of supplies and materials will be exempt from local sales or value-added taxes.[130] Unfortunately, this is normally not the case. On at least two occasions, the U.S. government was unexpectedly billed millions of dollars by contractors who were not exempt from host nation taxes.[131]

Typically, either the SOFA or host nation legislation will grant an exemption for U.S. commands making direct purchases. This exemption, however, may not pass through to a government contractor.[132] Similarly, where the U.S. forces are generally exempt from taxes on utility services provided to bases and facilities used by U.S. forces,[133] contractors do not receive similar favorable treatment.[134]

---

[129] Emery P. Dalesio, *State Court to Hear Lawsuit Over Men's Deaths in Iraq*, HONOLULU STAR-BULLETIN, Aug. 16, 2005, available at http://starbulletin.com/http://starbulletin.com/ (visited Feb. 7, 2006).
[130] Standard Value-Added Tax rates range from 5 to 25 percent. *See* http://en.wikipedia.org/wiki/Value-added_tax.
[131] Turner & Norton, *supra* note 5, at 96.
[132] Again, the Romanian supplement to the NATO SOFA is a notable exception. Article X provides that "with respect to the value-added tax, exemptions shall apply to articles and services acquired by the United States forces, *or by its contractors* when acting for or on behalf of U.S. forces. United States contractors in Romania solely for the purpose of supporting the United States forces shall not be subject to any form of income or profits tax by the Government of Romania or its political subdivisions." Romanian SOFA Supplement, *supra* note 69, at art. X (emphasis added).
[133] S*ee, e.g.*, Italian Law 427 of Oct. 29, 1993, 1993 Gazz. Uff. No. 265, Oct. 29, 1993 (providing relief from several types of taxes for NATO forces).
[134] Foreign government willingness to exempt U.S. forces from taxation may be motivated in part by the principle that "sovereigns don't tax other sovereigns." Though questionable whether this principle rises to the level of

On the individual level, contractor employees will have to contend with taxes such as those related to owning and driving a car (road tax, licensing and registration fees, insurance premium taxes) that members of the force or civilian component would not have to pay. Furthermore, absent a status agreement or tax treaty, an employee's income would be subject to host nation taxation. These factors will increase the personnel costs of the contract.

8. Customs

With a SOFA, U.S. Forces may import and re-export equipment, supplies, and provisions free of customs duties.[135] A contractor importing its own materiel would not be able to do so duty-free.[136] Rather, the contractor would have to pass title to the property to the U.S. government in order to have the equipment enter the host nation duty-free. For equipment that the contractor will use itself in performance of the contract rather than transfer to the U.S. armed forces for their use, this is not practicable. Customs tariffs vary widely, but would appear to add substantially to the contract cost. Furthermore, the contractor may face particular difficulties trying to bring military equipment into a country.[137]

9. Logistical Support

Contractors, and contracting officers, often assume that contractor employees will automatically be eligible to receive individual logistical support (*i.e.*, exchange / commissary privileges, vehicle registration, tax-free gas rations). Once again, however, without a status agreement, this is not the case. Furthermore, one must closely examine supplementary

---

Customary International Law, diplomatic and consular facilities are normally exempt from taxation. In contrast, the host nation is more likely to see a contractor as a source of income to the national and local government coffers.

[135] *See, e.g.*, NATO SOFA, *supra* note 60, at art. XI(4).

[136] Romania appears to provide the exception that proves the rule. It allows for duty-free importation and exportation by United States contractors for or on behalf of U.S. forces. It is unclear, however, whether this applies to all contractor shipments or only those destined for direct use by the U.S. armed forces. Romanian SOFA supplement, *supra* note 69, at art. XI.

[137] *See supra* notes 118-19 and accompanying text.

agreements to see whether a particular contractor employee qualifies for "civilian component" status. For example, in both Germany and Italy, only those qualified as "technical experts" will gain such status. Those that don't qualify will be dependent on local retail outlets and grocery stores and may be ineligible to use the military post office. All of these add not only inconvenience to the employee, but, inevitably, cost to the contract.

Also, as noted previously, most status agreements deal only with extending certain privileges to select *employees*. Thus, there is typically no provision for government contractor *firms* to register, tax-free, their company vehicles as if they were U.S. government vehicles, or to receive oil and fuel rations for those vehicles. This can add substantially to the cost of the contract, since many countries heavily tax petroleum products.

10. Administrative Law

In many substantive areas of administrative law, the United States government will be exempt from restrictive rules and regulations. These matters may be addressed explicitly or implicitly in an international agreement, or the United States may simply be immune to the adjudicative jurisdiction of the host nation by operation of international law.

In some cases, a supplemental agreement will establish the governing standards. For example, in the United Kingdom, the U.S. forces and Ministry of Defence (MOD) have entered into an agreement regarding health and safety standards that apply to MOD employees working with U.S. forces.[138] Where there is no agreement, and the SOFA doesn't explicitly exempt the U.S. forces from strictly complying with host nation administrative law, the U.S. typically takes

[138] *See* An Agreement Between the Health and Safety Executive, the Ministry of Defence and the United States Visiting Forces (USVF) in the United Kingdom, July 1989.

the position that it must abide with the substantive, but not the procedural, aspects of the law.[139] In the event of a dispute with the host nation, the United States seeks to resolve the matter in country-to-country negotiations. In doing so, it retains its rights as a sovereign to avoid the adjudicative jurisdiction of the host nation. Unfortunately, a contractor does not have the flexibility to avoid strictly complying with host nation law in these areas.

a. Environmental Law

In many foreign countries, the U.S. armed forces have established "Final Governing Standards" for environmental compliance.[140] These governing standards typically set a baseline for each area of environmental law that reflects the stricter of host nation or U.S. law, and they are often worked in concert with local environmental authorities. Of particular benefit to the United States, however, is that the procedural and administrative aspects of local laws, as well as fees and taxes, are avoided. Unfortunately, DOD contractors will need to comply with host nation laws, especially when they operate off-base facilities or if they transport hazardous waste or hazardous materials off base.

As with other host nation legal obstacles, this one will impose costs on the contractor that will, in turn, be passed on to the U.S. government. There may be other costs as well. Because of host nation sensitivities to environmental problems as well as the fact that polluters are often subject to strict liability (that is, liability for damages and clean-up costs without regard for fault), the United States may also find that it must pay for a contractor's malfeasance.

For example, in 2001, the Government of Italy filed suit in a Milan court to recover costs it had incurred in disposing of hazardous waste that had been consigned to the commercial vessel

[139] This is based on an interpretation of the typical SOFA clause obliging the sending state to "respect" the law of the receiving state. *See* NATO SOFA, *supra* note 60, at art. II.

Zanobia.[141] Among the many barrels of hazardous waste on that vessel were a few that had originated from a U.S. military installation. Because the contractor handling the waste was unable to pay the costs of disposal, Italy sought reimbursement from the United States government. Ultimately, the suit was dismissed and the two governments negotiated an agreement pursuant to Article XVI of the NATO SOFA.[142] The cost (about 4,200 Euro) was not great, but this case highlights the danger that a contractor's failure in the environmental arena may levy unexpected costs on the U.S. government.

b. Health and Safety Law

Defense contractors operating in a foreign country will also have to contend with local health and safety law. Most countries employ a regulatory scheme similar in scope to U.S. Occupational Safety and Health Act (OSHA) regulations.[143] For example, Italian Law 626 implements several European Union (EU) directives regarding the protection of worker health and safety in the workplace.[144] Law 626 provides criminal and civil penalties for anyone violating the law, including both employers (broadly required to create a safe environment for employees and hold employees accountable for unsafe practices) and employees (required to take responsibility for individual safety and comply with employers' safety directives). These broad regulatory schemes impose significant administrative costs that will ultimately be borne by the U.S. government.

---

[140] *See generally* Lt Col Richard A. Phelps**,** *Environmental Law for Overseas Installations*, 40 A.F. L. REV. 49 (1996).
[141] *Presidenza del Consiglio dei Ministri – Dipartimento per la Protezione Civile contro Jelly Wax Srl e alter*, Case No. R.G. 11117/95.
[142] The United States Embassy in Italy requested negotiations pursuant to Article XVI of the NATO SOFA in Diplomatic Note No. 371, Embassy of the United States of America, Rome, June 6, 2001. The two governments signed a settlement agreement on April 19, 2002 (on file with U.S. Sending State Office for Italy, U.S. Embassy, Rome, Italy).
[143] 29 U.S.C. 653 *et seq*. (2005).
[144] Italian Legislative Decree 626 of Sept. 19, 1994, Gazz. Uff. No. 265, Nov. 12, 1994.

They may present other unexpected hurdles as well. For example, complementing Law 626 in Italy is Law 494, which implements safety and health requirements at temporary or mobile construction sites.[145] Article 10 of Law 494 contains a procedural requirement that engineers in charge of construction projects hold engineering degrees (or educational and work experience equivalencies) from an Italian or EU university. The law requires that an engineering degree from outside Italy (and the EU) be recognized through an application process to the Italian Ministry of Justice. Thus, absent the type of relief afforded by an international agreement, or the flexibility to deal with such requirements as a sovereign, a U.S. contractor would have to employ locally certified engineers for all construction projects.

c. Labor and Employment Law

The labor and employment laws of the United States will normally apply to members of the civilian component, but, absent an agreement with the host nation, government contractors operating overseas will be subject to host nation laws.[146] Exemptions from compliance with host nation labor laws appear to be the exception rather than the rule with respect to the majority of SOFAs. [147]

---

[145] Italian Law No. 494 of Aug. 14, 1996, 1996 Gazz. Uff. No. 223, Sep. 23, 1996.

[146] In some instances, the labor and employment laws of both the United States and the host nation will apply to government contractors operating overseas, notwithstanding the fact these laws are potentially conflicting. *See* McCullough & Pafford, *supra* note 114, at 6 (noting, *e.g.,* that U.S. antidiscrimination laws enjoy extraterritorial application). Compliance with U.S. workers compensation laws is also required and directly impacts the cost to the government. Under the Defense Base Act, contractors insure against employee deaths or injuries arising from the course of employment. 42 U.S.C. § 1651 *et seq*. (2005). The insurance premiums, which have been as high as $30 per $100 of payroll in Iraq, are passed through to the government. ABA White Paper, *supra* note 104. Additionally, pursuant to the War Hazards Compensation Act, the government agrees to reimburse insurers the full cost for combat-related deaths and injuries, plus 15 percent in administrative fees. 42 U.S.C. § 1702 *et seq*. (2005). Death claims routinely result in payments of $1.2 million and $1.8 million. T. Christian Miller, *Army, Insurer in Iraq at Odds*, L.A. TIMES, June 13, 2005, available at http://aimpoints.hq.af.mil/display.cfm?id=4282. In Iraq, industry observers predict the United States will reimburse more than $500 million to the insurance industry. *See generally* McCullough & Pafford, *supra* note 114, and Jeffrey L. Robb, *Workers Compensation for Defense Contractor Employees Accompanying the Military Forces*, 33 PUB. CONT. L.J. 423 (2004).

[147] Again, the Romanian supplement to the NATO SOFA is a notable, and generous, exception. *See* Romanian SOFA Supplement, *supra* note 69, at art. XXI (stating that U.S. firms exclusively serving the United States forces

Thus, DOD contractors will need to comply with laws regulating things such as working hours, overtime, worker's compensation, and collective bargaining agreements.[148] These laws are often complex and may be more protective of workers than similar U.S. legislation. Consequently, compliance with local labor laws will likely increase the contract's performance costs. For example, Kuwaiti law limits the maximum annual overtime hours to 180, which increases the number of employees that a contractor must hire and ultimately the cost of performance.[149]

Indeed, host nation employment law may severely impact contractor performance by "restricting services to be contracted, by limiting contracted services to host [nation] contractor sources, or, in some cases, by prohibiting contractor use altogether."[150] For example, Italy has a workers' protection law that prohibits contracting out the "mere performance of work."[151] It is intended to ensure that contract employees, acting as *de facto* employees of the principal because they have little or no independence, do not receive pay, legal, and social security conditions lower than those applicable to the principal's employees. Violations of the law can result in criminal charges. They can also lead to big dollar losses, since the Italian government may find that the contractor's employees are, for all purposes, the employees of the enterprise. This means the United States or a contractor that uses subcontractors could be liable for any unpaid back taxes, benefits, or contributions, and that the employees will prospectively be considered to be on

---

shall be exempt from the laws and regulations of Romania, or any subdivision thereof, with respect to the terms and conditions of their employment and licensing and registration of businesses and corporations).

[148] Contractors would likely have to strictly comply with host nation law with respect to its local national employees in any event. DFARS, *supra* note 7, at 252.222-7002. Similarly, the U.S. forces normally apply host nation law to local national employees. *See, e.g.*, NATO SOFA, *supra* note 60, at art. IX(4) (stating that the conditions of employment shall be that set out in receiving state legislation).

[149] Davidson, *supra* note 5, at 259 n.204 (citing Kuwaiti labor laws).

[150] DODI 3020.41, *supra* note 7, at 6.1.6 (discussing the need for planners and contracting officers to take international agreements and HN support agreements into account when planning for contractor support).

[151] Italian Law No. 1369 of Oct. 23, 1960, 1960 Gazz. Uff. No. 288, art. I, para. 1, Nov. 25, 1960.

the principal's payroll. This could, naturally, dissuade the DOD or a DOD contractor from outsourcing work, since the expected cost savings would be illusory or fleeting.

D. The Status of Contractors Under Occupation Law

The United States' war in Iraq brought to light a novel concern – what is the status of contractors accompanying the force into a country during an armed invasion? For that matter, what about other situations short of war? For example, other non-permissive entries into foreign states are possible, even likely, such as humanitarian interventions to stop genocide. Furthermore, since the end of the Cold War, interventions into states with the purpose, at least in part, of transforming the country through state-building efforts, have increased dramatically.[152]

The method of entry into a foreign country makes a difference. If there is a forced entry rather than entry by agreement of the parties, the consensus is that foreign military personnel are immune from the jurisdiction of local law.[153] This would seem to apply to civilian personnel accompanying the armed forces, including contractors.[154] Thus, host nation law would not appear to be a barrier to mission accomplishment, at least until sovereignty is returned to the target country.

1. The International Law of Occupation

While host nation law will not present any obstacles to contractor-provided support, the operation of a well-defined body of international law could present a challenge. Until sovereignty is returned, occupation law is the default baseline governing the actions of the

---

[152] Fearon & Laitin, *supra* note 2, at 10 (noting that the UN Security Council has mandated 45 such missions since 1988, as compared with just 13 from 1958 to 1987).

[153] Erickson, *supra* note 55, at 138. See DEP'T OF ARMY FIELD MANUAL 27-10, *The Law of Land Warfare* 143 (1956) (stating in part that "[m]ilitary and civilian personnel of the occupying forces and occupation administration and persons accompanying them are not subject to local law . . . .")

[154] Turner & Norton, *supra* note 5, at 92 n. 675. (stating that "U.S. forces and accompanying civilians may not be covered by host nation law, even without SOFA protection; for example, if the U.S. is operating in the country during a full-scale conflict, or if there is no discernable local law due to local governmental collapse")

intervening power.[155] This legal regime is based on the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949.[156] Article 43 of the Hague Regulations captures the essence of occupation law. It states:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.[157]

As the language of this provision indicates, occupation law has a strong presumption for the *status quo ante*. Under occupation law, the occupier has limited legislative powers and may not make permanent changes to state institutions. When possible, it must use existing local laws. The occupier acts as a trustee of public immovable property, and must treat public movable property as private property.[158] The occupier must respect human rights. It must provide for the care and education of children, adequate food and medical supplies, and public health and hygiene.[159] In sum, occupation law does two things. First, it seeks to preserve the existing order in the occupied country. Second, it imposes obligations on the occupying power to protect the victims of war.

2. Costs Imposed by Contractor Actions in Support of State-Building Efforts

The aftermath of Operation Iraqi Freedom revealed a fault line between international law and the goals of modern interventions. Modern interventions foresee the need to make

[155] Spearin, *supra* note 30, at 38.
[156] Convention Between the United States and Other Powers Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, 36 Stat. 2277, 2295 [hereinafter Hague Regulations]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, 332-38 [hereinafter Fourth Geneva Convention].
[157] Hague Regulations, *supra* note 156, at art. 43.
[158] Fourth Geneva Convention, *supra* note 156, at art. 53.
[159] Fourth Geneva Convention, *supra* note 156, at arts. 55 & 56.

fundamental institutional and structural adjustments in the occupied territory in order to address the root causes of the "bad externalities" that induced the intervention.[160] For example, in Iraq, the United States sought to change the electoral system, create a constitutional democracy, and reform the economy. These measures, however, go beyond the strictures of occupation law. One commentator laments that occupation law "precludes virtually every type of reform vital to state-building: building transparent and accountable institutions, reforming legal codes to protect human rights, reforming economic codes to foster growth and development, and carrying out genuine multi-party elections."[161]

Of course, in many cases the UN Security Council will pass a resolution authorizing the intervening state to implement reforms, as it did in Iraq.[162] Such Security Council resolutions, however, "are often adopted in haste, with no overarching theme or consistency," leaving gaps that still necessitate strict adherence to the Hague and Geneva Conventions.[163]

The United States' experience in Iraq also reveals the extent to which it relies on contractors for stability operations, which typically take a back seat to warfighting tasks. What then, are the implications if contractors, acting on behalf of the United States, overstep the bounds of occupation law?

The answer is two-fold. First, local nationals may, at some point, seek damages from a contractor for violating pre-existing law. For example, a contractor may help implement reforms in the area of property rights. A contractor would be more susceptible than the DOD to legal action since it may continue to do business in the region and would not be shielded by sovereign immunity. If held liable for someone's loss, the contractor would naturally seek to pass those

[160] *See supra* note 2.
[161] Brett H. McGurk, *Revisiting the Law of Nation-Building: Iraq in Transition*, 45 VA. J. INT'L L. 451, 454 (2005).
[162] S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg., U.N. Doc. S/RES/1483 (2003).

costs to the U.S. government. Second, since the contractor is an agent of the United States, the succeeding government of the occupied country could seek reparations from the United States in the International Court of Justice for any losses it suffers.[164]

3. Costs Imposed by Contractor Actions Failing to Meet the Positive Obligations of Occupation Law

Similarly, the United States government is exposed to liability if it chooses to outsource some of its obligations under the Fourth Geneva Convention. This is probably a more likely scenario than being held liable for disturbing the pre-existing order. For example, if a private firm contracted to provide food, water, or health care to the local populace fails to deliver, the United States may be liable under a *respondeat superior* or agency theory.[165] This could occur in U.S. federal courts. David Scheffer asserts that Iraqi victims of abuse:

> might find a basis under the Alien Tort Statute to bring a civil action in federal court against an independent contractor, incorporated in the United States and operating in Iraq under contract with one of the occupying powers of the Authority, and allegedly operating in a manner that violates occupation law. This could be the case particularly if the independent contractor has performed occupation responsibilities contractually delegated or assigned to it by one of the occupying powers.[166]

The United States would attempt to avoid liability in such a circumstance by invoking the independent contractor exception. That defense might be hard to sustain, however, since failing to closely supervise the operations of the contractors would presumably be an admission that it

---

[163] McGurk, *supra* note 161, at 453.
[164] The International Court of Justice (ICJ) was established under the UN Charter and is empowered to settle legal disputes between states. UN CHARTER art. 7.
[165] *See supra* note 123 and accompanying text.
[166] David J. Scheffer, *Agora (Continued): Future Implication of the Iraq Conflict: Beyond Occupation Law*, 97 A.J.I.L. 842, 858 (2003).

had abdicated its responsibilities under occupation law. Also, as in the previous example, the succeeding government of the occupied country could challenge the United States in the International Court of Justice over violations, seeking reparations.

4. Post Occupation Contractor Impacts on Mission Accomplishment

Once full sovereignty is returned to the occupied territory, the host nation legal barriers noted in Section C again spring into existence and may encumber continuing peace and stability operations. Also, as indicated above, the United States could incur unexpected costs as a result of its use of contractors to perform tasks during the occupation. This exposure to liability, however, is difficult to predict, either in scope or probability.

Perhaps of more practical concern is the possibility that contractor misconduct or malfeasance, resulting in part from the inadequate command and control mechanisms for the commander in the theater of operations, will reflect poorly on the United States in the international community. For example, as law and order disappeared in the aftermath of the Iraqi invasion, the U.S. government contracted with many private security companies. Coalition Provisional Authority Order Number 17 granted immunity from Iraqi law to foreign contractors while working within the boundaries of their contracted tasks.[167] Cloaked with immunity and beyond the control of occupation authorities, the private guards' aggressive behavior has created a wellspring of anger at the U.S. presence.[168] The cost to the United States is imprecise, but it is a cost nonetheless.

---

[167] CPA Order No. 17 (CPA/MEM/26 June 2004/17 (establishing registration requirements for Private Security Companies) (available at http://www.iraqcoalition.org/regulations/#Orders) (visited Nov. 21, 2005). *See also* James J. McCullough & Courtney J. Edmonds, *Contractors on the Battlefield Revisited: The War in Iraq & Its Aftermath*, Briefing Papers No. 04-6 (2004) (noting that contractors accompanying multinational forces are generally immune from arrest or detention by other than their sending state, but Private Security Company employees may be held liable under Iraqi criminal and civil codes).

[168] Jonathon Finer & Ellen Knickmedyer, *U.S. Military Probing Video of Road Violence*, WASH. POST, Dec. 9, 2005, available at http://ebird.afis.mil/ebfiles/e20051209406109.html (visited Dec. 9, 2005) (describing a video posted on

web site maintained by former Aegis Specialist Risk Management employees showed contractors firing on Iraqi civilians).

Chapter 4

Conclusion

DANTE: *"My friend is trying to convince me that any contractors working on the uncompleted Death Star were innocent victims when the space station was destroyed by the rebels."*

BLUE-COLLAR MAN: *"Well, I'm a contractor myself. I'm a roofer . . . . You know, any contractor willing to work on that Death Star knew the risks. If they were killed, it was their own fault. A roofer listens to this, . . . (taps his heart) not his wallet."*[169]

The tremendous growth in the use of contractors has raised numerous policy, legal, fiscal, and operational concerns. With respect to legal issues, many lawyers and academics have analyzed the Law of Armed Conflict, the continuation of essential services, command and control, and other matters. This paper is a modest contribution to fill a gap in that literature, the impact of host nation legal barriers to contractor operations.

Regardless of where one stands on the wisdom of using contractors, most policy makers and commentators agree that the outsourcing trend was undertaken without adequate analysis of the costs or consequences.[170] Recently, an American Bar Association panel noted that "the implications of increased reliance on contractors do not seem to have been meaningfully

[169] CLERKS (View Askew 1994).
[170] Center for Public Integrity, *Early Warning: The U.S. Army Can Hardly be Surprised by its Problems with Contractors in Iraq*, available at http://www.publicintegrity.org/report. aspx?aid=274 (last visited Nov. 2, 2005) (stating that former Secretary of the Army Thomas E. White warned defense officials in 2002 that the Army's personnel reductions and subsequent reliance on contractors had been done without adequate analysis of the consequences).

analyzed by many segments of either the federal government or contractor communities."[171] It was as if one decided to buy a car without factoring in all of the charges and fees found in small print on the invoice. The fine print in this case includes the costs imposed by the operation of foreign and international law on contractor operations.

This paper shows that in cases where U.S. forces enter with the consent of host nation, there is likely to be a SOFA. That SOFA, however, will probably not cover contractors. There might be a SOFA supplement that addresses contractors in part by granting some privileges to qualifying employees, but it likely will not cover the company itself.

This lack of SOFA protection for contractors negatively impacts mission accomplishment. Most obviously, it raises the costs of the operation, particularly from the imposition of taxes and customs duties on contractor firms.[172] When SOFAs do not cover individual contractor employees, personnel costs will also increase. As one commentator notes, "[i]t is axiomatic that, on one level, SOFA benefits such as base-exchange, postal, housing, schools for minor dependent children and medical privileges (on a reimbursable basis) are a pricing term for any resulting contract. To the extent that a contractor can price its services lower where SOFA benefits are available, the United States (or the purchasing government in a foreign military sales case) can save money."[173] Taken together, these directly implicate the most prominent policy rationale for outsourcing – cost savings. Additionally, as discussed in the

[171] ABA White Paper, *supra* note 104.
[172] McCullough & Edmonds, *supra* note 134 (stating that "[u]nless otherwise protected by international agreement, neither the contractor nor its employees will enjoy any immunity from local civil or criminal jurisdiction and will be ineligible to receive customs-free or tax-free logistics support from the U.S. forces. Contract provisions or military regulations denoting the contractor as "accompanying the force" will not suffice to establish such status.")
[173] Donald P. Oulton & Alan F. Lehman, *Deployment of U.S. Military, Civilian and Contractor Personnel to Potentially War Hazardous Areas from a Legal Perspective*, THE DISAM JOURNAL (Summer 2001).

section on civil jurisdiction, civil injunctions of contractor activities or seizures of company assets may also undermine operational readiness and mission accomplishment.

In cases where U.S. forces enter a country without host nation consent, occupation law is the default baseline. Occupation law keeps host nation law mostly intact, but that law will not impact contractor performance during the period of occupation. However, the occupying power has certain obligations under occupation law. If the occupying power chooses to outsource some of those obligations, as the United States has done in Iraq, and the contractor fails to perform, the occupying power is liable under agency theory. Admittedly, in this circumstance, there is a paucity of remedies available, such as a suit filed in federal court under the Alien Tort Claims Act[174] or a suit in the International Court of Justice. Nonetheless, a nation would do well to think twice before outsourcing important obligations imposed on it under international humanitarian law to avoid the political costs of non-performance.

The costs imposed by the operation of foreign and international law can add up, but they should not be considered in isolation. As others have noted, there are other drawbacks to outsourcing. For example, because of the possibility that a contractor employee may flee in the face of danger, DOD must budget and plan for continuity of operations by military personnel. In some environments, outsourcing may pose force protection concerns. This is because contractors often employ local staff on local wages to maintain their profit margins, and performing adequate background checks on those employees is difficult.[175]

These obstacles suggest some obvious solutions. First, the government can use only military personnel or civilian government employees. This is unrealistic, however, especially given the desire to keep military forces small and focused on their core competencies. It also

clashes with the "global privatization revolution" cited by Peter Singer.[176] The United States can also seek to revise existing SOFAs to include U.S. contractors and their U.S. employees as members of the civilian component. More narrowly, it could seek to expand the definition of civilian component in existing agreements through an exchange of diplomatic notes, or develop mini-SOFAs to address the most costly issues, such as customs and taxes. The United States, however, rarely seeks to renegotiate existing status arrangements. Most SOFAs were negotiated when the United States had superior bargaining power and it can't open an agreement now and hope to keep it confined to a narrow set of issues. As the renegotiation of the German Supplemental Agreement shows, such a course is likely to involve difficult trade-offs.[177]

Thus, we are left with patchwork set of agreements, some generous, but most imposing some barriers to mission accomplishment when contractors are used in lieu of military or government civilian personnel. In such instances, the best one can do is attempt creative, ad hoc solutions. Such solutions work best at the local level and build on good relations between the visiting forces and the community, and bypass strict oversight from higher levels of government.[178] Unfortunately, the sharp increase in the number of contractors in the past decade have brought the problems described in this paper to the forefront and made them less susceptible to informal management at the local level.

This conclusion leads to two recommendations. First, while the new DOD instruction has done well to catch up with the outsourcing trend, it does not go far enough to address the

---

[174] 28 U.S.C. §1350 (2005).
[175] Spearin, *supra* note 30, at 39-40.
[176] *See* note 19 *supra* and accompanying text.
[177] One such trade-off in that case was the narrowing of the "technical expert" definition. See *supra* note 76 and accompanying text.
[178] The possible dilemma for attorneys in such cases is appearing to act on behalf of the contractor, since the government is the only proper client under ethics rules. *See, e.g.*, A.F. Rules of Prof. Conduct, Dec. 2, 2002, at rule 1.13.

operation of international and host nation law. It takes outsourcing as a given and then tasks commanders to figure out how those laws might impact their operations.[179] Instead, the instruction should direct commanders (through their planners, contracting officers, and attorneys) to use the framework of chapter three of this paper to tabulate the probable costs of outsourcing as part of the deliberate and crisis action planning process. In that way, commanders can smartly determine whether to use organic resources or private industry for logistical support and other functions.

Second, because the costs will often outweigh the benefits, the DOD should decrease its reliance on contracting out military support activities. Continuing the current trend puts the DOD in the unenviable position of having to use contractors, even when host nation legal barriers may compromise mission accomplishment, because many skill sets are no longer resident in the armed services.[180] Instead, it should retain more expertise, and restructure its forces accordingly, in order to perform those tasks most susceptible to outsourcing.

[179] The difficulty of ascertaining the effect of host nation law on contractor support to military operations has not escaped the notice of the contracting community. In March 2004, DOD provided public notice of its proposed amendments to the DFARS, including the "Compliance with Laws and Regulations" clause. Some respondents considered the clause "to be an unreasonable requirement because there is no reliable and accessible source of all information for contractors regarding all of the laws (particularly host country and local laws) that may be applicable to a contractor supporting a contingency or humanitarian effort." Defense Federal Acquisition Regulation Supplement, Contractor Personnel Supporting a Force Deployed Outside the United States, 70 Fed. Reg. 23790 (2005) (to be codified at 48 CFR pts. 207, 212, 225, & 252).

[180] Spearin, *supra* note 30, at 32 (quoting Director of Defense Procurement as saying, "we just don't have the logistics support in house anymore").

Bibliography

Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, 19 June 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67.

Agreement of 3 August 1959, as Amended by the Agreements of 21 October 1971, 18 May 1981, and 18 March 1993, to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany, 3 August 1959, 1 U.S.T. 531, 481 U.N.T.S. 262.

Agreement Regarding the Status of United States Forces in Romania, 30 October 2001.

Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, 9 July 9 1966, T.I.A.S. No. 6127, 17 U.S.T. 1677, 674 U.N.T.S. 163.

Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, 19 January 1960, 11 U.S.T. 1652, T.I.A.S. 4510, 373 U.N.T.S. 248.

Annex in Implementation of the Mutual Defense Cooperation Agreement Between the Government of the United States of America and the Government of the Hellenic Republic, 8 July 1990, T.I.A.S. No. 12321.

Avant, Deborah. "Private Security Companies." *New Political Economy* 10, no. 1 (March 2005): 121-131.

Boyle v. United Technologies Corporation, 487 U.S. 500 (1988).

Camm, Frank and Victoria A. Greenfield. *How Should the Army Use Contractors on the Battlefield? Assessing Comparative Risk in Sourcing Decisions.* Rand Corporation. Santa Monica, CA: 2005.

Castillo, Lourdes A. "Waging War with Civilians: Asking the Unanswered Questions." *Aerospace Power Journal* (Fall 2000): 26-31.

Center for Public Integrity. "Post-War Contractors Ranked by Total Contract Value in Iraq and Afghanistan from 2002 through July 1, 2004." http://www.publicintegrity.org/wow/resources.aspx?act=total.

Center for Public Integrity. "Windfalls of War: Winning Contractors." http://www.publicintegrity.org/wow/resources.aspx?act=total.

Charter of the United Nations, 24 October 1945, 59 Stat. 1031, T.I.A.S. No. 993.

COMUSNAVEUR Instruction 5840.2E / USAREUR Regulation 550-32 / USAFE Instruction *Tri-Component Directive for Italy on Personal Property, Rationed Goods, Motor Vehicles and Drivers' Licenses, Civilian Component and Technical Representative Status*. 20 February 2004.

Congressional Budget Office. *Logistics Support for Deployed Military Forces*. Washington, D.C., October 2003.

Congressional Research Service. *Andean Counterdrug Initiative (ACI) and Related Funding Programs: FY2005 Assistance*, Report No. RL32337. Washington, D.C., 10 May 2005.

Contractors in the Battle Space. Chicago, IL: American Bar Association Section of Public Contract Law, 12 October 2005. http://www.abanet.org/contract/federal/regscomm/home.html.

Convention on Diplomatic Relations, 18 April 1961, 22 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95.

Convention on the Privileges and Immunities of the United Nations, 13 February 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15;

Convention on the Safety of United Nations and Associated Personnel, G.A. Res. 49/59, U.N. GAOR, 49th Sess., Agenda Item 141, U.N. Doc. A/RES/49/59 (1994), *reprinted in* 34 I.L.M. 482 (1995).

Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

Convention Respecting the Laws and Customs of War on Land, 18 October 1907, 36 Stat. 2277, 205 Consol. T.S. 277, U.N.T.S. 539.

Crane, Conrad C. "Phase IV Operations: Where Wars are Really Won." *Military Review* (May/June 2005): 27-36.

Dalesio, Emery P., "*State Court to Hear Lawsuit Over Men's Deaths in Iraq*." Honolulu Star-Bulletin, 16 August 2005. http://starbulletin.com/http://starbulletin.com/.

Davidson, Michael J. "Ruck-Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield." *Public Contract Law Journal* 29 (2000): 233-267.

Department of the Army Pamphlet 715-16, *Contractor Deployment Guide*, 27 February 1998.

Department of the Army Field Manual 27-10, *The Law of Land Warfare* 18 July 1956.

Department of the Army Field Manual 3-100.21, *Contractors on the Battlefield*, 3 January 2003.

Department of the Army Regulation 700-137, *Logistics Civil Augmentation Program*, 16 December 1985.

Department of Defense, *Defense Federal Acquisition Regulation Supplement*, June 2005.

Department of Defense Directive 4500.54-G, *Electronic Foreign Clearance Guide*. https://www.fcg.pentagon.mil/fcg/cfm.

Department of Defense Instruction 3020.41. *Contractor Personnel Authorized to Accompany the U.S. Armed Forces*, 3 October 2005.

Department of Defense Joint Publication 4-0. *Doctrine for Logistic Support of Joint Operations*. 6 April 2000.

Diplomatic Note No. 17, Embassy of the United States of America, Rome, 11 January 2001.

Diplomatic Note No. 371, Embassy of the United States of America, Rome, 6 June 2001.

Douglas, Karen L. "Contractors Accompanying the Force: Empowering Commanders With Emergency Change Authority." *Air Force Law Review* 55 (2004): 127-155.

Elsea, Jennifer. Private Security Contractors in Iraq: Background, Legal Status, and Other Issues. CRS Report for Congress RL 32419. Washington, DC: Congressional Research Service, May 28, 2004.

Erickson, Richard J. "Status of Forces Agreements: A Sharing of Sovereign Prerogative." *Air Force Law Review* 37 (1994): 137-153.

Fallon, Andrew D. and Theresa A. Keene. "C*losing the Legal Loophole?* "Practical Implications of the Military Extraterritorial Jurisdiction Act of 2000." Air Force Law Review 51 (2001): 271-292.

Fearon, James D. and David D. Laitin. "Neotrusteeship and the Problem of Weak States." International Security, vol. 28, (Spring 2004): 5-43.

Finer, Jonathon, and Ellen Knickmedyer. "U.S. Military Probing Video of Road Violence." *Washington Post*, 9 December 2005. http://ebird.afis.mil/ebfiles/e20051209406109.html.

Fleck, Dieter, ed. *The Handbook of the Law of Visiting Forces*. New York, NY: Oxford University Press, 2001.

Geraci, Thomas A. "Overflight, Landing Rights, Customs, and Clearances." *Air Force Law Review* 37 (1994): 155-168.

Gordon, Michael R. "Catastrophic Success." *New York Times*, 19 October 2004.

Government Accounting Office. *Outsourcing DOD Logistics: Savings Achievable But Defense Science Board's Projections Are Overstated*, Report No. GAO-NSIAD-98-48. Washington D.C., December 1997.

Government Accounting Office. *Military Operations: Contractors Provide Vital Services to Deployed Forces but Are Not Adequately Addressed in DOD Plans*, Report No. GAO-03-695. Washington, D.C., June 2003.

Guillory Michael E. "Civilianizing the Force: Is the United States Crossing the Rubicon?" *Air Force Law Review* 51 (2001): 111-142.

Heller, Joseph. *Catch-22*. New York, NY: Simon and Schuster, 1955.

Hoffman, Stanley. *Gulliver Unbound: America's Imperial Temptation and the War in Iraq*. Lanham, MD: Rowman and Littlefied Publishers, Inc., 2004.

Isacson, Adam. "The U.S. Military in the War on Drugs." In *Drugs and Democracy in Latin America*. Edited by *C*oletta A. Youngers and Eileen Rosin. Boulder, CO: Lynne Reinner Publishers, 2005.

Italian Law No. 427 of 29 October 1993, 1993 Gazz. Uff. No. 265, Oct. 29, 1993

Italian Law No. 494 of 14 August 1996, 1996 Gazz. Uff. No. 223, Sep. 23, 1996.

Italian Law No. 1369 of 23 October 1960, 1960 Gazz. Uff. No. 288, art. I, para. 1, Nov. 25, 1960.

Italian Legislative Decree 626 of 19 September 19, 1994, Gazz. Uff. No. 265, Nov. 12, 1994.

Kelty, Ryan. "Military Outsourcing: A Case Study of the Effects of Civilianization on Sailor's Retention Intentions." Inter-University Seminar on Armed Forces and Society, October 2005.

Kravets, David. "CIA Contractor is Charged Under the Patriot Act in Novel Use of Anti-Terrorism Law." *Detroit News*, 19 June 2004. http://www.detnews.com/2004/nation/0406/19/nation-188432.htm.

Lazareff, Serge. *Status of Military Forces Under Current International Law*. Leyden, The Netherlands: A.W. Sijthoff, 1971.

Lepper, Steven J. "A Primer on Foreign Criminal Jurisdiction." Air Force Law Review 37 (1994): 169-189.

Markon, Jerry and Josh White. "Contractor Charged in Baghdad Badge Scam." *Washington Post*, 21 September 2005.

McCullough, James J. and Courtney J. Edmonds. *Contractors on the Battlefield Revisited: The War in Iraq & Its Aftermath.* West Group Briefing Papers No. 04-6 (2004).

McCullough, James J. and Adam J. Pafford. *Contractors on the Battlefield: Emerging Issues for Contractor Support in Combat & Contingency Operations*. West Group Briefing Papers No. 02-7 (June 2002).

McGurk, Brett H. "Revisiting the Law of Nation-Building: Iraq in Transition." *Virginia Journal of International Law* 45 (2005): 451-465.

Memorandum of Understanding Between the Ministry of Defense of the Republic of Italy and the Department of Defense of the United States of America Concerning Use of Installations/Infrastructure by U.S. Forces in Italy, 2 February 1995, 1995 WI. 149275.

Miller, T. Christian. "Army, Insurer in Iraq at Odds." *Los Angeles Times*, 13 June 2005. http://aimpoints.hq.af.mil/display.cfm?id=4282.

Miller, T. Christian. "Private Security Guards in Iraq Operate with Little Supervision." *Los Angeles Times*, 4 December 2005. http://ebird.afis.mil/ebfiles/e20051204405386.html.

Model Status-of-Forces Agreement for Peace-Keeping Operations: Report of the Secretary-General, 44th Sess., Agenda Item 76, U.N. Doc. A/45/594 (1990).

Oulton, Donald P. and Alan F. Lehman. "Deployment of U.S. Military, Civilian and Contractor Personnel to Potentially War Hazardous Areas from a Legal Perspective." *The DISAM Journal* (2001): 15-20.

PBS Frontline. "Private Warriors." http://www.pbs.org/wgbh/ pages/frontline /shows/ warriors.

Perlak, Joseph R. "The Military Extraterritorial Jurisdiction Act of 2000: Implications for Contractor Personnel." *Military Law Review* 169 (2001): 92-140.

Phelps, Richard A. "Environmental Law for Overseas Installations." *Air Force Law Review* 40 (1996): 49-88.

Presidenza del Consiglio dei Ministri – Dipartimento per la Protezione Civile contro Jelly Wax Srl e alter, Case No. R.G. 11117/95.

Restatement (Third) of the Foreign Relations Laws of the United States. Philadelphia, PA: American Law Institute, 1990.

Robb, Jeffrey L. "Workers Compensation for Defense Contractor Employees Accompanying the Military Forces." *Public Contract Law Journal* 33 (2004): 423-449.

Rumsfeld, Donald H. To The Honorable Ike Skelton. Letter, 4 May 2004.

Scheffer, David J. "Agora (Continued): Future Implication of the Iraq Conflict: Beyond Occupation Law." *American Journal of International Law* 97 (2003): 842-860.

Schmitt, Glenn R. "The Military Extraterritorial Jurisdiction Act: The Continuing Problem of Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad - - Problem Solved?" *Army Lawyer* (December 2000): 1-10.

Schmitt, Michael N. "Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees." *Chicago Journal of International Law* 5 (2004): 511-546.

Schooner, Steven L. "Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government." *Stanford Law and Policy Review* 16 (2005): 549-572.

Shi, J. Stephen. "The Legal Status of Foreign Military and Civil Personnel Following the Transfer of Power to the Iraqi Interim Government." *Georgia Journal of International and Comparative Law* 33 (2004): 245-260.

Singer, P.W. *Corporate Warriors: The Rise of the Privatized Military Industry*. Ithaca, New York: Cornell University Press, 2003.

Snee, S.J. & A. Kenneth Pye, *Status of Forces Agreements and Criminal Jurisdiction.* New York, N.Y.: Oceana Publications, Inc., 1957.

Spearin, Christopher. "American Hegemony Incorporated: The Importance and Implications of Military Contractors in Iraq." *Contemporary Security Policy* 24, no. 3 (December 2003): 26-47.

Stephenson, David P. "An Introduction to the Payment of Claims Under the Foreign and the International Agreement Claims Act." *Air Force Law Review* 37 (1994): 191-210.

Stockman, Farah. "CIA Contractor is Charged in Beating of Afghan Detainee." *Boston Globe*, 18 June 2004. http://www.boston.com/news/nation/articles/2004/06/18.htm.

The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 3 L.Ed. 287 (1812).

Turner, Lisa L. and Lynn G. Norton. "Civilians at the Tip of the Spear." *Air Force Law Review* 51 (2001): 1-110.

United States European Command Policy Memorandum 04-04. "Civilian Personnel Accreditation in the Republic of Italy." 24 August 2004.

United States v. Gatlin, 216 F.3d 207 (2d Cir. 2000).

Vernon, Rebecca Rafferty. "Battlefield Contractors: Facing the Tough Issues." *Public Contracts Law Journal* 33 (2004): 369-421.

Yost, Mark J. & Douglas S. Anderson. "Current Development: The Military Extraterritorial Jurisdiction Act of 2000: Closing the Gap." *American Journal of International Law* 95 (April 2001): 446-453.