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### ***Iraq Reconstruction***

### **Iraq SOFA: Issues Abound for Contractors**

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On October 17, 2006, Congress passed the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. No. 109-364) (FY07 NDAA). Section 552 of the FY07 NDAA purported to clarify one provision of the Uniform Code of Military Justice (UCMJ) — Article 10(a)(2) — by adding five words that had the effect of expanding UCMJ jurisdiction to persons serving with or accompanying an armed force in the field during “contingency operations.” 10 U.S.C. § 802 (a)(10). The practical effect of this expansion was to make contractor personnel accompanying the Armed Forces in contingency operations — such as Operation Iraqi Freedom and Operation Enduring Freedom in Afghanistan — subject to the Uniform Code of Military Justice. This provision was added without congressional debate, but one sponsor of the legislation, Senator Lindsey O. Graham (R-S.C.), suggested that a goal of the legislation was to ensure that contractors and military personnel accused of committing the same offenses would be treated equally. See Griff Witte “New Law Could Subject Civilians to Military Trial,” *The Washington Post*, A01, Jan. 15, 2007 (relating Sen. Graham’s comment regarding the differing standards that applied to contractors and military personnel performing similar jobs and his statement that the new law would bring uniformity to the combatant commander’s ability to “control the behavior of people representing our country.”). See Kara M. Sacilotto, *Jumping the (Un)Constitutional Gun?: Constitutional Questions in the Application of the UCMJ to Contractors*, 37 Pub. Cont. L. J. 179 (2008).

On November 17, 2008, slightly more than two years after Congress’s passage of the FY07 NDAA, the United States and Iraq signed a Security Agreement, commonly referred to as a Status of Forces Agreement (SOFA), that in many respects disrupts this parallel treatment. The SOFA’s main purpose is to grant permission formally to the U.S. military to perform its mission in Iraq, Article 4 of the SOFA, and to establish a time period for withdrawal of U.S. Forces, Article 24. See also Art. 1 (The purpose of the SOFA is to “determine the principal provisions and requirements that regulate the temporary presence, activities and withdrawal of the United States Forces from Iraq.”). In effect as of January 1, 2009, the SOFA also defines the legal rights of U.S. Forces, Department of Defense (DOD) civilian personnel, and DOD contractor personnel. In doing so, the SOFA treats DOD contractors quite differently from military personnel and DOD civilian employees.

### **Definitions**

Each of these categories of personnel — “United States Forces,” “Members of the United States Forces,” “Member of the civilian component,” and “United States contractors’ and ‘United States contractor employees’” — is separately defined in Article 2 of the SOFA. Whereas the “United States Forces” include members of the U.S. Armed Forces and “their associated civilian component,” defined as civilian DOD employees, “United States contractors” and “United States contractor employees,” are not included in either the definition of U.S. Forces or the civilian component. Furthermore, although private security contractors under contract with the Department of State have often been the target of calls for increased regulation and legal prosecution of contractors, the definition of “United States contractors” and “United States contractor employees” encompasses “citizens of the United States or a third country . . . who are in Iraq to supply goods, services, and security in Iraq to or on behalf of the United States Forces under a contract or subcontract with or for the United States Forces.” Art. 2, ¶ 5 (Emphasis added). Thus, contractors performing under DOS contracts exclusively appear excluded.

### **DOD Contractors vs. U.S. Forces and DOD Civilian Employees**

The differences in rights and obligations between the U.S. Forces, the civilian component, on one hand, and DOD contractors and their employees, on the other, continue throughout the SOFA. Most notable is jurisdictional treatment. Under Coalition Provisional Authority orders, contractors were immune from prosecution under Iraqi law. Putting aside the status of those orders, paragraph 2 of Article 12 of the SOFA provides that for jurisdictional purposes, Iraq has primary jurisdiction over U.S. contractors and contractor employees, regardless of the nature of the offense or the location where it is committed.

With respect to U.S. Forces and civilian DOD employees, in contrast, Article 12 of the SOFA gives the United States primary jurisdiction for all offenses except "grave premeditated felonies" (to be defined by the Joint Committee referenced in Article 23) that are committed outside "agreed facilities and areas," discussed in Articles 2 and 6 and to be defined in the future by the two governments, and outside the scope of duty. Art. 12, ¶¶ 1, 3. When Iraq exercises jurisdiction over members of the U.S. Forces or civilian component, under Article 12, paragraph 5, the U.S. still maintains custody over them pending trial. The SOFA is silent regarding custody of contractors and their employees, thus indicating that the SOFA does not mandate similar treatment of contractor employees. Moreover, paragraph 8 of Article 12 provides that when Iraq exercises jurisdiction over U.S. Forces or the civilian component, they "shall be entitled to due process standards and protections consistent with those available under United States and Iraqi law." Again, the SOFA is silent regarding due process protections for contractors and their employees.

Under Article 3, the U.S. Forces cannot transfer anyone except members of the U.S. Forces and the DOD civilian component into or out of Iraq "unless in accordance with applicable Iraqi laws and regulations, including implementing arrangements as may be agreed to by the Government of Iraq." With respect to carrying of weapons, Article 13 of the SOFA provides that members of the U.S. Forces and the civilian component may possess and carry weapons "that are owned by the United States . . ." Article 13 is silent, however, regarding contractors and their employees. Article 14 provides that members of the Armed Forces and the civilian component can enter and leave Iraq using only identification cards and travel orders issued by the United States. Contractors and their employees, in contrast, are not included in this Article. Under Article 16, paragraph 2, members of the U.S. Forces and the civilian component are not responsible "for payment of any tax, duty, or fee that has its value determined or imposed in the territory of Iraq, unless in return for services requested and received." Contractors and their employees are again omitted from this paragraph.

There are some areas where contractors and their employees are treated similarly to the U.S. Forces, but these areas are few. For example, paragraph 1 of Article 15 permits contractors, along with the U.S. Forces and civilian component, to import, export, re-export, transport and use equipment, supplies, materials and technology to be used by the U.S. Forces for purposes of the SOFA so long as such materials are not banned in Iraq. Paragraph 2 of Article 15, however, provides that U.S. Forces and the civilian component (but apparently not contractors and their employees) may import, re-export and use personal effect materials and materials and equipment for personal use. Article 17 allows contractors, like U.S. Forces and the civilian component, to use and rely on a valid U.S. driver's license and, under the terms of paragraph 3, professional licenses issued in the United States when related to performing their official or contractual duties in Iraq.

### **Guidance for Contractors**

To date, there are more questions than answers as to how the SOFA will be implemented, both as a matter of policy and as a legal matter. Officials from DOS advise that contractors with specific questions regarding implementation of the SOFA should seek guidance from their DOD contracting officer. The U.S. Embassy in Iraq can also provide information, and has issued guidance and policies in the past regarding, for example, exit and entry procedures. Information, but not legal advice, also is available from the following DOS Regional Management email address: BaghdadRegMgt@state.gov.

Article 23 of the SOFA defines various committees charged with the implementation and interpretation of the SOFA. In addition, on December 30, 2008, the Iraq Ministry of the Interior issued an Order (No. D.M. 31034) establishing a committee to engage in discussions with the U.S. Embassy's Regional Security Office (RSO) and officials from the Multi-National Forces (MFN) in Iraq "to facilitate full compliance by all U.S. Government personnel and contractors with the rules established by the Iraqi government . . ." regarding, among other things, licensing of contractors in security fields; registration of firearms; vehicle registration; licensing of pilots and aircraft related to personnel and security operations; custom, duties, taxes, and inspections; and entry and exit procedures and use of DOD "assets" to transport U.S. Forces, DOD civilians, U.S. contractors, Embassy personnel and other members of the Coalition Forces. Paragraph 3 of the Ministry Order states: "In the interim, no law enforcement or legal action will be taken against United States Government and affiliated contractor personnel on these matters until the Committee issues recommendations and the Ministry of the Interior agrees that these issues have been resolved."

### **Conclusion**

Perhaps the recommendations established by the Ministry of Interior committee and other agreements, both formal and diplomatic, reached between the U.S. and Iraqi governments on implementation will blur the distinctions that appear stark on the face of the SOFA. However, until more experience is gained under the SOFA, DOD contractors and their employees performing in Iraq should take note that the terms of the SOFA itself provide few protections, subject contractor employees to Iraqi civil and criminal jurisdiction, and require compliance with Iraqi civil and regulatory requirements.

Although the possibility of prosecution under the UCMJ through courts martial may have seemed intimidating when the FY07 NDAA was passed, at least contractors were guaranteed the fundamentals of due process. Now, even though

DOD contractors operating in contingency operations are still subject to many of the same UCMJ standards as their military counterparts, those contractors operating in Iraq cannot assume that they enjoy the same privileges as military personnel or civilian DOD employees, or that they will enjoy the same protections.

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