

Contracting Under the SOFA

New Agreement Subjects Contractors to Iraqi Criminal and Civil Laws



U.S. President George W. Bush and Iraqi Prime Minister Nuri al-Maliki. Photo: Eric Draper/White House.

ON November 16, 2008, the executive branches of the United States and the Republic of Iraq approved a status of forces agreement (SOFA) providing for the withdrawal of U.S. Forces from Iraq no later than December 31, 2011, and regulating the presence and activities of U.S. forces in Iraq in the meantime. President George W. Bush and Prime Minister Nuri al-Maliki signed ceremonial copies of the SOFA in Baghdad on December 14.

Behind the SOFA

The United States and Iraq were under significant pressure to execute a SOFA before December 31, 2008, the expiration date of United Nations Security Council Resolution 1790 (2007) which had extended the “mandate of the multinational force in [Iraq] – ‘for the last time.’” Both governments issued public statements in the months of negotiations leading up to the signing of the SOFA insisting that an agreement authorizing the continuing presence of U.S.

Forces in Iraq must be reached before the expiration of Resolution 1790.

Eager to get the SOFA signed and to herald Iraq’s sovereignty, the U.S. government acceded to Iraq’s demand that U.S. contractors be denied the immunity previously granted to them under Coalition Provisional Authority (CPA) Order 17. Under CPA Order 17, contractors could not be arrested or detained by Iraqi authorities and were “not subject to Iraqi laws or regulations in matters relating to the terms and conditions of their contract.”

Under the terms of the SOFA, U.S. citizens who are contractors in Iraq will be subject to the jurisdiction of Iraqi criminal and civil courts beginning on January 1, 2009. Additionally, State and Department of Defense officials have advised contractors asking about the status of employees not covered in the terms of the SOFA (such as third-country nationals) to “assume no-one is immune” from Iraqi jurisdiction.

Iraqi Judicial System: A Primer

So, what should contractors operating in Iraq know about the Iraqi judicial system? Much of the written code and procedure in the Iraqi judicial system is descendant from the same Napoleonic Code that formed the basis for many of the legal systems in continental Europe. However, according to specialists in human rights law and practitioners on the ground in Iraq, there is an apparent current disconnect between the rule of law as codified in Iraq, and the actual operation of the judicial system in its detention centers, prisons and courtrooms.

Contractors should familiarize themselves with the United Nations Assistance Mission for Iraq report issued on December 2, 2008. The U.N. report sharply criticizes Iraq’s judicial system as suffering from systemic human rights abuses. It notes that “many detainees have been deprived of their liberty for months or even years, often under ▶ 08

07 ◀ precarious physical conditions, without access to defense counsel, or without being formally charged with a crime or produced before a judge. Continuing allegations of widespread torture and ill-treatment of inmates are of particular concern.” Moreover, “slow bureaucratic procedures, insufficient resources, degraded infrastructure and lack of effective accountability measures result in inordinate delays in processing detainees’ cases.”

The U.N. report describes widespread and routine torture or ill-treatment of detainees in pre-trial detention facilities, including police stations. Many prisoners interviewed by the U.N. claimed to have been beaten or otherwise ill-treated, particularly upon arrest or while undergoing initial interrogation, most commonly to extract forced confessions from them. Allegations include beatings with cables and fists and forcing detainees to remain in stressful positions for prolonged periods. The U.N. also found that judicial investigators fail to advise detainees of their right to a lawyer and their right to silence.

According to the U.N. report, the situation appears particularly grim in areas under the control of the Kurdistan Regional Government (KRG). In one sample group of 55 KRG detainees, 38 had been held for up to four years without referral to an investigative judge, charge or transfer to court. Moreover, between April and June 2008, the U.N. documented 16 cases of detainees who were tortured during investigations by both security and intelligence officials, including two detainees who alleged being raped during investigations. These detainees allegedly suffered internal injuries and did not receive adequate medical attention.

The U.N. report’s recommendations

section encourages Iraq to adopt measures to ensure basic rights for defendants: grant detainees access to legal counsel, ensure that persons are not held without being charged with cognizable offenses, address the issue of detainee abuse by law enforcement and detention personnel, alleviate overcrowding of detention facilities, improve sanitation and hygiene conditions, and crack down on the intimidation and arrest of media professionals. U.S. contractors need to understand that the U.N. recommendations have no immediate or guaranteed effect in Iraq, and that nothing in the SOFA guarantees U.S. citizen contractors even basic U.S. constitutional protections while serving U.S. interests in Iraq.

The lack of protections for U.S. contractors in Iraq differs sharply from the protections given U.S. service members and civil servants in the SOFA. For example, a U.S. soldier arrested by the Iraqi police must be handed over to U.S. authorities within 24 hours of detention or arrest. By contrast, a U.S. citizen contractor arrested by the Iraqi police will be left to the disposition of the Iraqi judicial system – left entirely to sit in the Iraqi jail, awaiting Iraqi justice.

Contrary to some reports in the media, the SOFA does not fill a jurisdiction gap in accountability over U.S. contractors. There are already jurisdictional means by which U.S. courts can hold contractors in Iraq accountable for their actions under both the Military Extraterritorial Jurisdiction Act and the Uniform Code of Military Justice. Any prior failure to investigate and prosecute allegations of contractor wrongdoing in Iraq has been due to an absence of political and prosecutorial will on behalf of the U.S. government, not due to a lack of jurisdiction.

Nonetheless, starting January 1, 2009, the U.S. government can only obtain jurisdiction over U.S. citizen contractors suspected of wrong-doing if the Iraqi government “waives its primary right of jurisdiction in a particular case.” The SOFA does not require Iraq to notify the U.S. authorities when U.S. citizen contractors are arrested, meaning that the arrest of an American citizen may not even come to the U.S. government’s attention. According to the Department of State, there will be no exceptions to this deference to Iraqi sovereignty, not even if a contractor is arrested for doing exactly what his U.S. government contract obligated him to do.

Companies already under contract supporting U.S. interests in Iraq are understandably concerned and overwhelmed with unanswered questions. A few days after the signing of the SOFA, representatives from the Departments of State and Defense faced questions from contractors at meetings convened ostensibly to provide answers to many unresolved questions surrounding implementation of the SOFA. The contractors asked wide-ranging questions about Iraqi criminal and civil law, including:

- Will Iraqi criminal jurisdiction be retroactive, so that U.S. citizens in Iraq can be charged for offenses allegedly occurring years ago?
- Will employees already back in the U.S. now be subject to extradition if they are charged in Iraq?
- Will criminal defendants have rights to or access to legal counsel, basic sanitation and health care?
- In the civil court system, will Iraqi courts allow pre-judgment attachment of U.S. contractor assets, and will contractor equipment in Iraq be seized if a contractor is sued?

The U.S. government left each of these questions unanswered, and as of the date of this draft, has ▶ 10



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08 ◀ offered no follow-on guidance on any of the issues raised.

The clear take-away for U.S. contractors is that they must independently become conversant in all aspects of Iraqi law, its civil and criminal procedure, as well as administrative requirements for licensing, customs, taxation, etc. Potential ways to mitigate the costs of that undertaking are discussed below.

What exactly contractors must now learn is outlined in the SOFA to some extent. Under Article 3 of the SOFA, contractors may only transfer people into or out of Iraq “in accordance with applicable Iraqi laws and regulations, including implementation arrangements as may be agreed to by the Government of Iraq.” Article 8 references “applicable Iraqi environmental laws, regulations and standards.” Article 9 requires respect for the relevant rules of land and maritime safety and movement, aviation and air navigation. Article 11 might mean that contractors face fees for using communications frequencies. Article 13 suggests that contractor personnel can be prohibited from possessing and carrying weapons. The list goes on: Article 15 (Import and Export), Article 16 (Taxation), Article 17 (Licenses or Permits), and Article 20 (Currency). This is just the beginning of what contractors must do to accommodate the change in jurisdiction.

Contractors should also be aware that Iraqi jurisdiction (and the predictable media coverage of every contractor arrest) will mean additional civil suits in U.S. courts against contractor companies. There are several types of domestic suits against contractors that could be based on incidents in Iraq, and contractors operating in Iraq should begin to prepare for them.

First, contractors are subject to potential civil and criminal litigation in U.S. federal court every time a contractor employee injures a civilian in Iraq. In recent years numerous cases alleging violations of the Alien Tort Claims Act and Torture Victim Protection Act have been brought against U.S. companies based on their work in Iraq. There has also been an increase in lawsuits charging U.S. companies with violating various other human rights conventions, as well as a long list of potential state law torts such as wrongful death, negligence, battery and false imprisonment.

Now that U.S. contractors are susceptible to Iraqi criminal prosecution, there is every reason to believe that Iraqi charges for alleged contractor misconduct will be followed in short order by stateside civil litigation seeking monetary damages as soon as U.S. plaintiffs’ lawyers can identify the victims and their families.

Secondly, companies will also face lawsuits brought by their own employees (or families of employees) based on incidents in Iraq. “Failure to warn” and “fraudulent inducement” employment contract lawsuits are already a common way of blaming companies for sending employees into harms way.

The U.N. report discussed earlier could become “Exhibit A” in such suits. There are ways to mitigate those risks though, through employee notifications, warnings, training programs and litigation risk assessment reviews of policies and procedures.

The SOFA means that companies will face increased litigation risks, have to learn the ins and outs of Iraqi law, modify their operations and train their employees accordingly, negotiate

costly new insurance coverage, replace employees who decide to seek employment elsewhere rather than subject themselves to Iraqi jurisdiction, all the while not defaulting on contracts. It’s a tall order.

Companies should give their existing contracts a close read and consider whether any of these increased costs can be passed through to the government. Contractors should work with individual contracting officers to obtain equitable adjustments to cost and schedule based on clauses requiring “compliance with all local laws and regulations,” and could pursue various changes clause arguments, constructive change, and excusable delay theories.

Trade organizations could also push for extraordinary contract relief under Public Law 85-804. PL 85-804 gives the President the ability to authorize (by Executive Order) federal agencies to indemnify public contractors against unusually hazardous risks they undertake when facilitating the national defense. When indemnification is granted under PL 85-804, the contract is amended to provide indemnification for third-party claims (including litigation costs) resulting from the risk inherent in the contract.

The indemnity applies only to the extent that the claims exceed the contractor’s insurance coverage, and does not cover claims resulting from willful misconduct or lack of good faith. PL 85-804 indemnification is appropriate when the United States asks contractors to support the national defense and to incur extraordinary risk while doing so.

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