

# THE LEGAL STATUS OF FOREIGN MILITARY AND CIVILIAN PERSONNEL FOLLOWING THE TRANSFER OF POWER TO THE IRAQI INTERIM GOVERNMENT

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The “fog of war” has not lifted from the extremely dynamic situation in Iraq following the cessation of offensive operations by Coalition forces. The rapid disintegration of the government of the former dictator, Saddam Hussein, caused widespread disruption of critical services, such as those supplying water, power, sanitation, medical, and security to the people of Iraq. In addition, the continuing violence caused largely by former members of the regime, political and religious insurgents, and foreign terrorists exacerbated the extremely serious and volatile situation.

Into this maelstrom came the Coalition Provisional Authority (CPA), the initial civilian governing body for post-war Iraq. The CPA was charged with the monumental challenge of addressing the plight of the Iraqi people both in terms of providing for their immediate physical needs and reestablishing security and stability.<sup>1</sup> The overall goal of the CPA was to create conditions that would facilitate the creation of a new government by the Iraqis whereby they could assume responsibility for their own country.<sup>2</sup> Not only was the CPA confronted with a situation that in many ways rivaled that faced by the Allies after World War II, it was also given an incredibly short timeframe within which to accomplish its mission: the CPA was established in May 2003<sup>3</sup> and was to transfer its authority and principal functions to an Iraqi government on June 30, 2004.<sup>4</sup>

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<sup>1</sup> Press Release, Coalition Provisional Authority, An Historic Overview of CPA Accomplishments (June 28, 2004), [http://www.iraqcoalition.org/pressreleases/20040628\\_historic\\_review\\_cpa.doc](http://www.iraqcoalition.org/pressreleases/20040628_historic_review_cpa.doc).

<sup>2</sup> Press Release, U.S. Dep’t of State, Remarks to the Press with Coalition Provisional Authority Administrator L. Paul Brewer (Mar. 19, 2004), <http://www.state.gov/secretary/rm/30621.htm>.

<sup>3</sup> *Letter dated 8 May 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the President of the Security Council*, U.N. Doc. S/2003/6538 (2003) (communicating to the President of the Security Council that the United States and its Coalition partners had created the CPA).

<sup>4</sup> *Transition of Laws, Regulations, Orders, and Directives Issued by the CPA*, Ord. No. 100,

The role of the CPA was controversial from its inception. The CPA was established amidst the turmoil of a forcible change of government by an international coalition and the legality and necessity of its establishment is still being hotly debated by politicians, academics, and other observers.<sup>5</sup> Its efforts were further exacerbated by the profound and widespread effects of decades of repression of the Iraqi people, the neglect of the Iraqi infrastructure and economy by the regime of Saddam Hussein, and continuing internecine, sectarian, and terroristic violence.

The CPA had to deal with these legal, social, economic, and security challenges and problems in a virtual "fish bowl" atmosphere where its every action was subjected to intense scrutiny in the world press. Although the significant accomplishments of the CPA are still being cataloged, the fact that it made any progress at all is a testament to the dedication and professionalism of those involved with the CPA and other entities that worked so hard during the transition from dictatorial rule to a new government based on democratic principles.

Not surprisingly, the pace of the CPA's work continued to accelerate, especially during June 2004 with much of the attention being directed to the critical need to effectively bridge the transfer of power to the Iraqi Interim Government (Interim Government).<sup>6</sup> In the midst of this super-heated environment, with daily attacks and other security threats aimed at disrupting the handover to the Interim Government, the CPA Administrator, L. Paul Bremer III, promulgated a number of orders ostensibly to allow as seamless a transfer as possible of the many functions and powers needed for the governance of Iraq.<sup>7</sup> These orders covered a wide range of subjects in varying levels of detail, ranging from such minutiae as mandating that a vehicle driver always keep both hands on the steering wheel<sup>8</sup> to very broad policies regarding far-reaching economic, political, and security matters.<sup>9</sup>

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Coalition Provisional Authority, CPA/ORD/28 June 2004/100 (2004).

<sup>5</sup> Compare John Yoo, *Future Implication of the Iraq Conflict: International Law and the War in Iraq*, 97 AM. J. INT'L L. 563 (2003), with Winston P. Naga & Craig Hammer, *The New Bush National Security Doctrine and the Rule of Law*, 22 BERKELEY J. INT'L L. 375 (2004).

<sup>6</sup> Press Release, Coalition Provisional Authority, Administrator's Weekly Report: Governance, at 1 (June 19-28, 2004), [http://www.iraqcoalition.org/government/weekly\\_updates/\\_congo/June28\\_Gov.doc](http://www.iraqcoalition.org/government/weekly_updates/_congo/June28_Gov.doc).

<sup>7</sup> See generally CPA Official Documents, <http://www.iraqcoalition.org/regulations/index.html#Regulations> (last visited Oct. 28, 2004).

<sup>8</sup> *Traffic Code*, Ord. No. 86, Coalition Provisional Authority, CPA/ORD/19 May 2004/86 (2004).

<sup>9</sup> See, e.g., *Freedom of Assembly*, Ord. No. 19, Coalition Provisional Authority,

At least one of these orders, Order Number 17 (Order 17),<sup>10</sup> has caused no small amount of comment and concern from a variety of observers since it addresses the important issues relating to the continuing presence of foreign military and civilian personnel in Iraq following the transfer of power to the Interim Government. In particular, the immunity previously established for personnel of the CPA was extended through the tenure of the Interim Government.<sup>11</sup>

This Comment will briefly summarize the principal substantive provisions of Order 17 and will discuss some of its possible legal and practical ramifications. It will conclude with an overall appraisal of the Order in terms of its likely ability to achieve the apparent goals of the CPA in promulgating it.

### I. SUMMARY OF THE ORDER

Order 17 addresses the legal status of the myriad foreign military and civilian personnel in Iraq performing numerous tasks in support of the fledgling Iraqi Interim Government. It is prospective in nature in that it was promulgated literally on the eve of the handover of political power from the CPA to the Interim Government and by its terms extends in duration to the termination of the "mandate authorizing the MNF [Multinational Force] under U.N. Security Council Resolutions 1511 and 1546 and any subsequent relevant resolutions and . . . until the departure of the final element of the MNF from Iraq, unless rescinded or amended by legislation duly enacted and having force of law."<sup>12</sup>

Order 17 is comprised of a preamble, twenty substantive sections, and an annex concerning certain primarily technical aspects of the allocation of the radio frequency spectrum.<sup>13</sup> For purposes of this Comment, the focus is on those provisions that have the greatest impact on the control, oversight, and accountability for the many foreign military and civilian personnel in Iraq.<sup>14</sup>

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CPA/ORD/09 July 2003/19 (2003).

<sup>10</sup> *Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq*, Ord. No. 17, Coalition Provisional Authority, CPA/ORD/17 June 2004/17 (2004) [hereinafter Order 17].

<sup>11</sup> *E.g.*, *id.* § 2(3).

<sup>12</sup> *Id.* § 20.

<sup>13</sup> *Id.* Annex art. III.

<sup>14</sup> These provisions include Section 1 (Definitions), Section 2 (Iraqi Legal Process), Section 3 (Diplomatic and Consular Missions), Section 4 (Contractors), Section 5 (Waiver of Legal Immunity and Jurisdiction), Section 7 (Travel and Transport), Section 11 (Recruitment of Local

These personnel serve in various capacities that are either directly or indirectly supporting the Interim Government during the transition period, or possibly the successor government established in conjunction with the adoption of a new Iraqi Constitution and government.

Section 1 of Order 17 sets out certain definitions of key terms used in the remainder of the Order.<sup>15</sup> A number of these definitions also provide additional insight into the apparent intentions of the CPA when promulgating the Order. Taken together, the definitions identify those persons and entities that are covered by and benefit from Order 17, including: non-Iraqi military forces and civilian personnel assigned to or under the control or command of the Commander of the MNF; the CPA administrator; foreign liaison missions (until July 1, 2004); and diplomatic and consular missions.<sup>16</sup> Also included are non-Iraqi entities or individuals that are private contractors and subcontractors supplying goods or services in Iraq under a "contract."<sup>17</sup>

Section 2 establishes immunity from all legal process for these entities and individuals, as well as for their property, funds, and assets.<sup>18</sup> All personnel covered by the Order are also directed to "respect the Iraqi laws relevant to [them] including the Regulations, Orders, Memoranda and Public Notices issued by the Administrator of the CPA."<sup>19</sup>

Importantly, all covered personnel are made subject to the exclusive jurisdiction of their respective Sending States.<sup>20</sup> They are immune from any

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Personnel), Section 14 (Uniforms and Arms), Section 15 (Identification), and Section 18 (Claims). *See id.* The remaining provisions of Order 17 are not examined in this Comment.

<sup>15</sup> *Id.* § 1.

<sup>16</sup> *Id.* § 1.

<sup>17</sup> "Contract" is defined as

a) a contract or grant agreement with the CPA or any successor agreement thereto, or a contract or grant agreement with a Sending State, to supply goods and services in Iraq, where that supply is: i) to or on behalf of the MNF; ii) for humanitarian aid, reconstruction or development projects approved and organized by the CPA or a Sending State; iii) for the construction, reconstruction or operation of Diplomatic and Consular Missions; or iv) until July 1, 2004, to or on behalf of Foreign Liaison Missions; or b) a contract for security services provided by Private Security Companies to Foreign Liaison Missions and their Personnel, Diplomatic and Consular Missions and their personnel, the MNF and its Personnel, International Consultants, or Contractors.

*Id.* § 1(13).

<sup>18</sup> *Id.* § 2(1).

<sup>19</sup> *Id.* § 2(2).

<sup>20</sup> *Id.* § 2(3).

form of restraint on their liberty other than when it is imposed on behalf of their respective Sending States.<sup>21</sup> MNF personnel may, however, act to prevent serious misconduct by covered personnel or detain them if they pose a risk of injury to themselves or others.<sup>22</sup> In such cases, representatives of the Sending State of the persons involved must be immediately notified and where such persons are detained, they must be expeditiously transferred to appropriate authorities of the affected Sending State.<sup>23</sup>

Sending States of MNF personnel also are given the right to exercise criminal and disciplinary jurisdiction in Iraq over those persons subject to the military law of such Sending State.<sup>24</sup> The immunities afforded under Section 2 extend to the personnel, property, funds, and assets of Foreign Liaison Missions only with respect to acts or omissions committed during the period of authority of the CPA, ending on June 30, 2004.<sup>25</sup>

Section 3 makes all premises of Diplomatic and Consular Missions subject to the provisions of the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963.<sup>26</sup> It further recognizes that Iraq may enter into additional bilateral agreements with any other state regarding existing or new premises for use by diplomatic and consular missions.<sup>27</sup>

Section 4 addresses the issues raised by the presence and activities of non-Iraqi private contractors.<sup>28</sup> It first provides that any Sending State may contract independently with any supplier or contractor for any goods or services needed in Iraq by the Sending State.<sup>29</sup> For those contracts covered by the Order, the parties thereto are immune from the application of Iraqi laws and regulations relating to the terms and conditions of such contracts.<sup>30</sup> For other activities in Iraq not covered by the Order, contractors are required to comply with Iraqi laws regarding applicable licensing and registration requirements.<sup>31</sup> Private Security Companies (PSCs) and their employees must also comply with all

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* § 2(4).

<sup>25</sup> *Id.* § 2(5).

<sup>26</sup> *Id.* § 3.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* § 4.

<sup>29</sup> *Id.* § 4(1).

<sup>30</sup> *Id.* § 4(2).

<sup>31</sup> *Id.*

applicable CPA orders and other requirements while conducting their activities in Iraq.<sup>32</sup> These regulations include registration and licensing of weapons and firearms.<sup>33</sup>

Contractors are also granted immunity from Iraqi legal process, but only in connection with their activities relating to any contract or sub-contract as defined in the Order.<sup>34</sup> As in the case of immunity for other covered persons, there are also limited exceptions for MNF personnel to act to prevent serious misconduct by such contractors or to otherwise temporarily detain them should they pose a risk of injury to themselves or others.<sup>35</sup> These actions are subject to notification and expeditious turnover to representatives of the affected Sending State.<sup>36</sup>

Contractors are obligated to respect all relevant Iraqi laws, including orders and directives of the CPA.<sup>37</sup> Certification by a Sending State that its contractor acted pursuant to the terms of its contract shall be conclusive evidence thereof in any Iraqi legal process.<sup>38</sup> In the case of contractors, the Sending State is deemed to be the state of nationality of any such contractor notwithstanding the somewhat broader definition of Sending State in Section 1(5).<sup>39</sup>

Section 5 provides that the immunities granted in Order 17 are not for the personal benefit of covered individuals and may be waived.<sup>40</sup> Requests for waivers for all covered personnel except for contractors must be directed to the respective Sending State.<sup>41</sup> In the case of Contractors, such requests shall be made to the relevant Sending State in relation to the activities of the contractor under the contract involved.<sup>42</sup>

Section 7 covers freedom of movement of covered personnel and other transportation-related matters.<sup>43</sup> Vehicles, vessels, and aircraft of covered

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* § 4(3).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* § 4(4).

<sup>38</sup> *Id.* § 4(5).

<sup>39</sup> *Id.* § 4(6). Section 1(5) defines "sending state" as a "State providing personnel, International Consultants, services, equipment, provisions, supplies, material, other goods or construction work" to the CPA, MNF, international efforts, diplomatic or consular missions, or foreign liaison missions. *Id.* § 1(5).

<sup>40</sup> *Id.* § 5(1).

<sup>41</sup> *Id.* § 5(3).

<sup>42</sup> *Id.* § 5(3).

<sup>43</sup> *Id.* § 7.

entities and personnel are exempted from registration, licensing, and inspection by the Iraqi government, with the additional requirement that the equipment of Contractors carry appropriate third-party insurance.<sup>44</sup> In addition, there is an exemption from the payment of any dues, tolls, landing fees and the like, although where services are requested and rendered, no exemption can be claimed for charges at rates most favorable to the CPA and those covered by the Order.<sup>45</sup>

The MNF Commander, while obligated to cooperate with the Iraqi government regarding control and usage of Iraqi airspace for all military and civilian aircraft, is empowered to control Iraqi airspace required for military operations.<sup>46</sup> The MNF Commander is also charged with implementing a transfer of air traffic management to Iraqi civilian control.<sup>47</sup> This transfer is to maintain safety and efficiency of air traffic management and security. It will also be commensurate with the capabilities of the Interim Government and will conclude no later than the date of departure of the MNF from Iraq.<sup>48</sup>

Section 11 permits the MNF, Sending States, and contractors to employ persons locally in Iraq as may be required.<sup>49</sup> The terms and conditions of such employment will be determined by the MNF, Sending States, and the terms of the Contractor's contract.<sup>50</sup>

Section 14 governs the important issues of uniforms and arms.<sup>51</sup> As a general rule, military members of the MNF shall wear the appropriate official uniform of their respective Sending State when performing their duties.<sup>52</sup> The MNF Commander may also authorize the wearing of other clothing for operational reasons as well as the wearing of civilian clothes at other times.<sup>53</sup> MNF and PSC personnel may possess/carry arms when required by their official duties or the terms and conditions of their contracts, respectively.<sup>54</sup> Finally, "[a]s authorized by the ambassador or chargé d'affaires of a Sending

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<sup>44</sup> *Id.* § 7(2).

<sup>45</sup> *Id.* § 7(3).

<sup>46</sup> *Id.* § 7(4).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* § 11.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* § 14.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

State, Diplomatic and Consular personnel may possess and carry arms while on official duty."<sup>55</sup>

Section 15 requires, upon the request of the Iraqi government, a Sending State to confirm whether a given person is within a category of persons covered by the Order.<sup>56</sup>

Section 18 specifies that, unless

immunity has been waived pursuant to Section 5 of this Order, third-party claims . . . arising from or attributed to acts or omissions of CPA, MNF Foreign Liaison Mission Personnel, International Consultants, and Contractors or any persons employed by them [to perform a covered contract], whether normally resident in Iraq or not and that do not arise in connection with military operations, shall be submitted [to] the Sending State whose personnel (including the Contractors engaged by that State), property, activities or other assets are alleged to have caused the claimed damage. . .<sup>57</sup>

Such claims shall be resolved in a manner consistent with the laws, regulations, and procedures of the affected Sending State.<sup>58</sup>

Section 19 allows the MNF Commander to negotiate and conclude supplemental agreements or Protocols to the Order with the Iraqi Government, and calls upon the MNF and Iraqi Government to ensure close and reciprocal liaison at every appropriate level.<sup>59</sup>

Section 20 establishes the effective period of the Order from the date of signature by the CPA Administrator until the departure of the final element of the MNF from Iraq due to the termination of the mandate for the MNF by the UN, unless rescinded or amended by legislation duly enacted and having the force of law.<sup>60</sup>

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.* § 15.

<sup>57</sup> *Id.* § 18.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* § 19.

<sup>60</sup> *Id.* § 20.

## II. INTERPRETATION AND ANALYSIS OF SELECTED PROVISIONS OF ORDER 17

The basis for and extent of jurisdiction of the CPA to issue orders such as Order 17 were announced in the first regulation to be issued by the CPA.<sup>61</sup> Among other things, Regulation 1 provided that the CPA would temporarily exercise necessary governmental powers “for the effective administration of Iraq during the period of transitional administration.”<sup>62</sup>

Regulation 1 also provided that the goals of the CPA include restoring stability and security, creating conditions that will enable the people of Iraq to determine their political future in an atmosphere free from coercion, and promoting economic recovery and reconstruction.<sup>63</sup> To that end, the CPA was vested with exclusive executive, legislative, and judicial jurisdiction over Iraq.<sup>64</sup>

Within a week of the Regulation’s issuance, the UN Security Council expressly endorsed this approach by encouraging the CPA to administer matters in Iraq so as to ensure the welfare of the Iraqi people.<sup>65</sup> The Security Council also emphasized the need to establish an interim administrative structure run by Iraqis.<sup>66</sup> Less than two months later the CPA established the Governing Council of Iraqis as “the principal body of the Iraqi interim administration.”<sup>67</sup> The Security Council subsequently endorsed this action, stating that it welcomed “the establishment of the broadly representative Governing Council of Iraq . . . as an important step towards . . . representative government. . . .”<sup>68</sup>

These and numerous other similar actions and responses are strong evidence that the CPA was legitimately empowered to exercise the governmental functions on behalf of the people of Iraq until such time as security, economic, infrastructure, and other conditions in the country allowed Iraqis to form their own government. Thus, it is understandable that, on occasion, some

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<sup>61</sup> *The Coalition Provisional Authority, Reg. No. 1, Coalition Provisional Authority, CPA/REG/16 May 2003/01 (2003).*

<sup>62</sup> *Id.* § 1.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* § 1(2).

<sup>65</sup> S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg. at 2, U.N. Doc. S/RES/1483 (2003).

<sup>66</sup> *Id.* at 3.

<sup>67</sup> *Governing Council of Iraq, Reg. No. 6, Coalition Provisional Authority, CPA/REG/13 July 2003/06 (2003).*

<sup>68</sup> S.C. Res. 1500, U.N. SCOR, 58th Sess., 4808th mtg., U.N. Doc S/Res/1500 (2003).

of the actions of the CPA could be said to carry with them what some would characterize as a paternalistic tone since the CPA was in effect acting *in loco parentis* for the Iraqi people.

Accordingly, while perhaps not yet conclusively or unanimously determined by some observers, the CPA appears to have had the requisite authority to issue Order 17, albeit in the waning hours of its official existence. At least from a practical standpoint, the matters addressed by the CPA in Order 17 would appear to be reasonable, appropriate, and not particularly surprising in the context of the ongoing security challenges and the continuing activities of foreign governmental and private contractor entities and personnel providing support for both establishing the Interim Government and assisting in the reconstruction of critical infrastructure. Indeed, many of the provisions of Order 17 were fundamentally necessary if support was to continue beyond the disestablishment of the CPA, since without the protections and accommodations provided by Order 17, some States and private contractors would likely not have participated.

Beyond the underlying legitimacy of Order 17, there are a number of terms, provisions, and apparent omissions that warrant further discussion in the context of their potential for misinterpretation or for being otherwise problematic in their application. Further, since the drafting history is to date unknown, it is impossible to determine whether these terms, provisions, and omissions were actually intended by the CPA or were merely errors in drafting.

A number of definitions contained in Section 1 raise questions. For instance, the definitions of "Contract" and "Private Security Companies" do not appear to include those PSCs that may have been employed by the CPA.<sup>69</sup> When read in the context of the immunities generally provided to contractors in Section 4, this could expose such PSCs and their personnel to potential liability for acts or omissions while working for the CPA, notwithstanding its subsequent disestablishment. Such an interpretation could also be bolstered by the contrasting treatment afforded to Foreign Liaison Mission personnel for acts or omissions during the tenure of the CPA in Section 2(5).<sup>70</sup>

Further, the immunities and other provisions in Section 2, along with those elsewhere in Order 17 regarding MNF, CPA, and Foreign Liaison Mission Personnel and International Consultants, inexplicably omit Diplomatic and Consular personnel.<sup>71</sup> Although it may be argued that this is an implicit

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<sup>69</sup> Order 17, *supra* note 10, § 1.

<sup>70</sup> *Id.* § 2.

<sup>71</sup> *Id.*

recognition that such personnel should have the immunity afforded diplomatic personnel generally, such provision should have been included in Section 3. Section 3, however, while addressing utilization of the *premises* of such Missions, is remarkably silent as to the status of their personnel, whether on such premises or elsewhere in Iraq. Indeed, Order 17 is silent as to the legal status of these personnel in terms of their immunity from Iraqi legal process.

Section 4, which deals with contractors, has the greatest potential for both legal and practical problems in its implementation and enforcement.<sup>72</sup> In terms of the Section's provisions, a number are ambiguous or otherwise difficult to interpret, while others may prove impractical or unenforceable. This is especially unfortunate given the extensive and increasing reliance on such private contractors to provide much of the support needed by the Iraqi government,<sup>73</sup> whether directly or indirectly through contracts with the MNF or other organizations.

For instance, Section 4(1) allows Sending States to employ any contractor or supplier "without restriction."<sup>74</sup> This raises the question of whether suppliers and contractors from states that are otherwise restricted or prohibited from participating in such activities due to trade and other sanctions or embargoes imposed by the UN may nevertheless solicit contracts under Order 17. In addition, this section provides that each contract may be "awarded in accordance with the Sending State's laws and regulations."<sup>75</sup> When considered in the context of the overall contracting process typically involved in such situations, the inexplicable limitation to one of the initial steps in this process—the award of the contract—appears to leave open the more important questions: What laws govern the performance of such contracts? What remedies are available in case of breach? Which fora have jurisdiction to resolve such issues?

Contractors are also afforded immunity from Iraqi legal process,<sup>76</sup> but in contrast to the virtually absolute immunity granted to CPA and MNF personnel and international consultants in Section 2,<sup>77</sup> it is limited to those "matters

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<sup>72</sup> See Joanne Mariner, *Private Contractors Who Torture*, FIND LAW, May 10, 2004, at <http://writ.news.findlaw.com/mariner/20040510.html> (last visited Jan. 2, 2005).

<sup>73</sup> See, e.g., Mary H. Cooper, *A New Reliance on America's Other Army*, 62 CONG. Q. WKLY. 2185, 2186-90 (2004).

<sup>74</sup> *Id.* § 4(1).

<sup>75</sup> *Id.* (emphasis added).

<sup>76</sup> *Id.* § 4(3).

<sup>77</sup> See *id.* § 2.

relating to the terms and conditions of their Contracts."<sup>78</sup> Significantly, the certification of the Sending State that its contractor acted in a given situation pursuant to such terms and conditions is deemed conclusive evidence thereof.<sup>79</sup> This could effectively deprive the Iraqi legal system of any jurisdiction over such contractor in connection with matters covered by the immunity.

Whether there are some limits to this certification is a question of vital importance. For example, while some criminal acts of a contractor such as fraud or other financial crimes could arguably be said to be "relat[ed] to the terms and conditions of their Contracts,"<sup>80</sup> others like assault, rape; and murder could be well beyond the scope of the contract. In the case of PSCs, however, even this distinction may break down; a homicide or assault could be argued to be related to their contracts to provide security. What could the Interim Government do if the Sending State nevertheless certifies otherwise, particularly if either the laws of the Sending State do not effectively provide for prosecution of the contractor or the political situation is such that the Sending State will not likely pursue the matter to the extent warranted by the crime itself?

There is also a somewhat curious provision that, notwithstanding the definition of "Sending State" in Section 1(5),<sup>81</sup> for a "contract or grant agreement with or on behalf of the CPA and . . . any successor agreement or agreements thereto, the Sending State shall be the *state of nationality* of the individual or entity concerned."<sup>82</sup> Presumably, the reference to "individual or entity" is synonymous with "Contractor," but that is not clear from the actual language.

There is another inconsistency in the nature of the obligations of contractors generally, as compared to PSCs specifically, with respect to Iraqi laws, CPA orders, and other directives. PSCs "must comply" with such laws, orders and directives<sup>83</sup> whereas contractors in general are merely required to "respect" them.<sup>84</sup> It is unclear from the text whether this distinction is important.

Of perhaps even more significance than these textual concerns is that Section 4 also implicates the broader issue of whether existing norms of international law and the legal systems of individual states are adequate to

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<sup>78</sup> *Id.* § 4(2).

<sup>79</sup> *Id.* § 4(5).

<sup>80</sup> *Id.* § 4(2).

<sup>81</sup> *Id.* § 1(5).

<sup>82</sup> *Id.* § 4(6) (emphasis added).

<sup>83</sup> *Id.* § 4(2).

<sup>84</sup> *Id.* § 4(4).

address the profound and dramatic expansion in the last decade of the use of private contractors, in both numbers and in the scope of tasks they perform in such challenging situations like those in Iraq, Afghanistan, and the former Yugoslavia.<sup>85</sup> This is a relatively new phenomenon whereby private entities and individuals, instead of or to augment the more traditional role of individual or collective governmental and quasi-governmental entities, are used to perform the myriad tasks involved in the building or reconstruction of a state's ability to govern itself and adequately provide for the welfare of its own people.

These functions, while initially limited primarily to support roles, have spread across the full spectrum of government activities, and now include security matters ranging from intelligence collection and analysis to conducting actual combat operations.<sup>86</sup> Obviously, the latter type of activities have usually been undertaken by military and police forces provided by nations, individually or collectively, that are assumed to be trained, equipped, and deployed in a competent and disciplined manner. As such, these forces are also assumed to act in conformity with the requirements of international law, particularly the so-called law of armed conflict.<sup>87</sup> Accordingly, they are presumed to be legally accountable for the manner in which their operations are conducted, so that if there are alleged breaches of discipline or outright violations of national or international law they will be effectively addressed, with the guilty being punished appropriately and the victims being duly compensated where possible.<sup>88</sup>

When, however, private contractors perform similar functions, their status under both the domestic law of relevant states and international law—particularly the extent to which they are subject to, and their conduct is ordered by, adequate legal controls—is by no means clear.<sup>89</sup> Indeed, some recent situations involving private contractors employed by state governments indicate that there are very troubling legal and practical problems that have allowed private contractors to escape punishment for very serious criminal

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<sup>85</sup> See generally Peter Warren Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521 (2004).

<sup>86</sup> See Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 886 (2004).

<sup>87</sup> Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 199, 2002 (1998).

<sup>88</sup> See generally William G. Eckhardt, *Nuremberg—Fifty Years: Accountability and Responsibility*, 65 UMKC L. REV. 1 (1996).

<sup>89</sup> Singer, *supra* note 85.

acts.<sup>90</sup> Not only are there potential legal gaps in terms of a Sending State's jurisdiction to prosecute and punish one of its contractors for criminal acts committed in Iraq, but there will also likely be significant practical impediments with such a prosecution in terms of availability of witnesses and evidence, especially when such proceedings are conducted outside of Iraq.

Section 5 provides that the immunities granted in Sections 2 and 4 regarding MNF, CPA, Foreign Mission Personnel, International Consultants, and Contractors may be waived by the respective Sending State.<sup>91</sup> There are, however, several issues raised by its provisions, including whether the waiver is available in the case of entities that are within the definition of Contractors under Order 17, since Section 5(1) indicates that the immunities of the Order are "not for the benefit of the *individuals* concerned and may be waived pursuant to this Section."<sup>92</sup> In addition, although Section 5(3) indicates that, in the case of Contractors, requests for waiver of immunity are to be referred to the "relevant Sending State,"<sup>93</sup> it is not clear if this also means the state of nationality in the context of Section 4(6), which concerns contracts with or on behalf of the CPA.<sup>94</sup>

Section 7 provisions regarding travel and transport also raise questions as to interpretation and enforcement. The broad right of freedom of movement granted to personnel of the MNF, CPA and Foreign Liaison Missions, International Consultants, and Contractors (to the extent necessary to perform their Contracts)<sup>95</sup> does not take into account the possible exigencies relating to security matters that could require the Interim Government to attempt to restrict or control movement and access. These situations are inherently dangerous and the failure to address how this potential conflict is to be handled could have tragic consequences. Interestingly, this potential for conflict between the movement of personnel covered by Order 17 and efforts to control such movements by the Interim Government was apparently recognized by the drafters of Order 17, at least in the context of air traffic management, in that Section 7(4) provides for coordination and eventual turn-over of control to the Iraqi government.<sup>96</sup>

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<sup>90</sup> *Id.* at 524-25.

<sup>91</sup> Order 17, *supra* note 10, § 5.

<sup>92</sup> *Id.* § 5(1) (emphasis added).

<sup>93</sup> *Id.* § 5(3).

<sup>94</sup> *Id.* § 4(6).

<sup>95</sup> *Id.* § 7(1).

<sup>96</sup> *Id.* § 7(4).

Section 11 reveals potential issues regarding the way personnel, presumably Iraqi citizens and non-Iraqis not otherwise subject to the Order, may be locally recruited, hired, and employed by persons or entities covered by Order 17. This section provides that the terms and conditions of such recruitment, hiring, and employment are to be determined respectively by the MNF, Sending States and, in the case of Contractors, by the terms of the particular contract.<sup>97</sup> This approach could, nevertheless, conflict with Iraqi laws concerning such important matters as workplace safety, child labor, hours, and wages.<sup>98</sup> Given the significance of many of these laws, the general requirement in Sections 2(2) and 4(4) that parties covered by the Order “respect” Iraqi laws<sup>99</sup> seems inadequate without a mechanism for reconciling potential conflicting requirements.

Section 14 governs the wearing of uniforms and the carrying of arms by MNF and certain other personnel.<sup>100</sup> Although it does provide uniform requirements for MNF military personnel, it is silent as to any requirements for uniforms or other distinctive clothing for MNF civilian personnel or PSC personnel. This section also authorizes the carrying of “arms” by personnel of the MNF (presumably both military and civilian) and PSCs, as well as Consular and Diplomatic Personnel under certain conditions.<sup>101</sup> A particularly significant omission, however, is that Order 17 does not clarify what type of weapons are within the meaning of the term “arms,” which in the context of the proliferation of small arms and heavier weapons and explosives throughout Iraq could prove troubling at best.

Another potential ambiguity exists in Section 15 regarding identification of persons covered by the Order. Specifically, upon the request of the Iraqi government, a Sending State is obligated to “confirm that an individual falls into one of the categories covered by this Order.”<sup>102</sup> There is no mention made of confirming whether an entity may also be within the coverage of Order 17, although the definition of “Contractor” in Section 1(11) recognizes such coverage.<sup>103</sup> Further, in contrast to the provision of Section 4(5) that makes conclusive the certification of a Sending State (that one of its contractors is

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<sup>97</sup> *Id.* § 11.

<sup>98</sup> *Cf. Amendments to the Labor Code Law No. 71 of 1987, Ord. No. 89, Coalition Provisional Authority, CPA/ORD/05 May 2004/89 (2004).*

<sup>99</sup> *Id.* §§ 2, 4.

<sup>100</sup> *Id.* § 14.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* § 15.

<sup>103</sup> *Id.* § 1(11).

effectively covered by the immunity from Iraqi legal process provided therein),<sup>104</sup> it is unclear what the legal effect of this "certification" will be where the Interim Government seeks to enforce its laws against the individual whose status is so certified.

Finally, Section 18 concerns the handling of third party claims for property loss, damage, or personal injury arising out of the activities of persons or entities covered by Order 17.<sup>105</sup> Similar to several other sections noted previously,<sup>106</sup> there is the specific omission of Diplomatic and Consular personnel from the litany of those categories of personnel who benefit from the Order. The manner of submitting such claims is also confused in that there appears to have been an unintentional omission of the word "by" in the phrase "[claims] shall be submitted and dealt with by the Sending State whose personnel . . . are alleged to have caused the claimed damage."<sup>107</sup>

### III. CONCLUSION

Order 17 is one of several potentially critical components of the overall effort by the CPA to transfer power to the fledgling Iraqi Interim Government in an orderly and effective manner. While, as noted previously, there are a number of internal inconsistencies, apparently unintended omissions and provisions that are potentially difficult if not impossible to enforce, the overall thrust of Order 17 regarding important issues like immunity of personnel assisting the Iraqi government, responsibilities of Sending States, and the like is appropriate and reasonable under the circumstances existing at the time of the CPA's dissolution. Hopefully, should there be difficulties in the application of the Order as the Iraqi people continue their efforts to establish their own institutional capabilities to govern themselves, those inconsistencies can be resolved without undue difficulty.

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<sup>104</sup> *Id.* § 4(5).

<sup>105</sup> *Id.* § 18.

<sup>106</sup> *See supra* note 71 and accompanying text.

<sup>107</sup> Order 17, *supra* note 10, § 18.