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Hearing on “Negotiating a Long Term Relationship with Iraq”

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I appreciate the invitation to comment on the matter of “Negotiating a Long Term Relationship with Iraq.”

The impetus for today’s hearing may stem, in part, from the events of November 26, 2007 -- in particular, from a document entitled “Declaration of Principles” that was announced on that date by President George W. Bush and by Iraqi Prime Minister Nouri Kamel Al-Maliki of Iraq.

This “Declaration of Principles” touches on a host of topics, sketching many of the common interests shared by the United States and the Iraqi people. It is quite similar to the declaration of mutual interests announced by the United States and Afghanistan on May 23, 2005.

There has been a concern in some quarters that this “Declaration of Principles” amounts, in form and substance, to a binding agreement between the United States and Iraq, akin to an “executive agreement” that could be binding under international law.

In my view, this is not the case. The Declaration of Principles was not styled as a binding legal agreement. The document discusses a broad range of matters of aspiration and shared interest, including issues that the United States and Iraq could not possibly address without also seeking the cooperation of many other countries.

This includes, for example, enhancing the position of Iraq in regional and international organizations and helping Iraq to obtain debt forgiveness, as well as Iraq’s future accession to the World Trade Organization. These goals depend upon the actions of many other countries beyond the two states that joined in the declaration, and could not be made the subject of a self-executing agreement.

Rather, the Declaration of Principles reflects Iraq’s timely sense of its sovereign independence, as well as the ambitions that are shared by any free and democratic country.

The Security Council Mandate and the Status of American Forces

The Declaration of Principles records Iraq's wish to gain full recognition of its sovereignty – most notably, its return to the fully independent status enjoyed by the Iraqi nation before Saddam Hussein chose to invade neighboring Kuwait and embroil the world community in a difficult conflict. In the language of the Declaration of Principles, Iraq looks forward to exercising “full sovereignty ... over its territories, waters and airspace, and its control over its forces and the administration of its affairs.”

The November 2007 Declaration of Principles thus looks toward a future period when the United States and other allied forces may be hosted in Iraq for a number of purposes – **but may no longer have the legal umbrella of a United Nations security mandate, including provisions concerning the immunity of multinational forces.**

It is the issue of an appropriate legal framework for U.S. forces working in Iraq that accounts, in part, for the timing of the Declaration of Principles -- and for some of the urgency felt in future plans to negotiate a formal bilateral Status of Forces agreement.

The multinational force has operated in Iraq under a series of U.N. Security Council mandates since 2004. Resolution 1546, approved by the Council on June 8, 2004, was extended in November 2005 and November 2006 in Resolutions 1637 and 1723. These resolutions invoke the authority of Chapter VII of the U.N. Charter, which permits the use of military force by the United Nations and cooperating states in the multinational force.

Resolution 1723 was due to expire on December 31, 2007. Hence, in November 2007, the Declaration of Principles prominently focused on Iraq's intention to “**request to extend the mandate** of the Multi-National Force-Iraq (MNF-I) under Chapter VII of the United Nations Charter **for a final time.**” (Emphasis added).

The Iraqi representative to the United Nations also noted that this extension would be “for the last time.”

Upon Iraq's request to the United Nations, on December 18, 2007, the Security Council passed Resolution 1790 for a final extension of the multi-national force mandate until December 31, 2008.

But this was subject to the important proviso, recorded in the operative language of Resolution 1790. Namely, in operative paragraph 2, the Council noted that it “*Decides further* that the mandate for the multinational force shall be reviewed at the request of the Government of Iraq **no later than 15 June 2008**, and **declares that it will terminate this mandate earlier if requested by the Government of Iraq.**” (Bold-face emphasis added).

Thus, it could be the case that at any moment, the Government of Iraq could request a termination of the mandate of Resolution 1790, and the United States would be faced anew with the immediate question of the legal protections available to its forces in Iraq.

This is a topic typically treated through bilateral status of forces agreements, and the future intention of the United States to negotiate such an agreement is thus not surprising.

Status of Forces Agreements

The role of “status of forces agreements” (or “SOFA’s”) is a matter of general importance to all American service members and their families, as well as to political leaders interested in the posture and protection of American armed forces around the globe.

Recent headlines concerning events on the Japanese island of Okinawa highlight the importance of providing safeguards both to American forces stationed abroad and to the civilian populations with whom they come in contact. So, too, the decision by the United States to recognize Kosovo as a newly independent nation, separate from Serbia, may pose the question of how to assure appropriate status and legal protections to American service members who will be stationed in Kosovo as part of NATO peacekeeping forces.

A status of forces agreement is, in fact, a manifestation of the full sovereignty of the state on whose territory it applies. In particular, this kind of agreement serves to structure the relationship between a sovereign host (often called a “receiving” state) and one or more so-called “sending” states whose forces are permitted to visit or be stationed on foreign territory.

Status of forces agreements (“SOFA’s”) are widely used in modern international relations. Status of forces agreements govern the working relationship between states in the NATO alliance, as well as member states of the Partnership for Peace. Status of forces agreements govern and protect United Nations forces dispatched on peacekeeping and peace enforcement missions around the globe.

Status of forces agreements also serve to structure bilateral relationships between states, where the two parties conclude there is a common interest in permitting the location of a military force, or a monitoring station, or a pre-positioning of supplies, or indeed, any other anticipated military function or presence. Even a joint military exercise may be governed by a status of forces agreement, where there is any presence on foreign territory.

In a United Nations peacekeeping operation, the status of forces will typically be based on a model U.N. status of forces agreement. However, in a Chapter VII peace enforcement operation, the status of forces will not necessarily depend upon the consent of the state where they are deployed, since Chapter VII resolutions have coercive power.

For its part, the United States has attempted to assure that in United Nations mandates for peacekeeping and peace enforcement, there is an assurance that U.S. forces will not be subject to any assertion of international jurisdiction by a treaty court to which it has not assented.

Status of forces agreements can serve several purposes. In many respects, SOFA's are the military equivalent of diplomatic or consular immunity agreements. Status of forces agreements may describe the method of entry and departure of international troops. They may describe the division of legal authority in regard to any alleged misconduct.

Typically, primary criminal and civil jurisdiction over any act of misconduct committed in the course of the performance of "official acts" is reserved to the so-called sending state, while jurisdiction over *private* acts of misconduct can be assumed by the receiving state. There may, however, be instances in which the sending state is primarily or exclusively responsible for both spheres.

A SOFA agreement often has procedures for handling any commercial claims that arise from the presence or activities of international troops. The provision of buildings and grounds, the applicability or inapplicability of local taxes, customs issues, foreign exchange regulations, and the hiring of local workers, are also typical features. Alongside its substantive provisions, a SOFA will typically provide a standing structure for consultation and settlement of any disputes between the state parties. The relationship between the receiving and sending states may also be structured by a basing agreement concerning any approved installations, improvements, training activities, permissions for overflight, communications, and services.

For the further work of the Committee, I should note the detailed examination of the history and structure of SOFA agreements available in a collaborative study organized by a German international law scholar, Dieter Fleck, entitled *THE HANDBOOK OF THE LAW OF VISITING FORCES* (Cambridge University Press 2001). The issues that arise in overseas deployments are also addressed by John Woodliffe, a British scholar, in *THE PEACETIME USE OF FOREIGN MILITARY INSTALLATIONS UNDER MODERN INTERNATIONAL LAW* (Martinus Nijhoff 1992). And finally, Professor Kent Calder, my colleague at Johns Hopkins University, has recently finished an important work entitled *EMBATTLED GARRISONS: COMPARATIVE BASE POLITICS AND AMERICAN GLOBALISM* (Princeton University Press 2007).

Conclusion

The negotiation of a status of forces agreement does not suggest that the United States is seeking any permanent bases in Iraq. Indeed, we have status of forces agreements even for transient activities. The United States has expressly eschewed any desire for permanent bases in Iraq. Both the President and Secretary of Defense Robert Gates have made publicly embraced that position.

While status of forces agreements are typically concluded as an Executive agreement between two governments, this does not trench upon the long-standing interest of both political branches of government in foreign policy issues concerning the use of force. The Congress still retains its authority over the budget of the armed forces, and its oversight capabilities. The constitutional and statutory provisions concerning the use of force, as a matter of American domestic law, also remain intact. Thus, the issue of the negotiation of a future SOFA arrangement with Iraq may be a far more technical matter than some voices have suggested. Insofar as the future relationship with Iraq may involve mutual cooperation in training local forces and assisting in the fight against the type of terrorism that can ravage civilian lives and harm America's security, this is a common interest that we share with a great many countries in the world. Its nature, scope, and duration would not ordinarily be determined in a Status of Forces agreement.

Thank you for your attention, and I welcome any questions.