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Possible Extension of the UN Mandate for Iraq: Options

I have been asked to discuss possible options for extension of the current mandate and status of U.S. forces in Iraq for some interim period in the event that a long-term agreement for this purpose is not concluded by the time the current UN mandate expires at the end of 2008.

The Current Mandate

As we have seen in previous hearings before the Subcommittee on this subject, U.S. forces are currently present in Iraq as part of the Multinational Force (MNF) authorized by the UN Security Council under Chapter VII of the UN Charter. Security Council Resolution 1511 in October 2003 authorized the MNF “to take all necessary measures to contribute to the maintenance of security and stability in Iraq”, which includes the use of force against terrorists and insurgent groups and the freedom of movement necessary to accomplish this mission.¹ This authorization and mandate has been periodically renewed by the Council, the latest extension continuing through December 31, 2008.²

The status, privileges and immunities of U.S. forces in Iraq are still governed by an order issued in June 2004 by the Coalition Provisional Authority as the occupying authority during the initial period of U.S. operations in Iraq. That order, known as Coalition Provisional Authority Number 17 (or CPA 17), grants immunity to all MNF personnel from Iraqi arrest and criminal jurisdiction, and regulates other matters usually covered by Status of Forces agreements (SOFAs), such as contracting, travel, taxes and fees. CPA 17 was continued in force beyond the end of the occupation by a provision of the Iraqi Constitution. However, by its own terms, CPA

¹ This mandate has been elaborated and expanded by the Council from time to time. *See, e.g.*, UN Security Council Resolution 1546 (2004) and the letters incorporated by reference in that resolution.

² UN Security Council Resolution 1790 (2007).

17 will terminate when the UN mandate ends and MNF elements have left Iraq. At that point, if no further action were taken, U.S. forces would no longer have authority to operate in Iraq and would be subject to the full scope of Iraqi law, including the possibility of prosecution in Iraqi courts.

Options for Extending the Mandate

If a long-term agreement for the mandate and status of U.S. forces is not concluded by the end of this year, then it would be necessary to find some other means to provide for their mandate and status for some interim period while negotiations on long-term arrangements continue. This could be done by extension of the current mandate pursuant to action by the Security Council under either Chapter VI or Chapter VII of the UN Charter.

The basic difference between Chapters VI and VII is that under Chapter VII, the Council may impose measures on states that have obligatory legal force and therefore need not depend on the consent of the states involved. To do this, the Council must determine that the situation constitutes a threat or breach of the peace. In contrast, measures under Chapter VI do not have the same force, and military missions under Chapter VI would rest on consent by the state in question. Until now, Chapter VII has been used in the case of Iraq for various reasons, including the fact that it was initially necessary to use force and impose measures in the absence of Iraqi consent, and the need to adopt measures that would bind other states with respect to the disposition of Iraqi assets and other matters.

Action under Chapter VII. This option has been exercised by the Security Council on a number of occasions in the past with respect to forces in Iraq. By extending the current mandate and authority of the MNF, this would automatically continue the current status and immunities of U.S. forces under CPA 17, which remains in force “for the duration of the mandate authorizing the MNF under U.N. Security Council Resolutions 1511 and 1546 and any subsequent relevant resolutions.”³ It would also confirm the continuing applicability of the 2002 Congressional authorization for the presence of U.S. forces in Iraq, which authorized the President to use the armed forces to “defend the national security of the United States against

³ CPA 17, as revised, goes on to say that the MNF mandate “shall not terminate until the departure of the final element of the MNF from Iraq, unless rescinded or amended by legislation duly enacted and having the force of law.”

the continuing threat posed by Iraq” and to “enforce all relevant United Nations Security Council resolutions regarding Iraq.”⁴

It is true that at the time of the last extension, the Council declared that it would terminate the mandate whenever requested by Iraq, and Iraq advised the Council that it would not request a further extension.⁵ However, Iraq could decide that a temporary extension for the purpose of permitting the completion of long-term arrangements would be desirable, or the Council could decide on its own that such a temporary extension would be called for. In adopting such a resolution, the Council could take express notice of an Iraqi request for such an extension, as it has done in the past, and could expressly state that this would be only a temporary measure that would not affect Iraq’s long-term status.

There is no reason in principle why this could not be done under Chapter VII. Such an extension need not amount to any derogation from Iraqi sovereignty or require a determination that the Iraqi Government is currently a threat to the peace. The Council could base its action on a finding that the *situation* in Iraq is a continuing threat to the peace because of the actions or threats of other elements inside or outside Iraq. Chapter VII has been applied in many countries without derogating from their sovereignty, and in fact all states (including the United States) currently have obligations under Chapter VII with respect to international terrorism and the proliferation of weapons of mass destruction to non-state entities. In fact, Iraq itself would continue to be subject to certain other aspects of the existing Chapter VII regime even after the expiration of the MNF mandate, such as the provisions for compensation for Gulf War victims from Iraqi oil export revenues,⁶ and Iraq’s obligations not to acquire weapons of mass destruction.⁷

The adoption of a further Chapter VII resolution could also have benefits to Iraq in that it could also be used to continue Council measures affecting other states that Iraq might find useful. Specifically, the current immunity from attachment of Iraqi petroleum products and the proceeds of their sale, which was continued in the same Council resolution that extended the MNF mandate, will expire on December 31, 2008, unless further

⁴ Authorization for the Use of Military Force Against Iraq Resolution of 2002, P.L. 107-243.

⁵ UN Security Council Resolution 1790 (2007).

⁶ UN Security Council Resolutions 687 (1991), par. 16-19; 1483 (2003).

⁷ UN Security Council Resolutions 687 (1991), par. 7-14; 1762 (2007).

extended by the Council.⁸ This would have to be done under Chapter VII if it is to protect against attachment in other states.

Chapter VI. If a Chapter VII extension is nonetheless thought to be undesirable, the same results could be achieved through a Council decision under Chapter VI, based on the request or consent of the Iraqi Government. In the past, a number of peacekeeping and other military operations have been authorized by the Council under Chapter VI with the consent of the affected states.⁹ This, for example, was the case with respect to a number of peacekeeping operations in the Middle East, South Asia and the Congo, sometimes involving robust military missions.

A Chapter VI resolution would not require any finding of a threat to the peace; and since the mission would rest expressly on the consent of Iraq, there would be no question of intrusion on Iraqi sovereignty. This could all be made abundantly clear in the text of the resolution and in communications to the Council by Iraq and the United States. It could also be useful to have a brief U.S.-Iraqi agreement or exchange confirming that the two governments had consented to the extension of the mandate and status of MNF forces.

Such an extension would in practice have essentially the same operative consequences as a Chapter VII resolution in the current circumstances in Iraq. The existing mandate and authority of U.S. forces within the MNF would continue, this time based on the consent of Iraq. The status and immunities of U.S. forces would continue under CPA 17, which continues to apply so long as the MNF authorization continues under Security Council resolutions, without regard to whether they are under Chapter VI or Chapter VII. Likewise, the provision in the 2002 Congressional resolution authorizing the use of U.S. forces to enforce all relevant Security Council resolutions, without regard to whether they are under Chapter VI or Chapter VII, would continue to apply.

Such a shift from Chapter VII to Chapter VI with respect to the MNF could well be seen in Iraq as a positive reaffirmation of the Iraqi desire to reassert its sovereignty and independent status and to avoid the appearance

⁸ UN Security Council Resolution 1790 (2007), par. 3; UN Security Council Resolution 1483 (2003), par. 22.

⁹ See, e.g., M. Matheson, *Council Unbound: The Growth of UN Decision Making on Conflict and Postconflict Issues after the Cold War* (U.S. Institute of Peace, 2006), Chapters 4-5.

of a continuing international protectorate. The limited duration of such an interim extension would further emphasize that it is not aimed at the indefinite continuation of the current situation. It might also simplify matters for the Iraqi Government under its own law, since it would fall within the terms of CPA 17 that are already in force under the Iraqi Constitution, and hopefully would not require further action by the Iraqi Parliament. (As already noted, certain other aspects of the existing Chapter VII regime would continue, such as the provisions for compensation for Gulf War victims from Iraqi oil export revenues.)

I would stress, in passing, that I am not at all suggesting that Chapter VII should be abandoned in other cases as the usual vehicle for authorization of military operations where the robust use of force may be necessary. Chapter VII authority is often necessary or desirable, particularly where the Council cannot be confident that it will continue to have consent for the operation, or where there is doubt about the authority or stability of the regime giving consent, or where there is some other reason to give binding legal effect to the measures adopted by the Council. However, none of this is a problem with respect to a temporary extension of the MNF mandate with the consent of Iraq.

Other Options

The extension of the UN mandate is not the only possible option for ensuring that U.S. forces continue to have appropriate status and operational authority while negotiations for long-term arrangements are completed. The two governments might conclude a simple agreement extending the current authority and status of MNF forces for a temporary period to allow the completion of negotiations for long-term arrangements, or they might agree on a modified version of the current arrangements to deal with specific Iraqi concerns, such as the current immunity of contractor personnel. This could be done by a simple exchange of notes or by any other bilateral document that conveys the agreement of the two governments.

This could, however, raise questions as to whether further legislative action would be needed under either U.S. or Iraqi law, which could complicate the conclusion of any temporary arrangement. This possible problem could be resolved by the adoption of a Security Council resolution confirming the agreement and approving the extension of the current mandate. For purposes of Iraqi law, this would bring the arrangement within

the existing authority of CPA 17; and for purposes of U.S. law, it would fall within the terms of the 2002 Congressional resolution. The Security Council could take such action under either Chapter VI or Chapter VII, with the same pros and cons as suggested above.

Conclusion

If a long-term agreement on the mandate and status of U.S. forces is not concluded by the time the current UN mandate expires at the end of this year, some action will be necessary to protect U.S. forces and to ensure that they can continue their operations during the interim period that would be required to complete negotiations on long-term arrangements. The method used in the past was an extension of the MNF mandate by the Security Council under Chapter VII, and there is in principle no reason why this could not be done again. But if this is not possible for political reasons, the same objectives could be reached through Chapter VI action of the Council, based on the consent of Iraq; or it could be done through an interim bilateral agreement, with confirmation by a further Council resolution. Any of these options could be carried out without the need for further action by Congress, and hopefully the same would be true with respect to the Iraqi Parliament. This would provide breathing room for the two governments to negotiate a satisfactory long-term solution and to secure whatever legislative action may be needed under their respective domestic systems.