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Negotiating a Long Term Relationship with Iraq

I have been asked to give my views on the agreements with Iraq that are contemplated pursuant to the November 2007 U.S.-Iraq Declaration of Principles.¹ It would appear that the Administration intends to conclude a Status-of-Forces Agreement (or SOFA) to govern the rights and immunities of U.S. forces in Iraq, and a Strategic Framework document to establish a broader blueprint for future cooperation in the political, economic, cultural and security fields. These documents are intended, among other things, to govern the U.S.-Iraq security relationship after the expiration of the current UN Security Council mandate, which currently provides for the presence of U.S. and other Coalition forces through December of this year.

Security Commitments and Assurances

According to the Declaration of Principles, the new documents will include “security assurances and commitments to the Republic of Iraq to deter foreign aggression against Iraq that violates its sovereignty and integrity of its territories, waters, or airspace.”

The question of what constitutes a “security commitment” to another country has been the subject of dialogue between the Executive branch and Congress for decades. In 1969, the Senate adopted the National Commitments Resolution,² which asserted that any “promise to assist” a foreign country “by the use of Armed Forces” would be a “national commitment” that could only be given by means of a treaty, statute or concurrent resolution.

The National Defense Authorization Act for Fiscal Year 1991 included a provision requiring the President to submit a report to Congress

¹ See www.whitehouse.gov/news/releases/2007/1/20071126-11.

² S.Res. 85, 91st Cong., 1st Sess., June 25, 1969.

describing all existing “security arrangements with, or commitments to” other countries.³ In 1992, President George H.W. Bush submitted a report listing current U.S. security commitments and arrangements.⁴ He defined a “security commitment” as “an obligation, binding under international law, of the United States to act in the common defense in the event of an armed attack on that country.” He provided a list of current U.S. security commitments, almost all of which were contained in treaties concluded between 1947 and 1960, including the North Atlantic Treaty, the Rio Treaty (with Latin American countries), the Southeast Asia Treaty, and treaties with Australia, New Zealand, the Philippines, South Korea and Japan.⁵

The provisions of these treaties vary somewhat, but each contains language that contemplates U.S. action in the common defense in the event of armed attack against one of the treaty parties. For example, Article 5 of the 1949 North Atlantic Treaty says that the Parties agree “that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense . . . , will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.”⁶ Article V of the 1960 Treaty of Mutual Cooperation and Security between Japan and the United States says that each Party “recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes.”⁷

The 1992 Presidential report contrasted such security commitments with “security arrangements” – that is, pledges by the United States to take some action in the event of a threat to the other country’s security, typically to consult with that country – but containing no commitment with respect to

³ Sec. 1457, P.L. 101-510; codified in 50 USC 404c.

⁴ See *Treaties and Other International Agreements: the Role of the United States Senate*, a study prepared for the Senate Foreign Relations Committee by the Congressional Research Service, 103d Cong., 1st Sess., November 1993, p. 206-07.

⁵ The State Department also maintains a list of “U.S. Collective Defense Arrangements”, consisting of these treaties. See www.state.gov/s/l/treaty/collectivedefense.

⁶ April 4, 1949; 63 Stat. 2241; TIAS 1964; 34 UNTS 243.

⁷ June 23, 1960; 11 UST 1652; TIAS 4510; 373 UNTS 186.

the use of U.S. Armed Forces. It listed a number of such arrangements, including those with Israel, Egypt and Pakistan. For example, it cited the 1975 Memorandum of Agreement with Israel, which stated that in the event of a threat to Israel's security or sovereignty, the U.S. would "consult promptly with the Government of Israel with respect to what support, diplomatic or otherwise, or assistance it can lend in accordance with its constitutional practices."⁸ Pledges of this sort have also been called "security assurances".

In addition to such "security commitments" and "security assurances", there are a variety of other steps that the United States might take to enhance the security of a friendly country, including providing military assistance, sales of military items and technology, and stationing U.S. forces. Some or all of these steps may be taken in conjunction with security commitments or assurances.

Once again, the U.S-Iraq Declaration of Principles refers to "security assurances and commitments". However, on reflection, the Administration has now stated that the agreements contemplated will not include any security commitments to Iraq. Other forms of security assurances or arrangements may be included in either the SOFA or the strategic framework document, but the Administration has not yet, to my knowledge, indicated exactly what is intended.

Status of U.S. Forces

When U.S. forces are deployed to a foreign country for a significant period – whether under UN authority or not – the United States will typically wish to have in place an instrument making clear the status of U.S. forces and the extent of their immunity from the law and jurisdiction of the state in which they are operating. If the U.S. is acting as an occupying power, this may take the form of an occupation order; otherwise, it will take the form of an agreement with the state in question, either concluded by the U.S. government itself or by the multinational force or coalition of which it is a part. According to the Administration, the United States has such agreements with more than 115 countries.⁹

⁸ September 1, 1975; 32 UST 2150; TIAS 9828.

⁹ Condoleezza Rice and Robert Gates, "What We Need Next in Iraq", *Washington Post*, February 12, 2008.

There is no uniform model or template for SOFAs, but they typically have certain common objectives: to give U.S. forces the right to enter, leave and move about the country, wear their uniforms and use their vehicles; to exempt U.S. forces and personnel from some or all taxes and charges of the host country; to regulate claims and contracts; and to exempt U.S. personnel from local criminal and civil jurisdiction in whole or in part. This may be stated in brief and general terms, or it may be complex and detailed. For example, the SOFA concluded in 2002 with East Timor was less than three pages in length, while the Korea SOFA ran to more than 150 pages and was accompanied by a series of agreed understandings.

The terms of these agreements may vary, depending on the needs of the situation and the attitude and demands of the foreign government in question. For example, on the question of foreign criminal jurisdiction over U.S. personnel, some SOFAs allocate criminal jurisdiction between the United States and the host country, depending on whether or not the offenses alleged were committed against other U.S. personnel or in the course of official duty; while other SOFAs give U.S. personnel complete exemption from foreign criminal jurisdiction.

U.S. forces are present in Iraq as part of the Multinational Force (MNF) authorized by the Security Council under Chapter VII of the UN Charter. Security Council Resolution 1511 in October 2003 authorized that force “to take all necessary measures to contribute to the maintenance of security and stability in Iraq”, including the security of UN and Iraqi operations and “key humanitarian and economic infrastructure”. This “all necessary measures” language is understood to include freedom of movement and the right to use necessary force to carry out the MNF mission. Subsequent resolutions referred also to “preventing and deterring terrorism and protecting the territory of Iraq”, combat operations against violent groups and internment of their members, humanitarian assistance, civil affairs support, and relief and reconstruction.¹⁰

This authorization and mandate has been periodically renewed by the Council. In December 2007, the Council extended the mandate until December 31, 2008. It declared that it would terminate that mandate earlier if requested by the Iraqi Government, and noted that Iraq had advised that it

¹⁰ See UN Security Council Resolution 1546 (2004) and letters incorporated by reference.

would not request a further extension of that mandate.¹¹ (Of course, the Council still retains the right to extend the mandate if it should wish to do so, and any early termination of the mandate would still require affirmative Council action.)

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 Provision Authority Order Number 17 or CPA 17, grants immunity to all MNF personnel from Iraqi arrest and criminal jurisdiction, and regulates other matters usually covered by SOFAs, such as contracting, travel, taxes and fees. It differs from typical SOFAs in one significant respect, in that it grants such immunity to civilian contractors with respect to acts performed under their contracts.¹²

Article 126 of the Iraqi Constitution states that “existing laws shall remain in force, unless annulled or amended in accordance with the provisions of the Constitution”, which is apparently understood to mean, among other things, that CPA 17 will continue in force unless specifically rescinded or amended by the Iraqi Parliament. However, CPA 17 does not provide a clear basis for the status of U.S. forces after the termination of the MNF mandate. It only covers U.S. forces as part of the MNF, and it states that it will remain in force for the duration of the MNF mandate under Council resolutions “and shall not terminate until the departure of the final element of the MNF from Iraq”.

While this language might give some room for the continuation of immunities for any U.S. forces that may temporarily remain in Iraq as part of the MNF after December 31, 2008, it would, if possible, be better to clarify the matter in a definitive way. In the event a permanent SOFA is not agreed by that date (which the Administration evidently intends to do), it would seem prudent to take some affirmative step to continue the CPA 17 provisions for a further period while negotiations continue. This might, for example, be done by a temporary extension of the MNF mandate by the Security Council, an exchange of notes between the United States and Iraq

¹¹ UN Security Council Resolution 1790 (2007).

¹² See http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf.

temporarily extending the current status of U.S. forces, or an act of the Iraqi parliament.

Finally, the question arises as to whether any other agreement to be negotiated pursuant to the November 2007 Joint Declaration would in any way define or affect the future mission or status of U.S. forces. Secretaries Rice and Gates have stated that the coming negotiations with Iraq will “set the basic parameters for the U.S. presence in Iraq, including the appropriate authorities and jurisdiction necessary to operate effectively and to carry out essential missions” but that nothing to be negotiated will mandate combat missions, set troop levels, provide security commitments or authorize permanent bases in Iraq.¹³ It may be worthwhile to clarify what is intended along these lines, and in particular whether anything is intended that would go beyond the traditional scope of SOFAs as described above.

The Role of Congress

With respect to security commitments and assurances, U.S. practice gives useful guidance as to the form these commitments or assurances should take. Security commitments in the technical sense have generally been undertaken by treaty, or at a minimum by act of Congress.¹⁴ Certainly a binding commitment to defend Iraq would call for such action. On the other hand, properly limited security assurances – such as a simple promise to consult – have taken various forms, including sole executive agreements and policy statements, and the President could offer them on the basis of his own Constitutional authority.

With respect to Status-of-Forces Agreements, there is no uniform model or format. The NATO SOFA took the form of a treaty;¹⁵ some SOFAs have been agreements implementing prior mutual defense treaties;¹⁶ but a great many take the form of executive agreements concluded under the President’s own Constitutional authority. If the agreement is limited to

¹³ See note 9 above.

¹⁴ Apparently security commitments were given to the Marshall Islands and Micronesia under Compacts of Free Association approved by Congress. See note 4 above at p. 206.

¹⁵ North Atlantic Treaty Status of Forces Agreement, 4 UST 1792, June 19, 1951. Since this agreement granted exceptions and immunities from U.S. law to foreign NATO personnel, it had to be done as either a treaty or pursuant to act of Congress.

¹⁶ For example, the Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, TIAS 6127, July 9, 1966.

giving U.S. forces and personnel exemption from foreign law, the President may conclude it without further Congressional approval.

Other types of commitments would have to be evaluated within the context of any relevant existing legislation, which might or might not require further Congressional action, depending on the content of the commitments and the applicable statutory restrictions. Particular attention would have to be paid to any commitments of U.S. funds, any commitments to provide military assistance or arms sales, any arrangements involving U.S. bases in Iraq or access to Iraqi bases, any forgiveness of obligations to the United States, and any immunities or exceptions from the application of U.S. law. For example, any commitment to permanent U.S. bases in Iraq would be inconsistent with the most recent DOD Appropriations Act,¹⁷ and the Administration has now indicated that there will be no such commitments.

But even if a proposed commitment or arrangement falls within the President's independent Constitutional authority, this does not mean that Congress should play no role in the process. Given the obvious importance of the future U.S.-Iraq relationship and in particular the role of U.S. forces in the future security of Iraq, it would seem at a minimum that the Administration should engage in serious consultation with Congress on both the form and substance of the agreements that will implement the U.S.-Iraq Declaration of Principles. Ideally, the two branches should arrive at a consensus on the future role and status of U.S. forces, which might then be confirmed in some form – for example, by statute, joint resolution, provisions in authorization or appropriations legislation, sense-of-the-Congress resolution or formal exchanges with the Congressional leadership. Such steps would acknowledge and accommodate the direct interest and responsibility of Congress in U.S. foreign and national security policy, in the use of U.S. funds, and in the disposition of U.S. armed forces.

¹⁷ Act Making Appropriations for the Department of Defense for the Fiscal Year Ending September 30, 2008, Section 8113.