



**Statement of Jennifer K. Elsea
Legislative Attorney
American Law Division
Congressional Research Service**

before

**The Subcommittee on International Organizations, Human Rights, and Oversight
of the House Foreign Affairs Committee**

**Hearing: "Status of Forces Agreements and UN Mandates: What Authorities and
Protections Do They Provide to U.S. Personnel?"**

February 28, 2008

Chairman Delahunt, Ranking Member Rohrbacher, and Distinguished Members of the House Subcommittee,

I am Jennifer Elsea, a legislative attorney in the American Law Division at the Congressional Research Service. I work on a variety of issues connected with national security and international law, and have had the opportunity to prepare analyses regarding legal aspects of the use of force abroad. I thank the subcommittee for the opportunity to address the authorities and protections that status of forces agreements and U.N. mandates provide for U.S. personnel operating overseas. I will confine my remarks to the military operations in Afghanistan and Iraq, briefly describing the effects of the relevant U.N. resolutions and international agreements, as well as the congressional mandates for these operations. I ask that my remarks be submitted into the record, along with a report CRS has prepared entitled "Congressional Oversight and Related Issues Concerning the Prospective Security Agreement Between the United States and Iraq," which addresses the issues covered by these hearings in greater detail.

Afghanistan

The United States is participating in two military operations in Afghanistan, with separate (but overlapping) mandates and status of forces arrangements. Operation Enduring Freedom (OEF) refers to the U.S.-led coalition that initiated military action in Afghanistan in 2001 in response to the terrorist attacks of September 11, 2001. The International Security

Assistance Force (ISAF) is a NATO-led coalition deployed to Afghanistan under U.N. mandate beginning with Security Council Resolution 1386.¹

ISAF. The ISAF was initially a small force led by the United Kingdom established to provide assistance to the Afghan Interim Authority for the maintenance of security in Kabul and the surrounding areas. NATO took over the mission in 2003, which has gradually expanded to cover the entire territory of Afghanistan. Its U.N. mandate is related to “peace enforcement,” which is described as assisting the Afghan government in extending its authority and creating a secure environment.² U.N.S.C. Resolution 1510 (2003) authorized the expansion of the ISAF mandate

to allow it . . . to support the Afghan Transitional Authority and its successors in the maintenance of security in areas of Afghanistan outside of Kabul and its environs, so that the Afghan Authorities as well as the personnel of the United Nations and other international civilian personnel engaged, in particular, in reconstruction and humanitarian efforts, can operate in a secure environment, and to provide security assistance for the performance of other tasks in support of the Bonn Agreement [creating an international framework for the establishment of an elected government in Afghanistan].

Under a Military Technical Agreement negotiated by ISAF and the Afghan Interim Authority, ISAF has the authority, “without interference or permission, to do all that the Commander judges necessary and proper, including the use of military force, to protect the ISAF and its Mission.”

Annexed to the Military Technical Agreement is a document entitled “Arrangements Regarding the Status of the International Security Assistance Force.” It provides that all ISAF and supporting personnel are subject to the exclusive jurisdiction of their respective national elements for criminal or disciplinary offences, no matter where such conduct takes place. In addition, such personnel are immune from arrest or detention by Afghan authorities, and may not be turned over to any international tribunal or any other entity or State without the express consent of the contributing nation.

In March of 2006, NATO and the Islamic Republic of Afghanistan signed a “Declaration of Afghanistan's Long Term Cooperation and Partnership with NATO” to formalize the NATO presence in Afghanistan.³ It does not expressly address the status of NATO forces in Afghanistan, but a status of forces agreement (SOFA) seems likely to be part of any final agreement.

OEF. Operation Enduring Freedom is the U.S.-led coalition formed to combat terrorism after 9/11. It does not operate under a formal U.N. mandate, although the U.N. Security Council has effectively condoned its mission, first, by implicitly recognizing that

¹ U.N.S.C. Res. 1386 (Dec. 20, 2001).

² See NATO Topics: NATO in Afghanistan Fact Sheet, [<http://www.nato.int/issues/afghanistan/040628-factsheet.htm>].

³ Available at the Ministry of Foreign Affairs website, [<http://www.mfa.gov.af/documents.asp>].

the use of force was appropriate in response to the September 11, 2001 terrorist attacks,⁴ and later, by calling upon ISAF to “work in close consultation with” Operation Enduring Freedom in carrying out its mandate.⁵ In 2007, the Security Council provided even more explicit support for OEF, calling upon the Afghan Government, “with the assistance of the international community, including the International Security Assistance Force and Operation Enduring Freedom coalition, in accordance with their respective designated responsibilities as they evolve, to continue to address the threat to the security and stability of Afghanistan posed by the Taliban, Al-Qaida, other extremist groups and criminal activities....”⁶

The United States and the transitional government of Afghanistan concluded an agreement in 2002 regarding the status of U.S. military and civilian personnel of the U.S. Department of Defense present in Afghanistan in connection with cooperative efforts in response to terrorism, humanitarian and civic assistance, military training and exercises, and other activities.⁷ Such personnel are to be accorded “a status equivalent to that accorded to the administrative and technical staff” of the U.S. Embassy under the Vienna Convention on Diplomatic Relations of 1961.⁸ Accordingly, U.S. personnel are immune from criminal prosecution by Afghan authorities, and are immune from civil and administrative jurisdiction except with respect to acts performed outside the course of their duties.⁹ The Islamic Transitional Government of Afghanistan¹⁰ explicitly authorized the U.S. government to exercise criminal jurisdiction over U.S. personnel, and the government of Afghanistan is not permitted to surrender U.S. personnel to the custody of another state, international tribunal, or any other entity without consent of the U.S. government. The agreement does not appear to provide immunity for contract personnel.

The agreement with Afghanistan does not expressly authorize the United States to carry out military operations within Afghanistan, but it recognizes that such operations are “ongoing.” Congress authorized the use of military force there (and elsewhere) by joint resolution in 2001, for targeting “those nations, organizations, or persons [who] planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001. . . .”¹¹ While there is no explicit U.N. mandate authorizing the OEF, Security Council resolutions appear to provide ample recognition of the legitimacy of its operations, most recently by calling upon the Afghan Government, “with the assistance of the international

⁴ U.N.S.C. Res. 1368 (Sep. 12, 2001) (“Recognizing the inherent right of individual or collective self-defence in accordance with the [UN] Charter,” and expressing its “readiness to take all necessary steps to respond to the terrorist attacks”).

⁵ See U.N.S.C. Res. 1776 § 5 (Sep. 19, 2007); U.N.S.C. Res. 1707 § 4 (2007).

⁶ U.N.S.C. Res. 1746 § 25 (2007).

⁷ T.I.A.S. Exchange of notes September 26 and December 12, 2002 and May 28, 2003. Entered into force May 28, 2003.

⁸ *Id.*

⁹ Vienna Convention on Diplomatic Relations of April 18, 1961, T.I.A.S. 7502; 23 U.S.T. 3227.

¹⁰ The transitional government has since been replaced by the fully elected Government of the Islamic Republic of Afghanistan. For information about the political development of Afghanistan since 2001, see *Afghanistan: Government Formation and Performance*, CRS Report RS21922, by Kenneth Katzman.

¹¹ P.L. 107-40 (September 18, 2001); 115 Stat. 224.

community, including the International Security Assistance Force and Operation Enduring Freedom coalition, in accordance with their respective designated responsibilities as they evolve, to continue to address the threat to the security and stability of Afghanistan posed by the Taliban, Al-Qaida, other extremist groups and criminal activities....”¹² The Security Council has also called upon the ISAF to “work in close consultation with” Operation Enduring Freedom in carrying out its force mandate.¹³

On May 23, 2005, President Hamid Karzai and President Bush issued a “joint declaration” outlining a prospective future agreement between the two countries.¹⁴ It envisions a role for U.S. military troops in Afghanistan to “help organize, train, equip, and sustain Afghan security forces” until Afghanistan has developed its own capacity, and to “consult with respect to taking appropriate measures in the event that Afghanistan perceives that its territorial integrity, independence, or security is threatened or at risk.” The declaration does not mention the status of U.S. forces in Afghanistan, but a status of forces agreement can be expected to be part of the final arrangement.

Iraq

U.S. military operations in Iraq are congressionally authorized pursuant to H.J. Res. 114 (P.L. 107-243), which authorizes the President to use the armed forces of the United States

as he determines to be necessary and appropriate in order to - (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.

H.J. Res. 114 appears to incorporate future resolutions concerning Iraq that may be adopted by the Security Council as well as those adopted prior to its enactment. The authority also appears to extend beyond compelling Iraq’s disarmament to implementing the full range of concerns expressed in those U.N. resolutions in connection with the reconstruction efforts and establishment of an elected government, as well as for the broad purpose of defending “the national security of the United States against the continuing threat posed by Iraq.”

Despite the initial lack of consensus among Security Council members regarding whether its previous resolutions concerning Iraq and Kuwait authorized enforcement by military means, the Security Council adopted subsequent resolutions recognizing the occupation of Iraq and generally supporting the coalition’s plans for bringing about a democratic government in Iraq.¹⁵

The first of these, Resolution 1511 (Oct. 16, 2003), recognized the Coalition Provisional Authority (CPA) but underscored the temporary nature of its obligations and

¹² U.N.S.C. Res. 1746 § 25 (2007).

¹³ See U.N.S.C. Res. 1776 § 5 (Sep. 19, 2007); U.N.S.C. Res. 1707 § 4 (2007).

¹⁴ [<http://www.mfa.gov.af/Documents/ImportantDoc/US-Afghanistan%20Strategic%20Partnership%20Declaration.pdf>].

¹⁵ For an overview of the process, see *Iraq: Post-Saddam Governance and Security*, CRS Report RL31339, by Kenneth Katzman.

authorities under international law. In paragraph 13, Resolution 1511 provided a mandate for coalition forces, authorizing

a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq, including for the purpose of ensuring necessary conditions for the implementation of the timetable and programme [for establishing a permanent government in Iraq] as well as to contribute to the security of the United Nations Assistance Mission for Iraq, the Governing Council of Iraq and other institutions of the Iraqi interim administration, and key humanitarian and economic infrastructure.

The Security Council included in Resolution 1511 a commitment to “review the requirements and mission of the multinational force . . . not later than one year from the date of this resolution, and that in any case the mandate of the force shall expire upon the completion of the [electoral process outlined previously],” at which time the Security Council would be ready “to consider . . . any future need for the continuation of the multinational force, taking into account the views of an internationally recognized, representative government of Iraq.” Subsequent resolutions have extended the mandate pursuant to requests by the Iraqi government.

The Security Council Resolutions do not provide for the immunity of coalition troops from Iraqi legal processes. No SOFA was deemed possible prior to the recognition of a permanent government in Iraq. Immunity for coalition soldiers, contract workers, and other foreign personnel in Iraq in connection with security and reconstruction was established by order of the CPA, which relied for its authority on the laws and usages of war (as consistent with relevant U.N. Security Council resolutions.) CPA Order 17, Status of the Coalition Provisional Authority, MNF - Iraq, Certain Missions and Personnel in Iraq,¹⁶ established that all personnel of the multinational force (MNF) and the CPA, and all International Consultants, are immune from Iraqi legal process, which are defined to include “arrest, detention or proceedings in Iraqi courts or other Iraqi bodies, whether criminal, civil, or administrative.” Such persons are expected to respect applicable Iraqi laws, but are subject to the exclusive jurisdiction of their “Sending States.” States contributing personnel to the multinational force have the right to exercise within Iraq any criminal and disciplinary jurisdiction conferred on them by their domestic law over all persons subject to their military law.

In June, 2004, in anticipation of the dissolution of the CPA and handover of sovereignty to the Interim Government of Iraq, the Security Council adopted Resolution 1546, which reaffirmed and extended the authorization for the multinational force at the request of the incoming Interim Government of Iraq. Resolution 1546 incorporated letters from U.S. Secretary of State Colin Powell and Prime Minister of the Interim Government of Iraq Dr. Ayad Allawi. With respect to the status of coalition forces, Secretary Powell wrote:

In order to continue to contribute to security, the MNF must continue to function under a framework that affords the force and its personnel the status that they need to accomplish their mission, and in which the contributing states have responsibility for exercising jurisdiction over their personnel and which will ensure arrangements for, and use of assets by, the MNF. The existing framework governing these matters

¹⁶ Available online at [http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf]

is sufficient for these purposes. In addition, the forces that make up the MNF are and will remain committed at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions.

Prior to the handover of sovereignty to the interim government, Ambassador Bremer issued CPA Order 100 to revise existing CPA orders, chiefly by substituting the MNF-I for the CPA and otherwise reflecting the new political situation.¹⁷ CPA Order 100 stated as its purpose

to ensure that the Iraqi Interim Government and all subsequent Iraqi governments inherit full responsibility for these laws, regulations, orders, memoranda, instructions and directives so that their implementation after the transfer of full governing authority may reflect the expectations of the Iraqi people, as determined by a fully empowered and sovereign Iraqi Government.¹⁸

At the time of the handover of authority, the Transitional Administrative Law of Iraq (TAL)¹⁹ came into force as the temporary constitution of Iraq. Under Article 26 of the TAL,

The laws, regulations, orders, and directives issued by the Coalition Provisional Authority pursuant to its authority under international law shall remain in force until rescinded or amended by legislation duly enacted and having the force of law.

Accordingly, CPA Order 17 (as revised) survived the transfer of authority to the Iraqi Interim Government, which took no action to amend or rescind it. Iraq's permanent constitution was ratified in 2005. Laws in existence prior to the adoption of the permanent constitution continued in force unless expressly annulled, or subsequently repealed or amended, presumably including CPA Orders that were not rescinded by the Transitional Government.

Late last year, the U.N. Security Council extended the mandate for the multinational forces until December 31, 2008²⁰ based on Iraqi Prime Minister al-Maliki's request to extend the MNF mandate "one last time," under the proviso that "the extension is subject to a commitment by the Security Council to end the mandate at an earlier date if the Government of Iraq so requests and that the mandate is subject to periodic review before June 2008."²¹

By its terms, CPA Order 17 remains in force for the duration of the U.N. mandate and terminates only after the departure of the final element of the MNF from Iraq, or at such time as it is rescinded or amended by duly-enacted legislation having the force of law.²² Neither it nor CPA Order 100 establishes a timetable for the departure of all MNF elements from Iraq

¹⁷ CPA Order 100, Transition of Laws, Regulations, Orders, and Directives Issued by the Coalition Provisional Authority, June 28, 2004, available at [http://www.cpa-iraq.org/regulations/20040628_CPAORD_100_Transition_of_Laws_Regulations_Orders_and_Directives.pdf].

¹⁸ *Id.* § 1.

¹⁹ Law of Administration for the State of Iraq for the Transitional Period, 8 March 2004, available at [<http://www.cpa-iraq.org/government/TAL.html>].

²⁰ U.N.S.C. Res. 1790 (Dec. 18, 2007).

²¹ Letter from Nuri Kamel al-Maliki, Prime Minister of the Republic of Iraq, to the Security Council, attached as Annex I to U.N.S.C. Res. 1790.

²² CPA Order 17, *supra* note 16, § 20.

after the U.N. mandate ends. Order 17 could be interpreted to expire concomitantly with the U.N. mandate, because it defines Multinational Force with reference to the U.N. resolutions.²³ However, the order appears to have been designed to stay in force for a time after the expiration of the U.N. mandate, for a long enough period at least to allow the departure of all MNF personnel. If the U.N. Security Council or the Iraqi government adopts a timetable for the departure of the MNF, it seems logical that CPA Order 17 would continue in force until the deadline for departure passes. On the other hand, if the government of Iraq invites the United States or any other coalition government to maintain troops in Iraq after the U.N. mandate terminates, it may be politically expedient for the Iraqi government to continue to recognize CPA Order 17 until a new agreement establishing the role and status of such troops is reached.

It bears emphasis that the foregoing is subject to the sole interpretation of the Iraqi government. Whether the immunity of coalition troops and other personnel will continue in force after the U.N. mandate expires may depend on whether the Iraqi government deems them to be part of elements of the MNF that have not yet departed or military forces that have overstayed their mandate. Even more significantly, the Iraqi legislature could decide to repeal, amend, or possibly extend the order at any time, even before the U.N. mandate expires.

Another question regarding the status and role of U.S. forces in Iraq post-U.N. mandate is whether the congressional authorization to use military force will also end. H.J. Res. 114 does not contain explicit time requirements or call for the withdrawal of U.S. troops by any specific date or set of criteria. Presumably, continued force is authorized under the resolution only so long as Iraq poses a continuing threat to the United States and the U.S. military presence is not inconsistent with relevant U.N. resolutions. Because the specific threats posed by Iraq during Saddam Hussein's regime that were emphasized in the preamble to H.J. Res. 114 no longer exist (with the possible exception of the presence of al Qaida in Iraq), it may be argued that Iraq no longer poses a danger to the security of the United States, at least, not of the same kind that led Congress to pass H.J. Res. 114 in the first place. Once the U.N. mandate for the multinational forces in Iraq expires (and assuming that the U.N. Security Council does not adopt new language supporting a U.S. military role in Iraq), it is arguable that the U.S. use of military force in Iraq is not necessary or appropriate to enforce U.N. Security Council resolutions regarding Iraq. Such conclusions do not necessarily support a view that U.S. troops are automatically required to be withdrawn when the U.N. mandate expires,²⁴ but suggest that new legislation may be necessary to support a new role for U.S. troops under a possible agreement with Iraq.

²³ *Id.* § 1 (defining MNF to mean “the force authorized under U.N. Security Council Resolutions 1511 and 1546, and any subsequent relevant U.N. Security Council resolutions”).

²⁴ For an analysis of Congress's role in shaping the mission in Iraq, see generally *Congressional Authority to Limit U.S. Military Operations in Iraq*, CRS Report RL33837, by Jennifer K. Elsea, Michael John Garcia, and Thomas J. Nicola.