

Committee on Foreign Affairs
*Subcommittee on International Organizations,
Human Rights, and Oversight*

Memorandum
November 18, 2008

TO: Members, Committee on Foreign Affairs

FROM: Bill Delahunt, Chairman
Subcommittee on International Organizations,
Human Rights, and Oversight

SUBJECT: Hearing on “**Renewing the United Nations Mandate for Iraq:
Plans and Prospects**”
Wednesday, November 19, 2008, at 10:00 a.m. in 2175
Rayburn House Office Building

This is the eighth in a series of hearings by the Subcommittee on International Organizations, Human Rights, and Oversight on various aspects of security arrangements and combat authority for U.S. forces in Iraq – ranging from the existing UN Mandate to the draft bilateral agreement now under consideration by the Iraqi Parliament. This memorandum provides a timeline for those hearings and other Subcommittee and administration actions, and addresses a number of key questions:

- If the bilateral security agreement is not consummated by the current Mandate’s expiration date of December 31, 2008, is it politically possible for Iraq to seek and receive a renewal of the UN Mandate -- which currently provides both domestic and international combat authority and legal immunities to U.S. forces?
- Can the bilateral agreement be legally consummated without the approval of the U.S. Congress?
- What level of approval by the Iraqi Parliament (two-thirds or one-half) is required for the bilateral agreement to be legally consummated?

Timeline of Administration and Subcommittee Action

November 26, 2007 – President Bush and Prime Minister al-Maliki sign a “Declaration of Principles for a Long-Term Relationship,” pledging to negotiate by July 2008 a series of bilateral commitments that would replace the UN Mandate when it expires at the end of 2008, as well as terminate other obligations placed on Iraq by the UN Security Council since 1990. This document envisions a wide-ranging set of commitments covering political, economic, and security spheres. Key excerpts from the Declaration imply a U.S. commitment to engage in combat on behalf of the Iraqi Government against foreign and internal enemies, as well as against a coup.

December 5, 2007 – Chairman Delahunt sends a letter to the administration asking its position on the claim by a majority of Iraqi Members of Parliament that they must approve any extension of the UN Mandate.

December 18, 2007 – UN Security Council approves one-year renewal of the Mandate for Multinational Forces in Iraq, to expire on December 31, 2008.

December 19, 2007 – Subcommittee hearing titled “*The Extension of the United Nations Mandate for Iraq: Is the Iraqi Parliament Being Ignored?*” Testimony at this first hearing indicates that the renewal of the UN Mandate was requested by Prime Minister al-Maliki and the Iraqi executive branch over the opposition of a majority of the Iraqi Council of Representatives, or parliament. The parliamentarians signed a letter and passed legislation stating that the Iraqi Constitution required parliamentary approval of “international treaties and agreements” of this nature, and calling for the inclusion of a timetable for the withdrawal of U.S. troops. Testimony also demonstrates that the Maliki Government repeatedly stated its intention to seek parliamentary approval of the request for an extension of the UN Mandate, but failed to do so.

January 10, 2008 – State Department responds in writing to the Chairman’s letter of December 5, stating that it considers the Iraqi request for an extension valid without the approval of Parliament.

January 23, 2008 – Subcommittee hearing held jointly with the Subcommittee the Middle East and South Asia, and titled: “*The Proposed U.S. Security Commitment to Iraq: What Will Be in it and Should it Be a Treaty?*” Testimony at this second hearing reveals broad agreement among the witnesses that any agreement that included commitments to defend the Government of Iraq against internal and external enemies, as promised in the

November 26 Declaration of Principles, would require the approval of both Houses as a congressional-executive agreement, or ratification by the Senate as a treaty. In addition, testimony indicates that the Administration has not yet taken a series of consultative steps with Congress that are required by both law and regulation at the beginning of any “significant” international negotiation.

February 8, 2008 – Subcommittee hearing titled: “*The November 26 Declaration of Principles: Implications for UN Resolutions on Iraq for Congressional Oversight.*” Testimony was taken from public witnesses with expertise on U.S. law and UN procedures.

February 8, 2008 – Chairman Delahunt sends a letter to President Bush asking for the administration’s interpretation of the source of its legal authority to engage in combat in Iraq.

February 28, 2008 – Subcommittee hearing titled: “*Status of Forces Agreements and UN Mandates: What Authorities and Protections Do They Provide to U.S. Personnel?*” Testimony was taken from Congressional Research Service lawyers, including SOFA expert Chuck Mason, who reviewed existing SOFAs and found none that included “authority to fight.”

March 4, 2008 -- Subcommittee hearing held jointly with the Subcommittee the Middle East and South Asia, and titled “*Declaration and Principles: Future U.S. Commitments to Iraq.*” Testimony was taken from Ambassador David Satterfield, the State Department’s lead negotiator on the bilateral agreement.

March 17, 2008 – State Department responds to the Chairman’s letter of February 8 with a letter rejecting the previous testimony of public legal scholars, who had argued that U.S. domestic combat authority would expire with the UN Mandate.

June 4, 2008 -- Subcommittee briefing titled: *The Future of U.S.-Iraqi Relations: The Perspective of the Iraqi Parliament*” This briefing featured testimony from two Iraqi Members of Parliament, Sheik Khalaf al-Ulawayan and Professor Nadeem al-Jaberi. They presented a letter signed by members of Parliament representing a majority of the parliament, which stated that a two-thirds’ majority would be needed to affirm an international agreement.

July 23, 2008 -- Subcommittee hearing titled: “*Possible Extension of the UN Mandate for Iraq: Options.*” Testimony is taken from public witnesses on Iraqi public opinion on various options for continued U.S. involvement. In a

briefing after the hearing, current Member of Parliament and former interim Prime Minister of Iraq Ayad Allawi testifies on his party's willingness to accept an extension of the UN Mandate.

October 29, 2008 -- Chairman Delahunt and Representative Rosa DeLauro send a letter to President Bush asking for immediate attention to laying the groundwork at the United Nations for a renewal of the UN Mandate.

November 2008 – U.S. and Iraqi negotiators announce concurrence on the security agreement; the Iraqi cabinet re-opens negotiations with over 100 suggested changes; the administration and Iraqi negotiators agree on a new document, which is approved by the Iraqi Cabinet on November 16 and signed by U.S. Ambassador Ryan Crocker and Iraqi Foreign Minister Hoshyar Zebari and submitted to the Iraqi Parliament on November 17. First readings are held that day in Parliament of a bill approving the agreement and a bill establishing the constitutional process for approving international agreements.

Is a UN Mandate Renewal a Viable Option?

1. Iraqi Foreign Minister Hoshyar Zebari, September 11, 2008, interviewed by the Saudi newspaper Asharq al-Awsat:

“If such an agreement is not signed – which is a possibility – the alternative would be for the United States to go to the Security Council in agreement with the Iraqi government. **We may request that the Security Council resolution be extended for one year...If an extension takes place, it will be a routine one.** However, if the Iraqi government asks for amendments and changes on the resolution, I believe that the United State will use its veto power.”

2. Dr. Omar Abdelsattar Al-Karbuli, Member of Parliament from the Islamic Party (part of the Iraqi Accord Front), November 17, 2008, from the website of the Islamic Party:

Al-Karbuli said that "many complications will stand in the way of the passing of the security agreement with the U.S. in parliament."

Al-Karbuli added, "The Council of Representatives has not passed the law on treaties and agreements, in addition to lack of clarity on the voting process and applying the law to the agreement by the parliamentarians."

Al-Karbuli clarified that "**The Accord Front opposes the passage of the**

agreement at this time, and supports working towards extending the mission of the U.S. forces through a UN mandate. After the mandate is extended, negotiations on the agreement should be resumed."

Al-Karbuli said that "giving the parliament one week to vote on the agreement is not enough and does not allow a clear discussion of the articles of the agreement." He added that he expects "the government parties to put great effort into getting the agreement passed in the parliament next week."

3. Current Member of Parliament and former Interim President of Iraq Dr. Ayad Allawi, July 23, 2008, in testimony before the Subcommittee:

"Extension of the UN Security Council resolution under Chapter 7 is an option, but may be unacceptable in Iraq. A second option is a UN Security Council resolution, but under Chapter 6. This option and its ramifications need to be studied carefully because we are concerned about the protection of Iraqi assets from claims by international creditors. **Either one of these two temporary options would give us more time to negotiate a more permanent agreement in a transparent, cooperative manner."**

"It is necessary to consider and present alternative legislation that promotes the position of Iraq and its national unity. Another concept that should be considered is proposing legislation that would either renew the UNSC resolution, even if some minor adjustments were made to it, or proposing legislation that contains a bundle of three interdependent decisions:

- (a) Signing a strategic agreement with minor adjustments (different from SOFA) that will be presented along with but separate from SOFA.
- (b) Issuing a joint declaration to discuss SOFA during a year or the next year.
- (c) **Extending the UN mandate for another six months or one year."**

4. Current Member of Parliament and former Interim President of Iraq Dr. Ayad Allawi, November 14, 2008, in a letter to Chairman Delahunt:

"Therefore we believe for any bilateral agreement to be signed it would be better to be done after the withdrawal of the American troops, when

Iraq is fully qualified and when the government is in a position to defend the interests of the Iraqi people. We are also concerned about the expediency and acceleration of signing this agreement, because there has been very little time that has elapsed since the Declaration of Principles and until this agreement is to be signed, and I do not believe it is appropriate, it may not be convenient at this time, for the United States as it is beginning to change its administration -- and therefore I ask when we look into this agreement that it be delayed until a more convenient time.”

5. Member of Parliament Dr. Nadim al-Jaberi, June 4, 2008, in testimony before the Subcommittee:

“Iraqi officials have said they would seek a renewal of the UN mandate if the pact, which would allow American troops to stay in Iraq through 2011, is not passed by parliament by the end of the year.”

-- Associated Press news story, November 14, 2008.

<http://www.freep.com/article/20081114/NEWS07/81114052/1009/NEWS07>

Is Congressional Approval Required?

1. This statement appears on *President-elect Obama's* transition website:

Obama and Biden believe it is vital that a Status of Forces Agreement (SOFA) be reached so our troops have the legal protections and immunities they need. Any SOFA should be subject to Congressional review to ensure it has bipartisan support here at home.

2. On August 1, 2008, *Senator Biden* introduced a bill (S. 3433) with *Senators Chuck Hagel, Robert Casey, George Voinovich, and Jim Webb* that requires congressional approval and urges an extension of the UN Mandate for Iraq until such approval is obtained:

“Prohibition on Entry Into Force of Certain Agreements- No agreement containing a security commitment to, or **security arrangement with, the Republic of Iraq, may enter into force** except pursuant to Article II, section 2, clause 2 of the Constitution of the United States (relating to the making of treaties) or unless authorized by a law enacted on or after the date of the enactment of this Act pursuant to Article I, section 7, clause 2 of the Constitution (relating to the enactment of laws).”

“The notion that Iraq’s leaders plan to submit the agreement to their Parliament – but our President does not – makes no sense,” *Senator Biden* said in a press release. “The President cannot make such a sweeping commitment on his own authority. Congress must grant approval first.”

3. On December 6, 2007, *Senator Hillary Clinton* introduced a bill (S. 2426) that has been cosponsored by *Senator Obama* and 12 other Senators that requires congressional approval of any security agreement with Iraq “involving ‘commitments or risks affecting the nation’”:

“Prohibition on Use of Funds To Carry Out Certain Agreements- **No funds may be authorized or appropriated to carry out any bilateral agreement between the United States and Iraq** involving ‘commitments or risks affecting the nation as a whole’, including a status of forces agreement (SOFA), that is not a treaty approved by two-thirds of the Senate under Article II of the Constitution or authorized by legislation passed by both houses of Congress.”

4. On March 13, 2008, *Chairman Delahunt* introduced H.R. 5626, which is cosponsored by *Representative Rosa DeLauro* and 14 other Members of Congress, which would require congressional approval of any security agreement with Iraq and urges the Administration to support an Iraqi request for an extension of the UN Mandate (*Ms. DeLauro* had previously introduced a similar bill, H.R. 4959):

“No funds appropriated or otherwise made available to any department or agency of the United States may be used--

(1) to establish or maintain any permanent or long-term United States military base or facility in Iraq; or

(2) **to implement any agreement that is consistent with the security commitments of the United States to Iraq under the Declaration of Principles**, including the security commitments described in subparagraphs (A) through (C) of section 1(2) of this Act, or **any agreement that provides ‘authority to fight’ for United States Armed Forces engaged in combat operations**, other than for self-defense purposes, unless the agreement is in the form of a treaty with respect to which the Senate has given its advice and consent to ratification under Article II of the Constitution of the United States or the agreement is approved by an Act of Congress enacted after the date of the enactment of this Act.”

5. On May 22, 2008, an amendment by *Representative Barbara Lee* to require congressional approval of any security agreement with Iraq passed the House by a vote of 234 to 183 (*Ms. Lee* also introduced a bill with a similar prohibition, H.R. 6846, on September 9, 2008, which has eight co-sponsors):

“No provision of any agreement between the United States and Iraq described in section 1212 (a)(1)(A)(iv) **shall be in force with respect to the United States** unless the agreement--

(1) is in the form of a treaty requiring the advice and consent of the Senate (or is intended to take that form in the case of an agreement under negotiation); or

(2) is specifically authorized by an Act of Congress enacted after the date of the enactment of this Act.”

6. On March 4, 2008, constitutional scholar *Professor Oona Hathaway* (then of the Yale Law School but now of the Berkeley Law School) testified that before the Subcommittee that:

“(A)n agreement that would provide authority to engage in military action in Iraq would exceed the President’s own constitutional authority and thus **must be approved by Congress.**”

On November 7, 2008, Ms. Hathaway indicated in a memorandum to me that the proposed agreement is not a traditional, executive branch Status of Forces Agreement (SOFA) and would require congressional approval for two reasons -- its provision of combat authority that only Congress can provide once the UN Mandate expires, and the involvement of another country in the approval of U.S. military operations:

“Domestic legal authority to engage in military operations in Iraq expires on December 31, 2008. **The bilateral agreement does not replace that authority unless it is approved by Congress.**”

“The administration has argued that the bilateral agreement with Iraq may be concluded by the President as a sole executive agreement because it is simply a status of forces agreement (SOFA), more than a hundred of which have been concluded as sole executive agreements. That is, however, not correct. Although this agreement has been called a SOFA, it includes provisions that have never been a part of any prior SOFA of which I am aware—most notably, provisions

granting the authority for U.S. troops to engage in military operations, the grant of power over military operations to a joint U.S.-Iraq Committee, and a specification of timetables for military operations. **These non-traditional extra-SOFA commitments go beyond the President's own constitutional authority and must be approved by Congress.**"

7. On February 20, 2008, legal specialist *Chuck Mason of the Congressional Research Service* concluded from his review of scores of Status of Forces Agreements (SOFAs) that the proposed agreement would be unique among SOFAs if it provided combat authority:

"Authority to Fight: **SOFAs do not generally authorize specific military operations by U.S. forces....** While SOFAs do not generally provide authority to fight, the inherent right of self-defense is not impacted or diminished either."

Is Two-thirds or One-half the Standard for Approval by the Iraqi Parliament?

1. Article 61 of the Iraqi Constitution states:

"The Council of Representatives specializes in the following:

....Fourth: A law shall regulate the ratification of international treaties and agreements by a two-thirds majority of the members of the Council of Representatives."

http://www.washingtonpost.com/wp-dyn/content/article/2005/10/12/AR2005101201450_pf.html

2. "The Iraqi constitution determines that the Council of Representatives must first enact a law to ratify the Law of Treaties and Agreements, and must vote or pass this law through parliament by a two-thirds majority. This law will take long time to pass due to the two-thirds requirement, so it will not be enacted before the end of this year. We are constitutionally barred from ratifying any agreements without the enactment of this law and the law has not been enacted so far.

The negotiating team is not authorized to take any decision until they go back to Mr. Prime Minister. If he approves it, it will be sent to the Political Council for National Security, and if it is approved by the

Political Council for National Security with two-thirds majority, then they can send it to the parliament. The parliament must wait until it enacts the law to ratify international treaties and agreements, then we can submit the U.S.-Iraqi agreement to the parliament after the approval of this law.”

-- Dr. Mahmoud Al-Mashhadani, Speaker of the Iraqi Parliament, interviewed by the satellite news service al-Arabiya, August 31, 2008.

<http://www.alarabiya.net/programs/2008/08/31/55777.html>

3. “The decision to accept or reject the agreement will require a long time for reasons related to the legal proceedings that the agreement must go through. Ratifying the agreement will require a 2/3 majority vote of members of parliament.”

-- Khalid Shuwani, Member of Parliament, Legal Committee, October 25, 2008

<http://www.annabaa.org/nbanews/72/012.htm>

4. “We were also very concerned when this agreement was not going to be proposed in front of part of the Iraqi parliament, and this goes against the Iraqi constitution. And you cannot put any agreement into application in Iraq in accordance with the constitution unless you have majority or 2/3rds approval in parliament. Therefore not presenting it to parliament might be a factor in the agreement failing.”

-- Dr. Nadim al-Jaberi, Member of Parliament, June 11, 2008, in testimony before the Subcommittee.

5. “We, the undersigned members of the council, wish to confirm your concerns that any international agreement that is not ratified by the Iraqi legislative power is considered unconstitutional and illegal, in accordance with the current rulings and laws of the Iraqi Republic. Furthermore, any treaty, agreement, or “executive agreement” that is signed between Iraq and the United States will not be legal and will not enter the stage of implementation without first being ratified by the Council of Representatives, in accordance with section four of article 61 of the Iraqi constitution...”

-- Letter to Chairman Bill Delahunt, signed by parliamentarians representing a majority of the Iraqi Parliament, May 29, 2008.

6. "Section four of Article 61 stipulates that the Parliament shall enact a law by a two-thirds majority vote to regulate the approval of international treaties and agreements. Apparently, no such law has been enacted. The law regulating the approval of international treaties and agreements is a procedural one, and does not affect the basic constitutional duty of Parliament to approve all international treaties and agreements. In the absence of such a law, each time the Parliament approves an international treaty or agreement the act of approval becomes itself the procedural law for that specific treaty or agreement and requires therefore a two-thirds majority vote."

-- Issam Michael Saliba, Senior Foreign Law Specialist, Law Library of Congress, in testimony before the Subcommittee, December 19, 2007.

7. "According to the Iraqi Constitution, it is the job of the Iraqi Council of Representatives, the Iraqi Parliament, to ratify international treaties. This requires a two-thirds margin of support. Then the measure goes to the President to ratify the treaty, although such treaties are considered ratified after 15 days."

-- Michael Rubin, PhD, resident scholar, American Enterprise Institute for Public Policy Research, December 19, 2007, in testimony before the Subcommittee.

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