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

I have been asked to provide a description of the authorities and protections provided to U.S. personnel by status of forces agreements and UN mandates. I have also been asked to comment specifically on the role and content of the instruments that govern the status of U.S. forces in Afghanistan and Iraq.

In general, U.S. forces have sometimes been deployed pursuant to a UN mandate; but more often they have been deployed either by agreement of the state concerned, or without such agreement in the exercise of U.S. rights under international law. Wherever possible, the United States will typically wish to have some form of agreement or other instrument in place regulating the status of its forces when deployed for a significant period in foreign countries, so as to ensure that they have appropriate privileges and immunities from foreign law and jurisdiction.

UN Mandates

Two different types of armed forces are deployed under UN authority. First are peacekeeping forces under direct UN command, consisting of national units contributed by UN member states. Such forces may be authorized by decision of the Security Council under Chapter VI of the UN Charter, which requires the consent of the state or states into which the force is deployed; or this may be done under Chapter VII of the Charter, pursuant to a decision by the Council that there is a threat to the peace, in which case

the consent of the states concerned is not technically required.¹ According to the UN, there are currently 17 such peacekeeping operations.²

In the alternative, the Council may act under Chapter VII to authorize states, coalitions or regional organizations to deploy forces under their own command to deal with a threat to the peace. This, for example, was done in the case of the 1990-91 Gulf War, the 1992-93 intervention in Somalia, and the 1994 intervention in Haiti. The UN might exercise little or no control over such an operation once it is authorized.³

In either case, when the Security Council authorizes the operation, it will set forth the mandate of the force being authorized. In some cases, this mandate is general and open-ended; for example, the mandate for the Gulf War coalition was “to use all necessary means to uphold and implement” the Council’s previous resolutions on Iraq and to “restore international peace and security in the area.”⁴ In other cases, the mandate may be more detailed and restrictive.

Typically, however, the UN mandate will not attempt to spell out the status, privileges and immunities of the force authorized with respect to the law and jurisdiction of the state or states to which it is deployed. That is typically left to separate agreement with the state or states in question, or in the case of a hostile operation where such agreement is not possible, to the international law of belligerent occupation.

Status of Forces Agreements

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

¹ In the early years of the UN, forces were sometimes deployed pursuant to authorization by the UN General Assembly (under the so-called Uniting for Peace Resolution), but this practice has long since fallen into disuse, and all peacekeeping forces in recent decades have been authorized by the Security Council. See M. Matheson, Council Unbound: The Growth of UN Decision Making on Conflict and Postconflict

Issues after the Cold War (2006), Chapter 4.
² See <http://www.un.org/Depts/dpko/dpko/bnote.htm>.

³ See M. Matheson, Council Unbound, note 1 above, Chapter 5.
⁴ UN Security Council Resolution 678 (1990).

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.⁵

Although these agreements are generically referred to as Status of Forces Agreements or SOFAs, there is no uniform model or format. The NATO SOFA took the form of a treaty;⁶ some SOFAs have been agreements implementing prior mutual defense treaties;⁷ but a great many take the form of executive agreements concluded under the President's own Constitutional authority. If the agreement is limited to giving U.S. forces and personnel exemption from foreign law, the President may conclude it without further Congressional approval.

SOFAs 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.

⁵ Condoleezza Rice and Robert Gates, "What We Need Next in Iraq", *Washington Post*, February 12, 2008.

⁶ 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.

⁷ 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.

Often the SOFA is only one of a series of agreements with the host country that define and facilitate the overall U.S. security relationship with that country. There may, for example, be agreements for military assistance, arms sales, bases, economic assistance and other matters. There may also be joint declarations or other political documents that describe the overall relationship and the foreign policy objectives of the two countries.

Afghanistan

The current situation in Afghanistan is complicated by the fact that two separate forces are operating in the country: the International Security Assistance Force (ISAF), a multinational force under NATO command authorized by the Security Council under Chapter VII; and the Operation Enduring Freedom force under U.S. command that has conducted military operations against Taliban and Al Qaeda elements since the initial U.S. intervention after 9/11.

ISAF was authorized by the Security Council in 2001 with the mandate “to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment.”⁸ This mandate was later expanded to the maintenance of security in other areas of Afghanistan, to the protection of other international civilian personnel, and to providing security assistance to the Afghan government.⁹ ISAF was directed to work in close consultation with the Operation Enduring Freedom coalition in the implementation of this mandate.¹⁰

The status of ISAF and its personnel is governed by a Military Technical Agreement concluded between ISAF and the Afghan government. Among other things, it authorizes ISAF “to do all that the [ISAF] Commander judges necessary and proper, including the use of military force” to protect ISAF and its mission, and guarantees ISAF “complete and unimpeded freedom of movement throughout the territory and airspace of Afghanistan.” Attached to the agreement is an annex that functions as a

⁸ UN Security Council Resolution 1386 (2001).

⁹ UN Security Council Resolution 1510 (2003).

¹⁰ UN Security Council Resolution 1563 (2004).

SOFA for ISAF and, among other things, provides ISAF personnel immunity from Afghan arrest, criminal jurisdiction and taxation.¹¹

The Operation Enduring Freedom force is governed by separate instruments. In 2005, Presidents Bush and Karzai signed a Joint Declaration of the United States-Afghanistan Strategic Partnership which describes the overall purposes and goals of the two countries. Among other things, it says that the United States will: “help organize, train, equip and sustain Afghan security forces”; “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”; and “continue to conduct counter-terrorism operations in cooperation with Afghan forces”. It states that “in order to achieve the objectives contained herein,” U.S. forces are to have access to various Afghan facilities and “are to continue to have the freedom of action required to conduct appropriate military operations based on consultations and pre-agreed procedures.”¹²

The status and immunities of this force are governed by an Agreement regarding the Status of United States Military and Civilian Personnel of the U.S. Department of Defense Present in Afghanistan, concluded by an exchange of notes in 2003. Among other things, it gives U.S. personnel the status of administrative and technical staff of the U.S. Embassy (which exempts them from Afghan criminal jurisdiction), and regulates exit and entry, uniforms and driving licenses, fees and inspections, contracts and claims. This agreement says that it is “without prejudice to the conduct of ongoing military operations by the United States”, language which does not actually authorize U.S. forces to conduct such operations, but may suggest the context in which the parties understood those forces would be operating.

Iraq

U.S. forces are present in Iraq as part of the Multinational Force (MNF) authorized by the Security Council under Chapter VII. 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”

¹¹ See <http://www.operations.mod.uk/isa/afmta.pdf>.

¹² See <http://www.whitehouse.gov/news/releases/2005/05/print/20050523-2.html>.

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 interment of their members, humanitarian assistance, civil affairs support, and relief and reconstruction.¹³

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 would not request a further extension of that mandate.¹⁴ (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.¹⁵

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

¹³ See UN Security Council Resolution 1546 (2004) and letters incorporated by reference.

¹⁴ UN Security Council Resolution 1790 (2007).

¹⁵ See http://www.w.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf.

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 temporarily extending CPA 17, 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, perhaps in a way similar to the provisions of the U.S.-Afghan Joint Declaration mentioned above. 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.¹⁶ 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.

¹⁶ See note 5 above.