

Statement of Ruth Wedgwood

Edward B. Burling Professor of International Law and Diplomacy
The Paul H. Nitze School of Advanced International Studies
Johns Hopkins University

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

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I appreciate the invitation by the distinguished acting chairman of this Subcommittee to comment briefly on so-called “Status of Forces Agreements” – in particular, their nature and purposes.

The role of “status of forces agreements” is a matter of importance to all American service members and their families, as well as to political leaders interested in the posture and protection of American armed forces around the globe.

Recent headlines concerning events on the Japanese island of Okinawa highlight the importance of providing safeguards both to American forces stationed abroad and to the civilian populations with whom they come in contact. So, too, the decision by the United States to recognize Kosovo as a newly independent nation, separate from Serbia, may pose the question of how to assure appropriate status and legal protections to American service members who will be stationed in Kosovo as part of NATO peacekeeping forces.

As this hearing suggests, the topic of Status of Forces Agreements is equally of interest in the context of the Subcommittee’s ongoing examination of a document entitled a “Declaration of Principles” – which was announced on November 26, 2007, by President George W. Bush and Iraqi Prime Minister Nouri Kamel Al-Maliki.

The Declaration of Principles was not styled as a binding legal agreement. But it is a declaration of independence and aspiration, addressing issues of principle taken seriously by any free and democratic country.

The Declaration of Principles was apparently designed to articulate various aspirations concerning the future relationship between the United States and the independent Republic of Iraq. The document cites a broad range of matters, including issues that the United States and Iraq could not effectively address without the cooperation of many other countries, such as enhancing the position of Iraq in regional and international organizations and helping Iraq to obtain debt forgiveness.

But perhaps most importantly, the Declaration of Principles records Iraq's assertion that it will soon return to "full sovereignty" – in particular, the independent status it enjoyed before Saddam Hussein chose to invade neighboring Kuwait and embroiled the world community in a difficult conflict. In the language of the Declaration, this would include "sovereignty ... over its territories, waters and airspace, and its control over its forces and the administration of its affairs."

Status of Force Agreements and Sovereignty

A status of forces agreement is, in fact, a manifestation of the full sovereignty of the state on whose territory it applies. In particular, this kind of agreement serves to structure the relationship between a sovereign host (often called a "receiving" state) and one or more so-called "sending" states whose forces are permitted to visit or be stationed on foreign territory.

Status of forces agreements (sometimes called "SOFAs") are widely used in modern international relations. Status of forces agreements govern the working relationship between states in the NATO alliance, as well as member states of the Partnership for Peace. Status of forces agreements govern and protect United Nations forces dispatched on peacekeeping and peace enforcement missions around the globe. Status of forces agreements also serve to structure bilateral relationships between states, where the two parties conclude there is a common interest in permitting the location of a military force, or a monitoring station, or a pre-positioning of supplies, or indeed, any other anticipated military function or presence. Even a joint military exercise may be governed by a status of forces agreement, where there is any presence on foreign territory.

In a United Nations peacekeeping operation, the status of forces will typically be based on a model U.N. status of forces agreement. However, in a Chapter 7 peace enforcement operation, the status of forces will not necessarily depend upon the consent of the state where they are deployed, since Chapter 7 resolutions have coercive power. For its part, the United States has attempted to assure that in United Nations mandates for peacekeeping and peace enforcement, there is an assurance that U.S. forces will not be subject to any assertion of international jurisdiction by a treaty court to which it has not assented.

Status of forces agreements can serve several purposes. In many respects, SOFA's are the military equivalent of diplomatic or consular immunity agreements. Status of forces agreements may describe the method of entry and departure of international troops. They may describe the division of legal authority in regard to any alleged misconduct. Typically, primary criminal and civil jurisdiction over any act of misconduct committed in the course of the performance of "official acts" is reserved to the so-called sending state, while jurisdiction over *private* acts of misconduct can be assumed by the receiving state. There may, however, be instances in which the sending state is primarily or exclusively responsible for both spheres.

A SOFA agreement often has procedures for handling any commercial claims that arise from the presence or activities of international troops. The provision of buildings and grounds, the applicability or inapplicability of local taxes, customs issues, foreign exchange regulations, and the hiring of local workers, are also typical features. Alongside its substantive provisions, a SOFA will typically provide a standing structure for consultation and settlement of any disputes between the state parties. The relationship between the receiving and sending states may also be structured by a basing agreement concerning any approved installations, improvements, training activities, permissions for overflight, communications, and services.

For the further work of the Subcommittee, I should note the detailed examination of the history and structure of SOFA agreements available in a collaborative study organized by a German international law scholar, Dieter Fleck, entitled *THE HANDBOOK OF THE LAW OF VISITING FORCES* (Cambridge University Press 2001). The issues that arise in overseas deployments are also addressed by John Woodliffe, a British scholar, in *THE PEACETIME USE OF FOREIGN MILITARY INSTALLATIONS UNDER MODERN INTERNATIONAL LAW* (Martinus Nijhoff 1992). And finally, Professor Kent Calder, my colleague at Johns Hopkins University, has recently finished an important work entitled *EMBATTLED GARRISONS: COMPARATIVE BASE POLITICS AND AMERICAN GLOBALISM* (Princeton University Press 2007).

The November 2007 Declaration of Principles and the Need for a Status of Forces Agreement

Finally, and perhaps most importantly, I should note that the setting in which the November 2007 Declaration of Principles was reached makes clear that the negotiation of a Status of Forces agreement with the independent government of Iraq cannot be delayed into the indefinite future.

In particular, the Declaration notes Iraq's intention to "request to extend the mandate of the Multi-National Force-Iraq (MNF-I) under Chapter VII of the United Nations Charter *for a final time.*" (Emphasis added). This Iraqi request for extension of the mandate was indeed forthcoming, and was the prelude to the Security Council's vote in Security Council Resolution 1790, on December 18, 2007, for a final extension of the multi-national force mandate, until December 31, 2008.

However, Iraq's consent to this extension was carefully framed. The text of Security Council Resolution 1790 states in its operative language, at paragraph 1, that "the presence of the multinational force in Iraq is at the request of the Government of Iraq." Resolution 1790 also declares, in its operative paragraph 2, that "the mandate for the multinational forces shall be reviewed *at the request of the Government of Iraq or no later than 15 June 2008*" (emphasis added) and that the Security Council "*will terminate this mandate if requested by the Government of Iraq.*"

This undertaking by the Council means that, in principle, the availability of Chapter 7 authority for U.S. and allied operations in Iraq could be terminated at any time. Though the United States retains a veto on the Security Council, the Council's solemn promise to terminate the multinational mandate at the request of Iraq could not be easily disregarded.

Thus, the issue of governance and legal authority for any United States forces in Iraq may become urgent and immediate. The negotiation of a SOFA agreement with the government of Iraq is thus not, in my judgment, a matter that can be delayed for any substantial length of time.

Thank you for your attention, and I welcome any questions.