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

Before the House Committee on Foreign Affairs
Subcommittee on International Organizations, Human Rights, and Oversight

Hearing on "The November 26 Declaration of Principles: Implications for UN Resolutions on Iraq and for Congressional Oversight"

February 8, 2008

I appreciate the invitation by the Chairman and members of this Subcommittee to comment on the "Declaration of Principles" issued on November 26, 2007, following a video conference between President George W. Bush and Iraqi Prime Minister Nouri Kamel Al-Maliki of Iraq.

I have been asked to comment as well on the type of international instrument commonly called a "Status of Forces Agreement" – and the relationship between the November 2007 Declaration of Principles and this type of agreement.

We are all aware that it is an election year. There has been widespread speculation in the public press, indeed even in the new journalistic world of "blogs," as to whether the November 2007 Declaration of Principles is somehow an attempt to "tie the hands" of a future President. There has been speculation as to whether the Declaration somehow would exclude the Congress from its important role in developing the nature of America's relationship to the democratic government of Iraq.

In my judgment, both characterizations are inaccurate. With the end of the regime of Saddam Hussein, and the ongoing efforts to quell the terrorist attacks against civilians in Iraq, the long-enduring people of that country have a right to look forward to a return to an ordinary status in the community of nations. The Declaration is a set of aspirations and moral commitments to govern the period when the formal authority of the United Nations Security Council is ended, and the Multi-National Force will give way to ordinary cooperative relationships between states.

Iraq has had a multinational United Nations force deployed in country, under a Security Council mandate, since 2004. The Iraqi government has now stated that it wishes, after a limited period of time, to return to the enjoyment of full sovereignty and control over the administration of its affairs. The Declaration of Principles looks forward to the negotiation of a formal Status of Forces agreement by July 2008.

For any observer who wonders why there is some temporal urgency for thinking about the period when the United Nations mandate will end, a chronology of the requests of the Iraqi government may help to provide an answer.

In particular, on December 7, 2007, Iraqi Prime Minister Malaki wrote to the President of the Security Council, requesting that the Council extend the Chapter 7 mandate of the Multi-National Force for Iraq until December 31, 2008.

But Iraq also stated that it wished to condition this request upon "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.*" (Emphasis added).

On December 18, 2007, in Resolution 1790, the Security Council indeed voted unanimously to extend the mandate for the Multi-National Force for Iraq (MNF-1) until December 31, 2008. [1] But, pursuant to Iraq's request, the Council also provided that "the mandate for the multinational force shall be reviewed at the request of the Government of Iraq or no later than 15 June 2008, and *declare[d]* that it will terminate this mandate earlier if requested by the Government of Iraq." (Emphasis in original).

Thus, there could be a need to address the status of any foreign personnel in Iraq substantially before the end of the term of the current American president.

I do not read the November 2007 declaration of principles to be any attempt to steal the show, or preempt future judgments by the Congress or the next President. Rather, it is a rehearsal of the needs that Iraq will have in its return to full function, including developing its economic institutions, gaining foreign investment, winning access to the World Trade Organization, and seeking recovery of the funds and properties stolen and smuggled abroad by the former regime. It includes the importance of support for Iraq's democracy and efforts at national reconciliation. Necessarily, it also recognizes that Iraq will need to be secure in a difficult regional neighborhood, and must develop ways to protect its people against violence by al Qaeda and remnants of the old regime, and any threat of foreign aggression.

A pledge of cooperation in addressing these needs is something that every state in the international community owes to the people of Iraq. The United Nations Charter of 1945 is itself a statement of the joint burden of responsible states to meet threats to international peace and security.

The November 2007 declaration of principles is not a defense treaty. It is not the equivalent of Article 5 of the NATO Treaty. It is, no more or no less, a pledge to look for ways in which Iraq can enjoy the necessary preconditions for its future success.

---

[1] The extension of the mandate of the Multi-National Force for Iraq (MNF-I) thus provided in Security Council Resolution 1790 has built upon prior Security Council resolutions 1546 (2004), 1637 (2005), and 1723 (2006).

In a hearing before the House Armed Services Committee, this last Wednesday afternoon, on February 6, 2008, Secretary of Defense Bob Gates was asked by Congresswoman Ellen Tauscher about U.S. plans in Iraq. The Secretary replied that "we do not want, nor will we seek permanent bases in Iraq" and further stated that any future formal "status of forces" agreement "will not contain ... any security commitment to Iraq." Mr. Gates noted that the United States has, at any one time, 80 to 100 "status of forces" agreements world-wide, which have been handled as executive agreements rather than ratified treaties. But he committed the Defense Department to "transparency and openness" as any future status of forces agreement is negotiated with Iraq.[2]

So, too, on Wednesday, February 6, 2008, in a hearing before the Senate Armed Services Committee, Secretary Gates was asked by Senator Ted Kennedy about plans to conclude a bilateral Status of Forces Agreement by July 2008. Mr. Gates affirmed that "the status of forces agreement that is being discussed will not contain a commitment to defend Iraq, and neither will any strategic framework agreement. ... we certainly do not consider the declaration of principles a security commitment to the Iraqis." He also stated again that "My view is that there ought to be a great deal of openness and transparency to the Congress as we negotiate this status of forces agreement, so that you can satisfy yourselves that those kinds of commitments are not being made, and that there are no surprises in this."

Mr. Gates also noted that "my view is that there is nothing in the Status of Forces Agreement, that we are just beginning to negotiate, that would bind a future administration. It basically, like other Status of Forces Agreements, sets forth the rules by which we continue to operate in Iraq – in terms of protecting our soldiers, in terms of the legal relationship, and so on. I don't think that there's anything here that, in a substantive way, binds any future administration."

To be sure, Mr. Chairman, it is my private view that any future President will be obliged to consider the long-term reputation of the United States as a reliable partner. As President, he or she also will be bound to consider the situation of Iraq, and the moral obligations that the world community has to help that country climb back to a state of normalcy. But that judgment is not precluded by the November 2007 Declaration of Principles, though a wise President will want to pay heed to the human aspirations that are reflected in its language.

****

[2] So, too, in a colloquy with Congressman Joe Courtney, Secretary Gates stated: "The status of forces agreement will not have a security component to it. It will not be a security agreement with the Iraqis.// It will be like virtually all – well, like most status of forces agreements, basically, the rules of the road and an agreement on how we are able to operate in Iraq once the U.N. Security Council resolution authorizing that activity is concluded or runs out."

For clarity, let me briefly address the general nature of "status of forces" agreements – often called "SOFA's" – and what they typically entail. These are relatively commonplace agreements. The United Nations uses SOFA agreements. NATO has them, as does the Partnership for Peace or PfP. They are used in United Nations peacekeeping missions. And of course, there are also bilateral SOFA agreements.

SOFA agreements are designed to clarify the important question of **legal jurisdiction over visiting forces**. They are often rather dull. In a technical but useful book called THE HANDBOOK OF THE LAW OF VISITING FORCES (Oxford University Press 2001), German legal scholar Dieter Fleck has noted (at page 3) that SOFA agreements are an attempt "to elaborate clear status provisions for military and civilian personnel of foreign armed forces in a receiving state" and may be used for "exercises and even for transit operations."

Thus, even in an exercise of the Partnership for Peace or the Proliferation Security Initiative, as well as United Nations peacekeeping, it is important to have SOFA agreements to determine which state has jurisdiction over the activities and status of soldiers, sailors, airmen and marines. Typically, a NATO SOFA is practically applied so that any mishaps arising in the course of official duties are handled by the state of the so-called "sending state," whereas completely private acts will fall under the concurrent jurisdiction of the so-called "receiving state."

SOFA's are important in protecting our armed services personnel all over the world. During the negotiations of the treaty for the International Criminal Court, the United States delegation took care to make sure that the "Rome" treaty text included, in Article 98(2), a provision that the international court would respect the terms of standing SOFA agreements all over the world, that immunized American soldiers from foreign jurisdiction over official activities. We have not joined the International Criminal Court or the Rome treaty, but to meet our concerns about the Rome treaty's assertion of third-party jurisdiction, the SOFA agreements give some important protection.

In layman's terms, a SOFA can be likened to an immunity treaty for diplomats or consular personnel. The common element is that the responsibility to investigate and proceed against any wrongful acts committed in the course of official duties is left to the country of the alleged offender's nationality, i.e., the so-called "sending" country. A SOFA is not a pledge to station a certain number of forces or indeed, any forces at all. There is no mystery or diplomatic intrigue in a SOFA.

In our security posture around the world, there are difficult issues to be addressed, including the status and supervisory mechanism for private contractors, and other non-military personnel. But again, a SOFA has no implications for the size, duration or intensity of any military involvement. The virtue of a standing SOFA agreement is that the matter does not have to be addressed anew, each time official personnel are visiting or transiting or working in a foreign country.

This is not to prejudge our future relationship with the people of Iraq. There are so many truly extraordinary people in the American armed forces, and in the forces of cooperating allies, who are rightfully proud of their brave work in trying to quell the wanton violence directed against innocent civilians by suicide bombers and al Qaeda operatives. A future President may well conclude that we are honor bound not to precipitously abandon the mission of assisting them in rebuilding their country.

But no matter who is chosen as the next President, and what view is taken of America's role in assisting the Iraqi people, we would wish to have a SOFA agreement with the government of Iraq, as we do with dozens of other countries in the world.