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Legal Status of US Forces in Iraq From 2003-2008

M. Cherif Bassiouni*

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I. INTRODUCTION

Just before the end of President George W. Bush’s second term, the UN Security Council resolution authorizing US operations in Iraq as part of a Multi-National Force in accordance with international humanitarian law expired.¹ To

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¹ *Resolution No 1790*, UN Security Council, 5808th mtg, UN Doc S/ResES/1790 at 3-4 (2007). It should be noted that no UN resolution gave legitimacy to the US invasion of Iraq, which started with an intense bombardment of Baghdad on March 19, 2003, referred to as “shock and awe” as

ensure a legal basis for the continued US military presence and military operations in Iraq, the US and Iraqi governments negotiated a Status of Forces Agreement (SOFA),² as well as a “Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States of America and the Republic of Iraq” (Framework Agreement).³ The details of these two documents are of great importance, as their stipulations will inform the crucial developments in the US-Iraqi relationship, including the eventual US withdrawal of combat troops from Iraq.

President Bush and Prime Minister Nouri al-Maliki signed the “Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq,” (Iraq SOFA) in Baghdad on December 14, 2008, just two weeks before the Security Resolution’s expiration.⁴ In its final form, the Iraq SOFA varies significantly from other US SOFA agreements in several ways. Primarily, the agreement regulates ongoing

described by Harlan K. Ullman and James P. Wade, *Shock And Awe: Achieving Rapid Dominance* (National Defense University, 1996); Sue Chan, *Iraq Faces Massive US Missile Barrage*, CBS News (Jan 24, 2003), online at <http://www.cbsnews.com/stories/2003/01/24/eveningnews/main/537928.shtml> (visited Apr 24, 2010). The Security Council did not endorse the Bush doctrine of pre-emptive self-defense.

- ² Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq (Dec 14, 2008) (“Iraq SOFA”); Stephen Farrell, *Security Agreement Déjà Vu*, NY Times (Nov 20, 2008), online at <http://baghdadbureau.blogs.nytimes.com/2008/11/20/security-agreement-deja-vu/?partner=rss&emc=rss> (visited Apr 24, 2010); see Jomana Karadsheh and Arwa Damon, *Security Pact Runs into Discord in Iraqi Parliament*, CNN.com (Nov 17, 2008), online at <http://www.cnn.com/2008/WORLD/meast/11/17/iraq.security/index.html> (visited Apr 24, 2010) (reporting that Iraqi lawmakers decried the US-Iraq security agreement); see also Karen DeYoung, *US, Iraq Scale Down Negotiations Over Forces*, Wash Post A1 (July 13, 2008); but see *Rubaie Denies Halt of Iraq-US Security Pact*, Alsumaria Iraq (July 15, 2008), online at <http://www.alsumaria.tv/en/Iraq-News1-20093-Rubaie-denies-halt-of-Iraq-US-security-act.html> (visited Apr 11, 2010). The Iraqi Cabinet approved the agreement on November 16, 2008 and the agreement was thereafter submitted to the Parliament. Parliamentary reaction to the agreement was mixed, with the Sadr party vocally opposing the plan and staging demonstrations to disrupt the voting process in Parliament. The agreement was finally reached on December 4, just prior to the December 31 sunset deadline of the UN Resolution that gave the US the fig-leaf cover of legitimacy to have a military presence in Iraq.
- ³ Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States of America and the Republic of Iraq (“Framework Agreement”) (Nov 17, 2008).
- ⁴ See Press Release, White House, *President Bush and Iraq Prime Minister Maliki Sign the Strategic Framework Agreement and Security Agreement* (“Bush and Maliki Sign Agreements”) (Dec 14, 2008) online at <http://georgewbush-whitehouse.archives.gov/news/releases/2008/12/20081214-2.html> (visited Apr 24, 2010).

active military operations, with emphasis on Iraqi sovereignty and US accountability.⁵

As with the Iraq SOFA, the Framework Agreement proved quite distinct from other US “friendship” agreements, which traditionally deal with cultural and commercial concerns.⁶ In the Framework Agreement with Iraq, strategic issues are scattered throughout the document, as if to camouflage their presence among the more traditional cultural concerns. The Bush Administration likely structured the agreement that way to avoid having to submit it to the Senate, as it was required to do with the Iraq SOFA. The Framework Agreement overlaps with the Iraq SOFA with regard to strategic considerations. Both should be read *in pari materia*.

This Article describes and assesses these two agreements, as well as prior relevant legal instruments (US, Iraqi, and international), bearing upon the legal status and operations of US forces in Iraq. It also examines one issue which was not addressed by these agreements: US legal obligations in light of the “protected persons” status it gave to an estimated 3,400 Iranians who oppose the Iranian regime, and who have been living at Camp Ashraf in Diyala Province, Iraq, under US protection since 2003.

II. LEGAL AUTHORIZATION FOR THE DEPLOYMENT OF US FORCES IN IRAQ PRIOR TO THE IRAQ SOFA OF 2008

On October 31, 1998, the US Congress passed the Iraq Liberation Act in support of a democratic government to replace Saddam Hussein’s regime, laying the foundation for forceful regime change in that country.⁷ Then, after al-

⁵ See, for example, Dieter Fleck, ed, *The Handbook of the Law of Visiting Forces* 28 (Oxford 2001). Seven defense agreements to which the US is party have been concluded as treaties: Inter-American Treaty of Reciprocal Assistance (1947), 62 Stat 1681, TIAS No 1838 (“Rio Treaty”); North Atlantic Treaty (1949), 63 Stat 2241, TIAS No 1964; Mutual Defense Treaty, 3 UST 3947, TIAS No 2529 (1951) (Philippines); Mutual Defense Assistance Agreement, 2 UST 644, TIAS No 2217 (1951) (Australia and New Zealand); Southeast Asia Collective Defense Treaty (1954), 6 UST 81, TIAS No 3170; Treaty of Mutual Cooperation and Security (1960), 11 UST 1632, TIAS No 4509 (Japan); and Mutual Defense Treaty (1953), 5 UST 2368, TIAS No 3097 (Korea). One agreement was concluded as a Congressional-Executive agreement with express congressional approval: Compact of Free Association Act of 1985 (1986), 59 Stat 1031 (Marshall Islands/Federated States of Micronesia), codified at 48 USC § 1681.

⁶ See, for example, Treaty of Friendship, Commerce and Navigation (1853), 10 Stat 1005, TS 4 (Argentina); Treaty of Friendship, Establishment and Navigation (1961), 14 UST 1284, TIAS No 5432 (Belgium); Treaty of Friendship, Commerce, and Consular Rights (1925), 44 Stat 2379, TS 736 (Estonia); Treaty of Friendship, Commerce, and Navigation (1956), 8 UST 2217, TIAS No 3947 (Korea).

⁷ HR Res 4655: Iraq Liberation Act of 1998, 105th Cong, 2d Sess (Oct 31, 1998).

Qaeda's September 11, 2001 attack on the US⁸—in which Hussein's regime played no part—a Joint Resolution of the House and Senate authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided” in those attacks.⁹ This Resolution did not specifically mention Iraq, leaving that decision to the President, but the same language was subsequently included in another Joint Resolution of Congress, the Authorization for Use of Military Force Against Iraq Resolution of 2002, which mentioned Iraq specifically.¹⁰

The Resolution allowed the president to “defend the national security of the United States against the continuing threat posed by Iraq,”¹¹ in conformity with the international law of self-defense reflected in Article 51 of the UN Charter.¹² This premise was based on the assumption that the Bush Administration's assertions were true, and that Iraq constituted a threat to US security.¹³ The Administration claimed Iraq had weapons of mass destruction, and that Saddam Hussein was capable of using them against the US. Consequently, Administration officials argued, the US was authorized under the above legal sources to preemptively attack Iraq and to occupy it, in order to remove such a threat.¹⁴

⁸ See generally Lawrence Wright, *The Looming Tower: Al Qaeda and the Road to 9/11* (Knopf 2006); George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 Am J Intl L 891 (2002); Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commission*, 96 Am J Intl L 328 (2002). For a general discussion, see *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States* (2004).

⁹ SJ Res 23, 107th Cong, 1st Sess, § 2(a) (Jan 3, 2001).

¹⁰ See HJ Res 114, 107th Cong, 2d Sess, § 3(b)(2) (Oct 10, 2002).

¹¹ Id, § 3(a)(1).

¹² See UN Charter Art 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations[.]”).

¹³ See HJ Res 114, § 3(a)(1) (cited in note 10) (authorizing the President to “defend the national security of the United States against the continuing threat posed by Iraq”). See also Yoram Dinstein, *War, Aggression and Self-Defence*, ch 7(B)(a), (Cambridge 3d ed 2001) (discussing the invocation of the concept of self-defense in response to threats within the framework of Article 51 of the UN Charter); Ahmed M. Rifaat, *International Aggression* Part 3 (1979) (“The Concept of Aggression in Contemporary International Law”). See generally M. Cherif Bassiouni and Benjamin B. Ferencz, *The Crime Against Peace and Aggression: From its Origins to the ICC*, in M. Cherif Bassiouni ed, 1 *International Criminal Law: Sources, Subjects, and Contents* 207 (“1 Bassiouni ICL”) (Martinus Nijhoff 3d ed 2008) (discussing the history of aggression as a legal concept in international law); Roger S. Clark, *The Crime of Aggression and the International Criminal Court*, in 1 Bassiouni ICL at 243 (discussing the boundaries of a proposed “crime of aggression” provision for the International Criminal Court statute).

¹⁴ See Press Release, White House, *President Discusses the Future of Iraq* (Feb 26, 2003), online at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/02/print/20030226-11.html>

According to internal Bush Administration memoranda, officials contended the possession of weapons of mass destruction represented a material breach of UN Security Council Resolution 1441, thereby allowing the US to take military action against Iraq in order to enforce that resolution.¹⁵ The Resolution stated that “false statements or omissions in the declarations submitted by Iraq pursuant to this resolution and failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution shall constitute a further material breach of Iraq’s obligations and will be reported to the Council.”¹⁶ Justice Department official John Yoo had written the memo in anticipation of Iraq’s December 8, 2002 deadline to report to the Security Council. It became the purported legal basis and justification for the US’ use of force against Iraq, and for its military occupation.

Unlike what had been done in the first Gulf War, the Administration set up a military force to invade Iraq and proceeded to enlist other countries to join in a Multi-National Coalition Force without Security Council authorization.¹⁷ The US-led coalition invaded Iraq via Kuwait on March 20, 2003, after one day of bombing on March 19, 2003. Since then, the applicable laws governing US forces in Iraq have been the Uniform Code of Military Justice (“UCMJ”),¹⁸ the

(visited Apr 24, 2010) (“In Iraq, a dictator is building and hiding weapons that could enable him to dominate the Middle East and intimidate the civilized world -- and we will not allow it.”); Press Release, White House, *President Addresses the Nation* (Mar 19, 2003), online at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/print/20030319-17.html> (visited Apr 24, 2010) (“American and coalition forces are in the early stages of military operations to disarm Iraq, to free its people and to defend the world from grave danger.”).

¹⁵ Consider Office of Legal Counsel, Memorandum Opinion for the Counsel to the Vice President, *Whether False Statements or Omissions in Iraq’s Weapons of Mass Destruction Declaration Would Constitute a “Further Material Breach” Under UN Security Council Resolution 1441*, Opinions of the Office of Legal Counsel in Volume 26 § II(B) (Dec 7, 2001) (finding that Iraq’s fundamental obligation under Security Council Resolution 1441 is disarmament).

¹⁶ *Resolution 1441*, UN Security Council, 4644th mtg (Nov 8, 2002), UN Doc S/RES/1441 ¶ 4 (Nov 8, 2002).

¹⁷ See *Resolution 678*, UN Security Council, 2963d mtg (Nov 29, 1990), UN Doc S/RES/678 (authorizing member states to take “all necessary means” to uphold and implement Resolution 660, which called for Iraq to withdraw from Kuwait). See also Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Pre-emptive Self-Defense*, 97 Am J Intl L 576, 578–79 (2003) (noting that Security Council Resolution 678 explicitly authorized the use of force to expel Iraq from Kuwait); Michael J. Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85 Am J Intl L 74, 74 (1991) (arguing Security Council Resolution 678 imposes no obligation to use armed force in Iraq, though it does authorize it); Burns H. Weston, *Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy*, 85 Am J Intl L 516, 516–17 (1991) (arguing the UN’s implicit authorization of the use of force in Iraq “flirted precariously” with accepted principles of “right process”).

¹⁸ Uniform Code of Military Justice (1950), 64 Stat 109, codified at 10 USC § 47.

War Crimes Act,¹⁹ and subsequently, with respect to US private contractors, the Military Extraterritorial Jurisdiction Act of 2000 (MEJA).²⁰ Forces entered the capital, and Baghdad fell to US forces April 9, 2003. On May 1, 2003 President Bush declared that major combat operations in Iraq were over.

US Military operations in Iraq, under the Law of Armed Conflict (LOAC), constitute a “conflict of an international character” insofar as they involve states to which the conventional and customary laws of armed conflict apply.²¹ This body of law is found in the four Geneva Conventions of August 12, 1949,²² the 1907 Hague Convention,²³ and other customary aspects of law incorporated in Protocol I Additional to the four Geneva Conventions of August 12, 1949.²⁴

Two months after US forces invaded Iraq, on May 22, 2003 the UN Security Council adopted Resolution 1483 pursuant to its Chapter VII authority, calling Iraq a “threat to international peace and security.”²⁵ The Resolution notes a May 8, 2003 letter from the Permanent Representatives of the United States and United Kingdom of Great Britain and Northern Ireland to the President of the Security Council, referring to themselves as “occupying powers,” and as the “authority” administering Iraq pursuant to the Geneva Conventions of 1949 and the Hague Regulations of 1907.²⁶ Unlike subsequent resolutions, the Security Council did not annex that letter to Resolution 1483. Instead, only the Preamble

¹⁹ The War Crimes Act of 1996, Pub L No 104-192, 110 Stat 2104 (1996), codified at 18 USC § 2441.

²⁰ Military Extraterritorial Jurisdiction Act of 2000, Pub L No 106-523, 114 Stat 2488 (2000), codified at 18 USC § 3261–67 (2000).

²¹ See, for example, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Geneva-ICRC 2005); M. Cherif Bassiouni, ed, *A Manual on International Humanitarian Law and Arms Control Agreements* (Hotei 2000).

²² Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (“Geneva Convention I”), 6 UST 3114, TIAS No 3362 (1949); Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea (“Geneva Convention II”), 6 UST 3217, TIAS No 3363 (1949); Convention Relative to the Treatment of Prisoners of War (“Geneva Convention III”), 6 UST 3316, TIAS No 3364 (1949); Convention Relative to the Protection of Civilian Persons in Time of War (“Geneva Convention IV”), 6 UST 3516, TIAS No 3365 (1949).

²³ Convention Respecting the Laws and Customs of War on Land, 36 Stat 2277 (1907).

²⁴ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (“Protocol I”), 1125 UN Treaty Ser 3 (1977).

²⁵ *Resolution 1483*, UN Security Council, 4761st mtg, (May 22, 2003), UN Doc S/RES/1483.

²⁶ See id., ¶ 5.

to Resolution 1483 referred to the letter. The Security Council subsequently published the letter as a separate document.²⁷

Security Council Resolution 1483 supported the formation of an interim government in Iraq and established the Development Fund for Iraq to aid in the rebuilding process.²⁸ Thus, the resolution goes beyond the recognition of the applicability of the LOAC to the US and the Multinational Force, as it reaches matters of in-country governance. This was the beginning of a bootstrapping process employed by the US with UK support, to thicken the veneer of legitimacy that UN Security Council resolutions conferred on those states whose military forces operated in Iraq. In that respect, the Security Council adopted Resolution 1511 in October 2003 authorizing a multinational force (MNF) to take “all necessary measures to contribute to the maintenance of security and stability in Iraq.”²⁹ The Security Council thereafter extended the mandate of the MNF under Resolution 1511 on an annual basis in 2004, 2005, 2006 and 2007, allowing the MNF to operate in Iraq under Security Council authorization.³⁰ The Council adopted these resolutions, however, on the basis of the Iraqi government’s successive requests, which US Secretaries of State Colin Powell and Condoleezza Rice responded to in letters.³¹ The fact that the Council acted pursuant to a request by a member-state meant the foreign occupying forces became forces invited by a host state, thus giving their presence legitimacy under international law.

Security Council Resolution 1790 (December 18, 2007) stated that it was the intent of the Iraqi government that this resolution be the final one issued in this matter, thus ending the MNF mandate as of December 31, 2008.³² Each extension of UN Security Council Resolution 1483 has been made at the behest of the Iraqi government, and refers to the safeguarding of Iraqi sovereignty.

²⁷ UN Security Council, *Letter Dated 8 May 2003 From the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the President of the Security Council*, UN Doc S/2003/538 (May 8, 2003).

²⁸ *Resolution 1483*, ¶¶ 9, 12 (cited in note 25).

²⁹ *Resolution 1511*, UN Security Council, 4844th mtg (Oct 16, 2003). UN Doc S/RES/1511, ¶ 13.

³⁰ *Resolution 1546*, UN Security Council, 4987th mtg (June 8, 2004) UN Doc S/RES/1546; *Resolution 1637*, UN Security Council, 5300th mtg (Nov 11, 2005), UN Doc S/RES/1546; *Resolution 1723*, UN Security Council, 5574th mtg (Nov 28, 2006), UN Doc S/RES/1723; *Resolution 1790*, UN Security Council, 5808th mtg (Dec 18, 2007), UN Doc S/RES/1790.

³¹ See SC Res 1546 at Annex; SC Res 1637 at Annex I, II; SC Res 1723 at Annex I, II; SC Res 1790 at Annex I, II.

³² *Resolution 1790* (cited in note 30). Like its predecessors, Resolution 1790 came in response to a December 7, 2007 letter written by the Prime Minister of Iraq, Nouri al-Maliki. In a December 10, 2007 letter, US Secretary of State Condoleezza Rice responded to al-Maliki’s letter, expressing the US’s readiness to fulfill its obligations under the continuing UN mandate.

After the invasion of Iraq was complete on April 21, 2003, the Coalition Provisional Authority (CPA) was established to govern the country until an interim government could be established.³³ The CPA issued a series of provisional orders, including one specifically dealing with MNF personnel, CPA Order 17.³⁴ This order grants complete immunity to US forces and private contractors for any acts they engage in while in Iraq, including criminal violations under the 1969 Iraqi Criminal Code.³⁵ As the number of these violations increased, including the gruesome torture at Abu-Ghraib prison and elsewhere, the successive governments (and, more importantly, the people of Iraq) became anxious to have this immunity reversed. The Iraq SOFA of 2008 accomplished this, as described below.

Upon the CPA's dissolution on June 28, 2004, the interim Iraqi government put in place a Transitional Administrative Law (TAL), which served as an interim governance document until Iraq could adopt a constitution and establish a government pursuant thereto.³⁶ The National Assembly adopted, in 2005, The Permanent Constitution of the Republic of Iraq.³⁷ The Constitution superseded the TAL and its Annex.³⁸ It does not address, however, the legality of MNF forces presence in Iraq. Pursuant to the provisions of the Iraq

³³ President Bush named Paul Bremer the head of the CPA on May 6, 2003. See generally Paul Bremer, *My Year in Iraq: The Struggle to Build a Future of Hope* (Simon & Schuster 2006). The CPA was abolished June 28, 2004. Its website can still be accessed at <http://www.cpa-iraq.org/>. It remains unclear under what authority the CPA was created. Originally, governance of post-conflict Iraq fell to the Office of Reconstruction and Humanitarian Assistance, which was created in January 2003. For a more detailed discussion of this uncertainty, see L. Elaine Halchin, *The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities* (US Congressional Research Service 2004).

³⁴ Coalition Provisional Authority Order No 17, *Status of the Coalition Provisional Authority, MNF – Iraq, Certain Missions and Personnel in Iraq* (“CPA Order No 17”), CPA/ORD/27 June 2004/17 (June 27, 2004).

³⁵ See *id.*, §§ 2(1), 4(3) (declaring the Multinational Force and contractors “immune from Iraqi legal process”).

³⁶ Law of Administration for the State of Iraq for the Transitional Period, pmbl, Art 26 (Mar 8, 2004) (establishing law to govern Iraq “until a duly elected government, operating under a permanent and legitimate constitution achieving full democracy, shall come into being.”).

³⁷ Iraq Const. An English translation of the Iraqi Constitution can be found on the web site of the United Nations Assistance Mission for Iraq, online at http://www.uniraq.org/documents/iraqi_constitution.pdf (visited Apr 24, 2010).

³⁸ See *id.*, Art 143 (“The Transitional Administrative Law and its Annex shall be annulled on the seating of the new government”).

Constitution, a national unity government was formed in May 2006.³⁹ Nothing in the Constitution provides for the presence of MNF forces.⁴⁰

On November 26, 2007, the US and Iraq signed a Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship Between the Republic of Iraq and the United States of America (Declaration).⁴¹ The Declaration states that Iraq seeks a return to full sovereignty.⁴² It contains principles guiding cooperation between the two countries, including the agreement on the part of the US to provide in the future “security assurances and commitments . . . to deter foreign aggression against Iraq that violates its sovereignty and integrity of its territories, waters, or airspace.”⁴³ Thus, the Declaration partakes of a military alliance of sorts and is therefore in the nature of a defense treaty, which should have been submitted to the Senate for “advice and consent” under Article II of the US Constitution.⁴⁴ Instead, the Administration tucked this military provision into what it labeled a “Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship Between the Republic of Iraq and the United States of America,” in order to avoid submitting it to the Senate.⁴⁵

III. THE LEGAL AUTHORIZATION FOR THE DEPLOYMENT OF US FORCES IN IRAQ UNDER THE IRAQ SOFA OF 2008

Negotiations on a new agreement between the two governments started sometime in 2008,⁴⁶ with the goal of concluding a deal before the year’s end, when UN Security Council Resolution 1790 was to expire. The two governments agreed to some provisional elements at the end of August, and

³⁹ See generally *id.*

⁴⁰ *Id.* Originally, the CPA issued orders such as Order 17 that dealt with the presence of MNF forces and provided for their immunity from Iraqi jurisdiction. See CPA Order No 17 §§ 2(1), 2(3) (cited in note 34). The TAL extended the legal effect of the CPA orders, but Iraq Constitution, specifically ends applicability of the TAL. See Iraq Const Art 143 (cited in note 38). Thus, the immunity extended to US forces under CPA Order 17, which was extended by the TAL, came to an end. After that, US forces operated with only *de facto* immunity.

⁴¹ Press Release, White House, *Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship Between the Republic of Iraq and the United States of America* (Nov 26, 2007), online at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/11/print/20071126-11.html> (visited Apr 24, 2010).

⁴² See *id.*, § 3(2).

⁴³ *Id.*, § 3(1).

⁴⁴ US Const Art II, § 2.

⁴⁵ White House, *Declaration of Principles* (cited in note 41).

⁴⁶ The exact starting date has not been disclosed by the US government.

they made a first draft available to the media in late October.⁴⁷ The agreement required approval by two-thirds of Iraq's Cabinet before it could be submitted to parliament for approval.⁴⁸ However, the Iraqi Cabinet was reluctant to approve the draft agreement in its entirety, and unanimously rejected it on October 21, 2008, asking for certain amendments.⁴⁹

Iraq's Foreign Minister announced at the time that the amendments the Iraqi Cabinet requested were not "structural," but were merely changes in "descriptions" and "word choice."⁵⁰ That statement was essentially a diplomatic way of saying that the Iraqi government was dissatisfied with the US proposals contained in the draft. In fact, the differences between what the US proposed and what the Iraqis expected were substantial, though there were no official statements as to what the contentious issues were. Iraqi media reported that members of the ruling coalition, the United Iraqi Alliance,⁵¹ were dissatisfied with the draft's provisions on jurisdiction, the latitude given to US troops' operations in Iraq, the failure to specify that Iraqi territory could not be used for attacks against other states, and the dates and conditions for US troop withdrawal from parts, and eventually all, of Iraq.⁵² The final agreement addressed all of the above, which leads to the conclusion that the US acceded to

⁴⁷ See Stephen Farrell, *Draft Accord With Iraq Sets Goal of 2011 Pullout*, NY Times A1 (Aug 21, 2008) (reporting the US and Iraq have agreed to the removal of combat troops from Iraqi cities by June of 2008 and from the rest of the country by 2011 if conditions in Iraq remain relatively stable).

⁴⁸ See Elise Labott, *Iraqis Call for Amendments to US Security Pact*, CNN.com ¶ 24 (Oct 21, 2008), online at <http://www.cnn.com/2008/WORLD/meast/10/21/iraq.main/index.html> (visited Mar 30, 2010).

⁴⁹ See *id.*, ¶¶ 1, 17.

⁵⁰ See *US Warns Iraq over Troop Pact*, Aljazeera.net ¶ 8 (Oct 23, 2008), online at <http://english.aljazeera.net/news/americas/2008/10/20081022225932443146.html> (visited Apr 24, 2010); Mariam Karouny and Peter Graff, *Iraq Seeks Changes to Wording, Not Backbone of Pact*, Reuters ¶ 1 (Oct 22, 2008), online at <http://www.members.alertnet.org/thenews/newsdesk/LM444431.htm> (visited Apr 24, 2010). "Iraq's cabinet decided on Tuesday to demand amendments to the pact, despite having agreed last week to a 'final draft' after months of painstaking negotiations with Washington. The decision to reopen the negotiations has exasperated Washington, which is worried that its troops could have no legal basis to remain in Iraq beyond the end of this year when a UN Security Council resolution authorizing the force expires." *Id.*

⁵¹ The United Iraqi Alliance won 128 out of 275 seats in the December 2005 parliamentary elections. It was initially made up of four main Shiite parties: the SIIC, the Sadrist Movement, the Dawa party, and the Fadhlila party. However, the pullout of the Fadhlila and Sadr parties dropped the UIA's total to 83 in September 2007. Other parties in the parliament include the Democratic Patriotic Alliance of Kurdistan (53 seats); the Iraqi Accord Front (44 seats); the Iraqi National List (25 seats); the Iraqi National Dialogue Front (11 seats); Kurdistan Islamic Union (5 seats); Reconciliation and Liberation Bloc (3 seats); The Upholders of the Message (Al-Risaliyun) (2 seats); Turkmen Front, Rafidain List, and Mithal al-Alusi List; Yazidi Movement for Reform and Progress each with one seat.

⁵² See Labott, *Iraqis Call for Amendments to US Security Pact*, CNN.com ¶ 6 (cited in note 48).

these Iraqi requests.⁵³ A comparison of the final agreement and the original working document proposed by the US reveals that the former was quite different from the latter, but that is not uncommon for most treaties.⁵⁴

⁵³ Consider Mary Beth Sheridan, *Iraqi Parliament Begins Debate: Lawmakers, Top Council Must Approve*, Wash Post ¶¶ 1, 12, 21 (Nov 17, 2008), online at http://www.washingtonpost.com/wp-dyn/content/article/2008/11/17/AR2008111700522.html?nav=rss_world/mideast/iraq (visited Apr 3, 2010) (reporting indications that most of Iraq's major parties supported the agreements and that the US "had accepted last minute changes demanded by the Iraqi cabinet."). "After months of tense negotiations and public protests, the Iraqi cabinet's vote Sunday to approve the bilateral agreement was an indication that most major Iraqi parties support it. An Iraqi government spokesman portrayed the pact as closing the book on the occupation that began with the US-led invasion in 2003." Id. "The US government began negotiating the agreement in March and had hoped it would be signed by the summer. But the talks dragged on. Iraq won some major concessions, including the establishment of the 2011 withdrawal date instead of vaguer language favored by the Bush administration. It also rejected long-term US military bases on its soil. Still, the accord was attacked by Iraqi politicians when a near-final draft was distributed last month. Some explained their turnabout this week by noting that the US government had accepted last-minute changes demanded by the Iraqi cabinet." Id.

⁵⁴ See Patrick Cockburn, *It's All Spelled Out in Unpublicized Agreement: Total Defeat for US in Iraq*, Counterpunch Newsletter ¶ 6 (Dec 11, 2008), online at <http://www.counterpunch.org/patrick/12112008.html> (visited Apr 3, 2010) ("The SOFA finally agreed is almost the opposite of the one which US started to negotiate in March. . . . The first US draft was largely an attempt to continue the occupation without much change from the UN mandate which expired at the end of the year.").

The Status of Forces Agreement (SOFA), signed after eight months of rancorous negotiations, is categorical and unconditional. America's bid to act as the world's only super-power and to establish quasi-colonial control of Iraq, an attempt which began with the invasion of 2003, has ended in failure. There will be a national referendum on the new agreement next July, but the accord is to be implemented immediately so the poll will be largely irrelevant. Even Iran, which had furiously denounced the first drafts of the SOFA saying that they would establish a permanent US presence in Iraq, now says blithely that it will officially back the new security pact after the referendum. This is a sure sign that Iran, as America's main rival in the Middle East, sees the pact as marking the final end of the US occupation and as a launching pad for military assaults on neighbours such as Iran.

Astonishingly, this momentous agreement has been greeted with little surprise or interest outside Iraq. On the same day that it was finally passed by the Iraqi parliament international attention was wholly focused on the murderous terrorist attack in Mumbai. For some months polls in the US showed that the economic crisis had replaced the Iraqi war as the main issue facing America in the eyes of voters. So many spurious milestones in Iraq have been declared by President Bush over the years that when a real turning point occurs people are naturally sceptical about its significance. The White House was so keen to limit understanding of what it had agreed in Iraq that it did not even to publish a copy of the SOFA in English. Some senior officials in the Pentagon are privately criticizing President Bush for conceding so much to the Iraqis, but the American media are fixated on the incoming Obama administration and no longer pays much attention to the doings of the expiring Bush administration.

...

In what seemed to be an attempt to test the waters of Senate approval, the Bush Administration participated in House Hearings on the SOFA Agreement before any details of the Agreement were official. The testimony presented before the United States House of Representatives Foreign Affairs Committee on November 19, 2008 followed the agreement on a proposed text of the US-Iraq Security Agreement, as the House called it. This was done in order to avoid having to submit the Agreement to the Senate for its “advice and consent.” Nonetheless, the Bush Administration continued to refer to it as the Status of Forces Agreement. At the time of the House hearings, no English version of the Agreement was available, as Bush Administration officials had opined that the Agreement was a classified document. This approach appears somewhat deceitful, because the Administration created the public appearance that the House hearings satisfied the Constitutional requirements for treaties. Therefore, the House hearings were a discussion of an agreement whose official text was not before the House, but with a foreign government. Conversely, the Iraqi government posted the Arabic version online and English translations of this version were quickly transcribed by news media. An unofficial translation of the draft SOFA was all that the House Foreign Affairs Committee had to discern its contents. Therefore, most of the testimony before the Committee dealt with the feasibility of completing the SOFA prior to December 31, 2008 when the UN mandate allowing MNF forces to be present in Iraq was to end.

Administration witnesses testified before the House Committee concerning the Iraqi legal requirements for the Agreement before the Iraqi Parliament had passed a law describing the process of ratification of international treaties. It was still unclear at that time whether the SOFA would need a two-thirds majority, an absolute majority, or a simple majority to pass the Iraqi Parliament. The witnesses agreed that it would be practically impossible for the Iraqi Parliament to pass the SOFA if a two-thirds majority was required.

The SOFA finally agreed is almost the opposite of the one which US started to negotiate in March. This is why Iran, with its strong links to the Shia parties inside Iraq, ended its previous rejection of it. The first US draft was largely an attempt to continue the occupation without much change from the UN mandate which expired at the end of the year. Washington overplayed its hand. The Iraqi government was growing stronger as the Sunni Arabs ended their uprising against the occupation. The Iranians helped restrain the Mehdi Army, Muqtada's powerful militia, so the government regained control of Basra, Iraq's second biggest city, and Sadr City, almost half Baghdad, from the Shia militias. The prime minister Nouri al-Maliki became more confident, realizing his military enemies were dispersing and, in any case, the Americans had no real alternative but to support him. The US has always been politically weak in Iraq since the fall of Saddam Hussein because it has few real friends in the country aside from the Kurds. The leaders of the Iraqi Shia, 60 per cent of the total population, might ally themselves to Washington to gain power, but they never intended to share power with the US in the long term.

Id.

Professor Oona Hathaway testified as to specific US constitutional problems with the proposed SOFA. Among these problems, she cited the undermining of the powers of the US President in giving operational control in Iraq to the Joint Military Operations Coordination Committee, which would deprive the President of some of his power as commander-in-chief. She also cited the presence of withdrawal timetables as a possible violation of the commander-in-chief power. Further, Professor Hathaway took issue with the non-involvement of the Senate in approving of the agreement. In her prepared statement, Professor Hathaway stated:

The Administration has asserted that the bilateral agreement with Iraq is simply a status of forces agreement, more than a hundred of which have been concluded as sole executive agreements. That is incorrect. Although it has been called a SOFA, it includes provisions that have never been a part of any prior SOFA most notably, provisions granting the authority for US troops to engage in military operations.⁵⁵

Lastly, Professor Hathaway pointed out that domestic legal authority to engage in military operations needs to come from Congress, as the Authorization for the Use of Military Force passed by Congress in 2002 would no longer apply to an Iraq not governed by Saddam Hussein.⁵⁶

Another expert, Thomas Donnelly of the American Enterprise Institute, took a slightly different track and described the political benefits of the SOFA in that it would be a “setback for Iran,” since the SOFA had the support of Grand Ayatollah Ali al-Sistani, whom Donnelly represented as having given it a “green light.” Donnelly also described the Agreement as a setback for Moqtada al Sadr, an Iraqi Shia militia/political leader who opposed the US presence in Iraq. As Donnelly stated, “Americans in Iraq have never been simple ‘occupiers;’ our current and future role should be to serve as ‘interlocutors,’ the most trustworthy arbiters among people who have had little reason to trust each other.”⁵⁷

Republican Congressman Bill Delahunt, the Chairman of the House Committee, criticized the Bush Administration for not making the Agreement public. He also asked about the willingness of Iraqi officials to return to the Security Council to request an extension of the Chapter VII mandate, a move the Bush Administration insisted the Iraqi government would not do.⁵⁸ Issam

⁵⁵ Renewing the United Nations Mandate for Iraq: Plans and Prospects, Hearing before the Subcommittee on International Organizations, Human Rights, and Oversight of the Committee on Foreign Affairs, 110th Cong, 2d Sess 17 (2008) (statement of Oona A. Hathaway, Esq., Professor of Law).

⁵⁶ See id at 17–18.

⁵⁷ Id at 31–32 (statement of Mr. Thomas Donnelly).

⁵⁸ Id at 4–6.

Saliba, a senior foreign law specialist at the Law Library of Congress, sent a short document discussing Iraqi Constitutional requirements for the passing of international agreements. Professor Michael Matheson, the former acting legal advisor to the State Department, discussed the validity of an extended Chapter VII mandate. Iraq Consultant Raed Jarrar testified about the state of Iraqi political parties and the problems those parties posed to the passing of the Agreement. However, none of the experts talked extensively about the actual contents of the Agreement; likely because they did not want to rely on a unofficial translation of a text that had yet to be finalized. All seemed to believe that the Iraqi Parliament would not be able to approve the Agreement before the December 31, 2008 deadline, which proved to be incorrect.

No SOFA or Memorandum of Understanding (MOU) that regulates the presence of US forces in a foreign country includes a security arrangement with the host country.⁵⁹ A security arrangement with a foreign state is typically deemed to be part of a treaty subject to the “advice and consent of the Senate.”⁶⁰ The President can execute a SOFA pursuant to his Executive Agreement powers, though this has not been the US’s practice.⁶¹ But in the case of the Iraq

⁵⁹ But see Bush and Maliki Sign Agreements (cited in note 4).

⁶⁰ US Const Art II, § 2 (cited in note 44). Consider Louis Henkin, *Foreign Affairs and the United States Constitution* at 222–23 (Oxford 2d ed 1997) (noting the common practice of Presidents to refrain from “committing” armed forces through sole executive agreements).

⁶¹ See Stephen H. Wirls and Daniel C. Diller, *Chapter 3: Chief Diplomat* in *Powers of the Presidency* 140 (Congressional Quarterly 2d ed 1997) (noting the President’s use of executive agreements is widely held as constitutional but very few are negotiated and implemented without any congressional approval). An MOU is likely to be less comprehensive than a SOFA. Consider DeYoung, *US, Iraq Scale Down Negotiations Over Forces*, Wash Post at A1 (cited in note 2) (noting that US and Iraqi officials hope the MOU will “sidestep political roadblocks that have impeded completion of a broader agreement”) (emphasis added). However, a SOFA submitted to the Senate as a treaty was unlikely to be ratified by December 31, 2008, when Security Council Resolution 1790 expired. An Executive Agreement would have immediate effect. Consider Lawrence Margolis, *Executive Agreements and Presidential Power in Foreign Policy* 84 (1986) (arguing that lack of speed in Congress is a factor in President’s choice to invoke executive agreement power). While the Administration submitted the NATO SOFA to the US Senate for “advice and consent,” it has not submitted other SOFAs. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces (“NATO Status of Forces Agreement”) (1951), 4 UST 1792, TIAS No 2846. See R. Chuck Mason, *Status of Forces Agreement (SOFA): What Is It, and How Might One Be Utilized in Iraq?*, 2 (Congressional Research Service, June 16, 2008) (“The NATO SOFA is the only SOFA that was concluded as part of a treaty.”). More extensive documents, such as the collective defense treaties signed with Japan and South Korea, have been adopted by the US Senate as treaties and then later supplemented with a SOFA via Executive Agreement. See, for example, Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Regarding Facilities and Areas and the Status of United States Armed Forces in Japan with Agreed Minutes (1960), 11 UST 1652, TIAS No 4510. An Executive Agreement signed by the incumbent president could be continued or discontinued by the new administration after January 20, 2009; the agreement would not be binding on the next US administration. The US and Iraqi

SOFA, there are certain assurances that require Senate action. For example, the US, upon request of the Iraqi government, may take “appropriate measures, including diplomatic, economic, or military measures” to deter external or internal security threats against Iraq.⁶² This is a commitment to the use of force by the US, and it is hard to see how such a commitment can be deemed not to require Senate action as provided by the US Constitution.

The Iraq SOFA is set to govern relations between the two nations for the next three years, unless either party terminates it at an earlier date.⁶³ The agreement also requires a one-year written notification of the intent of either party to terminate the agreement.⁶⁴ It should be noted that the continued active military operations in Iraq makes the SOFA still subject to the International Law of Armed Conflict applicable to conflicts of an international character.⁶⁵

governments most recently agreed to include a “time horizon” in the agreement. See Steven Lee Myers, *Bush, In a Shift, Accepts Concept of Iraq Timeline*, NY Times A1 (Jul. 19, 2008).

Presently, the US is party to more than 100 agreements that may equate to a SOFA. See *Treaties In Force, A List Of Treaties And Other International Agreements Of The United States In Force*, Department of State (Jan 1, 2009), online at <http://www.state.gov/s/l/treaty/treaties/2009/index.htm> (visited Apr 24, 2010). The SOFAs are often incorporated into a larger security agreement framework. With the exception of the NATO SOFA, the US is party exclusively to bilateral SOFAs. See R. Chuck Mason, *Status of Forces Agreement (SOFA): What is it, and How Has it Been Utilized?* CRS Report RL34541 1 (June 18, 2009). The NATO SOFA is also the only SOFA that has been concluded as part of a treaty. *Id.* at 2. For a breakdown of all the US SOFAs as of November 2007, see *id.* at 23 (breaking down each agreement by party and type of authority used to create agreement).

Only the NATO SOFA was concluded as a treaty with full advice and consent of the US Senate. Seven other SOFAs have been included in broader Security Agreements that were negotiated as treaties and subject to the Senate oversight, or were negotiated following such a Security Treaty in accordance with provisions contained within the treaty. Japan 11 UST 1652 (1960); Australia 14 UST 506 (1963); Korea 17 UST 1677 (1967); Honduras 35 UST 3884 (1982); Philippines TIAS (1993); Haiti TIAS (1995); and Guatemala TIAS (2005). Three SOFAs were concluded as part of a Congressional action. Marshall Islands 2004; Micronesia 2004; and Palau 1986. Six SOFAs were concluded as part of a Base Lease Agreement's, mostly with the UK, with some Congressional involvement. Antigua and Barbuda 1941/1977; Bahamas 1941/1950; UK-Ascension Island 1956; UK-Bermuda 1941/1950; UK-Diego Garcia 1966; and UK-Turks and Caicos Islands 1979. Sixty-one further SOFAs were made pursuant to Presidential Agreements.

⁶² Iraq SOFA, Art 27 (cited in note 2).

⁶³ *Id.*, Art 30(1).

⁶⁴ *Id.*, Art 30(3).

⁶⁵ See Geneva Convention I, Art 2 (cited in note 22); see also Geneva Convention II, Art 2 (cited in note 22); see also Geneva Convention III, Art 2 (cited in note 22); Geneva Convention IV, Art 2 (cited in note 22); Protocol I (cited in note 24). The US ratified the 1949 Conventions, but not Protocol I. Most of the latter's provisions are deemed part of customary international law. Compare Protocol I, Arts 15 (“Protection of civilian medical and religious personnel”), 21 (“Medical vehicles”), 40 (“Quarter”) with Henckaerts & Doswald-Beck, *Customary International Humanitarian Law* at Chs 7 (“Medical and Religious Personnel and Objects”), 15 (“Denial of Quarter”) (cited in note 21).

IV. THE CONTENT OF THE SOFA

The signed Iraq SOFA is eighteen pages long and consists of a preamble and thirty articles. A reading of the English and Arabic texts reveals that Arabic was the working language. The sentence structure, syntax and phraseology are essentially Arabic. In fact, the reader of the English text will note certain stylistic incongruities, indicating translation, while a reading of the Arabic text flows naturally.

More significantly, both versions of the texts reveal a consistent emphasis on the rights and privileges of the granting state to the grantee state, which gives the agreement the characteristic of a limited business invitee status to US forces, and not that of a concession. By comparison to other US SOFAs with other host-countries, the Iraq SOFA has unique features with respect to the many limitations placed on in-country military operations granted the US. Its tenor and style emphasize Iraqi sovereignty.

The Iraq SOFA's articles cover a number of subjects, including: the laws to be followed by US forces;⁶⁶ how missions are to be planned and executed;⁶⁷ the disposition and use of property to Iraq;⁶⁸ environmental considerations;⁶⁹ movement of vehicles, individuals and goods;⁷⁰ how contracts will be executed by a Joint Committee;⁷¹ telecommunications and radio concerns;⁷² which country will exercise jurisdiction;⁷³ who may carry weapons and be in uniform;⁷⁴ payment of taxes and use of currency;⁷⁵ support services for US and Iraqi forces;⁷⁶ the procedures for settling civil claims;⁷⁷ procedures for detaining individuals and the disposition of current detainees;⁷⁸ how the agreement itself will be carried out;⁷⁹

⁶⁶ Iraq SOFA, Art 3 ("Laws") (cited in note 2).

⁶⁷ Id, Art 4 ("Missions").

⁶⁸ Id, Arts 5 ("Property Ownership"), 6 ("Use of Agreed Facilities and Areas"), 7 ("Positioning and Storage of Defense Equipment"), 26 ("Iraqi Assets"), 28 ("The Green Zone").

⁶⁹ Id, Art 8 ("Protecting the Environment").

⁷⁰ Id, Arts 9 ("Movement of Vehicles, Vessels, and Aircraft"), 14 ("Entry and Exit"), 15 ("Import and Export").

⁷¹ Id, Art 10 ("Contracting Procedures").

⁷² Iraq SOFA, Art 11 ("Services and Communications") (cited in note 2).

⁷³ Id, Art 12 ("Jurisdiction").

⁷⁴ Id, Art 13 ("Carrying Weapons and Apparel").

⁷⁵ Id, Arts 16 ("Taxes"), 20 ("Currency and Foreign Exchange").

⁷⁶ Id, Art 19 ("Support Activities Services").

⁷⁷ Id, Art 21 ("Claims").

⁷⁸ Iraq SOFA, Art 22 ("Detention") (cited in note 2).

⁷⁹ Id, Arts 23 ("Implementation"), 29 ("Implementing Mechanisms"), 30 ("The Period for which the Agreement is Effective").

the withdrawal of US forces;⁸⁰ and the termination of the application of UN Chapter VII powers.⁸¹

The Iraq SOFA begins with a preamble, and continues with two standard articles detailing the agreement's scope and the definitions of the terms included in the agreement. The remaining articles, however, appear in no particular order. Articles regulating the status of forces and operations are mixed throughout, while provisions for future relations are located toward the end.

The Iraq SOFA calls for US combat troops to be out of Iraqi cities by June 30, 2009, and out of the country by December 31, 2011.⁸² These dates were probably established in anticipation of new Iraqi and US administrations in 2009. Pull-out from Iraq's cities did occur as planned on June 30, 2009, amid widespread celebrations within Iraq.⁸³ The agreement also provides for earlier withdrawal of US forces from Iraq at the request of either government.⁸⁴ Training and support troops may remain longer than combat troops, if the Iraqi government so requests.⁸⁵ President Barack Obama announced during a February 27, 2009 speech to the Marine Corps at Camp Lejeune, North Carolina, that combat troops would be removed from Iraq by August 31, 2010, a year and a half ahead of the date the Iraq SOFA establishes.⁸⁶ However, withdrawal from Iraq could be delayed if situations of instability occur such as in Kirkuk, where American forces have noted some reluctance at leaving amid growing tension in the area.⁸⁷

It should be noted that US forces in Iraq are only permitted to engage in combat actions involving security threats to Iraq. The Iraq SOFA provides that

⁸⁰ Id, Art 24 ("Withdrawal of the United States Forces from Iraq").

⁸¹ Id, Art 25 ("Measures to Terminate the Application of Chapter VII to Iraq").

⁸² Id, Art 24.

⁸³ See Alissa Rubin, *Iraq Marks Withdrawal of US Troops From Cities*, NY Times A1, A1 (June 30, 2009) (reporting Iraqi celebration of US troop withdrawal with parades, fireworks and a national holiday).

⁸⁴ Iraq SOFA, Art 24(4) (acknowledging the right of either party to request the departure of US forces at any time) (cited in note 2). President Barack Obama announced during a February 27, 2009 speech that combat troops would be removed from Iraq by August 31, 2010 because of the need to move more troops into Afghanistan. See generally Press Release, The White House, *Responsibly Ending the War in Iraq* (Feb 28, 2009), online at <http://www.whitehouse.gov/blog/09/02/27/Responsibly-Ending-the-War-in-Iraq> (visited Feb 18, 2010).

⁸⁵ Consider Iraq SOFA, Art 5(5) (declaring that Iraqi representatives at the Joint Committee shall be notified upon the discovery of any historical or cultural site).

⁸⁶ See Press Release, The White House, *Responsibly Ending the War in Iraq* ¶ 16 (cited in note 84) ("[B]y August 31, 2010, our combat mission in Iraq will end.").

⁸⁷ See Adam Entous, *Pentagon 'very nervous' about Arab-Kurdish Feud*, Reuters (Aug 11, 2009), online at <http://www.reuters.com/article/idUSN11536529> (visited Apr 3, 2010) ("Washington has pushed for a settlement before its forces go home.").

“Iraqi land, sea, and air shall not be used as a launching or transit point for attacks against other countries.”⁸⁸

Iraqi airspace is to be transferred to the Iraqi government when the agreement goes into effect, and it conveys Iraqi ownership of all buildings and facilities on the ground built by the US. All cultural or historic sites must be returned to Iraq at that time.⁸⁹ These transfers had not occurred by March 2009.

Iraq’s sovereignty is the major theme of the Iraq SOFA: the agreement refers to the US presence as “temporary” on at least nine occasions. Questions concerning the movement of troops in and out of the country, and the movement of vehicles and equipment inside the country, are included in the Iraq SOFA and are subject to some Iraqi restrictions.⁹⁰ Additionally, provisions in the agreement require Iraqi approval in many areas, including: entry or exit of Iraqi citizens and residents;⁹¹ operations against al-Qaeda and terrorist groups;⁹² radio frequencies;⁹³ license plates for US vehicles;⁹⁴ radio and media programming with reach beyond US installations;⁹⁵ detention of suspects;⁹⁶ and search

⁸⁸ Iraq SOFA, Art 27 (cited in note 2).

⁸⁹ Id. The US handover of historical and cultural sites required by Article 5 of the Agreement has been occurring. The Agreement sets no definitive timetable for the return of such sites, leaving the decisions of how and when up to the Joint Committee established by the Agreement. On October 1, 2009 US forces transferred control of the historic Ibn Sina Hospital specifically in accordance with the Agreement. Press Release, *Historic Hospital to Transition to Iraqi Control*, Multi-National Force–Iraq (July 8, 2009), online at <http://www.usf-iraq.com/news/headlines/historic-hospital-to-transition-to-iraqi-control> (visited Apr 24, 2010). The US has also utilized the Immigration and Customs Enforcement Agency to comply with Article 15 of the Agreement, which requires the US to “take measures to ensure that no items or material of cultural or historic significance to Iraq are being exported.” Agreement Between the United States of American and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, Art. 15, (Nov. 17, 2008), online at http://graphics8.nytimes.com/packages/pdf/world/20081119_SOFA_FINAL_AGREED_TEXT.pdf (visited Apr 24, 2010). On February 25, 2010, the US handed over six Iraqi artifacts in a ceremony representing the return of more than 1,000 archeological artifacts. *US Returns Historical Artifacts to Iraq*, Telegraph (Feb. 26, 2010), online at <http://www.telegraph.co.uk/expat/expatnews/7322965/US-returns-historical-artifacts-to-Iraq.html> (visited Apr 24, 2010).

⁹⁰ See id, Arts 9, 14.

⁹¹ See id, Art 3(2) (prohibiting transfer of persons other than US armed forces “unless in accordance with applicable Iraqi laws and regulations”).

⁹² See id, Arts 4(1), 4(2) (“All such military operations that are carried out pursuant to this Agreement shall be conducted with the agreement of the Government of Iraq.”).

⁹³ Iraq SOFA, Art 11(2) (cited in note 2) (“The Government of Iraq owns all frequencies”)

⁹⁴ Id, Art 18(1) (“Official vehicles shall display official Iraqi license plates to be agreed upon between the Parties.”).

⁹⁵ Id, Art 19(2) (“Broadcasting, media, and entertainment services that reach beyond the scope of the agreed facilities and areas shall be subject to Iraqi laws.”).

warrants for homes.⁹⁷ References to military operations are couched in language suggesting that US actions are to be exclusively based on self-defense or security considerations. Admittedly, this provides the US with much leeway. Still, it gives the Iraqi government a legal basis to question military operations in the future.

The Iraq SOFA specifically allows for self-defense, in accordance with “international law,”⁹⁸ which suggests that the Bush Administration wanted to emphasize that it is within the realm of an Executive Agreement, not to be construed as a bilateral security agreement, which would require the Senate’s advice and consent.⁹⁹

Overall, the Iraq SOFA calls for increased accountability for US forces in Iraq. For example, the US is required to supply the Iraqi government with lists of US forces entering and exiting Iraq;¹⁰⁰ all buildings in Iraq used by MNF-I are to be inventoried and the list given to the Iraqi government, and all buildings are to be returned to Iraq (free of charge) at the expiration of the agreement;¹⁰¹ US forces are to inform Iraqi authorities of the Iraqi suppliers’ and Iraqi contractors’ names, and the amount of relevant contracts;¹⁰² air traffic control and surveillance are to be handed over to Iraqi authorities as soon as the agreement goes into effect;¹⁰³ and combat operations are to have an Iraqi element through a Joint Mobile Operations Command Committee (JMOCC) to control operations of US and Iraqi forces.¹⁰⁴ The Iraqi government alone has the final say in whether operations are in conformity with Iraqi law.

In the area of claims, both sides agreed to waive their rights to request compensation because of any harm, loss, or destruction of property, or to request compensation for injury or death of forces members or civilian members from both sides occurring during their official duties.¹⁰⁵ This does not apply to civil settlements where the US will pay compensation to settle individual claims arising from wrongful conduct by a member of the armed forces or civilian

⁹⁶ See *id.*, Art 22(1) (prohibiting detention or arrest “except through an Iraqi decision issued in accordance with Iraqi law”).

⁹⁷ *Id.*, Art 22(5) (prohibiting the search of houses or other real estate properties by United States armed forces without an Iraqi judicial warrant).

⁹⁸ *Id.*, Art 4(5).

⁹⁹ See US Const Art II, § 2 (cited in note 44). See generally Henkin, *Foreign Affairs and the Constitution* (cited in note 60).

¹⁰⁰ Iraq SOFA, Art 14(2) (cited in note 2).

¹⁰¹ *Id.*, Art 5(8).

¹⁰² *Id.*, Art 10.

¹⁰³ *Id.*, Art 9(3).

¹⁰⁴ See *id.*, Art 4(2).

¹⁰⁵ Iraq SOFA, Art 21(1) (cited in note 2).

members during their official duties, or to non-combat accidents caused by US armed forces.¹⁰⁶

Under the Iraq SOFA, the US benefits from a waiver of fees and taxes for activities in Iraq. This includes all fees related to US usage of telecommunications frequencies, use of Iraqi ports, and services and goods obtained by US forces, or any entities acting on their behalf, in Iraq for official use.¹⁰⁷ Moreover, US forces members and civilian members are permitted to import, re-export, and use their personal equipment and materials for consumption or personal use, and are exempt from taxes.

V. JURISDICTIONAL QUESTIONS

Jurisdiction over US forces was a major issue during the negotiations. The jurisdictional clause is at the heart of the agreement and is quoted below because of its importance. It states:

Art. 12 – Legal Jurisdictions

Recognizing Iraq's sovereign right to determine and enforce the rules of criminal and civil law in its territory, in light of Iraq's request for temporary assistance from the United States Forces set forth in Article 4, and consistent with the duty of the members of the United States Forces and the civilian component to respect Iraqi laws, customs, traditions, and conventions, the Parties have agreed as follows:

1. Iraq shall have the primary right to exercise jurisdiction over members of the United States Forces and of the civilian component for the grave premeditated felonies enumerated pursuant to paragraph 8, when such crimes are committed outside agreed facilities and areas and outside duty status.
2. Iraq shall have the primary right to exercise jurisdiction over United States contractors and United States contractor employees.
3. The United States shall have the primary right to exercise jurisdiction over members of the United States Forces and of the civilian component for matters arising inside agreed facilities and areas; during duty status outside agreed facilities and areas; and in circumstances not covered by paragraph 1.

¹⁰⁶ Id, Art 21(2).

¹⁰⁷ Id, Arts 9(5), 11(4), 15(2), 16(1).

4. At the request of either Party, the Parties shall assist each other in the investigation of incidents and the collection and exchange of evidence to ensure the due course of justice.

5. Members of the United States Forces and of the civilian component arrested or detained by Iraqi authorities shall be notified immediately to United States Forces authorities and handed over to them within 24 hours from the time of detention or arrest. Where Iraq exercises jurisdiction pursuant to paragraph 1 of this Article, custody of an accused member of the United States Forces or of the civilian component shall reside with United States Forces authorities. United States Forces authorities shall make such accused persons available to the Iraqi authorities for purposes of investigation and trial.

6. The authorities of either Party may request the authorities of the other Party to waive its primary right to jurisdiction in a particular case. The Government of Iraq agrees to exercise jurisdiction under paragraph 1 above, only after it has determined and notifies the United States in writing within 21 days of the discovery of an alleged offense, that it is of particular importance that such jurisdiction be exercised.

7. Where the United States exercises jurisdiction pursuant to paragraph 3 of this Article, members of the United States Forces and of the civilian component shall be entitled to due process standards and protections pursuant to the Constitution and laws of the United States. Where the offense arising under paragraph 3 of this Article may involve a victim who is not a member of the United States Forces or of the civilian component, the Parties shall establish procedures through the Joint Committee to keep such persons informed as appropriate of: the status of the investigation of the crime; the bringing of charges against a suspected offender; the scheduling of court proceedings and the results of plea negotiations; opportunity to be heard at public sentencing proceedings, and to confer with the attorney for the prosecution in the case; and, assistance with filing a claim under Article 21 of this Agreement. As mutually agreed by the Parties, United States Forces authorities shall seek to hold the trials of such cases inside Iraq. If the trial of such cases is to be conducted in the United States, efforts will be undertaken to facilitate the personal attendance of the victim at the trial.

8. Where Iraq exercises jurisdiction pursuant to paragraph 1 of this Article, members of the United States Forces and of the civilian component shall be entitled to due process standards and protections consistent with those available under United States and Iraqi law. The Joint Committee shall establish procedures and mechanisms for implementing this Article, including an enumeration of the grave premeditated felonies that are subject to paragraph 1 and procedures that meet such due process standards and protections. Any exercise of jurisdiction pursuant to paragraph 1 of this Article may proceed only in accordance with these procedures and mechanisms.

9. Pursuant to paragraphs 1 and 3 of this Article, United States Forces authorities shall certify whether an alleged offense arose during duty status. In those cases where Iraqi authorities believe the circumstances require a review of this determination, the Parties shall consult immediately through the Joint Committee, and United States Forces authorities shall take full account of the facts and circumstances and any information Iraqi authorities may present bearing on the determination by United States Forces authorities.

10. The Parties shall review the provisions of this Article every 6 months including by considering any proposed amendments to this Article taking into account the security situation in Iraq, the extent to which the United States Forces in Iraq are engaged in military operations, the growth and development of the Iraqi judicial system, and changes in United States and Iraqi law.¹⁰⁸

Article 12 grants Iraq jurisdiction over “grave premeditated felonies” that are committed by US forces outside US installations or while forces are off duty. This may prove to be an issue, as US forces in Iraq are considered to be “on duty,” and Article 12(9) grants the US the authority to decide if the individual was on or off duty. The Iraqi government may have a different view as events unfold over the next two years. A renegotiation of this point will call for the Joint Ministerial Committee (JMC) to decide if a military unit or a member of the US forces is deemed on or off duty. Additionally, if Iraq has jurisdiction over such a unit or person, the individual in question is granted due process under Article 12(8) according to guarantees of both US *and* Iraqi law, but the individual in question is to remain in US custody during investigation and trial. If convicted, the individual in question would be transferred to Iraqi custody. All of these provisions are to be reviewed every six months.

The position of civilian contractors operating in Iraq is subject to some uncertainty. For example, Articles 12(7) and (8) grants civilian contractors deemed to be employees of the Department of Defense the same due process standards as members of the US military.¹⁰⁹ However, civilian contractors who are not employees of DOD fall under the provision on “civilian component” (Article 12). Notification of arrest of military personnel and DOD employees does not extend to civilian contractors (Article 12-5).

Contractors in Iraq are subject to the local laws of Iraq and therefore not subject to the same governing framework as military personnel in Iraq and are

¹⁰⁸ Id, Art 12.

¹⁰⁹ See id, Arts 12(7)–(8) (stating members of the US armed forces and members of the civilian component are entitled to due process standards and protections).

not considered employees of the DOD.¹¹⁰ Civilian employees of the DOD would be covered by the same SOFA provisions as US military personnel. The definition of a contractor can be found in Article 2 of the Agreement, “non-Iraqi persons or legal entities, and their employees, who are citizens of the United States or a third country and who are in Iraq to supply goods, services, and security in Iraq to or on behalf of the United States Forces under a contract or subcontract with or for the United States Forces.”¹¹¹ A recent development regarding contractors occurred in late 2009 when seventeen countries, including the US, signed the Montreux Document setting down the understandings of governments involved in Iraq and Afghanistan regarding the legal obligations surrounding contractors in combat zones.¹¹² The Document emphasizes the need for contractors to be held to international legal standards during their operations. The Document recognizes three types of states who have obligations for civilian contractors: “Contracting States” who contract for the services of civilians; “Territorial States” in whose territory the civilians are working, and “Home States” where civilian corporations may be headquartered or incorporated.¹¹³ States signing the Document are required to ensure contractors are trained on international humanitarian law and relevant administrative, judicial and military regulations that will govern their conduct while in the theater of operations.¹¹⁴ The Document further requires States to provide for penal sanctions for actions that violate international legal obligations. Should those obligations be breached, the document requires the employing State to provide reparations for the contractors’ actions. The Document avoids defining contractors as combatants or non-combatants, a move probably designed to have the document provide a more functional than political approach to the role of civilian contractors in combat zones. Lastly, the Document provides several “best practices” for employing States to utilize when relying on civilian contractors and for States in whose territory the contractors will work to provide for a domestic legal framework regarding the presence of civilian contractors.

Article 2(1) gives Iraq the right to exercise primary jurisdiction over both US military forces and contractors who have committed certain “grave premeditated felonies,” presumably enumerated in Paragraph 8, but which do

¹¹⁰ Jennifer K. Elsea, *Private Security Contractors in Iraq and Afghanistan: Legal Issues*, CRS Report R40991 11–12 (Dec. 22, 2009).

¹¹¹ Framework Agreement, Art. 2 (cited in note 3).

¹¹² Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, UN Doc 1/63/467-S/2008/636 (Oct. 8, 2009) online at [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908/\\$FILE/ICRC_002_0996.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908/$FILE/ICRC_002_0996.pdf) (visited Apr 24, 2010).

¹¹³ Id.

¹¹⁴ Id.

not appear in that paragraph—a curious omission to say the least.¹¹⁵ Instead, their determination is left to the joint committee. Consequently, there is uncertainty as to what these “grave premeditated felonies” will be, as well as which category of civilian contractors (deemed DOD employees or not) or even what category of US military personnel may be subjected to the “primary right to exercise jurisdiction” that Paragraph 1 granted to Iraq.¹¹⁶ Another issue that affects interpretation of this provision is that it has to be read in conjunction with Paragraph 3, which gives the US primary jurisdiction with respect to matters “arising inside agreed facilities and areas; duty status outside agreed facilities and areas; and in circumstances not covered by Paragraph 1.”¹¹⁷ How can these two provisions be interpreted when one of them gives primary jurisdiction to Iraq and the other gives primary jurisdiction to the US?¹¹⁸ This may mean that any crimes referred to in Paragraph 1 as “grave premeditated felonies” are subject to Iraqi jurisdiction, while similar crimes, committed inside certain “agreed facilities and areas,” as well as during duty status “outside agreed facilities and areas” and in “circumstances not covered by Paragraph 1” are subject to US primary jurisdiction.¹¹⁹ This ambiguity, not to say contradiction, is bolstered by Paragraph 2, which explicitly states, “Iraq shall have the primary right to exercise jurisdiction over US contractors and US contractor employees.”¹²⁰ On their face, these three paragraphs are ambiguous and are likely to give rise to contradictory interpretations.

If the allocation of jurisdiction is intended to give the US jurisdiction in certain areas and under certain circumstances, then it should be understood as complete and applicable to military and nonmilitary personnel accompanying military personnel as well as to civilian contractors and their employees, even though they may not be US citizens. This interpretation would leave jurisdiction outside these areas or beyond duty assignments by the US military to the Iraqi

¹¹⁵ Id, Art 2(1), (8). It should be noted that nothing in the 1969 Iraqi Criminal Code refers to “grave premeditated felonies.” The Code contains provisions whose penalties are for what US criminal law defines as crimes and misdemeanors. See STS 251/88, The Penal-Code with amendments, Iraq Ministry of Justice (“The Criminal Offence”), NO (111) at ch 3 (1969). US criminal law does not have a criminal nomenclature of “grave premeditated felonies.” Neither Title 18 nor Title 10 of the US code uses these terms. The 1961 Model Penal Code of the American Law Institute, adopted with the same variations in more than forty states also does not have this nomenclature. How is it going to be interpreted if it does not exist in Iraqi and US criminal law is a question likely to create conflict between the two states when a situation will arise that involves a crime under the 1969 Iraqi Criminal Code.

¹¹⁶ Iraq SOFA, Art 12(1) (cited in note 2).

¹¹⁷ Id, Art 12(3).

¹¹⁸ Compare id, Art 12(1), with id, Art 12(3).

¹¹⁹ Id, Art 12(1), (3).

¹²⁰ Id, Art 12(2).

authorities. If so, then it seems that Paragraph 1 qualifies what such Iraqi jurisdiction refers to as “grave premeditated felonies.”¹²¹

The issue with respect to the criminal responsibility of US civilian contractors could arise under the previously existing immunity of private contractors under CPA Order 17, which states, “Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto.”¹²² A September 16, 2007 incident involving the killing of 17 Iraqi civilians by US security firm Blackwater USA (currently known as Xe LLC) aggravated negative Iraqi public attitudes toward US contractors.¹²³ In response to the shooting the House of Representatives voted overwhelmingly to adopt a bill bringing US government contractors in Iraq under US criminal jurisdiction, however, contractors continued to work in Iraq under a cover of immunity until the 2008 SOFA.¹²⁴

The ambiguities discussed above led the International Peace Operations Association to raise issues in a recent publication, which warns contractors about the practical realities of Iraqi jurisdiction.¹²⁵ It states, “US contractors need

¹²¹ Iraq SOFA, Art 12(1) (cited in note 2).

¹²² CPA Order 17, § 4(3) (cited in note 34).

¹²³ See Sabrina Tavernise, *US Contractor Banned by Iraq Over Shootings*, NY Times, ¶ 5 (Sep 18, 2007), online at <http://www.nytimes.com/2007/09/18/world/middleeast/18iraq.html> (visited Apr 3, 2010) (“The deaths struck a nerve with Iraqis, who say that private security firms are often quick to shoot and rarely held responsible for their actions.”).

¹²⁴ See David M. Herszenhorn, *House's Iraq Bill Applies US Law to Contractors*, NY Times ¶ 1 (Oct 5, 2007), online at <http://www.nytimes.com/2007/10/05/washington/05cong.html> (visited Apr 3, 2010); James Risen, *End of Immunity Worries US Contractors in Iraq*, NY Times ¶ 2 (Nov 20, 2008), online at <http://www.nytimes.com/2008/12/01/world/middleeast/01contractors.html> (visited Apr 24, 2010) (reporting that private contractors were stripped of their immunity once the Iraqi government ratified the Iraq SOFA). Families of the victims of the 2007 Blackwater shooting filed a civil lawsuit in federal court alleging Blackwater founder Erik Prince, the company, and its affiliated companies violated the federal Alien Tort Statute in committing war crimes, and that they should be liable for claims of assault and battery; wrongful death; intentional and negligent infliction of emotional distress; and negligent hiring, training and supervision under state law. The lawsuit sought compensatory damages for death, physical, mental, and economic injuries, as well as punitive damages. In December 2009, however, the case was dismissed due to the government's mishandling of the case. See Charlie Savage, *Judge Drops Charges From Blackwater Deaths in Iraq*, NY Times ¶ 5 (Dec 31, 2009), online at <http://www.nytimes.com/2010/01/01/us/01blackwater.html> (visited Apr 3, 2010). The decision enraged Iraqis, and in attempt to quell political tensions, Vice President Biden announced in Baghdad that the DOJ would appeal the dismissal. See Ernesto Londoño, *Justice Department to Appeal Dismissal of Blackwater Indictment*, Wash Post ¶ 1 (Jan 24, 2010), online at <http://www.washingtonpost.com/wpdyn/content/article/2010/01/23/AR2010012301121.html> (visited Apr 24, 2010).

¹²⁵ See Tara Lee and Ryan Berry, *Contracting Under the SOFA: New Agreement Subjects Contractors to Iraqi Criminal and Civil Laws*, 4 J Intl Peace Ops 7, 8 (2009) (warning US contractors about a UN Assistance Mission for Iraq report that criticizes Iraq's judicial and penal systems, including reporting incidents of mistreatment and torture in Iraqi prisons). The article also refutes the claim

to understand that . . . nothing in the SOFA guarantees US citizen contractors even basic US constitutional protections while serving US interests in Iraq.”¹²⁶ US contractors’ reactions to the Iraq SOFA are described as “understandably concerned and overwhelmed with unanswered questions.”¹²⁷

Following the conclusion of the Iraq SOFA, US forces are not permitted to detain or arrest anyone (except members of the armed forces and civilian members) unless the detention or arrest is based on an Iraqi decision issued in accordance with Iraqi laws.¹²⁸ Those detained must be handed over to Iraqi authorities within twenty-four hours.¹²⁹ Further, all detainees in US custody shall be released following the conclusion of the agreement, unless the Iraqi authorities request otherwise.¹³⁰ The detainees represent a difficult point for the Iraqi government, which will have to absorb these “civilian internees” in a domestic prison system operating under Iraq’s constitution. US detainees may be deemed criminals under the Iraq justice system, and will have to be tried accordingly.¹³¹

As of 2008, the US has set up plans to deliver each month files of 1,500 detainees, until the files of all 15,800 detainees have been delivered to the Iraqi government.¹³² The Iraqi government has forty-five days to look through the files and decide which detainees should be released and which should be transferred to Iraqi custody.¹³³ This plan is to become operational after the Iraqi government has developed its own plan for the transfer of detainees in

that contractors have been operating in a legal vacuum while in Iraq, citing both the Military Extraterritorial Jurisdiction Act and the Uniform Code of Military Justice as possible means of jurisdiction over contractors. *Id.* at 10.

¹²⁶ *Id.* at 8.

¹²⁷ *Id.* The article also highlights changes that US contracting companies will need to make with respect to the SOFA: “face increased litigation risks, have to learn the ins and outs of Iraqi law, modify their operations and train their employees accordingly, negotiate costly new insurance coverage, replace employees who decide to seek employment elsewhere rather than subject themselves to Iraqi jurisdiction, all the while not defaulting on contracts.” *Id.* at 10.

¹²⁸ Iraq SOFA, Art 22(1) (cited in note 2).

¹²⁹ *Id.*, Art 22(2).

¹³⁰ *Id.*, Art 22(4) (“The United States Forces shall act in full and effective coordination with the Government of Iraq to turn over custody of such wanted detainees to Iraqi authorities pursuant to a valid Iraqi arrest warrant and shall release all the remaining detainees in a safe and orderly manner, unless otherwise requested by the Government of Iraq[.]”).

¹³¹ See *id.* (“Competent Iraqi authorities shall issue arrest warrants for persons who are wanted by them[.]”).

¹³² See Joseph Giordono, *US, Iraq Set Up Detainee Transfers*, Stars and Stripes ¶¶ 6–7 (Dec 12, 2008), online at <http://www.stripes.com/article.asp?section=104&article=59360> (visited Apr 24, 2010).

¹³³ *Id.*, ¶ 5.

accordance with Article 22(4) of the agreement.¹³⁴ On August 28, 2009, the US military announced that the number of detainees in US custody had dropped below 9,000 persons.¹³⁵ The challenges for those released remained high.¹³⁶

VI. THE STRATEGIC FRAMEWORK AGREEMENT OF 2008

In addition to the Iraq SOFA described above, the US and Iraqi governments also concluded a Strategic Framework Agreement (Framework Agreement), detailing future foreign relations between the two states.¹³⁷ Similar documents are usually termed treaties, according to a survey of the US treaties in force as of 2007. According to the US State Department, thirty-two such “friendship” agreements are deemed “treaties,” while only three are termed “agreements” signed by the Executive.¹³⁸

Traditionally, “friendship, commerce, and navigation,” agreements have gone through the advice and consent process, including those agreements addressing investment and trade relations. More recently, presidents have opted to send agreements to Congress as part of a legislative process, which requires less of a majority to pass than the traditional advice and consent process for formal treaties.¹³⁹ The legislative process is also faster than the treaty process, which sometimes finds conventions languishing in committee rather than being put to the full Senate for a vote. However, both processes require cooperation with Congress, a step not taken in the formation of either the Framework Agreement or the Iraq SOFA. Although there was a sense of urgency in

¹³⁴ See *id.*, ¶ 11.

¹³⁵ Hamid Ahmed and Bushra Juhi, *US Military: Number of Iraqi Detainees Below 9,000*, Associated Press ¶ 1 (Aug 28, 2009), online at <http://www.highbeam.com/doc/1A1-D9AD890G0.html> (visited Apr 24, 2010).

¹³⁶ See generally Campbell Robertson, *Iraqis Freed by US Face Few Jobs and Little Hope*, NY Times (Aug 6, 2009), online at <http://www.nytimes.com/2009/08/07/world/middleeast/07detainees.html> (visited Apr 24, 2010).

They have received a grim welcome. Many return to families crippled by debt from months without a breadwinner. Insurgents see them as potential recruits—or American agents. Old friends, neighbors and even relatives refuse to greet them in public, suspicious of their backgrounds or worried that a few minutes of socializing could mean guilt by association. The burdens placed on these former detainees and their families is quite heavy. The Government of Iraq offers no social services for such persons.

Id., ¶ 4.

¹³⁷ Framework Agreement (cited in note 3).

¹³⁸ See US Dept of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on November 1, 2007* (Office of the Assistant Legal Advisor for Treaty Affairs, 2007), online at <http://www.state.gov/s/l/treaty/treaties/2007/index.htm> (visited Apr 24, 2010).

¹³⁹ See Steve Charnovitz, *Using Framework Statutes to Facilitate US Treaty Making*, 98 Am J Int'l L 696, 697 (2004).

completing the Iraq SOFA before the expiration of UN Security Council Resolution 1790, no such urgency could be cited in the formation of the Framework Agreement.

The Framework Agreement's preamble notes the end of UN Security Council action pursuant to Chapter VII authorization in Iraq, which raised the question of why this separate agreement was created if much of the content would be repetitive of provisions found within the Iraq SOFA. Among the provisions in the Framework Agreement is a reiteration of the US pledge not to use the territory of Iraq to launch attacks against other countries.¹⁴⁰ The Iraq SOFA states, "Iraqi land, sea, and air shall not be used as a launching or transit point for attacks against other countries."¹⁴¹ The Framework Agreement uses the exact same language, but adds that the US may not "seek or request permanent bases or a permanent military presence in Iraq."¹⁴²

The Framework Agreement encroaches on the Iraq SOFA provisions when it states in the preamble, "Recognizing both countries' desire to establish a long-term relationship, the need to support the success of the political process, reinforce national reconciliation within the framework of a unified and federal Iraq, and to build a diversified and advanced economy that ensures the integration of Iraq into the international community." The Framework Agreement further states:

Reaffirming that such a long-term relationship in economic, diplomatic, cultural and security fields will contribute to the strengthening and development of democracy in Iraq, as well as ensuring that Iraq will assume full responsibility for its security, the safety of its people, and maintaining peace within Iraq and among the countries of the region.¹⁴³

The Iraq SOFA preamble similarly reads:

Recognizing the importance of: strengthening their joint security, contributing to world peace and stability, combating terrorism in Iraq, and cooperating in the security and defense spheres, thereby deterring aggression and threats against the sovereignty, security, and territorial integrity of Iraq and against its democratic, federal, and constitutional system.¹⁴⁴

In this respect, the Framework Agreement adds little that was not already contained in the Iraq SOFA.

A reading of the language of the Framework Agreement suggests that its original working language was English, as opposed to the Iraq SOFA, which

¹⁴⁰ Framework Agreement, § 1, ¶ 4 (cited in note 3).

¹⁴¹ Iraq SOFA, Art 27 (cited in note 2).

¹⁴² Framework Agreement, § 1, ¶ 4 (cited in note 3).

¹⁴³ *Id.*, pmb1, ¶ 5.

¹⁴⁴ Iraq SOFA, pmb1 (cited in note 2).

appears to have been originally written in Arabic. Apart from notable similarities in content, topics normally in a “friendship” agreement can be found in the Framework Agreement in such sections as “Cultural Cooperation,”¹⁴⁵ “Economic and Energy Cooperation,”¹⁴⁶ “Health and Environmental Cooperation,”¹⁴⁷ and “Information Technology and Communications Cooperation.”¹⁴⁸

The section entitled “Law Enforcement and Judicial Cooperation” includes many of the provisions common to a rule of law plan, such as fighting corruption, organized crime, and drugs.¹⁴⁹ It also provides for further integration of police, courts, and prisons.¹⁵⁰ These sentiments echo and inform some SOFA content in regard to jurisdiction, which is subject to change depending on “the security situation in Iraq, the extent to which the United States Forces in Iraq are engaged in military operations, the growth and development of the Iraqi judicial system, and changes in United States and Iraqi law.”¹⁵¹

VII. THE IRAQ SOFA AND THE FRAMEWORK AGREEMENT COMMITTEES

The Iraq SOFA and the Framework Agreement cumulatively establish four new “committees.”¹⁵² The Iraq SOFA’s addition of the JMOCC procedures to military operations adds another layer of review to US military operations, irrespective of the security needs of US forces and perceived threats. The Iraq SOFA represents a subtle shift in how the US will “plan, coordinate, and execute missions in Iraq.”¹⁵³ It is unclear from the text of the SOFA what the exact make-up of the JMOCC will be and how US military commanders are to coordinate with Iraqi liaison officers. The JMOCC process may mean nothing

¹⁴⁵ Framework Agreement, § 4 (cited in note 3).

¹⁴⁶ Id, § 5.

¹⁴⁷ Id, § 6.

¹⁴⁸ Id, § 7.

¹⁴⁹ Id, § 8, ¶ 3.

¹⁵⁰ Framework Agreement, § 8, ¶ 1 (cited in note 3).

¹⁵¹ Iraq SOFA, Art 12(10) (cited in note 2).

¹⁵² It is possible that behind the creation of the committees is the fact that every previous time the US has set up a committee in dealing with Iraq, someone was given a position that included remuneration and paid for travel and other expenses. The committees may be a way to create jobs in Iraq for the benefit of the friends of politicians.

¹⁵³ Raymond T. Odierno, Commanding General MNF-I, *Letter to Soldiers, Sailors, Airmen, Marines, Coast Guardsmen and Civilians of MNF-I* ¶ 3 (Dec 4, 2008) (notifying multinational forces of changes to operations in Iraq, including the coordination of combat operations through Iraqi Security Forces and the issuance of new rules of engagement).

more than an extra layer of decision-making at the operational planning phase. However, requiring that the JMOCC approve tactical decisions could cause a delay in reaction time for field-level (regimental or battalion) commanders. From a tactical standpoint, a commander's biggest concerns will most likely be who has the final say over approval of military operations, what level of operations need approval, and what are the procedural requirements for initiating an operation.

In the event that the JMOCC is unable to resolve any issues, the SOFA requires a JMC to provide a solution, creating yet another layer of operational oversight with additional delays in military actions.¹⁵⁴ MNF-I and its smaller units, such as Multi-National Corps—Iraq, currently work out of a Joint Operations Center (JOC) with other member governments. Should the new JMOCC be set up similar to a JOC structure and procedure, it may not pose much of a transition problem for US military forces currently serving in Iraq. However, if the new JMOCC is comprised of civilian representatives such as Iraqi cabinet ministers (more like the US National Security Council), then bureaucratic stagnation may ensue. As MNF-I already answers to US Central Command (CENTCOM) regarding military operations in Iraq, the JMOCC would be in direct competition with CENTCOM authority, and therefore may create conflict between civilian and military leadership.

The Framework Agreement also contains provisions for the establishment of yet another Joint Committee, a Higher Coordinating Committee (HRC) to “monitor the overall implementation of the Agreement and develop the agreed upon objectives.”¹⁵⁵ Membership in the HRC is not settled, and may include representatives from various ministries or departments, depending on the Committee's needs.¹⁵⁶ In addition, Joint Coordination Committees (JCCs), which report to the HRC, are to be established under the Framework Agreement.¹⁵⁷ These committees will focus on resolving disputes, proposing new projects, and coordinating with government departments when necessary.¹⁵⁸ It is unclear if these committees will serve in addition to, or in lieu of, the offices within the government already tasked with similar topics, such as the Fulbright and exchange programs located in the agreement.¹⁵⁹

¹⁵⁴ See Iraq SOFA, Art 4(2) (cited in note 2) (“Issues regarding proposed military operations that cannot be resolved by the JMOCC shall be forwarded to the Joint Ministerial Committee.”).

¹⁵⁵ Framework Agreement, § 9, ¶ 1 (cited in note 3).

¹⁵⁶ See *id.*

¹⁵⁷ *Id.*, § 9, ¶ 2.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*, § 4, ¶¶ 1, 3.

VIII. THE US DUTY UNDER INTERNATIONAL LAW TO ENSURE THE PROTECTION OF INDIVIDUALS CONFINED IN “CAMP ASHRAF” TO WHOM THE US HAS GRANTED “PROTECTED PERSONS” STATUS

None of the text of any of the agreements mentioned above addresses certain international legal obligations that the US has incurred during its period of occupation, namely those Iranian civilians to whom it has granted “protected persons” status, living at Camp Ashraf in Diyala Province.

Some 3,400 members of the People’s Mojahedin Organization of Iran (PMOI) reside at Camp Ashraf, Iraq. Since 2003, they had been protected by units of the Multinational Force-Iraq, and in 2004, they were officially declared to be “protected persons” under the Fourth Geneva Convention.¹⁶⁰ On May 10, 2003, then Major General (now General) Ray Odierno, who in September 2008 assumed command of all US forces in Iraq, announced a disarmament plan arranged between the PMOI located at Camp Ashraf in Diyala Province, Iraq, and US forces.¹⁶¹ General Odierno stated that the PMOI had agreed to “disarm and consolidate.” In 2004, the US Military granted members of the PMOI “protected persons” status under the Fourth Geneva Convention after the group agreed to voluntarily give up their weapons, and presented no resistance to incoming coalition forces.¹⁶² The group also signed an Agreement with MNF forces rejecting violence and terrorism.¹⁶³ The PMOI were afforded this status

¹⁶⁰ See Geneva Convention IV, part 3 (cited in note 22) (“Status and Treatment of Protected Persons”). In September 2003, this writer submitted to Secretary of Defense Donald Rumsfeld a memorandum entitled “Legal Opinion on the Legal Status under International Law of the Members of the People’s Mojahedins Organization of Iran Presently in the Territory of Iraq,” arguing that the people at Camp Ashraf are civilian “protected persons” under the Geneva Conventions. The DOD accepted this position and has acted accordingly since then, including providing them with security escort when leaving the confines of Ashraf City for such tasks as going to the bank or market. See Douglas Jehl, *US Sees No Basis to Prosecute Iranian Opposition Terror’ Group Being Held in Iraq*, NY Times (July 27, 2004) (reporting that the deputy commanding general in Iraq said members of the People’s Mujahedeen of Iran have been deemed “protected persons” by the US military); see also Protocol I (cited in note 24); United Nations, Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (“Protocol II”), UN Doc A/32/144 (1977).

¹⁶¹ See Stephen Coates, *US Says Iran Opposition in Iraq Agrees to Disarm*, Agence France-Presse ¶ 3 (May 10, 2003).

¹⁶² See Michael Ware, *US Protects Iranian Opposition Group in Iraq*, CNN.com ¶¶ 8, 16 (Apr 6, 2007), online at <http://www.cnn.com/2007/WORLD/meast/04/05/protected.terrorists/index.html?eref=yahoo> (visited Apr 24, 2010). See also *Proclamation by the Commander, Multi-National Forces-Iraq, on the Signing of the “Agreement for the Individuals of the People’s Mujahedin Organization of Iran (PMOI)” at Ashraf, Iraq* (July 2, 2004).

¹⁶³ See Geoffrey D. Miller, Deputy Commanding General MNF-I, *Letter to the People of Ashraf* ¶ 2 (July 21, 2004) (“You have signed an Agreement rejecting violence and terrorism.”).

despite their possession of weapons, because they were not considered regular members of the armed forces of a party to a conflict, as intended under the Third Geneva Convention.¹⁶⁴ The US State Department conducted an extensive review into the PMOI and its members, which did not result in any charges being brought against the group or any of its members.¹⁶⁵

The Iraqi government and several political leaders have threatened to expel the PMOI, or to forcefully repatriate them to Iran.¹⁶⁶ These are clear indicators of the threat and dangers to which the individuals at Camp Ashraf are likely to be exposed if they return to Iran.¹⁶⁷ However, Diyala Province, where Camp Ashraf is located, can still be deemed under constructive US control. Whether or not it is under US control, the question of the continued US obligations to those it has designated “protected persons” remains.

Under Article 45 of the Fourth Geneva Convention, “in no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.”¹⁶⁸ Having designated the PMOI “protected persons,” the US has a duty to abide by all the provisions of the Fourth Geneva Convention, including those regarding the transfer of custody. Regardless of the SOFA, the US would be obligated under this provision for the continued protection of “protected persons” under the Fourth Geneva Convention.

According to a recently released Bush Administration legal memo, Administration attorneys argued that “protected persons” status would not apply to al-Qaeda, and would be reserved primarily for citizens or residents of

¹⁶⁴ On September 12, 2008, this writer joined with attorney Steven Schneebaum in a letter to Defense Secretary Robert Gates, noting the continued obligations of the US to the “protected persons.” See also n 165.

¹⁶⁵ See Jehl, *US Sees No Basis to Prosecute*, NY Times ¶ 1 (cited in note 160) (“A 16-month review by the United States has found no basis to charge members[.]”).

¹⁶⁶ Paul Tait, *Iraq Says Working to Expel Iranian Rebel Group*, Reuters ¶ 1 (Mar 2, 2008), online at <http://www.reuters.com/article/idUSL023773720080302> (visited Apr 24, 2010) (reporting that Iraq was trying to expel the Mujahadeen e-Khalq (“MEK”) group).

¹⁶⁷ The protected persons, who are members of the PMOI, were in opposition to Ayatollah Khomeini, whose Revolutionary Guard are believed to have killed some 30,000 members as they fled to Iraq. See Christina Lamb, *Khomeini fatwa 'led to killing of 30,000 in Iran'*, Sunday Telegraph, (Feb 4, 2001). They are also believed to have fought alongside Iraq in the Iraq-Iran war of 1980-88. Their return to Iran would mean certain death for some, and likely torture and imprisonment for others. They would fulfill the definition of “persecuted” under the 1951 Convention Relating to the Status of Refugees. See Convention Relating to the Status of Refugees (1951), 189 UNTS 150, Art 33 (“Prohibition of Expulsion or Return (“Refoulement”)”). See also Guy Goodwin-Gill, *The Refugee in International Law* (Oxford 3d ed 2007).

¹⁶⁸ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1950), Art 45, ¶ 4, 6 UST 3516, 75 UNTS 287.

the occupied territory.¹⁶⁹ Although the memo's main purpose was to exclude a certain segment of combatants from Geneva Conventions protections (and therefore subject to detainment at Guantanamo Bay, Cuba), the memo also has an impact on the PMOI, who were granted "protected persons" status by the US. Nationals of "neutral States are not per se excluded from 'protected person' status in occupied Iraq" and therefore the PMOI, who are officially citizens of Iran, could be protected.¹⁷⁰ According to the memo, the Geneva Conventions would apply as long as the US is considered an occupying power, and the US would be considered an "occupying power over any Iraqi territory that is 'actually . . . under the authority' of the United States."¹⁷¹ This could mean that the US feels its obligation to the PMOI will end once Diyala Province is turned back over to Iraq's government.

Two additional international obligations bind the US to protect the PMOI: the 1951 UN Convention Relating to the Status of Refugees¹⁷² and the 1967 Protocol to the Convention Relating to the Status of Refugees.¹⁷³ The 1951 Convention, which is incorporated in the 1967 Protocol, states that each party to the convention "shall accord to refugees lawfully in its territory, the right to choose their place of residence."¹⁷⁴ The Convention also explicitly prohibits repatriation that would amount to *refoulement*, "where [the refugee's] life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."¹⁷⁵

The second protection arises under the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).¹⁷⁶ CAT states that "no state party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."¹⁷⁷ The US will need assurances from the Iraqi government that individuals currently under "protected persons" status will be considered relevant to these additional conventions.

¹⁶⁹ Office of Legal Counsel Memorandum Opinion for the Counsel to the President, "*Protected Person*" Status in Occupied Iraq Under the Fourth Geneva Convention ("Protected Person Memo"), Opinions of the Office of Legal Counsel in Volume 28 § 3(C) (Mar 18, 2004).

¹⁷⁰ Id, § 2(E).

¹⁷¹ Id, § 1.

¹⁷² Convention Relating to the Status of Refugees (cited in note 167).

¹⁷³ Protocol to the Convention Relating to the Status of Refugees (1967), 606 UNTS 267.

¹⁷⁴ Convention Relating to the Status of Refugees, Art 26 (cited in note 167).

¹⁷⁵ Id, Art 33(1).

¹⁷⁶ Resolution 39/46, UN General Assembly, 39th Sess (Dec 10, 1984), A/RES/39/46. ("Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment").

¹⁷⁷ Id, Art 3(1).

Failure to carry out its obligations under international law exposes the US to international liability. On December 21, 2001, the UN General Assembly, upon recommendation from the International Law Commission, adopted a resolution regarding the Responsibility of States for Internationally Wrongful Acts.¹⁷⁸ The Principles of State Responsibility hold states responsible not only for their actions, but also for their omissions of that which is “attributable to the State under international law; and constitutes a breach of an international obligation of the state.”¹⁷⁹ Article 12 defines the breach of an international obligation, stating, “[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.”¹⁸⁰ Therefore, the principles obligate the US to ensure that it fulfills its international responsibilities towards “protected persons.”

In a June 17, 2008 meeting of the Iraqi cabinet, the council of ministers stated:

The implementation of the necessary measures (infra) in respect of the terrorist Mojahedin-e Khalq Organization is approved in the following manner:

All the previous ratifications that had been approved previously that the Mojahedin-e Khalq Organization must be expelled as a terrorist organization from Iraq is hereby underscored:

The Mojahedin-e Khalq Organization that is present on Iraqi territory will come under the full control of the Iraqi government until it is expelled from Iraq. This organization will be treated according to the laws of Iraq;

Any cooperation with the terrorist Mojahedin-e Khalq Organization by any organization, party, institution or person, (whether Iraqi or alien) in Iraq is prohibited and anyone who cooperates with them will be subject to the laws of the war on terrorism and will be referred to the judicial system according to the said laws.

It is incumbent on the Multi-National Force-Iraq to abandon this organization and hand over to relevant Iraqi authorities all control points and issues that relate to the members of this organization.

Judicial lawsuits against those groups of members of the terrorist Mojahedin-e Khalq Organization who have committed crimes against the people of Iraq will be activated;

Coordination will be made between the Government of Iraq and the International Committee of the Red Cross to find fundamental solutions for

¹⁷⁸ *Resolution 56/83*, UN General Assembly, 56th Sess (Dec 12, 2001), UN Doc A/RES/56/83 (“Responsibility of States for internationally wrongful acts”).

¹⁷⁹ *Id.*, Arts 2(a)–(b).

¹⁸⁰ *Id.*, Art 12.

the problem of the presence of the said organization in Iraqi territory and the implementation of the decisions taken to expel them from Iraq.¹⁸¹

Should the International Committee of the Red Cross (ICRC) be involved, as the cabinet members have stated, it would have a duty to see to the safe transfer of protected persons to countries other than Iran, and also to countries who would not, in turn, hand over the individuals to Iran.¹⁸² In 2009, control over Camp Ashraf and the province in which it is located, was handed over to Iraqi forces.¹⁸³ The detainees within Ashraf and the Iraqi soldiers clashed on July 28 and 29, 2009, which resulted in six dead Iranian detainees. US officials claimed they were given no advance warning of the raid on the camp.¹⁸⁴ The Government of Iraq and the PMOI offered differing versions of the clashes. No clarification of the events has been forthcoming.

The Permanent Constitution of the Republic of Iraq, 2005, also provides protection against *refoulement* of refugees.¹⁸⁵ Even though Article 21(2) states that “[a] law shall regulate the right of political asylum in Iraq. No political refugee shall be surrendered to a foreign entity or returned forcibly to the country from which he fled,”¹⁸⁶ it also contains an exception for any persons “accused of” or “charged with” having committed “terrorist crimes.”¹⁸⁷ It is clear from the June 17, 2008 Iraqi cabinet decision that it intends to invoke this exception to Article 21. However, there are several reasons why this decision would not meet international standards for the denial of political asylum.

Article 21 of the Iraqi Constitution sets out the basic rules for extradition and the granting of political asylum.¹⁸⁸ In particular, it forbids extradition of Iraqi nationals to third states, and establishes that the right to asylum will be governed by legislation. It stipulates, however, that no one will be eligible for asylum if that person has been “accused of” (official translation) or “charged with” (correct translation) having committed “terrorist crimes.”¹⁸⁹

¹⁸¹ Ratification of the Council of Ministers, No. 216, Iraqi Cabinet, 27th Session (Jun 17, 2008).

¹⁸² International norms require only the safeguarding of individuals and family unity, not social and political unity, unless there are compelling reasons of justice otherwise. See Elizabeth Wilmshurst and Susan Breau, eds, *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge 2007).

¹⁸³ See Timothy Williams, *Clashes at Iranian Exile Camp in Iraq*, NY Times A6, ¶ 5 (July 29, 2009).

¹⁸⁴ Id, ¶ 3.

¹⁸⁵ See Iraq Const, Art 21(2) (cited in note 37).

¹⁸⁶ Id.

¹⁸⁷ Id, Art 21(3).

¹⁸⁸ See id, Art 21.

¹⁸⁹ Id, Art 21(3). The PMOI was designated a “foreign terrorist organization” by the US State Department in 1997, but a Federal Court of Appeals ruled in July 2010 in favor of the PMOI, forcing the State Department to Reconsider the designation. See Glenn Kessler, *Court tells State*

There is every reason to believe that the Iraqi government, eager to satisfy the Iranian government, will interpret the language of Article 21(3) to deny asylum to the members of the PMOI and justify their repatriation to Iran and/or their involuntary expulsion from the country. Iran's history sadly, but unequivocally, demonstrates that should these people be forced to return, their lives would be in imminent danger.

The use of Article 21(3) of the Iraqi Constitution to justify the denial of members of PMOI currently in Iraq political asylum or refugee status if and when they apply for it, and their consequent repatriation or expulsion would be a violation of conventional and customary international law obligations that are binding and enforceable. In particular, provisions of the Refugee Convention and Protocol and the CAT absolutely forbid the *refoulement* of refugees or potential refugees to a place where they might be persecuted or tortured. Those provisions have become customary international law. In addition, the International Covenant on Civil and Political Rights also includes a prohibition of *refoulement*. These rules have become *jus cogens*, meaning that no derogation is ever acceptable, regardless of a state's adherence or non-adherence to any specific treaty.

International rules, moreover, require that any decision to repatriate a refugee necessitates a final and independent judicial determination that she or he has committed a serious crime in the country of refuge, and that his or her continued presence there poses an unacceptable threat to the order and security of that country. None of these elements is present with respect to the PMOI or the people of Ashraf. The cabinet references no findings or basis for the designation of the PMOI at Ashraf as a terrorist organization. Moreover, Paragraph 5 of the cabinet's statement seems to imply that lawsuits will commence against the PMOI with accusations of terrorism. However, this demonstrates that no judicial determination has been made against any member of the PMOI at Ashraf.

Using lawsuits against a group as the basis for designating them a terrorist organization before they have had the opportunity to present any evidence or arguments in their case is contrary to the constitutional right to due process of

Dept. to Reconsider Terrorist Label for Iran Opposition Group, Wash Post (Jul 17, 2010), online at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/16/AR2010071605881.html> (visited Jul 26, 2010). An equivalent designation under English law has now been set aside by the courts, and the listing in the EU has also been successfully challenged. See John F. Burns, *Iranian Exiles Aren't Terrorist Group, British Court Says*, NY Times ¶ 1 (May 8, 2008), online at <http://www.nytimes.com/2008/05/08/world/europe/08britain.html?scp=4&sq=ashraf&st=cse> (visited Apr 24, 2010).

law.¹⁹⁰ No criminal cases have commenced, no one has been convicted of violating Iraq's national terrorism laws, and no one in Ashraf has been given the opportunity to present their cases in a public forum to a neutral fact-finder considering the dangers inherent in their return to Iran.¹⁹¹ The EU removed the PMOI from its terrorist list on January 27, 2009.¹⁹²

There is no mention in the SOFA of these "protected persons" currently in Iraqi territory, and it is unclear if these "protected persons" fall under the provisions set for detainees. It is possible that Article 22, Paragraph 4 may provide some protection for the PMOI by requiring the US to "provide to the Government of Iraq available information on all detainees who are being held by them."¹⁹³ However, there is no provision requiring Iraqi officials to follow US recommendations regarding detainees. Efforts by Iraq to return the Camp Ashraf "protected persons" continues and the position of the US in connection with its obligations toward them is uncertain.¹⁹⁴

The Framework Agreement includes a provision promising to "support and strengthen Iraq's democracy and its democratic institutions as defined and established in the Iraqi Constitution, and in so doing, enhance Iraq's capability to protect these institutions against all internal and external threats."¹⁹⁵ This provision can be seen as supportive language of Iraq's obligations for asylum and non-*refoulement* found within the constitution.¹⁹⁶

For all of these reasons, a reading of Article 21(3) of the Iraqi Constitution as justifying the denial of refugee status to, and expulsion of, the PMOI members from Iraq to Iran would be an egregious violation of fundamental norms of international law, which would and should draw the severe condemnation of the entire world community.

¹⁹⁰ Consider US Const, Amends V, XIV, § 1 (cited in note 44) (declaring that neither the federal government nor any state may deprive persons of "life, liberty, or property, without due process of law").

¹⁹¹ Article 186 of the Iranian Islamic Punishment Act (1997) declares the PMOI "*Mohareb*" (at enmity with God) and Article 190 of that Act states that the penalties for committing *Mohareb* are "killing," "hanging," and "amputation."

¹⁹² See Stephen Castle, *Europe Takes Terrorist Label Off Iranian Resistance Group*, NY Times ¶ 1 (Jan 27, 2009), online at <http://www.nytimes.com/2009/01/27/world/middleeast/27iran.html> (visited Apr 24, 2010).

¹⁹³ Iraq SOFA, Art 22(4) (cited in note 2).

¹⁹⁴ See generally Protected Person Memo (cited in note 169).

¹⁹⁵ Framework Agreement, § 2, ¶ 1 (cited in note 3).

¹⁹⁶ See Iraq Const, Art 21 (cited in note 37).

IX. CONCLUSION

The Iraq SOFA and the Framework Agreement represent a significant political and legal shift in US-Iraqi relations, particularly when compared to conditions immediately prior to and during the beginning of the US-led war and occupation in Iraq. Prime Minister Maliki and other Iraqi leaders, in participating in the negotiation of these agreements, were able to include strong legal parameters on US activities in Iraq in the coming years. In this sense, the agreements represent a symbolic, and perhaps literal, end to a period of US impunity in Iraq, placing new standards for accountability on US forces and imposing a date certain for US combat troop withdrawal. This does not mean a certain end to US military presence in Iraq. Strategic considerations such as the protection of the Gulf Federation Council states and Iraq from potential Iranian threats are among the obvious ones. US military presence in the region is not about to disappear in the foreseeable future. Instead, it is likely to be less auspicious.

Still unresolved by these agreements is the issue of the PMOI “protected persons” in Iraq. The longer the legal obligations of the US with regard to these “protected persons” remain ambiguous, the more tenuous the PMOI’s situation becomes. In March 2009, Iraqi forces besieged Camp Ashraf after Iraq National Security Adviser Mowaffaq al-Rubaie ordered the camp shut down.¹⁹⁷ The expulsion of the PMOI “protected persons” to Iran will likely lead to violations of international law and of the PMOI “protected persons” human rights, and that exposes the US to the consequences of international law breaches. However, uncertain US political relations with Iran may mean the Obama Administration will sacrifice the safety of the PMOI “protected persons” in order to enhance relations with that country and to avoid tensions in US-Iraq relations, which are dependent on the cooperation of the Maliki government, an Iranian Shia dominated coalition.

¹⁹⁷ See Tim Cocks, *Iraqi Army Besieges Iranian Exile Camp- Residents*, Reuters ¶ 1 (Mar 16, 2009), online at <http://www.reuters.com/article/featuredCrisis/idUSLF475178> (visited Apr 24, 2010).