

Don't Call It a SOFA! An Overview of the U.S.-Iraq Security Agreement

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Part I. Introduction

On 1 January 2009, the United States and Iraq entered a new phase in their relationship as the United Nations Security Council Resolution 1790 (UNSCR 1790)¹ authorizing the multinational force in Iraq expired and two new bilateral agreements took its place.² On the surface, much of the U.S.-Iraq relationship and the on-going military operations may not seem immediately different; however, fundamental changes have been made to the existing legal and operational structure. Most importantly, the new bilateral regime makes the Government of Iraq (GOI) solely responsible for its security and stability, instead of the multinational forces operating under UNSCR 1790 and prior Resolutions. The two bilateral agreements constitute a request by Iraq for U.S. Forces to assist with Iraq's security and stability, but this request carries a number of restrictions, including an acknowledgement that the United States "recognizes the sovereign right of the Government of Iraq to request the departure of the United States Forces from Iraq at any time."³

There were many diplomatic and political twists and turns during the negotiations between the United States and Iraq,⁴ but ultimately the two agreements were signed on 17 November 2008. These agreements are: (1) The U.S.-Iraq Strategic Framework Agreement (SFA)⁵ and (2) the U.S.-Iraq Security Agreement (SA).⁶ Neither agreement is referred to as a Status of Forces Agreement, or SOFA.⁷ This is purposeful. Though the SA contains many provisions common to other SOFAs,⁸ the term SOFA should not be used for two reasons.

First, in a technical sense, it is not accurate to use the term SOFA for either of the two agreements. The SFA is an agreement that defines the long-term strategic relationship between the U.S. Government and the GOI. It contains none of the typical provisions one might expect to find in a SOFA and, with regard to "Defense and Security Cooperation," the SFA contains no actual substance. Instead, it specifically refers to the U.S.-Iraq SA, for the nature of that cooperation.⁹ On the other hand, the SA goes far beyond a regular SOFA, to include authorizing combat missions and detentions, discussing the deterrence of "security threats" and the termination of U.N. Security Council measures, as well as U.S. efforts to safeguard Iraqi economic assets and obtain Iraqi debt forgiveness.¹⁰

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¹ S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec. 18, 2007) [hereinafter UNSCR 1790]. This resolution was the last in a series of resolutions that reaffirmed and extended the authorization for the multinational force set forth in UNSCR 1546. S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004) [hereinafter UNSCR 1546].

² This article will only address bilateral agreements between the United States and Iraq. Bilateral agreements with other countries, such as the United Kingdom, are outside the article's scope.

³ 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, U.S.-Iraq, art. 24, para. 4, Nov. 17, 2008 [hereinafter SA], available at http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf. This article also states, "The Government of Iraq recognizes the sovereign right of the United States to withdraw the United States Forces from Iraq at any time." *Id.*; see *infra* Part V (providing further discussions of withdrawal and termination).

⁴ Barring some minor discussion *infra*, the process of the agreement's negotiation, and the domestic politics surrounding the negotiations in both the United States and Iraq, is beyond the scope of this article.

⁵ Strategic Framework Agreement for a Relationship of Friendship and Cooperation Between the United States of America and the Republic of Iraq, U.S.-Iraq, Nov. 17, 2008 [hereinafter SFA], available at http://www.mnf-iraq.com/images/CGs_Messages/strategic_framework_agreement.pdf.

⁶ SA, *supra* note 3.

⁷ Status of forces agreements "generally establish the framework under which U.S. military personnel operate in a foreign country, addressing how the domestic laws of the foreign jurisdiction shall be applied toward U.S. personnel while in that country." R. CHUCK MASON, CONG. RESEARCH SERV. REPORT, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW MIGHT ONE BE UTILIZED IN IRAQ?, RL34531, summary (2008).

⁸ See *infra* note 135 (providing a break-out of SA sections that are common to SOFAs).

⁹ SFA, *supra* note 5, sec. III.

¹⁰ See SA, *supra* note 3, art. 4 (missions), art. 22 (detention), art. 25 (measures to terminate the application of chapter VII to Iraq), art. 26 (Iraqi assets), art. 27 (deterrence of security threats).

Second, and more importantly, the reason not to use the term SOFA for these two agreements is related to the significant political sensitivities surrounding the presence of foreign forces in the Middle East. The coalition campaigns in Iraq and Afghanistan have added new twenty-first century images to those deep-seated regional concerns. History has witnessed various western powers seek to control Middle Eastern territories, but these attempts at colonization and foreign domination have ultimately, always, been rejected. In this context, a “SOFA” can give the impression of a willing consent to *permanent* foreign military occupation. Skeptics need only look to such places as Europe, Korea, and Japan and see more than half a century of U.S. military presence operating under SOFAs.

More specifically, referring to either of these agreements as a SOFA between the United States and Iraq raises the specter of the failed U.S.-Iran SOFA agreed to in 1964. That SOFA granted full immunity to American personnel in Iran and created an image among Iranians of their government’s weakness in the face of foreign domination.¹¹ Objections to that agreement formed a primary pillar of the Ayatollah Khomeini’s platform for revolution in Iran.¹² Almost three decades later, the Iranian influence was a constant threat to the successful completion of U.S.-Iraq negotiations.¹³ But efforts were made to counter the Iranian influence, which included distinguishing the current U.S.-Iraq agreements from that 1964 SOFA with Iran. The differences between the new Iraq agreements and the inflammatory Iran agreement are real. As will be discussed below, under the terms of the SFA and SA, the Iraqis exercise significant sovereignty,¹⁴ including the primary jurisdiction over American contractors, and the possibility of jurisdiction over American servicemembers.¹⁵ Additionally, the SA is drafted to be temporary and to provide for the withdrawal of U.S. Forces, as even its official title suggests: “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.”¹⁶

The SA’s title was politically important to the Iraqis and, for similar reasons of strategic communications, it is in the United States’ best interests to avoid the term “SOFA.” At the same time, regardless of titles used, these U.S.-Iraq agreements should be heralded as a major step forward in Iraq’s assumption of responsibility for its own security and governance. It was a step that was made publicly and openly, which was subjected to the politics of democracy and the scrutiny of the press in both countries, and was only made possible through the courage and sacrifice of many Americans, coalition personnel, and Iraqis that set the conditions for the negotiations to take place. If the agreements are viewed as a mistake, if Iraqi public perception is turned against the newly established bilateral framework, then those sacrifices may have been in vain. United States Forces have already been accused of breaching the agreement,¹⁷ and the first true test of public perception could come in 2009 if an Iraqi referendum on the agreements is held as planned.¹⁸ An unsuccessful referendum could dramatically change the U.S. position in Iraq, leading to a withdrawal earlier than either government intends. A substantial key to insuring good public perception in Iraq is for members of the U.S. Forces to understand the U.S. rights, obligations, and authorities under the SFA and SA and to work within those constraints. This article is offered to assist in that effort.

There is no substitute for reading the agreements first hand and those Judge Advocates deploying to Iraq should make it a priority to do so. However, this article provides an overview of the two U.S.-Iraq agreements, to include a highlight of the

¹¹ See, e.g., JAMES A. BILL, *THE EAGLE AND THE LION: THE TRAGEDY OF AMERICAN-IRANIAN RELATIONS* 156 (1989) (“On October 13, 1964, the Majlis approved a law that provided American military personnel and their dependents stationed in Iran with full diplomatic immunity. This action effectively exempted Americans serving in military advisor positions in Iran from Iranian law.”).

¹² See *id.* Ayatollah Khomeini “powerfully and frontally attacked the shah and America for attempting to destroy the dignity, integrity and autonomy of Iran.” *Id.* at 159. “Ayatollah Khomeini established his nationalist credentials with Iranians by his outspoken opposition to this agreement. His blunt criticism of the SOFA led to the Shah’s sending him into exile, where he remained until early 1979.” JOHN W. LIMBERT, *NEGOTIATING WITH THE ISLAMIC REPUBLIC OF IRAN* 15 n.7 (U.S. Inst. of Peace Special Rep. 199) (Jan. 2008), available at <http://www.usip.org/pubs/specialreports/sr199.pdf>.

¹³ See, e.g., Ernesto Londoño, *Iran Interfering in U.S.-Iraq Security Pact, General Says*, WASH. POST, Oct. 13, 2008, at A14, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/12/AR2008101201871.html>.

¹⁴ Even though there was an “assumption of full responsibility and authority by a fully sovereign and independent Interim Government of Iraq by 30 June 2004,” and the U.N. Security Council has recognized “the importance of consent of the sovereign Government of Iraq for the presence of the multinational force and of maximum coordination and close partnership between the multinational force and that Government,” the expiration of the UNSCR regime and the start of a new bilateral regime represents a new level of authority by the Government of Iraq. UNSCR 1546, *supra* note 1, at 1; UNSCR 1790, *supra* note 1, at 2.

¹⁵ See *infra* Parts IV.A and IV.F.

¹⁶ See SA, *supra* note 3 (emphasis added).

¹⁷ See *Iraqi Leader: U.S. Raid That Killed 2 Breached Accord*, CNN.com, Apr. 26, 2009, <http://www.cnn.com/2009/WORLD/meast/04/26/iraq.troops.raid/index.html> (“Iraq Prime Minister Nuri al-Maliki is accusing U.S. troops of violating the security agreement between the two countries after a raid in Wasit province Sunday that left two people dead . . .”).

¹⁸ See *infra* Part V.

provisions which required a change in U.S. operations. Also, areas of potential friction between the United States and Iraq based on the agreements' language or lack thereof, will be noted so that they can be anticipated. The SFA forms the foundation out of which the SA rises, therefore the SFA will be reviewed first in Part II. Part III will introduce the SA, covering the preliminary scope and definitions, as well as the SA's effect on U.S. military operations, including detention operations. Part IV will discuss the status of U.S. Forces in Iraq, including matters of jurisdiction and contractors. Part V concludes with a discussion of the SA's withdrawal and termination provisions.

Part II. The U.S.-Iraq Strategic Framework Agreement (SFA)

The SFA is an agreement that defines the long-term strategic relationship between the U.S. Government and the GOI. The first section of the agreement sets out the principles of cooperation, followed by seven additional sections covering a wide range of cooperation areas.¹⁹ The SFA also requires the formation of a Higher Coordinating Committee to monitor the SFA's implementation and lays the foundation for the establishment of further Joint Coordination Committees and other agreements or arrangements as may be required.²⁰

As is typical of such provisions, the SFA contains no binding language in the preamble. However, the preamble sets the stage for the SFA by affirming both countries' sovereignty,²¹ recognizing the GOI no longer poses a threat to international peace and security,²² and affirming that a long-term relationship between the United States and Iraq "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."²³ The SFA then sets out the following general principles "to establish the course of the future relationship" between the United States and Iraq:

1. A relationship of friendship and cooperation is based on mutual respect; recognized principles and norms of international law and fulfillment of international obligations; the principle of non-interference in internal affairs; and rejection of the use of violence to settle disputes.
2. A strong Iraq capable of self-defense is essential for achieving stability in the region.
3. The temporary presence of U.S. forces in Iraq is at the request and invitation of the sovereign Government of Iraq and with full respect for the sovereignty of Iraq.
4. The United States shall not use Iraqi land, sea, and air as a launching or transit point for attacks against other countries; nor seek or request permanent bases or a permanent military presence in Iraq.²⁴

Principles 3 and 4 set a strong tone regarding the activities of U.S. forces in Iraq. As discussed below, that restrictive tone is amplified in the SA.

In addition to the above general principles, the SFA covers the following seven areas of cooperation:

1. Political and Diplomatic;²⁵
2. Defense and Security;²⁶
3. Cultural;²⁷
4. Economic and Energy;²⁸
5. Health and Environment;²⁹

¹⁹ SFA, *supra* note 5, secs. I to VIII.

²⁰ *Id.* secs. IX to X. These committees contain representatives from both the United States and Iraq.

²¹ *Id.* pmb., para. 1.

²² *Id.* pmb., para. 2.

²³ *Id.* pmb., para. 5.

²⁴ *Id.* sec. I: *see infra* Part III.B.1 (providing a discussion of the Iraqi Government's displeasure with a U.S. operation into Syria in October 2008).

²⁵ SFA, *supra* note 5, sec. II.

²⁶ *Id.* sec. III.

²⁷ *Id.* sec. IV.

²⁸ *Id.* sec. V.

²⁹ *Id.* sec. VI.

6. Information Technology and Communications;³⁰
7. Law Enforcement and Judicial.³¹

Leaving aside the first two cooperation areas of “Political and Diplomatic” and “Defense and Security,” the other five areas contain aspirational and political language with very general commitments to achieve the various goals set forth. The language is generally a promise that “the Parties agree to cooperate to” bring to fruition the provisions set out in the area of cooperation.³² However, the first cooperation area, “Political and Diplomatic,” uses more binding language:

[T]he United States **shall ensure maximum efforts to work with and through** the democratically elected Government of Iraq to: . . . [s]upport and strengthen Iraq’s democracy . . . [s]upport and enhance Iraq’s status in regional and international organizations . . . [and s]upport the Government of Iraq in establishing positive relations with the states of the region.³³

Clearly a stronger commitment was desired in this area of cooperation by deviating from the “agree to cooperate to” language in other sections and using the words “shall” and “maximum efforts.”³⁴ But perhaps more important is the commitment to “work with and through the . . . Government of Iraq.”³⁵ Not only has the United States agreed to do its utmost to support the GOI, this is a clear demonstration of the GOI’s assertion of its sovereignty in international relations.

As for the area of “Defense and Security Cooperation,” the SFA contains no actual substance. Instead, it specifically refers to the U.S-Iraq SA, stating that security and defense cooperation between the two countries “shall be undertaken pursuant to” that separate agreement.³⁶ Therefore, we turn now to the SA.

Part III. The U.S.-Iraq Security Agreement (SA)

The full title of the SA is 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.”³⁷ The title alone expresses the temporary nature of the agreement with its use of the words “withdrawal” and “temporary presence.” Given the nature of the agreement, along with the regional political sensitivities previously discussed,³⁸ servicemembers are encouraged to use the acronym “SA” vice “SOFA.”

As with the SFA, the SA’s preamble offers preliminary non-binding language, but does frame the situation as an undertaking between “two sovereign, independent, and coequal countries.”³⁹ This theme of acknowledging Iraqi sovereignty and the associated limitations on U.S. Forces is pervasive throughout many of the agreement’s thirty articles. The SA overview begins with Articles 1 and 2.

³⁰ *Id.* sec. VII.

³¹ *Id.* sec. VIII.

³² This language is used in SFA secs. IV to VIII. *See, e.g., id.* sec. V (regarding economic and energy cooperation which begins by noting that Iraq will require “unprecedented capital investment in reconstruction, the development of Iraq’s extraordinary natural and human resources, and the integration of Iraq into the international economy and its institutions.”). But then the agreement goes on to say only

[t]o that end the Parties agree to cooperate to: . . . [s]upport Iraq’s efforts to invest . . . [m]aintain active bilateral dialogue . . . [p]romote expansion of bilateral trade . . . [f]acilitate the flow of direct investment into Iraq . . . [p]romote Iraq’s development of the Iraqi electricity, oil, and gas sector . . . [e]ncourage the creation of a positive investment environment . . . [and] [e]ncourage increased Iraqi agricultural exports.

Id. Such language is clearly more of a political than legal nature.

³³ *Id.* sec. II (emphasis added).

³⁴ *Id.*; *see supra* note 32 (discussing the “agree to cooperate” language).

³⁵ SFA, *supra* note 5, sec. II.

³⁶ *Id.* sec. III.

³⁷ SA, *supra* note 3.

³⁸ *See* discussion *supra* Part I.

³⁹ SA, *supra* note 3, pmb1.

A. Scope and Definitions

According to Article 1, the SA applies to “the temporary presence, activities, and withdrawal of the United States Forces from Iraq.”⁴⁰ Therefore, the agreement covers only U.S. Forces in Iraq. It does not speak to the activities of other U.S. Government entities or individuals, nor does it cover any foreign government entity or force. This is made clear in Article 2 of the SA, which defines “United States Forces,”⁴¹ “Member of the United States Forces,”⁴² and “Member of the civilian component.”⁴³ Specifically these definitions state:

[1]. “United States Forces” means the entity comprising the members of the United States Armed Forces, their associated civilian component, and all property, equipment, and materiel of the United States Armed Forces present in the territory of Iraq.

[2]. “Member of the United States Forces” means any individual who is a member of the United States Army, Navy, Air Force, Marine Corps, or Coast Guard.

[3]. “Member of the civilian component” means any civilian employed by the United States Department of Defense. This term does not include individuals normally resident in Iraq.⁴⁴

Thus, only U.S. Department of Defense servicemembers and civilians are covered by the SA.⁴⁵ As further clarification, Article 2 also defines U.S. contractors and their employees as:

[N]on-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. However the term does not include persons or legal entities normally resident in the territory of Iraq.⁴⁶

There are a number of provisions in the SA that discuss contractors,⁴⁷ but the separation between contractors and personnel of the U.S. Forces becomes significant when the agreement discusses the exercise of personal jurisdiction over individuals. However, before covering jurisdictional issues, this article will provide an overview of the SA’s effects on U.S. military operations, including self-defense and detention operations.

B. Missions

Article 4 of the SA covers “missions” or military operations and is one of the articles which make the agreement fundamentally different from all other U.S. SOFAs.⁴⁸ Article 4 begins with a request from the GOI for “the temporary assistance of the United States Forces for the purposes of supporting Iraq in its efforts to maintain security and stability in Iraq, including cooperation in the conduct of operations against al-Qaeda and other terrorist groups, outlaw groups, and remnants of the former regime.”⁴⁹ Standard SOFAs do not discuss engaging in combat operations, whereas this SA provision invites U.S. Forces to participate in Iraq’s internal armed conflict.⁵⁰ It also provides internationally accepted legal authority

⁴⁰ *Id.* art. 1.

⁴¹ *Id.* art. 2, para. 2.

⁴² *Id.* art. 2, para. 3.

⁴³ *Id.* art. 2, para. 4.

⁴⁴ *Id.* art. 2, paras. 2–4. Note that the definition of a member of the U.S. Forces civilian component as a “civilian employed by the United States Department of Defense” is distinguished from “United States contractors” and “United States contractor employees” which are defined at Article 2, paragraph 5. *Id.* art. 2, para. 5.

⁴⁵ United States Government employees under chief of mission authority will receive privileges and immunities pursuant to the Vienna Convention on Diplomatic Relations. See Vienna Convention on Diplomatic Relations of April 18, 1961, 23 U.S.T. 3227, T.I.A.S. 7502. Also note that military dependents are not covered by the SA, but their presence in Iraq would be extremely unlikely.

⁴⁶ SA, *supra* note 3, art. 2, para. 5. Note that this language will not cover contractors for other agencies, such as the Department of State.

⁴⁷ See *infra* Part IV.F.

⁴⁸ See *supra* Part I (discussing why the SA should not be referred to as a SOFA).

⁴⁹ SA, *supra* note 3, art. 4, para. 1.

⁵⁰ There seems to be a reluctance to refer to Iraq’s situation as an internal (or non-international) armed conflict. Be that as it may, with the expiration of UNSCR 1790, and the request in the SA for U.S. assistance by a fully-sovereign Iraq, there is no basis to argue that the United States is engaged in an “international armed conflict.” However, a state of armed conflict must still exist, otherwise there is no basis in international law to engage in the type of

for U.S. Forces to conduct combat operations in Iraq. This was necessary to fill the legal vacuum created by the expiration of UNSCR 1790.⁵¹

The SA's grant of authority for military operations is based upon Iraq's sovereignty, which includes the right to consent to the presence of the U.S. military and to allow the United States to conduct military operations that comply with international and domestic Iraqi law. This differs from the U.N. Security Council's Chapter VII authorization to the multinational force to "take all necessary measures to contribute to the maintenance of security and stability in Iraq."⁵² Now, instead of U.S. Forces operating unilaterally, subject only to multinational force regulations and rules,⁵³ their operations must be "conducted with full respect for the Iraqi Constitution and the laws of Iraq."⁵⁴ Additionally, such operations are limited to those "conducted with the agreement of the Government of Iraq"⁵⁵ and, in fact, must "be fully coordinated with Iraqi authorities."⁵⁶ This coordination "shall be overseen by a Joint Military Operations Coordination Committee [hereinafter JMOCC] to be established pursuant to" the SA.⁵⁷ Lastly, military operations "shall not infringe upon the sovereignty of Iraq and its national interests, as defined by the Government of Iraq."⁵⁸

The practical reality of these limitations is that U.S. commanders must work "by, with, and through"⁵⁹ the Iraqis and develop processes for obtaining the appropriate Iraqi operating authorities. Preferably this cooperation and coordination is occurring at the lowest levels through U.S. commanders' relationships with the GOI and Iraqi Security Forces (ISF) leadership. However, the exact level of mission coordination required by Article 4 may prove to be a significant friction point between the United States and Iraq. For instance, in April 2009, U.S. Forces conducted a raid in Wasit province that

lethal offensive military operations which the United States is conducting in Iraq. Since it cannot be an "international armed conflict," it must be an internal (or non-international) armed conflict.

⁵¹ See UNSCR 1790, *supra* note 1.

⁵² See, e.g., UNSCR 1546, *supra* note 1, para. 10.

⁵³ These rules and regulations implemented the authority from various U.N. Security Council resolutions and U.S. domestic requirements.

⁵⁴ SA, *supra* note 3, art. 4, para. 3. Paragraph 3 goes on to provide that "[i]t is the duty of the United States Forces to respect the laws, customs, and traditions of Iraq and applicable international law." *Id.* (emphasis added). This is similar to language within Article 3 that "[w]hile conducting military operations pursuant to this Agreement, it is the duty of members of the United States Forces and of the civilian component to respect Iraqi laws, customs, traditions, and conventions and to refrain from any activities that are inconsistent with the letter and spirit of this Agreement." *Id.* art. 3, para. 1 (emphasis added).

The author has read speculation about whether the word "respect" in the SA means something different (i.e., less) than "comply." This may stem, in part, to the previous language that governed U.S. personnel under Coalition Provisional Authority (CPA) Order Number 17, which provided: "All MNF, CPA and Foreign Liaison Mission Personnel and International Consultants shall respect the Iraqi laws relevant to those Personnel and Consultants in Iraq including the Regulations, Orders, Memoranda and Public Notices issued by the Administrator of the CPA." COALITION PROVISIONAL AUTHORITY ORDER NO. 17 (REVISED), sec. 2, para. 2 (27 June 2004) [hereinafter CPA ORDER 17] (emphasis added), available at http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf. The CPA and CPA Order 17 will be discussed further *infra* Part IV.A.

Because the CPA Order 17 uses the word "relevant," there appears to be more latitude in interpreting what that means than allowed by the language in the SA. More importantly, CPA orders were unilateral acts without input or interpretation by a sovereign Iraq. This is vastly different from the current bilateral framework. Lastly, it is submitted that since service member conduct is a recognized key to creating a positive perception of the SA within the Iraqi population, and since U.S. Forces are attempting to help Iraq establish a system based on the rule of law, teaching U.S. Forces that the word "respect" means anything less than full compliance is not in the interests of mission success. This is true whether or not the word "respect" was intentionally inserted in the SA to provide an obligation different than required by the word "comply."

⁵⁵ SA, *supra* note 3, art. 4, para. 2.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* art. 4, para. 3.

⁵⁹ This is a common phrase used to describe the expected relationship between United States and Iraqi units. The policy to work by, with, and through the Iraqi Security Forces (ISF) has been described as follows:

ISF are the principal enforcers of security and stability in Iraq. These forces include the Iraqi Army, National Iraqi Police, Border Enforcement Police, Local Iraqi Police, and Facility Protection Services.

- Mentor ISF to enforce Iraqi Law
- Mentor ISF before illegal conduct escalates
- Mentor ISF to avoid serious corruption and sectarianism
- Allow ISF to take the lead when possible
- Don't enforce minor criminal laws

MULTI-NATIONAL CORPS–IRAQ, LEADERS' GUIDE TO THE SECURITY AGREEMENT pt. IV (n.d.) [hereinafter LEADERS' GUIDE] (on file with author).

left two Iraqis dead and resulted in the detention of six men.⁶⁰ The raid “set off public protests and drew a pointed complaint from Prime Minister Nuri Kamal al-Maliki that the operation violated [the SA].”⁶¹ U.S. Forces issued a statement that “the raid had been ‘fully coordinated and approved’ by the Iraqi government.”⁶² At the same time, “the Iraqi Defense Ministry announced it had detained two top Iraqi military officials in Wasit province for authorizing the American raid without obtaining approval from their commanders.”⁶³ This incident illustrates the difficulties of coordination, but despite the inherent challenges in such processes, the transition of security responsibilities to the ISF is a necessary part of creating a stable Iraq in which the ISF assumes the major role for defending the nation.

It is important to note that nothing in the SA, including Article 4, changes the overall mission of the U.S. Forces:

US Forces . . . will continue to focus on combating al-Qaeda and other extremist groups . . . continue to treat all Iraqi citizens with the utmost dignity and honor . . . continue to build Iraqi capacity to exercise full sovereignty and achieve sustainable stability, and . . . continue to help Iraq progress from a fragile state to one that is secure, stable, and committed to good governance and regional stability.⁶⁴

1. Use of Iraqi Territory, Security Commitments, and Deterrence of Security Threats

Although the U.S. Forces mission remains unchanged, during negotiations there were some concerns about the expansion of that mission to include binding obligations related to the deterrence of security threats. Specifically, some individuals in the United States questioned whether the Bush administration was using the SA to provide Iraq with a binding “security commitment” without the formal input of Congress, and which would tie the hands of the next U.S. president.⁶⁵ Whether there was originally any intent to do this or not, the end result is that the SA does not bind the United States to any particular course of action except “[i]n the event of any external or internal threat or aggression against Iraq . . . and upon request by the Government of Iraq, the Parties shall immediately initiate strategic deliberations.”⁶⁶ This provision adds very little to the security equation, since, in the face of any such threats, the United States would naturally engage in high level consultations with Iraq simply based on the potential jeopardy to the multitude of U.S. personnel in Iraq.

As for actions beyond the strategic deliberations, the SA provides that “as *may be mutually agreed*, the United States shall take appropriate measures . . . to deter such a threat.”⁶⁷ The agreement also makes it extremely clear that U.S. Forces in Iraq will not be used for U.S. purposes beyond their mission within Iraq. This issue arose at the end of October 2008, when U.S. Forces launched an attack from Iraq into Syria.⁶⁸ The operation was apparently targeted at foreign fighters moving through Syria into Iraq.⁶⁹ The GOI criticized the attack and declared that Iraqi territory should not be used for attacks on neighboring countries.⁷⁰ Since the SA was not yet signed,⁷¹ it was subject to modification to accommodate the GOI’s desire.

⁶⁰ Steven Lee Myers, *After a U.S. Raid: 2 Iraqis Dead, Protests and Regrets*, N.Y. TIMES, Apr. 26, 2009 at 8, available at <http://www.nytimes.com/2009/04/27/world/middleeast/27iraq.html>.

⁶¹ *Id.*

⁶² Ernesto Londono & Zaid Sabah, *Deaths in U.S. Raid Elicit Anger in Iraq*, WASH. POST, Apr. 27, 2009, at 6, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/26/AR2009042600410.html>

⁶³ *Id.*

⁶⁴ Letter from General Raymond T. Odierno, to the Soldiers, Sailors, Airmen, Marines, Coast Guardsmen, and Civilians of Multi-National Force–Iraq (Dec. 4, 2008).

⁶⁵ See, e.g., Letter from Senator Joseph R. Biden, Chairman of the Senate Committee on Foreign Relations, to the President of the United States (Dec. 19, 2007) (on file with author).

⁶⁶ SA, *supra* note 3, art. 27, para. 1.

⁶⁷ *Id.* (emphasis added).

⁶⁸ See Assoc. Press, *Syria: Deadly U.S. Attack “Serious Aggression”: Eight Reported Dead; U.S. Says Raid Targeted Foreign Fighter Network*, MSNBC.com, Oct. 26, 2008, <http://www.msnbc.msn.com/id/27389245/>.

⁶⁹ See *id.*

⁷⁰ See *Syria Protests Deadly Helicopter Raid to UN Chief*, VOA News.com, Oct. 28, 2008, <http://www.voanews.com/english/archive/2008-10/2008-10-28-voa22.cfm?CFID=135284429&CFTOKEN=10232382&jsessionid=de306f8fc7c2eed294f5f7d5d7b635205877>.

⁷¹ The SA was signed on 17 November 2008, approximately three weeks after the U.S. operation into Syria. See SA, *supra* note 3, signature page.

The restriction on the United States' use of Iraqi territory begins as a general principle in the SFA: "The United States shall not use Iraqi land, sea, and air as a launching or transit point for attacks against other countries."⁷² The SA reiterates the restriction in Article 27,⁷³ and then builds upon it by prohibiting the United States' use of Iraqi airspace, other than "exclusively for the purposes of implementing" the SA.⁷⁴ Similarly, the United States "shall use telecommunications systems exclusively for the purposes of" the SA.⁷⁵ The SA also limits U.S. Forces and contractors to importing and exporting "equipment, supplies, materials, and technology . . . exclusively for use by the United States Forces exclusively for the purposes of" the SA.⁷⁶ This is further enforced by granting Iraqi authorities "the right to request the United States Forces to open in their presence any container in which such items are being imported in order to verify its contents."⁷⁷ Lastly, U.S. Forces' use of cash and financial instruments in Iraq is limited to the exclusive purposes of the SA.⁷⁸ Obviously, every effort was made by Iraqi negotiators to foreclose the possibility of another unilateral operation into a neighboring country or any similar use of Iraqi territory. While this restriction is understandable, a future problem could arise concerning the limits of U.S. self-defense in border areas. As discussed in the next section, the SA permits U.S. Forces to act in self-defense.⁷⁹

2. U.S. Forces and Self-Defense

In addition to not changing the U.S. mission, the SA does not change U.S. Forces' right to self-defense. This is recognized in Article 4, paragraph 5, which states, "The Parties retain the right to legitimate self defense within Iraq, as defined in applicable international law."⁸⁰ This separate paragraph distinguishes self-defense from other "military operations that are carried out pursuant to" the SA.⁸¹ Thus, U.S. self-defense does not require coordination with Iraqi authorities. Nor would such a requirement make sense because self-defense is an "inherent right" of U.S. unit commanders.⁸² Plus, self-defense is exercised "in response to a hostile act or demonstrated hostile intent" and is therefore generally time-critical.⁸³ The word "legitimate" arguably adds no additional requirements to the practice of U.S. Forces, as all self-defense conducted in accordance with the Rules of Engagement (ROE) is considered legitimate.⁸⁴

Thus, the normal U.S. paradigm remains. A hostile act or demonstrated hostile intent remains sufficient grounds to engage the threat with proportional force, up to and including deadly force.⁸⁵ Yet despite this recognition of the standard U.S. self-defense paradigm, there is the potential for future friction on this issue. As previously discussed, the restriction on acting against Iraq's neighbors potentially affects self-defense at the border areas.⁸⁶ Thus, a hot pursuit in self-defense that resulted in crossing an international border would be problematic. Additionally, there is gray area between engaging in self-defense and the requirement that military operations be "fully coordinated with Iraqi authorities."⁸⁷ For instance, what if a U.S. patrol gets shot at by a sniper and the point-of-origin is inside a closed Iraqi military compound? Is it self-defense to enter the compound and look for the culprit? If the point-of-origin was a village, could U.S. Forces engage in a company-

⁷² SFA, *supra* note 5, sec. I, para. 4.

⁷³ See SA, *supra* note 3, art. 27, para. 3 ("Iraqi land, sea, and air shall not be used as a launching or transit point for attacks against other countries.").

⁷⁴ See *id.* art. 9. Iraqi airspace will be discussed in greater detail *infra* Part IV.D.

⁷⁵ *Id.* art. 11, para. 6; see *infra* Part IV.D (discussing frequencies and telecommunications in Iraq in greater detail).

⁷⁶ SA, *supra* note 3, art. 15, para. 1.

⁷⁷ *Id.*

⁷⁸ *Id.* art. 20, para. 1.

⁷⁹ See *id.* art. 4, para. 5.

⁸⁰ *Id.*

⁸¹ *Id.* para. 2.

⁸² INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK ch. 5, para. III.E.2.a(1) (2008) [hereinafter OPLAW HANDBOOK].

⁸³ *Id.*

⁸⁴ The word "arguably" is inserted into this sentence as it is entirely conceivable that a self-defense incident could give rise to controversy. "Each nation's understanding of what triggers the right to self-defense is often different, and will be applied differently . . ." *Id.* ch. 5, pt. IV.B, at 77; see IRAQI PENAL CODE (3d ed. 1969) (with amendments, pt. one, ch. 3, sec. 4, paras. 42–46), available at http://law.case.edu/saddamtria/documents/Iraqi_Code_1969.pdf (providing the Iraqi criminal law requirements to engage in self-defense).

⁸⁵ See, e.g., LEADERS' GUIDE, *supra* note 59, pt. I.

⁸⁶ See *supra* Part III.B.1.

⁸⁷ SA, *supra* note 3, art. 4, para. 2.

level cordon and search of the village? Or, at what point do patrols for purposes of force protection, or route clearance for convoys, become military operations requiring coordination? There is definite tension between the concept of self-defense and the requirement for coordination of military operations.

There is also the question of how expansive is the definition of hostile intent? The U.S. paradigm holds that it is “[t]he threat of imminent use of force against the United States, U.S. forces, or other designated persons or property. It includes the threat of force to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital U.S. government property.”⁸⁸ The United States makes the determination of whether there is a threat of imminent use of force “based on an assessment of all facts and circumstances known to U.S. forces at the time and . . . [i]mminent does not necessarily mean immediate or instantaneous.”⁸⁹ Does this definition of an imminent threat allow U.S. Forces to take unilateral action (i.e., not coordinated with Iraqi authorities) based on intelligence that an individual poses an imminent threat to the security and stability of Iraq or U.S. Forces?

These questions are not easily answered. Since the SA entered into force on January 1, 2009, the United States and Iraq have been filling in the SA’s gray areas with a new custom of practice. To the extent that any disagreements arise, the intent is to resolve it at lower levels, but ultimately it could be up to the JMOCC to address.⁹⁰

C. Detention Operations

In addition to the changes in military operations established by Article 4, the SA also significantly modifies U.S. Forces’ detention operations. Before the SA took effect, U.S. Forces could detain any person believed to be a threat to the security or stability of Iraq.⁹¹ Detainees were essentially held for “imperative reasons of security,” which was not linked to a requirement for future criminal prosecution.⁹² Therefore, classified information and intelligence often served as the basis to detain. Following the SA’s implementation on January 1, 2009, no arrest or detention may be carried out without a valid arrest warrant issued by an Iraqi investigative judge (subject to the exceptions discussed in the next section below).⁹³ This warrant requirement comes from Article 22 of the SA, which states, “No detention or arrest may be carried out by the United States Forces . . . *except through an Iraqi decision* issued in accordance with Iraqi law”⁹⁴ Additionally, warrantless searches have also been curtailed. Article 22, paragraph 5 states, “The United States Forces may not search houses or other real estate properties *except by order of an Iraqi judicial warrant* and in full coordination with the Government of Iraq, except in the case of actual combat operations conducted pursuant to Article 4.”⁹⁵

To obtain a warrant (and ultimately a conviction), Iraqi judges require physical evidence and witnesses.⁹⁶ As U.S. Forces will be unable to share classified information with the Iraqi judges, they must shift to evidentiary based targeting and detentions and away from security and intelligence based targeting and detentions. That does not mean that classified intelligence is useless, only that operations must be conducted in a way that prepares for eventual criminal prosecution and conviction.

⁸⁸ OPLAW HANDBOOK, *supra* note 82, ch. 5, para. III.E.2.d, at 76.

⁸⁹ *Id.* para. III.E.2.e, at 76.

⁹⁰ *See* SA, *supra* note 3, art. 4, para. 2.

⁹¹ In general, this is based on the authority under the U.N. Security Council Resolutions. *See* UNSCR 1790, *supra* note 1; UNSCR 1546, *supra* note 1. Discussion about the basis of detention authority before the SA is beyond the scope of this article.

⁹² *See* Multi-National Force–Iraq, Press Conference with Major General Douglas Stone, Deputy Commanding General, Detainee Operations (Mar. 23, 2008) [hereinafter Stone Press Conference] (transcript available at http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=17793&Itemid=131).

⁹³ *See, e.g.,* LEADERS’ GUIDE, *supra* note 59, pt. II(1). As a civil law based system, Iraqi investigative judges play a far greater role in the investigation of crimes than any U.S. judge. It is imperative now for Judge Advocates and leaders within the U.S. Forces to be familiar with the civil law system in general, and Iraqi law specifically. A good resource to begin that familiarization is in chapters V and IX in the *Rule of Law Handbook*. *See* THE JUDGE ADVOCATE GENERAL’S LEGAL CTR. & SCH. & CTR. FOR LAW AND MILITARY OPERATIONS, *RULE OF LAW HANDBOOK: A PRACTITIONER’S GUIDE FOR JUDGE ADVOCATES* chs. V, IX (2008).

⁹⁴ SA, *supra* note 3, art. 22, para. 1 (emphasis added). The full paragraph reads: “No detention or arrest may be carried out by the United States Forces (except with respect to detention or arrest of members of the United States Forces and of the civilian component) *except through an Iraqi decision* issued in accordance with Iraqi law *and* pursuant to Article 4.” *Id.* (emphasis added). The emphasized “and” at the end of the paragraph is disjunctive, which provides an exception to the warrant requirement, as discussed *infra* Part III.C.1. Detention of U.S. personnel will be discussed *infra* Parts III.C.2 and IV.F.

⁹⁵ SA, *supra* note 3, art. 22, para. 5 (emphasis added).

⁹⁶ The requirements to obtain a warrant and conviction in Iraq are beyond the scope of this article.

1. Exceptions to the Warrant Requirement

The law often includes exceptions and there are several for the SA's warrant requirement. As already cited above, Article 22's requirement for a *search* warrant is not applicable during "combat operations conducted pursuant to Article 4."⁹⁷ This is the only exception. The requirement to have a warrant to *detain*,⁹⁸ on the other hand, has two exceptions that apply: (1) U.S. Forces may detain a person who is engaging in combat activity,⁹⁹ or (2) U.S. Forces may detain a person who is committing a serious crime.¹⁰⁰

At first blush, the "combat activity exception" appears deceptively simple. First, as with the search warrant exception, if U.S. Forces are engaged in an approved mission under SA Article 4,¹⁰¹ there is no warrant requirement to detain or capture an individual that is either a target of that approved mission, is taking a direct part in hostilities, or is otherwise a threat to the security or stability of Iraq, because U.S. Forces are operating under law of armed conflict authorities.¹⁰² An example is when servicemembers witness someone planting an improvised explosive device (IED). In such a scenario, U.S. Forces do not require an arrest warrant issued by an Iraqi judge to detain the person.

The "combat activity exception" is also applicable if U.S. Forces are acting in self-defense under the ROE. It would be absurd to accept a contrary interpretation that results in the legal authority to kill a person in self-defense but denies the legal authority to detain the same person under those circumstances.¹⁰³ The more difficult questions relating to self-defense are those involving Article 4's requirement of coordination, as discussed earlier in Part III.B.2. However, this coordination issue potentially overlaps with the warrant exceptions as well. To return to the hypothetical previously posed, what if the United States decides to take unilateral action purported to be in self-defense (i.e., not coordinated with Iraqi authorities) based on intelligence that an individual poses an imminent threat to the security and stability of Iraq or U.S. Forces? If it is unilateral, then it is not authorized by the SA, unless it is in self-defense. If the Iraqis do not support the U.S. interpretation of the imminent threat element of hostile intent,¹⁰⁴ then related detentions could be considered unauthorized. This, in turn, could result in the release of any persons detained. Clearly, the way to avoid this situation is to maximize U.S.-Iraq coordination.

The more problematic exception to the arrest warrant requirement is when U.S. Forces observe "criminal activity." For the exception to apply, U.S. Forces will need to observe the activity first-hand.¹⁰⁵ Should servicemembers intervene when

⁹⁷ SA, *supra* note 3, art. 22, para. 5.

⁹⁸ *Id.* art. 22, para. 1.

⁹⁹ This is not stated directly in the SA but can be based on an interpretation of the SA in conjunction with the law of armed conflict.

¹⁰⁰ This is not stated directly in the SA but can be based on an interpretation of the SA in conjunction with Iraqi law. The Iraq Law on Criminal Proceedings states: "Any person may arrest any other person accused of a felony or misdemeanour without an order from the authorities concerned . . . [i]f the offence was committed in front of witnesses." 2 IRAQI LAW ON CRIMINAL PROCEEDINGS WITH AMENDMENTS, Civil Proceedings para. 102(A)(i) (1971) [hereinafter IRAQI LAW ON CRIMINAL PROCEEDINGS] (Baghdad, Iraq), available at http://law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf; see also LEADERS' GUIDE, *supra* note 59, pt. II(2).

¹⁰¹ As discussed *supra* note 94, this is based on a reading of a disjunctive "and" within Article 22, para. 1.

¹⁰² The authority to detain is based on the proposition that Iraq is engaged in an internal armed conflict, that the United States is a party to that internal armed conflict pursuant to the security agreement, which includes a request for U.S. assistance in maintaining security and stability in Article 4. See SA, *supra* note 3, art. 4, para. 1. Therefore, the law of noninternational armed conflict applies in Iraq which permits the capture, detention or internment of various actors. Further discussion on LOAC detention rules is beyond the scope of this article, but for an excellent analysis of the various LOAC sources of detention authority see Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT'L L. 48 (2009), available at <http://www.law.harvard.edu/faculty/rgoodman/pdfs/RGoodmanCivilianDetentionAJIL.pdf>.

[I]f states have authority to engage in particular practices in an international armed conflict (e.g., targeting direct participants in hostilities), they a fortiori possess the authority to undertake those practices in noninternational conflict. Simply put, whatever is permitted in international armed conflict is permitted in noninternational armed conflict. Hence, if IHL permits states to detain civilians in the former domain, IHL surely permits states to pursue those actions in the latter domain.

Id. at 50 (citations omitted).

¹⁰³ See Goodman, *supra* note 102, at 57.

¹⁰⁴ See discussion *supra* note 89.

¹⁰⁵ See, e.g., LEADERS' GUIDE, *supra* note 59, pt. II(2). Additionally, the Iraqi Law on Criminal Proceedings states:

The offence is considered witnessed if it was witnessed whilst being committed or a shortly afterwards or if the victim followed the perpetrator afterwards or if shouting crowds followed him afterwards or if the perpetrator was found a short while later carrying the equipment or weapons or goods or documents or other things pointing to the fact that he was a perpetrator or participant in the offence or if traces or signs indicate this at the time.

IRAQI LAW ON CRIMINAL PROCEEDINGS, *supra* note 100, para. 1(B).

any crime is observed? The policy guidance is “no.” The mission of U.S. Forces is not to enforce minor Iraqi criminal laws.¹⁰⁶ Specific direction provided to U.S. Forces leaders states:

ISF are in the lead for law enforcement. When minor crimes are observed, report to ISF. Do not enforce minor Iraqi laws to the detriment of your primary mission. However, a seemingly minor crime, such as a curfew violation, may be evidence of a more serious crime and require assessment. Use judgment and discretion and work **by/with/through the ISF**. Crimes where, absent exceptional circumstances, US Forces should not intervene:

Crimes When there is NO Risk of Imminent Harm:

- Pick pocketing
- Trespassing
- Minor altercations between LNs [Local Nationals]
- Burglary/robbery
- Fraud and bribery
- Traffic violations
- Squatting
- Drunk and disorderly¹⁰⁷

The guidance to leaders goes on to discuss crimes in which U.S. Forces should intervene, such as terrorism crimes,¹⁰⁸ crimes threatening death or grievous bodily harm,¹⁰⁹ or crimes threatening public properties.¹¹⁰ Deciding when to detain without a warrant, and when not to, will not be an easy task for those faced with the realities on the ground. Ultimately, the preferred course of action is for the ISF to take the lead on the detention of any individual.

2. Post-Detention Requirements

If U.S. Forces, instead of the ISF, detain a person, they must comply with another significant change in operations. The SA requires that when U.S. Forces “detain or arrest persons as authorized by this Agreement or Iraqi law, such persons *must be handed over to competent Iraqi authorities within 24 hours* from the time of their detention or arrest.”¹¹¹ Who the “competent” Iraqi authority, or CIZA,¹¹² is will depend on the area of operations. In some cases the CIZA is still being determined. It could be an Iraqi Army commander at certain levels, or it could be the local police chief. What is important is that the CIZA has the authority to extend U.S. Forces detention of the individual.¹¹³ An Iraqi investigative judge can also serve in this capacity, but for the judge to issue a detention order, U.S. Forces will need to provide evidence of criminal conduct.¹¹⁴ Without CIZA authorization, a detainee must be released at the end of twenty-four hours.¹¹⁵

¹⁰⁶ See, e.g., LEADERS’ GUIDE, *supra* note 59, pt. IV.

¹⁰⁷ *Id.* pt. VII.

¹⁰⁸ *Id.* pt. VIII (including possession or emplacement of explosives/IED materials, torture, kidnapping, and possession of unauthorized weapons).

¹⁰⁹ *Id.* (including murder, rape, assault, battery, and arson).

¹¹⁰ *Id.* Such crimes include causing damage to infrastructure or critical public utilities, stealing or causing serious damage to public property and riotous looting. See *id.*

¹¹¹ SA, *supra* note 3, art. 22, para. 2 (emphasis added).

¹¹² “IZ” is an acronym used to indicate “Iraq.”

¹¹³ See SA, *supra* note 3, art. 22, para. 3. This provision states, “The Iraqi authorities may request assistance from the U.S. Forces in detaining or arresting wanted individuals.” *Id.* Not only does this provision relate to the competent authority authorizing continued detention of an individual by U.S. Forces, but it also authorizes a situation where ISF asks U.S. Forces to take a detainee for them. However, holding persons for ISF should be the exception and not the norm. United States Forces personnel facing such a situation should seek chain-of-command guidance and approval.

¹¹⁴ See *supra* notes 91 to 110 and accompanying text (discussion regarding warrants).

¹¹⁵ Another option is to turn over the detainee to the ISF.

It is also not entirely clear from the SA when the twenty-four hour clock starts. The SA uses the language “from the time of their detention or arrest.”¹¹⁶ But is that at the point of capture? Is it at some point after the individual is processed? However this ambiguity is resolved, it certainly will not add much (if any) time to the detention clock. Therefore, U.S. Forces must move quickly to gain an extension of time or turn over the individual to Iraqi authorities.

One final note on detention and warrants: Article 22 does not apply when U.S. Forces arrest or detain members of their own force or of the civilian component.¹¹⁷ Such arrests and detentions can continue in accordance with U.S. domestic and military laws and regulations. However, detention or arrest of U.S. contractors and their employees by U.S. Forces is *not* specifically provided for under the SA. This could potentially affect the maintenance of good order and discipline on base. This issue, and contractors in general, will be discussed in greater detail in Part IV.F.

3. Legacy Detainees

In addition to reducing the U.S. ability to unilaterally detain personnel to only twenty-four hours, Article 22 also addresses the status of all the detainees held by U.S. Forces when the SA entered into force. At one point in 2007, the population of detainees held by U.S. Forces was in excess of 25,000.¹¹⁸ Although this was significantly reduced throughout 2008,¹¹⁹ there were still over 15,000 detainees in U.S. custody at the start of 2009.¹²⁰ Under the SA, the United States must provide the GOI with “available information on all detainees who are being held by them.”¹²¹ Based on this information, Iraqi authorities will issue arrest warrants for those who are wanted for criminal offenses.¹²² The United States will turn custody over to Iraq for those with warrants and the remainder shall be released “*in a safe and orderly manner*, unless otherwise requested by the Government of Iraq and in accordance with Article 4 of this Agreement.”¹²³

Out-processing detainees for release is a very involved process. To do it in the “safe and orderly manner” required by the SA takes time. The process requires that they undergo a physical exam, after which they are provided with any follow-on medication they may need.¹²⁴ Their property is then returned, they are paid any money that is owed them for work completed during their detention, given clothes, and then out-processed for release at their point of capture.¹²⁵ Thus, U.S. Forces have determined they can release approximately 50 detainees a day, for a total of 1500 a month, in a “safe and orderly manner.”¹²⁶ This will continue into the summer of 2009.¹²⁷ Based on available evidence and intelligence information, the United States has prioritized the planned releases from the least-dangerous to the most.¹²⁸ Ultimately, there will be 5000–6000 detainees left that are “the most dangerous.”¹²⁹ It is hoped there will be sufficient evidence to obtain Iraqi detention orders for these

¹¹⁶ SA, *supra* note 3, art. 22, para. 2.

¹¹⁷ See *id.* art. 22, para. 1 (“No detention or arrest may be carried out by the United States Forces (except with respect to detention or arrest of members of the United States Forces and of the civilian component) except through an Iraqi decision issued in accordance with Iraqi law and pursuant to Article 4.”).

¹¹⁸ See Stone Press Conference, *supra* note 92. This rise in detainees resulted from the “surge” of U.S. Forces brought in to help stabilize the country.

¹¹⁹ A record 18,500 Iraqi detainees were freed in 2008. See Andrea Stone, *Some Worried About Detainee Transfer to Iraq*, USA Today.com, Jan. 25, 2009, http://www.usatoday.com/news/world/2009-01-25-detainees_N.htm.

¹²⁰ As of 23 February 2009 there were 14,270 after the release of approximately 1200 in the month of February in accordance with the SA. See *id.*

¹²¹ SA, *supra* note 3, art. 22, para. 4.

¹²² *Id.* art. 22, para. 4.

¹²³ *Id.* (emphasis added).

¹²⁴ See Multi-National Force–Iraq, Media Roundtable: Brig. Gen. David Quantock, Deputy Commanding General of MNF-I Detainee Operations and CG of Task Force 134 (Feb. 23, 2009) [hereinafter Quantock Media Roundtable] (transcript available at http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=25573&Itemid=128).

¹²⁵ Property used as evidence will not be returned. See *id.* Many detainees earn \$4 an hour working at U.S. detention facilities. See *id.*

¹²⁶ See *id.* The United States began executing this plan in February but was only able to release approximately 1200 detainees. *Id.* However, expectations were that the goal of 1500 a month would be reached in March. See *id.*

¹²⁷ See *id.*

¹²⁸ See *id.*

¹²⁹ See *id.*

detainees and to ultimately convict them in the Iraqi courts.¹³⁰ But if not, those individual deemed the most dangerous will also be released.¹³¹

Once the total number of detainees held by the United States is below 8000, U.S. Forces plan to shut down the detention facility at Camp Bucca.¹³² There is a new facility opening in Taji which will hold approximately 5000 detainees with detention orders or convictions.¹³³ This facility will be transferred to the GOI in December of 2009 or early 2010, at which point only Camp Cropper will continue to be a joint facility between the Iraqis and the U.S. Forces. The plan is for that facility to also be transferred to the GOI sometime in 2010.¹³⁴

Part IV. The Status of U.S. Forces

Thus far, this article has focused on the specifics of U.S. military operations, including self-defense and detainee operations. Now it is appropriate to step back and look at the overall status of U.S. Forces in Iraq. Although the U.S.-Iraq SA is not being referred to as a SOFA, there are still many provisions within in it that are typical of other SOFAs.¹³⁵ This section discusses some of those provisions, specifically those related to jurisdiction, freedom of movement, claims, airspace, frequencies, basing and contracting.

A. Criminal Jurisdiction Over U.S. Personnel

Generally, a key provision of any agreement about the status of foreign forces in a country discusses the division of jurisdiction between the parties. The general rule in international law is that “foreign military personnel and their dependents, while stationed within the territory of another country, are fully subject to the law of that country unless expressly or impliedly exempted by the host country through agreement with the sending state, or by operation of customary international law.”¹³⁶ This is based on the concept of territorial jurisdiction in which “a sovereign nation has jurisdiction over all persons found within its borders.”¹³⁷ Thus, a nation which receives deployed forces (known as the “receiving state”) will have jurisdiction over those forces by virtue of territorial sovereignty.

An exception to this general rule arises from the law of armed conflict which recognizes “that military forces in enemy territory, including occupied territory, are immune from the jurisdiction of local law.”¹³⁸ This concept arose from the proposition that when armed forces are deployed for combat they are subject to the exclusive jurisdiction of the “sending state” which deployed them.¹³⁹ This has been referred to as the “law of the flag.”¹⁴⁰

¹³⁰ See Stone, *supra* note 119.

¹³¹ See Quantock Media Roundtable, *supra* note 124.

¹³² See *id.*; see also Stone, *supra* note 119.

¹³³ See Quantock Media Roundtable, *supra* note 124; see also Stone, *supra* note 119.

¹³⁴ See *id.*

¹³⁵ The following articles in the SA would be considered standard SOFA provisions: The Preamble, Article 1 (scope and purpose), Article 2 (definition of terms), Article 3 (laws), Article 5 (property ownership), Article 6 (use of agreed facilities and areas), Article 7 (positioning and storage of defense equipment), Article 8 (protecting the environment); Article 9 (movement of vehicles, vessels, and aircraft), Article 10 (contracting procedures), Article 11 (services and communications), Article 12 (jurisdiction), Article 13 (carrying weapons and apparel), Article 14 (entry and exit), Article 15 (import and export), Article 16 (taxes), Article 17 (licenses or permits), Article 18 (official and military vehicles), Article 19 (support activities services), Article 20 (currency and foreign exchange), Article 21 (claims), Article 23 (implementation), and Article 29 (implementing mechanisms). SA, *supra* note 3.

The following Articles in the SA would be considered “non-standard” SOFA provisions: Article 4 (missions), Article 22 (detention), Article 24 (withdrawal of the U.S. Forces from Iraq), Article 25 (measures to terminate the application of chapter VII to Iraq), Article 26 (Iraqi assets), Article 27 (deterrence of security threats), Article 28 (The Green Zone), and Article 30 (The period for which the agreement is effective). *Id.*

¹³⁶ Colonel Richard J. Erickson, *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, 37 A.F.L. REV. 137, 138 (1994) (providing an excellent overview of the history, purpose and content of SOFAs); see also Major Steven J. Lepper, *A Primer on Foreign Criminal Jurisdiction*, 37 A.F.L. REV. 169, 186 (1994).

¹³⁷ OPLAW HANDBOOK, *supra* note 82, ch. 7, para. IV.B.1.b, at 121.

¹³⁸ Erickson, *supra* note 136, at 138.

¹³⁹ OPLAW HANDBOOK, *supra* note 82, ch. 7, para. IV.B.1.c, at 121.

¹⁴⁰ See Lieutenant Commander Ian Wexler, *A Comfortable SOFA: The Need for an Equitable Foreign Criminal Jurisdiction Agreement with Iraq*, 56 NAVAL L. REV. 43, 54–55. This “law of the flag” in its original meaning dealt with “the immunity of a military force temporarily passing through the territory of another state in peacetime.” Erickson, *supra* note 136, at 138.

It was the law of the flag that applied to U.S. and coalition forces during the initial 2003 Iraq campaign and the subsequent occupation. However, as the multinational forces mission in Iraq shifted toward restoring sovereignty to the Iraqis, something beyond the law of the flag was desired to ensure the continued immunity of those forces from Iraqi legal processes. The Coalition Provisional Authority (CPA), which wielded legislative, executive, and judicial powers in Iraq,¹⁴¹ thus issued CPA Order 17.¹⁴² This order was specifically intended to substitute for a SOFA.¹⁴³ The desired immunity was set forth as follows:

Unless provided otherwise herein, the MNF [Multinational Force], the CPA [Coalition Provisional Authority], Foreign Liaison Missions, their Personnel, property, funds and assets, and all International Consultants *shall be immune from Iraqi legal process.*

. . . .

All MNF, CPA and Foreign Liaison Mission Personnel, and International Consultants shall be subject to the *exclusive* jurisdiction of their Sending States. They *shall be immune* from any form of arrest or detention other than by persons acting on behalf of their Sending States . . .

The Sending States of MNF Personnel shall have the right to exercise within Iraq any criminal and disciplinary jurisdiction conferred on them by the law of that Sending State over all persons subject to the military law of that Sending State.¹⁴⁴

Under the new SA, the blanket immunity originally created by CPA Order 17 has been altered.¹⁴⁵ The general rule in international law, that a sovereign nation has jurisdiction over all persons found within its borders, is now applicable.¹⁴⁶ Thus Iraq has jurisdiction over members of the U.S. Forces within the country by virtue of its sovereignty. But the United States also has jurisdiction based on the Uniform Code of Military Justice and other domestic U.S. legislation.¹⁴⁷ This is known as a situation of “concurrent jurisdiction” vice “exclusive jurisdiction.” In other words, both states could exercise jurisdiction. Therefore an agreement between the sending and receiving states is necessary to clarify the legal relationships. The SA fulfills this function in Article 12.

The end result of Article 12 is that the United States continues to retain the *primary* right to exercise jurisdiction over members of the U.S. Forces and of the civilian component in most cases. But, the GOI now has the *primary* right to exercise jurisdiction over U.S. contractors and their employees,¹⁴⁸ as well as over members of the U.S. Forces and the civilian

This principle that a military force “operating on foreign soil is in no way subject to the territorial sovereign and exercises an exclusive right of jurisdiction over its members” . . . governed U.S. foreign policy and military policy for almost 150 years. Its view that U.S. forces were abroad were subject only to the laws of the United States was also embraced by many other nations with forces outside their borders. Customary international law thus evolved to the point where license to enter foreign territory carried with it an express or implied right to maintain military discipline free from the territorial sovereign’s interference.

Lepper, *supra* note 136, at 171 (citation omitted). However, after World War II, there was a complete reversal of this traditional doctrine such that “negotiation of a SOFA became imperative because no exception to the general rule [that territorial jurisdiction extends to foreign military personnel] could be relied upon any longer by any nation.” Erickson, *supra* note 136, at 139. Thus the “law of the flag” today relates only to the law of armed conflict exception that military forces in enemy territory, including occupied territory, are immune from the jurisdiction of local law.

¹⁴¹ The CPA was established as a transitional government following the invasion of Iraq by the United States, United Kingdom and the other members of the coalition of the willing which was formed to oust the government of Saddam Hussein in 2003. The CPA’s authority was set forth in CPA Regulation Number 1 and was based on “relevant U.N. Security Council resolutions, including Security Council Resolution 1483 (2003), and the laws and usages of war.” COALITION PROVISIONAL AUTHORITY REGULATION NO. 1 (16 May 2003) [hereinafter CPA ORDER NO. 1]; *see also* S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003).

¹⁴² *See* CPA ORDER 17, *supra* note 54.

¹⁴³ Wexler, *supra* note 140, at 43–44.

¹⁴⁴ CPA ORDER 17, *supra* note 54, sec. II, paras. 1, 3, 4 (emphasis added).

¹⁴⁵ Even though the CPA dissolved on 30 June 2004, its orders remained in effect pursuant to the Law of Administration for the State of Iraq for the Transitional Period. Law of Administration for the State of Iraq for the Transitional Period art. 26 (c) (Mar. 8, 2004), *available at* <http://www.cpa-iraq.org/government/TAL.html> (“The laws, regulations, orders, and directives issued by the Coalition Provisional Authority pursuant to its authority under international law shall remain in force until rescinded or amended by legislation duly enacted and having the force of law.”).

¹⁴⁶ *See* discussion *supra* Part IV.

¹⁴⁷ *See* UCMJ art. 2(a)(10) (2008); Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. ch. 212 (2006) [hereinafter MEJA].

¹⁴⁸ SA, *supra* note 3, art. 12, para. 2.

component who commit “grave premeditated felonies . . . when such crimes are committed *outside* agreed facilities and areas and *outside* duty status.”¹⁴⁹ Additionally, Iraq can request the United States to waive its primary right to jurisdiction in a particular case, and vice versa.¹⁵⁰

1. Addressing U.S. Concerns About the Exercise of Iraqi Criminal Jurisdiction

Leaving aside the issues of civil jurisdiction and jurisdiction over contractors for now,¹⁵¹ the idea of subjecting U.S. servicemembers to the *criminal* jurisdiction of Iraq is troublesome for many Americans. Concerns are heightened by questions about the capacity and fairness of the Iraqi criminal justice system.¹⁵² The SA addresses these concerns in a number of ways.

First, as mentioned above, Iraq will only have the primary right to exercise jurisdiction in a limited number of situations involving grave premeditated felonies. These felonies will be enumerated by a Joint Committee.¹⁵³ Second, primary Iraqi jurisdiction only applies when the grave premeditated felonies are committed off base *and* off duty.¹⁵⁴ This should be extremely rare. Additionally, the duty status of members will be determined by U.S. authorities, not Iraqis.¹⁵⁵ Therefore, this involves only a very small number of persons, if any, and they will be ones who have committed an abhorrent act against the local populace.¹⁵⁶ By agreeing to primary Iraqi jurisdiction (albeit in very narrowly tailored situations) the U.S. Government signals to critics “that it does not act with impunity in Iraq; that it respects the Iraqi judicial system that it has helped to regenerate; and that the U.S. truly considers Iraq to be a sovereign nation capable of managing its affairs.”¹⁵⁷

The third way in which the SA addresses the concerns about the capacity and fairness of the Iraqi criminal justice system is by limiting the pre-trial custody of a member of the U.S. Forces or civilian component. Iraqi authorities may not arrest or detain such persons for more than twenty-four hours before turning them over to U.S. authorities, who will then maintain custody of the accused member.¹⁵⁸ Fourth, in order to exercise its right to primary jurisdiction over a member of U.S. Forces or of the civilian component, Iraq must notify the United States “in writing within 21 days of the discovery of an alleged

¹⁴⁹ *Id.* art. 12, para. 1

¹⁵⁰ *Id.* art. 12, para. 6. A full discussion of waivers of jurisdiction is beyond the scope of this article, however readers should consider the guidance set out in Army Regulation 27-50/SECNAVINST 5820.4G, *Status of Forces Policies, Procedures, and Information* which, in general, lays out the considerations and procedures to follow if the designated Commanding Officer (DCO) believes that a request should be made for a foreign country to forego their right to exercise jurisdiction over an accused, and also establishes that the United States will not grant a waiver of U.S. jurisdiction without prior approval of the Judge Advocate General of the accused’s Service. See U.S. DEP’T OF ARMY, REG. 27-50/ SECNAVINST 5820.4G, STATUS OF FORCES POLICIES, PROCEDURES, AND INFORMATION para. 1-7 (15 Dec. 1989).

¹⁵¹ Civil jurisdiction will be discussed *infra* Part IV.C and contractors will be discussed *infra* Part IV.F.

¹⁵² See, e.g., HUMAN RIGHTS WATCH, THE QUALITY OF JUSTICE: FAILINGS OF IRAQ’S CENTRAL CRIMINAL COURT (2008), available at <http://www.hrw.org/en/reports/2008/12/14/quality-justice-0>.

¹⁵³ SA, *supra* note 3, art. 12, paras. 1, 8. The term “joint” reflects that the committee is composed of both United States and Iraqi representatives.

¹⁵⁴ *Id.* art. 12, para. 1. The importance of this protection has already been demonstrated. In the disputed raid discussed *supra* Part III.B, Iraq’s prime minister made a statement that “his government intends to prosecute U.S. soldiers who carried out the operation.” Londono & Sabah, *supra* note 62. However, under no reasonable interpretation of the SA does the agreement give jurisdiction to Iraq over U.S. Forces engaged in operations ordered by U.S. commanders. Even when those operations have not been “fully coordinated” to the Iraqi’s satisfaction under Article 4 of the SA, Iraq has no reasonable basis to claim such U.S. Forces have forfeited their “duty status” for purposes of Iraqi prosecution under Article 12 of the SA. “American officials, speaking on the condition of anonymity, suggested Prime Minister Nouri al-Maliki’s move could be politically motivated. National elections are to be held next winter.” *Id.*

¹⁵⁵ SA, *supra* note 3, art. 12, para. 9. However:

In those cases where Iraqi authorities believe the circumstances require a review of [the U.S. certification that a member was in a duty status] 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.

Id.

¹⁵⁶ Consider, for instance, the 9 July 2006 incident at Mahmoudiya. See Wexler, *supra* note 140, at 47. This is perhaps the most egregious crime to-date by U.S. servicemembers against Iraqi citizens. *Id.* On that day, five U.S. Soldiers in the village of Mahmoudiya raped, mutilated, and murdered a young Iraqi girl and her family. *Id.* Four of the five Soldiers have plead guilty and/or been convicted at court-martial. *Id.* The fifth Soldier was discharged from the military before facing court-martial and was recently convicted in U.S. district court. See Fifth Campbell Robertson & Atheer Kakan, *Iraqis Seek Death Penalty for American*, N.Y. TIMES, May 8, 2009, available at <http://www.nytimes.com/2009/05/09/world/middleeast/09green.html>.

¹⁵⁷ Wexler, *supra* note 140, at 81.

¹⁵⁸ SA, *supra* note 3, art. 12, para. 5.

offense” of its intent to exercise jurisdiction.¹⁵⁹ Failure to do so would be grounds for the United States to exercise jurisdiction. Fifth, and perhaps most importantly, if Iraq exercises primary jurisdiction, the member “shall be entitled to due process standards and protections consistent with those available under United States and Iraqi law.”¹⁶⁰ These due process standards and protections must be established by the Joint Committee.¹⁶¹

2. What About Double Jeopardy?

One due process concern that is not clearly addressed by the SA is the issue of double jeopardy. Article 12 discusses when the United States or Iraq has the *primary* right to exercise jurisdiction over members, but does not discuss the subsequent exercise of jurisdiction by either State. Although not technically double jeopardy,¹⁶² “[i]n any system involving two or more sovereigns capable of prosecuting offenses, the question of double jeopardy arises”¹⁶³ in that both sovereigns could prosecute an individual for the same offense. When the NATO SOFA was drafted, this possibility was acknowledged and the following constraint was laid out:

Where an accused has been tried in accordance with the provisions of this Article by the authorities of one Contracting Party and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offense within the same territory by the authorities of another Contracting Party. However, nothing in this paragraph shall prevent the military authorities of the sending State from trying a member of its force for any violation of rules of discipline arising from an act or omission which constituted an offense for which he was tried by the authorities of another Contracting Party.¹⁶⁴

No similar language is found in the SA. Thus, although the United States has, in most cases, the “*primary* right to exercise jurisdiction,” there appears to be no limitation on the subsequent exercise of Iraqi jurisdiction. The potential loophole is cause for concern. What if the GOI is not satisfied with the manner in which the United States has exercised jurisdiction? For instance, what if U.S. authorities decide to exercise nonjudicial punishment in a case instead of pursuing a court-martial?¹⁶⁵ Such decisions have legitimate bases, such as evidentiary concerns, but could clearly be unsatisfactory to Iraqi officials and politicians. Or what if an accused is acquitted, or receives a light sentence?¹⁶⁶ Iraqi outrage could lead to a request to hand the servicemember over to the Iraq criminal system. The possibility of this occurring is increased because the SA requires the United States to “seek to hold the trials of . . . cases [involving a victim who is not a member of the U.S. Forces or of the civilian component] *inside Iraq*.”¹⁶⁷ Thus, not only is the potential visibility of such cases increased, it is also logistically easier for Iraq to seek the turnover of a member since they will still be present in Iraq.¹⁶⁸ As a final added concern, the “due process standards and protections” to which members are entitled under Article 12, paragraph 8 appear to apply only “[w]here Iraq exercises jurisdiction pursuant to paragraph 1”¹⁶⁹ involving its “primary right to exercise

¹⁵⁹ *Id.* art. 12, para. 6.

¹⁶⁰ *Id.* art. 12, para. 8.

¹⁶¹ *Id.* These standards have not yet been established. For a suggestion about a joint or “hybrid” United States-Iraqi court, based in Iraq, to decide the outcome of such cases, see Wexler, *supra* note 140, at 84–85.

¹⁶² Double jeopardy is “the fact of being prosecuted twice for substantially the same offense.” BLACK’S LAW DICTIONARY 506 (7th ed. 1999). If prohibited, this generally only applies to the *same* sovereign. As discussed here, there are two different sovereigns, the United States and the Republic of Iraq.

¹⁶³ Lepper, *supra* note 136, at 177.

¹⁶⁴ North Atlantic Treaty: Status of Forces art. VII, para. 8, June 19, 1951, 4 U.S.T. 1792 [hereinafter NATO SOFA]. The reader should note that even this language has not proven to be trouble-free. When has an accused been “tried” for purposes of this paragraph? If the United States exercises prosecutorial discretion not to prosecute, does that suffice? What about the exercise of military discipline or administrative procedures instead of court-martial? “Unfortunately, none of these questions have simple answers [but] . . . [i]t is generally the United States’ position that when it acquires primary jurisdiction . . . its decision not to proceed to trial is an exercise of jurisdiction sufficient to preclude receiving state prosecution.” Lepper, *supra* note 136, at 178 (citing J. SNEE & K. PYE, STATUS OF FORCES AGREEMENT: CRIMINAL JURISDICTION 68, 71 (1957)).

¹⁶⁵ See UCMJ art. 15 (2008) (regarding nonjudicial punishment).

¹⁶⁶ It is entirely probable this could happen. See Wexler, *supra* note 140, at 45–48 (reviewing how some Iraq combat related killings resulted in court-martial sentences that were correspondingly light, did not make it to trial, or ended in acquittal).

¹⁶⁷ SA, *supra* note 3, art. 12, para. 7 (emphasis added).

¹⁶⁸ Additionally, Article 14 of the SA covers entry and exit procedures for U.S. Forces and of the civilian component, and requires the United States to submit lists of the names of members entering and leaving Iraq. *Id.* art. 14. Personnel should discard any thoughts of slipping a member out of Iraq in the dead of night before charges are filed or before the news breaks.

¹⁶⁹ *Id.* art. 12, para. 8.

jurisdiction . . . for . . . grave premeditated felonies.”¹⁷⁰ Arguably, this does not apply to a case where Iraq exercises subsequent jurisdiction, vice primary.

The worst case scenario seems to be a serious case that begins with the United States exercising *primary* jurisdiction, such as where an on-duty U.S. Soldier is alleged to have negligently killed an Iraqi civilian.¹⁷¹ On that basis, the United States asserts jurisdiction, investigates, and then decides not to prosecute; or exercises nonjudicial punishment; or actually prosecutes at court-martial and the Soldier is acquitted. The GOI, dissatisfied with the case result, then seeks to assert jurisdiction, and at the same time argues that the procedural guarantees promised under Article 12 do not apply. Although GOI refusal to grant procedural guarantees seems unlikely, assertion of secondary jurisdiction is entirely foreseeable. Consider the events in South Korea in 2002 when:

[A] fifty-seven-ton U.S. armored vehicle en route to a U.S. training site ran over and killed two Korean girls near a village in rural South Korea. At the time of the incident, the U.S. asserted that both U.S. service members in the armored vehicle were operating in their “official duty” capacity and not subject to Korean law. Pursuant to the Korea SOFA . . . Korea requested waiver of primary jurisdiction. The request was denied. Both U.S. service members were prosecuted under the UCMJ for negligent homicide and acquitted by military juries.

Both the refusal to waive jurisdiction in favor of the South Korean Government and the subsequent acquittals of the two service members were the focus of violent and prolonged protests against the U.S. military presence in Korea.¹⁷²

The difference between the South Korean incident and the hypothetical posed here is that the Korea SOFA has a double jeopardy provision that is virtually identical to the provision in the NATO SOFA.¹⁷³ Therefore, the acquitted servicemembers were clearly protected.

One possible legal argument against a secondary assertion of jurisdiction by Iraq is that when the United States exercises jurisdiction under SA Article 12, members “shall be entitled to due process standards and protections pursuant to the Constitution and laws of the United States.”¹⁷⁴ Since the Fifth Amendment to the U.S. Constitution provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb,”¹⁷⁵ this *arguably* precludes a subsequent Iraqi exercise of jurisdiction, but not clearly so. The argument is potentially further strengthened by reference to the Iraqi Constitution, which also has a provision concerning “double jeopardy.”¹⁷⁶ But ultimately, the difference between that legalistic argument and an explicit double jeopardy clause within the agreement, is a lack of clarity. In an emotional situation involving Iraqi victims, it is entirely conceivable that constitutional arguments will fail in the face of internal Iraqi politics and domestic pressure.

United States Forces commanders and legal practitioners need to understand that the basic proposition that “there’s only Iraqi jurisdiction if the member is off-base and off-duty” is an over-simplification. Even though an offense has not met the definition of a “grave premeditated felony” under the SA, there is still the potential for Iraq to exercise jurisdiction over a servicemember. In such cases, political and diplomatic solutions may be all that stands between a servicemember and the exercise of Iraqi jurisdiction.

¹⁷⁰ *Id.* art. 12, para. 1.

¹⁷¹ Such a case would result in primary U.S. jurisdiction because of the member’s on-duty status and because the allegation does not imply any premeditation. Therefore, the situation is not a “grave *premeditated* felon[y] . . . committed . . . outside duty status” that would give Iraq the primary right to exercise jurisdiction. *Id.*

¹⁷² Wexler, *supra* note 140, at 62 (citations omitted).

¹⁷³ *See* Facilities and Areas and the Status of United States Armed Forces in Korea U.S.-S. Korea art. XXII, para. 8, July 9, 1966, 17 U.S.T. 1677.

¹⁷⁴ SA, *supra* note 3, art. 12, para. 7.

¹⁷⁵ U.S. CONST. amend. V.

¹⁷⁶ IRAQ CONST. art. 19(5) (2005) (“The accused may not be tried for the same crime for a second time after acquittal unless new evidence is produced.”) The reader will note that this is not an explicit bar, since new evidence can permit another prosecution even after acquittal.

3. Mutual Legal Assistance

One final note on Article 12 is that it provides for mutual legal assistance in paragraph 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.”¹⁷⁷

Such a provision is generally considered to be important to the United States which may need to invoke it as a basis to obtain information for courts-martial.¹⁷⁸ However, this is a two-way street and Iraq has the right to expect U.S. cooperation when it comes to providing support to Iraqi investigations of U.S. personnel.¹⁷⁹

B. U.S. Forces Freedom of Movement

The SA grants U.S. Forces substantial freedom of movement within Iraq.¹⁸⁰ This is a necessity to accomplish all that is required to sustain U.S. Forces and complete the mission. However, because of the new jurisdiction scheme discussed above, there are some recommended precautionary measures that servicemembers should take to avoid situations in which they could be detained by Iraqi authorities:

- Limit non-mission specific travel;
- Only leave the base if performing official duties;
- Always travel with at least one “battle buddy” and preferably more;
- Only leave the FOB in uniform;
- Talk to the chain-of-command before participating in any voluntary events like a community service project or sporting event;
- Do not take liberty/pass, frequent Iraqi shops and restaurants, or conduct any voluntary travel off the base without consulting the chain of command.

Given the amount of convoy driving and other mobility needs, there have been some specific concerns expressed about U.S. personnel following Iraqi traffic laws. Article 18 of the SA requires official vehicles to have a valid registration and to display official Iraqi license plates.¹⁸¹ At the same time it exempts military vehicles from the license and registration requirement. Instead such vehicles must be “clearly marked with numbers.”¹⁸² This exemption does not mean that the U.S. Forces drivers do not have to follow the rules of the road. Pursuant to SA Article 3, it is the duty of U.S. Forces member to “respect Iraqi laws” and this includes Iraqi traffic laws.¹⁸³ These laws can currently be found in CPA Order 86.¹⁸⁴ This CPA Order was written mostly by American’s in 2004. Therefore, a good rule of thumb is if it would be wrong in the United States, it is probably wrong in Iraq. Additionally, U.S. Forces members are advised to:

- Travel at off-peak times such as night or early morning;
- Stop at check points;
- Follow directions given by traffic police unless there is an emergency or specific threat that requires otherwise.

If a situation results where Iraqi authorities or police stop a U.S. convoy, their authority should be respected. It is suggested that servicemembers not show a driver’s license but instead request that the Iraqi authorities file their inquiry with the U.S. chain-of-command. If Iraqi authorities attempt to detain service members, the servicemembers have been provided

¹⁷⁷ SA, *supra* note 3, art. 12, para. 4.

¹⁷⁸ See Lepper, *supra* note 136, at 186.

¹⁷⁹ See *id.*

¹⁸⁰ See, e.g., SA, *supra* note 3, art. 9, para. 1 (“[V]essels and vehicles operated by or at the time exclusively for the United States Forces may enter, exit, and move within the territory of Iraq for the purposes of implementing this Agreement.”).

¹⁸¹ *Id.* art. 18, para. 1. Interestingly, although the SA exempts U.S. Forces from virtually all fees, duties, and taxes, they still must pay the Iraqis for the cost of the plates that official vehicles must display. See *id.*

¹⁸² *Id.* art. 18. Additionally, Iraqi authorities are required to accept valid driver’s licenses issued by U.S. authorities. See *id.* art. 17.

¹⁸³ *Id.* art. 3, para. 1.

¹⁸⁴ COALITION PROVISIONAL AUTHORITY ORDER NO. 86 (20 May 2004) [hereinafter CPA ORDER 86]. As discussed *supra* note 145, CPA orders remain in effect until rescinded or amended by subsequent legislation.

an “Emergency Jurisdiction Card” that should be presented in such a situation. The text of the card is in both English and Arabic. It begins by stating, “DO NOT DETAIN. THIS SOLDIER IS ON DUTY.”¹⁸⁵ The card goes on to say:

Under provision of the Agreement Between the Republic of Iraq and the United States of America the United States has primary jurisdiction over service members in duty status. Accordingly, the United States asserts the following rights:

- That this service member be immediately returned to United States military control
- This service member will provide his name and unit contact information for your report to your chain of command regarding this incident
- You may accompany this service member back to his base of operations and report this incident to his chain of command.¹⁸⁶

Hopefully confrontations between U.S. drivers and Iraqi authorities will be rare. Most likely such a scenario will be related to a traffic accident. Accidents also give rise to claims, which are discussed in the next section.

C. Claims, Civil Jurisdiction and Liability

Claims for damages are common when U.S. Forces deploy.¹⁸⁷ “Absent an agreement to the contrary (or a combat claims exclusion), the United States normally is obligated to pay for damages caused by its forces. As a general rule, the desirable agreement has the State parties waive claims against each other.”¹⁸⁸ Such is the basic arrangement contained in Article 21 of the SA.

[E]ach Party shall waive the right to claim compensation against the other Party for any damage, loss, or destruction of property, or compensation for injuries or deaths that could happen to members of the force or civilian component of either Party arising out of the performance of their official duties in Iraq.¹⁸⁹

In some agreements, Receiving States also “agree to pay third party claims caused by U.S. forces in the performance of official duties, and release [service members] from any form of civil liability resulting from such acts.”¹⁹⁰ However, the SA pushes third party claims on to the United States, which has agreed to:

[P]ay just and reasonable compensation in settlement of meritorious third party claims arising out of acts, omissions, or negligence of members of the United States Forces and of the civilian component done in the performance of their official duties and incident to the non-combat activities of the United States Forces. United States Forces authorities may also settle meritorious claims not arising from the performance of official duties.¹⁹¹

Although Article 21 addresses third party claims, it is silent about the possibility of Iraqi civil judgments against a member of the U.S. Forces or civilian component. As discussed above, the general rule in international law is that “foreign military personnel . . . are fully subject to the law of [the host] country unless expressly or impliedly exempted by the host country through agreement with the sending state.”¹⁹² This includes civil liability.

¹⁸⁵ Assertion of Jurisdictional Rights under Provision of the Agreement Between the Republic of Iraq and the United States of America On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq (n.d.) (U.S.-Iraq Emergency Jurisdiction Card) (on file with author).

¹⁸⁶ *Id.*

¹⁸⁷ OPLAW HANDBOOK, *supra* note 82, ch. 7, pt. IV.B.1.e, at 123.

¹⁸⁸ *Id.*

¹⁸⁹ SA, *supra* note 3, art. 21, para. 1.

¹⁹⁰ OPLAW HANDBOOK, *supra* note 82, ch. 7, pt. IV.B.1.e, at 123.

¹⁹¹ SA, *supra* note 3, art. 21, para. 2. Article 21 also provides that, “All claims in this paragraph shall be settled expeditiously in accordance with the laws and regulations of the United States.” *Id.* This permits payment of claims under the Foreign Claims Act, 10 U.S.C. § 2734, which are not based on legal liability, but on the maintenance of good foreign relations. *See also* OPLAW HANDBOOK, *supra* note 82, ch. 7, pt. IV.B.1.e, at 123.

¹⁹² Erickson, *supra* note 136, at 138; *see supra* Part IV.A (discussing jurisdiction),.

The NATO SOFA addresses civil liability by stating, “The sending State shall not claim immunity from the jurisdiction of the courts of the receiving State for members of a force or civilian component in respect of civil jurisdiction of the courts of the receiving State except”¹⁹³ that “[a] member of a force or civilian component shall not be subject to any proceedings for the enforcement of any judgment given against him in the receiving State in a matter arising from the performance of his official duties.”¹⁹⁴ Thus, persons subject to the NATO SOFA are only subject to civil judgments when they are involved in matters outside the performance of official duties. No such clarifying language is found in the SA.

A cursory reading of Article 12 on jurisdiction may leave the reader with the impression that only criminal jurisdiction is discussed. However, a careful reading of the Article reveals otherwise. The initial Article 12 paragraph states, “Recognizing Iraq’s sovereign right to determine and enforce the rules of criminal and *civil* law in its territory . . . the Parties have agreed as follows”¹⁹⁵ After this initial mention of civil jurisdiction, the topic is never raised in subsequent paragraphs. Instead, only the unmodified word “jurisdiction” is used. Such is the case in paragraph 1 which provides Iraq with the right to “exercise jurisdiction” in certain cases.¹⁹⁶ Thus, for “grave premeditated felonies . . . committed outside agreed facilities and areas and outside duty status,”¹⁹⁷ Iraq could exercise both criminal *and* civil jurisdiction over members of the U.S. Forces and of the civilian component. Beyond such cases, the U.S. position should be that Iraq has waived civil jurisdiction because the United States has the “primary right to exercise jurisdiction over members . . . in circumstances not covered by paragraph 1.”¹⁹⁸

D. Airspace and Frequencies

Part of Iraq’s assertion of sovereignty includes control over Iraqi airspace and frequencies. Under international law, “[E]very State has complete and exclusive sovereignty over the airspace above its territory. Absent permission, military aircraft cannot overfly the territory of another state. . . . Similarly, landing rights must be provided by agreement, usually in the form of a SOFA, basing agreement, mutual defense agreement or access agreement.”¹⁹⁹ Additionally, every State has the sovereign right to regulate its telecommunication and radio frequency spectrum.²⁰⁰ As with other aspects of sovereignty, such rights are suppressed during armed conflict and occupation. Thus, following the 2003 campaign, the coalition forces took control of all of Iraq’s airspace, radio control towers and the nation’s network of airports.²⁰¹ Since the SA reinstated Iraq’s full sovereignty, control of the airspace and frequencies had to be returned. As stated in the agreement: “Surveillance and control over Iraqi airspace shall transfer to Iraqi authority immediately upon entry into force of this agreement,”²⁰² and “[t]he Government of Iraq owns all frequencies.”²⁰³

¹⁹³ NATO SOFA, *supra* note 164, art. VIII, para. 9.

¹⁹⁴ *Id.* art. VIII, para. 5(g).

¹⁹⁵ SA, *supra* note 3, art. 12 (emphasis added).

¹⁹⁶ *Id.* art. 12, para. 1.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* art. 12, para. 3. How the issue on jurisdiction and double jeopardy would affect this argument is beyond the scope of this article. See criminal double jeopardy discussion *supra* Part IV.A.2.

¹⁹⁹ The Judge Advocate General’s Department, United States Air Force, Air Force Operations and the Law: A Guide for Air and Space Forces 193 (2002).

²⁰⁰ See Constitution of the International Telecommunications Union Constitution pmbl. (Dec. 22, 1992) [hereinafter ITU], available at <http://www.itu.int/net/about/basic-texts/constitution/preamble.aspx>.

While fully recognizing the sovereign right of each State to regulate its telecommunication and having regard to the growing importance of telecommunication for the preservation of peace and the economic and social development of all States, the States Parties to this Constitution, as the basic instrument of the International Telecommunication Union, and to the Convention of the International Telecommunication Union (hereinafter referred to as “the Convention”) which complements it, with the object of facilitating peaceful relations, international cooperation among peoples and economic and social development by means of efficient telecommunication services, have agreed as follows:

Id. pmbl. (emphasis added).

²⁰¹ See Agence France-Presse, *Iraq to Take More Control of Airspace*, Dec. 31, 2008, MILITARY.com, available at <http://www.military.com/news/article/iraq-to-take-more-control-of-airspace.html?col=1186032320397>.

²⁰² SA, *supra* note 3, art. 9, para. 3.

²⁰³ *Id.* art. 11, para. 2.

1. Airspace Transition

The return of Iraqi airspace control does not negate the U.S. Forces' need to use the airspace. On the contrary, air operations are very busy. For instance, in January 2009, "about 130 mobility missions were flown every day to restock and resupply the US forces around Iraq."²⁰⁴ Thus, the SA provides U.S. aircraft with the authorization "to over-fly, conduct airborne refueling . . . , and land and take off within, the territory of Iraq."²⁰⁵ U.S. aircraft:

- (1) Will be granted "permission every year to land in and take off from Iraqi territory";²⁰⁶
- (2) "[S]hall not have any party boarding them without the consent of the authorities of the United States Forces";²⁰⁷ and
- (3) "[S]hall not be subject to payment of any taxes, duties, fees, or similar charges, including overflight or navigation fees, landing, and parking fees."²⁰⁸

Also, although the SA transfers control over Iraqi airspace to Iraq, "Iraq may request from the United States Forces temporary support for the Iraqi authorities in the mission of surveillance and control of Iraqi air space."²⁰⁹ This request was made, and a two-phase transition was initiated to transfer airspace sovereignty from the coalition to Iraqi civil and military authorities. In Phase 1, Iraq "requested that the U.S. continue to control airspace at or below 24,000 feet until Iraq's capabilities 'mature'."²¹⁰ However, the day-to-day operations for airspace above 24,000 feet are now run by Iraqis.²¹¹ Coalition air assets using airspace above 24,000 feet must coordinate with Iraqi air traffic controllers to transit that area.²¹² Yet, there should be "no noticeable effect on air operations below 24,000 feet—a key factor in conducting a range of US operations from aeromedical evacuation to close air support for troops in the field."²¹³

As for Phase 2, it "will focus on long-term development of the Iraqi Civil Aviation Authority, to gain compliance with the International Civil Aviation Organization . . . [which] requires work on management and oversight, infrastructure development, improved communication, navigation and surveillance upgrades, and creating a trained workforce of air traffic controllers."²¹⁴

2. Frequencies and Communications

Just as with airspace, the return of Iraqi frequency control does not negate the U.S. Forces' need to use frequencies. As background, the electromagnetic spectrum is made up of all frequencies of electromagnetic waves.²¹⁵ The electromagnetic spectrum is a finite natural resource of each country and should be used rationally, efficiently, and economically.²¹⁶ For this

²⁰⁴ Marc V. Schanz, *In for the Long Haul*, 92 A.F. MAG. No. 3, Mar. 2009, at 38, available at <http://www.airforce-magazine.com/MagazineArchive/Pages/2009/March%202009/0309haul.aspx>.

²⁰⁵ SA, *supra* note 3, art. 9, para. 2. Note that the language removed from the quoted provision above relates to the purpose of such aircraft. Specifically, they must be operating "exclusively for the purposes of implementing" the SA. *Id.* The significance of this language was discussed *supra* Part III.B.1. Also note that the types of aircraft identified by the agreement are "United States Government aircraft and civil aircraft that are at the time operating exclusively under a contract with the United States Department of Defense." *Id.* Aircraft not fitting this description are not covered by the SA.

²⁰⁶ *Id.* art. 9, para. 2.

²⁰⁷ *Id.*

²⁰⁸ *Id.* art. 9, para. 5. However, U.S. Forces "shall pay fees for services requested and received." *Id.* art. 9, para. 6.

²⁰⁹ *Id.* art. 9, para. 4.

²¹⁰ Schanz, *supra* note 204, at 39.

²¹¹ *See id.* Other Phase 1 moves include: "approval of an implementation plan by the Iraqi civil aviation authorities and the IqAF; partial transfer of aeronautical information system functions from the combined force air component commander; and development of an agreement between the CFACC and the Iraqis, defining coordination and delegation of airspace." *Id.*

²¹² *See id.*

²¹³ *Id.* ("Previously established coordination procedures also help ensure that unmanned aerial vehicle operations continue unhindered. The procedures governing air strikes are unchanged, as US air traffic control liaisons are positioned with Iraqi air controllers to ensure airspace is clear before conducting a strike.").

²¹⁴ *Id.*

²¹⁵ *Frequency Asked Questions*, CHIPS MAG., 38, Oct.–Dec. 2006 [hereinafter CHIPS MAG.], available at http://www.chips.navy.mil/archives/06_Oct/web_pages/spectrum.htm.

²¹⁶ *See* ITU, *supra* note 200, FAQ.

reason, governments generally establish a system to manage, protect, and regulate the use of the spectrum within their borders.²¹⁷ How Iraq manages this spectrum is important to U.S. Forces, because “[c]ompeting battlefield demands for radio frequencies have potentially lethal consequences Wireless voice and data communications are an increasingly integral part of military tactics. But as more radio-based capabilities are introduced, so too is the possibility of clashing signals.”²¹⁸ The concern for proper spectrum management goes beyond the communications realm, as discussed in a 2006 Congressional Research Service report about improvised explosive devices (IEDs):

[M]uch of the Radio Frequency (RF) spectrum in the Iraq combat theater is un-managed and can sometimes cause dangerous interference with radio communications on the ground. Sometimes IED radio jammers can lock onto other new electronic combat systems because of a lack of coordination for spectrum usage. Other times, when a jammer is on, a [S]oldier cannot use his radio for communications. The [S]oldier must shut off the jammer to send and receive, thus opening a window of vulnerability for insurgents to use. Also, UAVs [Unmanned Aerial Vehicles] can sometimes lose their RF control links due to interference once they are far away from their control base.²¹⁹

To ensure U.S. Forces maintain the ability to use the electromagnetic spectrum effectively for mission requirements, the SA requires Iraqi authorities to “allocate to the United States Forces such frequencies as coordinated by both Parties.”²²⁰ The United States “shall return frequencies allocated to them at the end of their use not later than the termination” of the SA.²²¹

Although required to provide the United States with appropriate frequencies, the SA also states that the United States “shall operate their own telecommunications systems in a manner that *fully respects* the Constitution and laws of Iraq.”²²² The term “telecommunications” is defined in an extremely broad manner as “[a]ny transmission, emission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, radio, optical or other electromagnetic systems.”²²³ The potential ramifications of this provision are, as yet, unrealized. However, one wonders to what extent a fully sovereign Iraq might seek to subject U.S. communications, to include electronic and signals intelligence, to Iraqi oversight to ensure the Iraqi Constitution and laws are fully respected.

E. Basing

The very first term defined in the SA is “[a]greed facilities and areas” which “are those Iraqi facilities and areas owned by the Government of Iraq that are in use by the United States Forces during the period in which this Agreement is in force.”²²⁴ These are the bases from which the United States will operate while the SA is in effect. As of the time of this writing, the location and nature of the agreed facilities and areas is still in flux. This is because portions of the U.S. Forces are in the process of re-locating. The SA requires that “[a]ll United States combat forces shall withdraw from Iraqi cities, villages, and localities no later than the time at which Iraqi Security Forces assume full responsibility for security in an Iraqi province, provided that such withdrawal is completed no later than June 30, 2009.”²²⁵ The combat forces withdrawn “shall

²¹⁷ CHIPS MAG., *supra* note 215.

²¹⁸ David Perera, *Defense Officials Seek Better Management of Radio Spectrum*, Govexec.com, Dec. 7, 2006, http://www.govexec.com/story_page.cfm?articleid=35625&ref=relink.

²¹⁹ CLAY WILSON, CONG. RESEARCH SERV. REPORT, IMPROVISED EXPLOSIVE DEVICES (IEDS) IN IRAQ AND AFGHANISTAN: EFFECTS AND COUNTERMEASURES, RS22330, at CRS-3 (2006), *available at* <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA454399&Location=U2&doc=GetTRDoc.pdf>.

²²⁰ SA, *supra* note 3, art. 11, para. 2. This coordination will take place through the JMOCC. *Id.*

²²¹ *Id.* The SA also exempts U.S. Forces “from the payment of fees to use transmission airwaves and existing and future frequencies, including any administrative fees or any other related charges.” *Id.* art. 11, para. 4. Also, the U.S. Forces “must obtain the consent of the Government of Iraq regarding any projects of infrastructure for communications that are made outside agreed facilities and areas exclusively for the purposes of this Agreement in accordance with Article 4, except in the case of actual combat operations conducted pursuant to Article 4.” *Id.* art. 11, para. 5. There is no definition provided for “projects of infrastructure for communications.”

²²² *Id.* art. 11, para. 3 (emphasis added).

²²³ ITU, *supra* note 200, annex 1012, *available at* <http://www.itu.int/net/about/basic-texts/constitution/annex.aspx>. The SA, *supra* note 3, art. 11, para. 3, looks to the constitution of the ITU to define “telecommunications.”

²²⁴ SA, *supra* note 3, art. 2, para. 1.

²²⁵ *Id.* art. 24, para. 2. At the time of this article’s publication, discussions were ongoing about whether Iraq would extend withdrawal deadlines for U.S. Forces operating in the northern city of Mosul. *See Iraq Rules Out Extension of U.S. Withdrawal Dates*, REUTERS, May 3, 2009, <http://www.reuters.com/article/topNews/idUSTRE5422D320090503?feedType=RSS&feedName=topNews>. However, as noted, “[e]ven after June, U.S.

be stationed in the agreed facilities and areas outside cities, villages, and localities to be designated by the JMOCC.”²²⁶ This designation is still in progress.

One friction point during this process could result from the lack of a definition for cities, villages, and localities. The SA also does not define “combat forces.”²²⁷ The United States may narrowly construe the term to include only those forces which conduct operations which are primarily offensive in nature. All other members of the force might be considered to be engaged in military support operations and activities.²²⁸ The SA contemplates U.S. personnel “training, equipping, supporting, supplying, and establishing and upgrading logistical systems, including transportation, housing, and supplies for Iraqi Security Forces.”²²⁹ These would surely not be considered “combat forces” for the purposes of withdrawing from Iraqi cities, villages, and localities. But there is a wide range of other personnel who should also fall outside the definition of “combat forces,” such as those performing duties as:

- Convoys and convoy escort
- Force protection (including proactive measures)
- Quick reaction forces
- Aerial intelligence, surveillance and reconnaissance (ISR)²³⁰

Ultimately it will fall to the JMOCC to address these ambiguities.

Once U.S. Forces are settled into the agreed facilities and areas, “Iraq authorizes the United States Forces to exercise within the agreed facilities and areas all rights and powers that may be necessary to establish, use, maintain, and secure such agreed facilities and areas.”²³¹ This includes entry control.²³² Additionally, SA Article 19 authorizes U.S. Forces to provide services inside the base such as “military post offices; financial services; shops selling food items, medicine, and other commodities and services; and various areas to provide entertainment and telecommunications services, including radio broadcasts.”²³³ This allows life “inside the wire” to be essentially within the control of U.S. authorities.

The one area that looms as a possible source of tension concerns property ownership. Pursuant to the SA, “Iraq owns all buildings, non-relocatable structures, and assemblies connected to the soil that exist on agreed facilities and areas, including those that are used, constructed, altered, or improved by the United States Forces.”²³⁴ Prior to its withdrawal, the United

forces can conduct combat and other operations within cities if authorized by the Iraqi government. A major base on the outskirts of Mosul, for example, will not be affected.” *Id.*

²²⁶ SA, *supra* note 3, art. 24, para. 3. Additionally, “Upon their withdrawal, the United States Forces shall return to the Government of Iraq all the facilities and areas provided for the use of the combat forces of the United States.” *Id.* art. 5, para. 2.

²²⁷ Only the much broader “United States Forces” is defined. *Id.* art 2, para. 2. “Combat forces” is necessarily a smaller component than United States Forces, but the SA is silent as to what degree.

²²⁸ One of the primary difficulties will be in trying to determine whether combat forces which provide security for Provincial Reconstruction Teams (PRTs) can be kept outside the definition. Otherwise, the combat forces providing movement support would need to travel to the PRTs (normally located in cities) from the outlying bases on an “as required” basis, or the PRTs would need to rely on contractors for force protection and movement. A third alternative, locating the PRTs outside the population centers, would seem to defeat their mission.

The front-line operatives in the campaign to stabilize Iraq are the American and Coalition members who comprise the Provincial Reconstruction Teams, or PRTs. These are relatively small operational units comprised not just of diplomats, but military officers, development policy experts (from the U.S. Agency for International Development, the Department of Agriculture, and the Department of Justice), and other specialists (in fields such as rule of law, engineering, and oil industry operations) who work closely with Iraqi provincial leaders and the Iraqi communities that they serve. While PRTs dispense money for reconstruction projects, the strategic purpose of these civil-military field teams is both political and economic. By building provincial governments’ ability to deliver essential services and other key development projects to local Iraqis, PRTs help to extend the reach of the Iraqi government to all corners of the country and help build the stability necessary to complete the transition to full-Iraqi control.

U.S. Dep’t of State, Provincial Reconstruction Teams (PRTS), <http://www.state.gov/p/nea/ci/iz/c21830.htm> (last visited Apr. 23, 2009).

²²⁹ SA, *supra* note 3, art. 4, para. 4.

²³⁰ This list is not intended to be complete, but instead is offered to highlight the wide range of personnel which could be construed to not be “combat forces.”

²³¹ SA, *supra* note 3, art. 6, para. 2. This includes producing and providing “water, electricity, and other services.” *Id.* art. 11, para. 1.

²³² *Id.* art. 6, para. 3. For joint use facilities and areas adjacent to agreed facilities, the JMOCC will establish mechanisms for entry and use. *See id.* art. 6, paras. 2, 3.

²³³ *Id.* art. 19, para. 1.

²³⁴ *Id.* art. 5, para. 1.

States must hand-over all such property to the GOI “free of any debts and financial burdens.”²³⁵ However, U.S. Forces and U.S. contractors “shall retain title to all equipment, materials, supplies, relocatable structures, and other movable property that was legitimately imported into or legitimately acquired within the territory of Iraq in connection with” the SA.²³⁶ It is foreseeable that opinions may differ over whether a particular piece of property is “movable” or “non-relocatable.” It will be the responsibility of the Joint Committee to create mechanisms to handle any possible dispute.²³⁷

F. U.S. Contractors and their Employees

Thus far, the focus of this article has been on “the United States Forces and of the civilian component.” As previously mentioned, “United States contractors” and “United States contractor employees” were defined separately by the SA.²³⁸ This was done to permit different treatment of contractors, to include a different jurisdictional scheme from that granted members of the U.S. Force and the civilian component. A brief overview of these changes for contractors is set forth below.²³⁹

Iraqi politicians and negotiators were intent on changing the legal regime governing foreign contractors in Iraq. This was due, at least in part, to the controversy surrounding the conduct of security contractors in Iraq, specifically the company Blackwater.²⁴⁰ Now, contractors have significantly fewer privileges and immunities than they enjoyed under CPA Order 17. One significant change is that some contractors formerly included under the CPA Order are no longer included under the new SA.²⁴¹ For instance, Blackwater is actually a contractor for the Department of State and not U.S. Forces. While CPA Order 17 included them in the definition of MNF Personnel, and they received the associated immunities,²⁴² they are now outside the scope of the SA.²⁴³

²³⁵ *Id.* art. 5, para. 6.

²³⁶ *Id.* art. 5, para. 9.

²³⁷ *See id.* art. 5, para. 6. The Joint Committee is separate from the JMOCC. *Id.* Article 23 established the Joint Ministerial Committee, which is responsible for establishing the JMOCC and the Joint Committee. *See id.* art. 23. Additionally, the Joint Committee is authorized to “establish Joint Sub-Committees in different areas to consider the issues arising under this Agreement according to their competencies.” *Id.* art. 23, para. 4.

²³⁸ *See supra* Part IV.A for discussion; SA, *supra* note 3, art. 2, para. 5. It is important to note that the SA only covers contractors who are operating “under a contract or subcontract with or for the United States Forces.” *Id.* art. 2, para. 5. Contractors not fitting the SA definition are not covered.

²³⁹ It is beyond the scope of this article to provide a detailed analysis of the effects the SA has on contracting and contractors.

²⁴⁰ The Iraqis have expressed “outrage over a September 2007 shooting in Baghdad’s Nisoor Square that left 17 Iraqi civilians dead.” *U.S. Drops Blackwater’s Iraq Deal*, FOXNews.com, Jan. 30, 2009, <http://www.foxnews.com/politics/2009/01/30/official-state-department-drops-blackwater-contract-iraq/>.

The Nisoor Square shooting strained relations between Washington and Baghdad and fueled the anti-American insurgency in Iraq, where many Iraqis saw the bloodshed as a demonstration of American brutality and arrogance. Five former Blackwater guards have pleaded not guilty to federal charges in the United States that include 14 counts of manslaughter and 20 counts of attempted manslaughter.

Blackwater maintains the guards opened fire after coming under attack, an argument supported by transcripts of Blackwater radio logs obtained by the AP. They describe a hectic eight minutes in which the guards repeatedly reported incoming gunfire from insurgents and Iraqi police.

Id. Blackwater has abandoned “its brand name as it tries to shake a reputation battered by its work in Iraq, renaming its family of two dozen businesses Xe. The parent company’s new name is pronounced like the letter ‘z.’” Assoc. Press, *Blackwater Worldwide Changes Its Name to Xe*, N.Y. TIMES, Feb. 13, 2009, available at http://www.nytimes.com/2009/02/14/business/14bizbriefs-BLACKWATERWO_BRF.html.

²⁴¹ *See SA, supra* note 3, art. 2, para. 5.

²⁴² Coalition Provisional Authority Order 17 defined Multi-National Personnel as those non-Iraqi military and civilian persons assigned under the command of Multi-National Forces commander operating in Iraq. The definition included civilian contractors accompanying the military force:

“MNF Personnel” means all non-Iraqi military and civilian personnel (a) assigned to or under the command of the Force Commander or MNF contingent commanders, (b) subject to other command authority to aid, protect, complement or sustain the Force Commander, or (c) employed by a Sending State in support of or accompanying the MNF.

CPA ORDER 17, *supra* note 54, sec. 1, para (2).

In addition to immunizing contractors from Iraqi legal process as MNF Personnel under CPA Order 17, sec. 2, para. (1), the Order also provided that:

Contractors shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their Contracts

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.

. . . .

As for those contractors covered by the SA, “Iraq shall have the primary right to exercise jurisdiction over United States contractors and United States contractor employees.”²⁴⁴ Although this is a significant change in the status of U.S. contractors in Iraq, it is not inconsistent with their status in most countries where they are generally subject to host nation laws. This includes Afghanistan.²⁴⁵ The SA does permit the United States to request Iraq “to waive its primary right to jurisdiction in a particular case.”²⁴⁶ The affected person could then, as appropriate, be prosecuted under the Military Extraterritorial Jurisdiction Act²⁴⁷ or Article 2(a)(10) of the UCMJ.²⁴⁸ It is likely that such a waiver request would only occur in a situation where the act in question was committed in connection with a U.S. contract, and had little to no connection to Iraq other than physical location.

Other SA effects on contractors include the lack of SA authority for U.S. contractors and U.S. contractor employees to wear uniforms or carry weapons.²⁴⁹ Thus contractors will have to comply with Iraq’s laws, as well as U.S. directives on personal arming. The SA provides no authority for U.S. contractors or their employees to avoid standard GOI entry and exit requirements.²⁵⁰ There are no SA exemptions for contractor vehicles.²⁵¹ Nor does the waiver of claims pursuant to SA Article 21 apply to contractors or their employees.²⁵²

Certification by the Sending State that its Contractor acted pursuant to the terms and conditions of the Contract shall, in any Iraqi legal process, be conclusive evidence of the facts so certified.

Id. sec. IV, paras. 2, 3, 5.

²⁴³ For this, and other reasons, when the SA entered into force in January, the Government of Iraq took steps to deny Blackwater a license to operate. *See U.S. Drops Blackwater’s Iraq Deal*, FOXNews.com, Jan. 30, 2009, <http://www.foxnews.com/politics/2009/01/30/official-state-department-drops-blackwater-contract-iraq/>; *see also* Ernesto Londoño & Qais Mizher, *Iraq to Deny New License to Blackwater Security Firm*, WASH. POST, Jan. 29, 2009, at A12, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/28/AR2009012803319.html>.

Private security companies working for the U.S. government in Iraq have been required to obtain licenses from the Iraqi Interior Ministry since 2004, but some have operated without licenses, and until this year, there was little the Iraqi government could do to enforce the rule.

The ministry revoked Blackwater’s license in September 2007 and threatened to expel the company’s employees, but U.S. officials ignored the order and renewed the company’s contract the following April.

Id.

²⁴⁴ SA, *supra* note 3, art. 12, para. 2.

²⁴⁵ *See Status of Forces Agreements and UN Mandates: What Authorities and Protections Do They Provide to U.S. Personnel?: Hearing Before the Subcomm. on International Organizations, Human Rights, and Oversight of the H. Foreign Affairs Comm.*, 110th Cong. (2008) (statement of Jennifer K. Elsea), available at <http://www.house.gov/delahunt/elseatestimony.pdf>.

The United States and the transitional government of Afghanistan concluded an agreement in 2002 regarding the status of U.S. military and civilian personnel of the U.S. Department of Defense present in Afghanistan in connection with cooperative efforts in response to terrorism, humanitarian and civic assistance, military training and exercises, and other activities. Such personnel are to be accorded “a status equivalent to that accorded to the administrative and technical staff” of the U.S. Embassy under the Vienna Convention on Diplomatic Relations of 1961. Accordingly, U.S. personnel are immune from criminal prosecution by Afghan authorities, and are immune from civil and administrative jurisdiction except with respect to acts performed outside the course of their duties. The Islamic Transitional Government of Afghanistan explicitly authorized the U.S. government to exercise criminal jurisdiction over U.S. personnel, and the government of Afghanistan is not permitted to surrender U.S. personnel to the custody of another state, international tribunal, or any other entity without consent of the U.S. government. The agreement does not appear to provide immunity for contract personnel.

Id. CRS-3 (citations omitted).

²⁴⁶ SA, *supra* note 3, art. 12, para. 6.

²⁴⁷ *See* MEJA, *supra* note 147.

²⁴⁸ *See* UCMJ art. 2(a)(10) (2008).

²⁴⁹ In contrast, U.S. Forces and the civilian component are granted such authority by SA. SA, *supra* note 3, art. 13. Note that Iraq has existing criminal sanctions prohibiting persons from wrongfully wearing a uniform to which they are not entitled, including uniforms belonging to a foreign country. *See* IRAQI PENAL CODE WITH AMENDMENTS pt. two, ch. 4, sec. 4, para. 261 (3d ed. 1969), available at http://law.case.edu/saddamtrial/documents/Iraqi_Penal_Code_1969.pdf (providing the Iraqi criminal law requirements to engage in self-defense). One area where this could create friction is with interpreters employed by the U.S. who were previously wearing uniforms.

²⁵⁰ In contrast, U.S. Forces and the civilian component are required to have only identification cards and travel orders pursuant to SA. SA, *supra* note 3, art. 14.

²⁵¹ In contrast, official and military vehicles are exempt from registration fees and military vehicles do not require license plates pursuant to SA. *Id.* art. 18.

²⁵² *See id.* art. 21. This article does not mention contractors at all except to exclude from the claims waiver those claims arising from contracts. *See id.* art. 21, para. 1. *See supra* Part IV.C (discussing about the claims provision).

The SA allows contractors to import and export equipment, supplies, material and technology to the same degree as U.S. Forces.²⁵³ Additionally, there will be no “taxes, duties, or fees . . . imposed on goods and services purchased by or on behalf of the United States Forces in Iraq for official use or on goods and services that have been purchased in Iraq on behalf of the United States Forces.”²⁵⁴ As with U.S. Forces, valid U.S. driver’s licenses and professional licenses issued to contractor employees shall be deemed acceptable and/or valid to Iraqi authorities, and no test or fee is required to operate a personal car or other vehicle, vessel or aircraft belonging to the U.S. Forces in Iraq.²⁵⁵ Lastly, U.S. Forces are permitted to “select contractors and enter into contracts in accordance with United States law for the purchase of materials and services in Iraq.”²⁵⁶ This freedom to contract is qualified, however, by the requirement that U.S. Forces “shall contract with Iraqi suppliers of materials and services to the extent feasible when their bids are competitive and constitute the best value.”²⁵⁷

On 30 December 2008, the Iraqi Ministry of Interior issued an order suspending implementation of certain requirements until the GOI and U.S. Forces reach an agreement within the Joint Committee process.²⁵⁸ This grace period does not, however, provide immunity from criminal prosecution or from other legal process in Iraq. The ministerial order addresses the following areas:

- Issuing of licenses for contractors of security and personnel protection and facilities;
- Registration of firearms and weapons of individuals;
- Registration of vehicles;
- Issuing of licenses for pilots and aircraft related to personnel and security operations;
- Imposition of customs, duties, tariffs, and taxes, and conduct of related inspections;
- Compliance with entry, exit, and in-country transit requirements/procedures.²⁵⁹

One final note on contractors: Although the SA specifically permits U.S. Forces to detain or arrest members of the U.S. Forces and of the civilian component,²⁶⁰ no similar authorization for the detention or arrest of U.S. contractors by U.S. authorities is discussed in the SA. This has the potential to pose problems for maintaining good order and discipline within the agreed facilities and areas. However, as previously discussed, U.S. Forces do have the authority to detain personnel who are witnessed committing a crime.²⁶¹ The SA also authorizes U.S. Forces “within the agreed facilities and areas all rights and powers that may be necessary to establish, use, maintain, and secure such agreed facilities and areas.”²⁶² Therefore, especially within the agreed facilities and areas under exclusive U.S. control, it would seem acceptable for U.S. Forces to engage in regular law enforcement.²⁶³

Part V. Conclusion: The Withdrawal of U.S. Forces and Termination of the SA

It is well known that the SA requires that “[a]ll the United States Forces shall withdraw from all Iraqi territory no later than December 31, 2011.”²⁶⁴ This does not mean that in 2011 the United States will no longer be in Iraq. There will still be

²⁵³ See SA, *supra* note 3, art. 15. The only exception to this relates to “personal effect materials and equipment for consumption or personal use.” *Id.* art. 15, para. 2. Unlike U.S. Forces and the civilian component, contractor employees have no express right to import items for personal consumption free of inspections, licenses, or other restrictions, taxes, customs duties, or any other charges.

²⁵⁴ *Id.* art. 16, para. 1. Note, however, that unlike U.S. Forces and the civilian component, contractor employees are not exempt from “payment of any tax, duty, or fee that has its value determined and imposed in the territory of Iraq, unless in return for services requested and received.” *Id.* art. 16, para. 2.

²⁵⁵ *Id.* art. 17, paras. 1–3.

²⁵⁶ *Id.* art. 10.

²⁵⁷ *Id.* This language is essentially aspirational. Additionally, this provision concludes by stating, “The United States Forces shall respect Iraqi law when contracting with Iraqi suppliers and contractors and shall provide Iraqi authorities with the names of Iraqi suppliers and contractors, and the amounts of relevant contracts.” *Id.*

²⁵⁸ See Republic of Iraq, Ministry of Interior, The Minister’s Office, Order No. D.M. 31034 (Dec. 30, 2008) (on file with author).

²⁵⁹ See *id.*

²⁶⁰ SA, *supra* note 3, art. 22, para. 1; see *supra* Part III.C (providing a discussion of detention authority).

²⁶¹ See discussion *supra* Part III.C.1.

²⁶² SA, *supra* note 3, art. 6, para. 2.

²⁶³ Note that Article 6 also requires the United States and Iraq to “coordinate and cooperate regarding exercising these rights and powers in the agreed facilities and areas of joint use.” *Id.*

²⁶⁴ *Id.* art. 24, para. 1. In addition to the withdrawal of forces, the agreement itself expires: “This Agreement shall be effective for a period of three years, unless terminated sooner by either Party pursuant to paragraph 3 of this Article.” *Id.* art. 30, para. 1. The agreement entered into force on 1 January 2009. *Id.* art. 30, para. 4. Thus, the three year period will expire on 1 January 2012.

American diplomats present, along with other governmental officials. However, with the expiration of the agreement, the United States will not only lose the authority to conduct combat operations, but U.S. Forces will be required to withdraw. The only way for this, or any other provision of the SA, to be amended is through “the official agreement of the Parties in writing and in accordance with the constitutional procedures in effect in both countries.”²⁶⁵

The SA can terminate earlier than 2011. All that is required is written notice from one party to the other, and the agreement will terminate in one year.²⁶⁶ In a similar vein, the United States recognized “the sovereign right of the Government of Iraq to request the departure of the United States Forces from Iraq at any time.”²⁶⁷ The likelihood of such a termination or withdrawal request is greater than many know. There is an Iraqi referendum on the security pact scheduled for some time in the summer of 2009.²⁶⁸ As of the time of this writing, the details of the referendum are still not clear, but the possibility exists that if the referendum on the SA reflects a lack of support by the Iraqi public, then the U.S. exit from Iraq could be much earlier than expected.

There are two clear ways to help ensure the SA is viewed positively by the Iraqis. First, U.S. leaders must make every effort to adhere to the terms. This article has identified various gray areas where friction may occur. These areas must be handled delicately and in cooperation with Iraqi counter-parts. Although the United States must protect its interests, it must not do so in a way that sacrifices the greater objective of maintaining good relations with Iraq. The United States cannot be seen as exploiting its position or strong-arming Iraq. To do so risks public condemnation and loss of public support. The second way to help ensure the SA is viewed positively falls on the shoulders of every Soldier, Sailor, Airman, Marine, Coast Guardsman, and Civilian of the U.S. Forces serving in Iraq. There is no room for any misconduct toward Iraqi citizens, nor can individuals afford to act beyond the scope of their missions. A single failure in this area is potentially catastrophic to the U.S.-Iraq Security Agreement. The U.S. chain of command must continue to impress upon all members of the U.S. Forces in Iraq that mission success can only be achieved through their individual good conduct and their good relations with the Iraqis that they are in Iraq to support and protect.

²⁶⁵ *Id.* art. 30, para. 2.

²⁶⁶ *Id.* art. 30, para. 3.

²⁶⁷ *Id.* art. 24, para. 4. This provision also allows the reverse, that the U.S. can withdraw its forces from Iraq at any time. *See id.* President Obama has indicated that he intends to withdraw most troops from Iraq by August of 2010, 16 months in advance of the 2011 deadline. *See* Dan Lothian & Susan Malyeaux, *Obama: U.S. to Withdraw Most Iraq Troops by August 2010*, CNN.com, Feb. 27, 2009, <http://www.cnn.com/2009/POLITICS/02/27/obama.troops/index.html>.

²⁶⁸ Rania Abouzeid, *Iraq Approves Long-Debated US Security Pact*, Nov. 27, 2008, Time.com, <http://www.time.com/time/world/article/0,8599,1862660.00.html>.