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Iraq at the Crossroads

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The Iraq Status-of-Forces Agreement, Iran, and Guantanamo Bay

Sean Foley, Ph.D.*

“They have reduced the Iranian people to a level lower than that of an American dog. If someone runs over a dog belonging to an American, he will be prosecuted. Even if the Shah himself were to run over a dog belonging to an American, he would be prosecuted.”

– The Ayatollah Khomeini, Tehran, Iran, 1964¹

“The Status of Forces Agreement between Iraq and the United States should not violate Iraq’s sovereignty for even an iota.”

– Ayatollah Ali al-Sistani, Baghdad, Iraq, 2008²

Introduction³

On October 26, 1964, the Iranian religious leader Ayatollah Khomeini delivered one of the most significant political statements in modern Iranian history.⁴ Khomeini chastised Iran’s pro-U.S. monarch, Muhammad Reza Shah for approving a status-of-forces agreement (SOFA) that provided U.S. military personnel and their dependents with diplomatic immunity for any crime committed in Iran.⁵ The agreement, much like other SOFAs that the U.S. government had signed with other

* Sean Foley is an Assistant Professor in the Department of History at Middle Tennessee State University.

¹ JAMES A. BILL, *THE EAGLE AND THE LION: THE TRAGEDY OF AMERICAN-IRANIAN RELATIONS 159-60* (1988).

² *No to violation of Iraq’s sovereignty*, PRESS TV, Nov. 10, 2008, <http://www.presstv.ir/detail.aspx?id=74959§ionid=351020201> (last visited Mar. 28, 2009).

³ The author thanks York Norman for reviewing various versions of this text. The author also thanks Dan Stigall for his advice on the mechanics, scholarship, and history of SOFA agreements.

⁴ See Ayatollah Khomeini, *Speech Number Sixteen* (Oct. 26, 1964), available at <http://www2.irib.ir/worldservice/imam/speech/16.htm> (last visited Mar. 28, 2009).

⁵ BILL, *supra* note 1, at 159-60.

nations after World War II,⁶ established the legal status for U.S. troops deployed in a foreign country and “how the domestic laws of the foreign jurisdiction shall be applied toward U.S. personnel while in that country.”⁷

But Iran’s SOFA was unique in one respect: it did not stipulate concurrent jurisdiction over U.S. personnel in Iran.⁸ This omission meant that U.S. servicemen and their dependents would not be held accountable by Iran’s government for criminal actions committed within Iran.⁹

Khomeini seized on this omission and charged that the SOFA violated Iran’s sovereignty and trampled upon its national dignity. If an “American assaulted your *marja*’ [Iran’s leading religious figure] or even the Shah,” he argued, Iran’s police could not apprehend him and Iranian courts could not try him.¹⁰ Instead, “the files must be sent to America so that our masters . . . can decide what is to be done.”¹¹ The SOFA, he concluded, had reduced Iranians “to a level lower than an American dog.”¹²

Though the Shah immediately exiled Khomeini to Turkey, the speech and the mass protests it inspired set in motion a series of events that would lead to the fall of the Shah’s regime and to Iran’s Islamic Revolution in 1979. Following the revolution, Khomeini organized a new Islamic government in Iran that views itself as hostile to the United States.¹³

Iran’s experience with its SOFA provides a cautionary tale to both Iraqis and Americans as they implement Iraq’s recently signed SOFA with the United States and define the long-term role of the United States and its military forces in Iraq. The agreement lays out a clear timetable for the withdrawal of U.S. forces from Iraq, as well as resolves multiple contentious issues from the status of private security contractors to control over the Green Zone and U.S. military operations. In addition, the SOFA provides a mechanism for lifting international sanctions mandated by fourteen U.N. Security Council Resolutions passed since 1990.¹⁴

⁶ Christopher M. Van de Kieft provides an excellent overview of the U.S. definition of a status of forces agreement:

A Status of Force Agreement (‘SOFA’) is an agreement between the United States and a foreign country that establishes the legal status for deployed U.S. troops in the host country A SOFA apportions criminal jurisdiction between the United States and the receiving nation, and outlines civil jurisdiction, taxes, claims, duties, services provided by the United States and the host nation, hiring of local employees and procurement of supplies.

Christopher M. Van de Kieft, *Uncertain Risk: The United States Military and the International Criminal Court*, 23 CARDOZO L. REV. 2325, 2343-44 n.147 (2002).

⁷ R. Chuck Mason, *Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized?* CRS REPORT RL 34531, 2 (Dec. 1, 2008), available at <http://ftp.fas.org/sgp/crs/natsec/RL34531.pdf>.

⁸ Andrew L. Johns, *The Johnson Administration, the Shah of Iran, and the Changing Pattern of U.S.-Iranian Relations, 1965–1967: ‘Tired of Being Treated like a Schoolboy’*, 9 J. COLD WAR STUD. 64, 70-71 (2007).

⁹ *Id.*

¹⁰ BILL, *supra* note 1, at 159-60.

¹¹ *Id.*

¹² *Id.*

¹³ BILL, *supra* note 1, at 161, 261-315.

¹⁴ See Mohammad K. Shiyab, Op-Ed., *The Status of Forces Agreement happens to be good for Iraq*, DAILY STAR, Dec. 24, 2008, available at http://www.dailystar.com.lb/article.asp?edition_id=1&categ_id=5&article_id=98657#; see also *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*, Nov. 17, 2008, at 20-21, available at http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf.

SOFA and International Law

Significantly, the United States' SOFA with Iraq is part of a system of agreements which the United States and other national militaries have maintained with governments around the globe since the end of World War II.¹⁵ Besides the United States; Russia, the United Nations, the International Committee of the Red Cross, and many other nations have SOFAs or similar agreements (often called Laws of Visiting Forces).¹⁶ The Soviet Union also had similar agreements with members of the Warsaw Pact during the Cold War.¹⁷ SOFAs generally are not that much different from other international agreements or treaties,¹⁸ and have been recognized under international law for many decades.¹⁹ Although it is possible to challenge the North Atlantic Treaty Organization's SOFA in the International Court of Justice (ICJ), no state has brought a case forward in the ICJ or another any other international legal forum.²⁰ At least 115 nations, or close to half the global community, had SOFAs with the United States in 2008.²¹

There is no standard format for SOFAs, which vary in length from one page to over two hundred.²² Some of these agreements, such as the United States' SOFA with West Germany, granted sweeping powers to foreign military forces.²³ For instance, American commanders not only had exclusive control over their soldiers and weapons on West German soil, but they also had the right to patrol roads, railways, restaurants, and other large public areas.²⁴ Other SOFAs have been far more limited in scope.

¹⁵ See Richard J. Erickson, *Status of Forces Agreements: Sharing of Sovereign Prerogative*, 37 A. F. L. REV. 137, 139 (1994). (discussing U.S. military immunity in Europe). During the First and Second World Wars, the U.S. government demanded full immunity for American soldiers stationed overseas – a right Great Britain and other nations only granted temporarily to U.S. soldiers through formal diplomatic notes. When Washington decided to station its soldiers in Europe permanently after 1945, a new legal system was required since temporary remedies could no longer be applied. The result was the North Atlantic Treaty Organization (NATO) Status of Forces Agreement, which was signed in 1951. See *id.*

¹⁶ See PETER ROWE, *Historical Developments Influencing the Present Law of Visiting Forces*, in THE HANDBOOK OF THE LAW OF VISITING FORCES 13-32 (Dieter Fleck ed., 2001). See also BAKHTIYAR TUZMUKAMEDOV, *Russian Forces in the Commonwealth of Independent States*, in THE HANDBOOK OF THE LAW OF VISITING FORCES, *supra* at 417-40; JEAN PHILIPPE LAVOYER, *The International Committee of the Red Cross: Legal Status and Headquarters Agreements*, in THE HANDBOOK OF THE LAW OF VISITING FORCES, *supra* at 471-86.

¹⁷ See ROWE, *supra* note 16, at 26.

¹⁸ See Greg Bruno, *U.S. Security Agreements and Iraq*, COUNCIL ON FOREIGN REL., Dec. 23, 2008, http://www.cfr.org/publication/16448/us_security_agreements_and_iraq.html (last visited Apr. 9, 2009).

¹⁹ See ROWE, *supra* note 16, at 13-32.

²⁰ See BALDWIN DE VIDTS, *Settlement of Disputes*, in THE HANDBOOK OF THE LAW OF VISITING FORCES, *supra* note 16, at 237-40.

²¹ Condoleezza Rice & Robert Gates, *What We Need Next in Iraq*, WASH. POST, Feb. 13, 2008, at A19, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/12/AR2008021202001.html>.

²² Mason, *supra* note 7, at 3; Bruno, *supra* note 18.

²³ Stephen D. Krasner, *Building Democracy After Conflict: The Case For Shared Sovereignty*, 16 J. OF DEMOCRACY 69, 77 (2005).

²⁴ *Id.*

Iraq and the Need for a SOFA

Despite the prevalence of SOFA agreements in Europe and other parts of the world, no SOFA was in place in Iraq before the current agreement was signed and ratified by the Iraqi parliament in November 2008.²⁵ The agreement was badly needed at the time because the United Nations' mandate authorizing the U.S. presence in Iraq expired at the end of 2008, and any attempt to secure an extension would have been risky for Iraq and the United States.²⁶ A request for an extension would have sparked intense international debate, and it was uncertain whether the United Nations Security Council would have approved the request.²⁷ Absent a new agreement, the legal mandate for U.S. soldiers to remain in Iraq would have ended on December 31, 2008 – weeks before a new presidential administration would take power in Washington and Iraqis would hold local government elections.²⁸

History of Iraq SOFA Process

Earlier attempts at reaching a SOFA between Iraq and the United States had ended in disaster. The Bush Administration's initial draft SOFA permitted the United States to control Iraq's airspace and water, to imprison Iraqis without due process, and to initiate military action unilaterally.²⁹ U.S. troops and civilian contractors would have enjoyed full immunity from Iraqi law.³⁰ Iraq's Prime Minister, Nouri al-Maliki, rejected the Bush Administration's SOFA proposal and stated in June 2008 that negotiations for the agreement were at a dead end.³¹ Echoing the demands of Iraq's most powerful religious leader, the Ayatollah Ali al-Sistani, al-Maliki insisted that a SOFA must be approved by the parliament of Iraq and that an agreement that infringed on Iraqi sovereignty would be dismissed.³² In November 2008, al-Sistani warned that the SOFA "should not violate Iraq's sovereignty for even an iota."³³ If al-Sistani believed that his demands had been ignored, he could issue a *fatwa* (an Islamic legal opinion) that would effectively scuttle a SOFA.³⁴

To their credit, U.S. officials understood these concerns and sought to address them. The Iraq Study Group report in 2006 recommended that the United States not build permanent bases in

²⁵ Bruno, *supra* note 18.

²⁶ Sam Dagher, *Iraqis Insist on Changes to Long-Delayed Security Pact With U.S.*, N.Y. TIMES, Oct. 30, 2008, at A16; David Ignatius, *A Critical Stage in Iraq*, WASH. POST, Oct. 22, 2008, at A19.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Juan Cole, *Iraq: The Necessary Withdrawal*, THE NATION, Jan. 12, 2009, at 23.

³⁰ *Id.*

³¹ Amit R. Paley & Karen DeYoung, *Key Iraqi Leaders Deliver Setbacks to U.S.: Premier Rejects Terms of Proposed Pacts; Cleric Reactivates Militia*, WASH. POST, June 14, 2008, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/13/AR2008061302019.html>.

³² *Grand Ayatollah Ali Sistani rejects SOFA*, UNITED PRESS INT'L, July 8, 2008, available at http://www.upi.com/Emerging_Threats/2008/07/08/Grand_Ayatollah_Ali_Sistani_rejects_SOFA/UPI-69541215548391/ (last visited Apr. 9, 2009).

³³ Press TV, *supra* note 2.

³⁴ Sean Foley, *U.S-Iraq Treaty Has Ominous Parallels to Events in the Iran Revolution*, THE TENNESSEAN, July 6, 2008, 15A.

Iraq,³⁵ while, then-U.S. Ambassador to Iraq, Ryan Crocker repeatedly reassured Iraqis in 2008 that an agreement would not infringe on their sovereignty.³⁶

The final agreement contained a number of revisions and key concessions. Not only did it provide a clear deadline for the 2011 withdrawal of U.S. forces from Iraq, but it also transferred the centerpiece of the U.S. presence in Iraq – the Green Zone in Baghdad – to Iraqi control in 2009.³⁷ Additionally, the agreement ended the immunity from prosecution under Iraqi law enjoyed by military contractors working for the U.S. Defense Department.³⁸ This immunity had been highly unpopular with Iraqis after guards working for Blackwater International killed 14 Iraqis in Baghdad in September 2007.³⁹ Henceforth, these individuals will be subject to Iraqi law. Moreover, off-duty and off-base U.S. troops who commit crimes in Iraq will fall under Iraqi jurisdiction.⁴⁰ Finally, U.S. commanders must obtain permission from Iraqi leaders before undertaking military operations in the country.⁴¹

Where We Are Now

However, these concessions may not be enough to assuage Iraqis' reservations about a SOFA negotiated with the Bush Administration. Only 54 percent of the Iraqi parliament's 275 members voted to approve the agreement, and several key Shiite political parties boycotted the vote.⁴² A spokesman for Muqtada al-Sadr, one of Iraq's leading Shiite politicians, predicted that "[h]istory will record the honorable position of the nationalists who rejected this humiliating agreement."⁴³ Sunni Iraqis only supported the SOFA after al-Maliki agreed to hold a national referendum on it in July 2009.⁴⁴ The passage of the referendum is not assured, and it is not clear what the legal status of U.S. troops in Iraq will be if Iraqi voters reject it.

³⁵ Joseph Curl, *Panel seeks final pullout in '08; Bush rebuffs call for direct talks with Iran*, WASH. TIMES, Dec. 7, 2006, at A01.

³⁶ Trudy Rubin, *Worldview: Security's complication; the surge's success is emboldening Iraqi thinking on a U.S. withdrawal*, PHILA. INQUIRER, June 15, 2008, at D05. For instance, Crocker noted in June 2008 that "[t]here isn't going to be an agreement that infringes on Iraqi sovereignty" and that the agreement "isn't going to be forever." *Id.*

³⁷ Andrea Stone, *Iraqis to take charge of Green Zone in '09; Agreement with U.S. ends immunity for some private security companies*, USA TODAY, Dec. 30, 2008, at 7A.

³⁸ *Id.*

³⁹ Monte Morin, *Iraq rescinds license for Blackwater security firm*, L.A. TIMES, Jan. 30, 2009, at A4.

⁴⁰ Richard Tomkins, *New rules toughen Iraq mission; Warrants OK'd slowly*, WASH. TIMES, Dec. 31, 2008, at A01.

⁴¹ Trudy Rubin, *Worldview: Change is in the air with new Iraq accord; Baghdad will have final say on U.S. military operations*, PHILA. INQUIRER, Dec. 24, 2008, at A11.

⁴² Tina Susman & Raheem Salman, *Iraqi legislators OK pact setting up U.S. withdrawal; 'We have crossed an important milestone,' Maliki tells his nation*, L.A. TIMES, Nov. 28, 2008, at A1. Of the 198 lawmakers present, 149 raised their hands in favor of the SOFA. Seventy-seven were absent. *Id.*

⁴³ Richard Tomkins, *U.S. pact goes to parliament: Al-Maliki risks a bitter blow in rejection of sovereignty bid*, WASH. TIMES, Nov. 26, 2008, at A14, available at <http://www.washingtontimes.com/news/2008/nov/26/us-pact-goes-to-parliament/>.

⁴⁴ Tina Susman, *U.S.–Iraqi Accord Shows Muqtada Sadr's diminished clout*, L.A. TIMES, Dec. 2, 2008, at A5, available at <http://articles.latimes.com/2008/dec/02/world/fg-sadr2>; Editorial, *Problems with the SOFA*, WASH.

Even if the referendum passes this summer, President Obama and his advisors will be wise to reject the advice of U.S. military commanders – no matter how well-intentioned they may be – to delay the withdrawal of U.S. troops from Iraq. According to polls commissioned by the BBC and others in 2008, nearly three quarters of Iraqis oppose the continued presence of foreign troops in Iraq and more than forty percent approve of attacks on U.S. and other Coalition forces.⁴⁵ U.S. actions in Iraq have damaged America's image throughout the Arab and Muslim world and have proven to be a potent recruitment tool for extremist groups. One also has to look at the widespread public sympathy, in Iraq and the wider Middle East, for Muntadhar al-Zaidi, the Iraqi journalist who threw his shoes at President George W. Bush and called him a dog at a December 2008 news conference in Baghdad.⁴⁶ It will be impossible to begin to repair this image before a full U.S. withdrawal from Iraq. More importantly, delaying the U.S. withdrawal will add credibility to those who originally opposed the SOFA and arouse deep-seated Iraqi suspicions about the power of foreign armies and permanent military bases in their country.

The Need to Act Cautiously

These suspicions reflect Iraqis' past relationship with Great Britain, which wielded enormous influence through economic ties, political agreements, and military bases from World War I until 1958. Though British officials promised that they would not impose alien institutions on Iraqis when they seized the territory from the Ottoman Empire in 1917, they nonetheless created new governing institutions and selected a king for Iraq after the war.⁴⁷ When Shiites and Kurds resisted British plans, the British government crushed their revolts with automatic weapons, bombs, and aerial bombardment.⁴⁸ Senior British officials even contemplated using mustard gas on Iraqis.⁴⁹ Indeed, Saddam Hussein was not the first person to contemplate (or ultimately to employ) chemical weapons on civilians in Iraq's history.⁵⁰

Still, the most significant and blatant example of Britain's interference in Iraq's internal affairs occurred in 1940 and 1941. At that time, Iraqi Prime Minister Rashid Ali refused to heed Britain's request to suspend Iraqi relations with Italy.⁵¹ The British government responded to Ali's defiance by mobilizing its forces in Iraq, destroying Iraq's army and air force, and toppling the

TIMES, Dec. 2, 2008, at A16, available at <http://www.washingtontimes.com/news/2008/dec/02/problems-with-the-sofa/>.

⁴⁵ Cole, *supra* note 29, at 24.

⁴⁶ Tina Susman, *Iraqi Shoe Thrower Elicits Mixed Reaction Among Arabs*, L.A. TIMES, Dec. 16, 2008, at A1, available at <http://articles.latimes.com/2008/dec/16/world/fg-shoeman16>.

⁴⁷ JOHN FISHER, CURZON AND BRITISH IMPERIALISM IN THE MIDDLE EAST 305 (1999); PHEBE MARR, THE MODERN HISTORY OF IRAQ 22-36 (2004).

⁴⁸ RASHID KHALIDI, RESURRECTING EMPIRE: WESTERN FOOTPRINTS AND AMERICA'S PERILOUS PATH IN THE MIDDLE EAST 27 (I.B. Tauris Press 2004) (2004); MARR, *supra* note 47, at 22-24.

⁴⁹ NIALL FERGUSON, THE WAR OF THE WORLD: TWENTIETH-CENTURY CONFLICT AND THE DESCENT OF THE WEST 412 (2006) (arguing that the British might have used chemical weapons in Iraq had supplies been available, and also noting that "Winston Churchill, no faint heart in these matters," was "shocked by the actions of some trigger-happy pilots and vengeful ground troops" in Iraq in 1920).

⁵⁰ See MARR, *supra* note 47, at 178, 186-192.

⁵¹ *Id.* at 53-55.

country's government.⁵² For many Iraqis and others in the Middle East, the ouster of Rashid Ali demonstrated that national sovereignty did not exist as long as foreign troops were stationed permanently within national boundaries.⁵³

Here, it is worth noting that recently the presence of American soldiers has aroused suspicion in Iraq's southern neighbor, Saudi Arabia. Throughout the 1990s, Osama bin Laden manipulated Saudi unease by insisting that the presence of U.S. soldiers in Saudi Arabia justified terrorist attacks within the Saudi kingdom.⁵⁴ He argued that the troops who were originally supposed to leave Saudi Arabia shortly after the Gulf War in 1991, but actually stayed for many years, threatened the kingdom's sovereignty.⁵⁵ Bin Laden also argued that the U.S. soldiers' proximity to the Saudi cities of Mecca and Medina, Islam's two holiest cities, threatened the security of all Muslims.⁵⁶

Finally, there is the unfortunate example of the U.S. Naval base at Guantanamo Bay, Cuba. While many today associate the base with allegations of torture and the U.S. war on terrorism, the base is a result of the Spanish-American War in 1898, when the United States liberated Cuba from Spanish rule and turned the island into a virtual U.S. protectorate.⁵⁷ The Platt Amendment, which Congress approved in 1901, gave Washington a veto over the newly independent Cuban government's ability to conduct its own foreign policy.⁵⁸ Although the amendment has long since faded into history and a Communist government has ruled Cuba for decades, the United States continues to maintain its base at Guantanamo Bay.

Conclusion

The continued presence of the U.S. naval base in Guantanamo Bay alone is enough to give any Iraqi and American pause when considering the ramifications of the current agreement with Iraq. While there may be a host of valid reasons for modifying or delaying the plan for withdrawing U.S. forces from Iraq, it would nonetheless be wise to adhere as closely as possible to the timetables in the SOFA. Any deviation from it would lend credibility to those who opposed the agreement and arouse intense Iraqi suspicions about the influence of foreign armies in their country. If these suspicions were to take hold among a significant segment of Iraqis, it would put the July 2009 referendum on the SOFA in jeopardy, forestall President Obama's efforts to improve American ties with the Muslim world, and create a chaotic political situation in which U.S. forces would have to remain in Iraq for many years to come. That would not be in the interests of Americans or Iraqis and it would only help those who wish to harm both Iraq and America.

⁵² *Id.* at 55-56.

⁵³ *See* Foley, *supra* note 34, at 15A.

⁵⁴ JOHN L. ESPOSITO, UNHOLY WAR: TERROR IN THE NAME OF ISLAM, 11-13, 22-23 (2002).

⁵⁵ OSAMA BIN LADEN, MESSAGES TO THE WORLD: THE STATEMENTS OF OSAMA BIN LADEN 36-37 (Bruce Lawrence ed., James Howarth trans., 2005).

⁵⁶ *Id.* at 58-59.

⁵⁷ Amy Kaplan, *Where Is Guantánamo?*, 57 AM. Q. 831, 834-35 (2005).

⁵⁸ *Id.* at 835-37.