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Sharing a SOFA With Iraq: Towards a Status of Forces Agreement

JURIST Guest Columnist **Kevin Govern** of Ave Maria School of Law, Ann Arbor, MI, says that a viable Status of Forces Agreement (SOFA) and Strategic Framework Agreement between the US and Iraq governing future US troop presence in the country requires a variety of institutional, legal and political obstacles to be overcome before the UN mandate for coalition forces in Iraq runs out...

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In 350 B.C.E., the Greek philosopher Aristotle identified a fundamental law of physics: "horror vacui" or "nature abhors a vacuum." JURIST readers may well conclude that *de jure* and *de facto* leaders will abhor a vacuum regarding the legal status of coalition forces currently present in Iraq.

On 16 October 2003, UN Security Council Resolution (UNSCR) 1511 officially recognized the Coalition Provisional Authority (CPA) as Iraq's transitional government. That resolution also granted authority for a multinational, coalitional stabilization force in Iraq under Chapter VII of the UN Charter. Seven months later, on 27 June 2004, the CPA issued

Order 17, granting all foreign personnel under the U.S.-led CPA, both uniformed and civilian, immunity from "local [Iraqi] criminal, civil and administrative jurisdiction and from any form of arrest or acting on behalf of their parent states." When the CPA transferred power to a sovereign Iraqi interim government, and the CPA officially dissolved, a legal "vacuum" of authority existed regarding Iraqi legal jurisdiction over coalitional forces.



In an earlier era, the US approach to such an absence of local jurisdiction as well as authority for operations on foreign soil would have involved the so-called "law of the flag" approach: "a foreign army permitted to march through a friendly country, or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of that place" (See *Coleman v. Tennessee*, 97 U.S. 509, 515 (1878)).

In March 2008, the US Department of State's official position was that coalition operations could continue "beyond the end of [2008] under the laws passed by Congress and the president's authority as commander in chief." (See [U.S.: No need for more Iraq war permit from Congress](#), Reuters, 6 March 2008).

Such "laws passed by Congress" might well include the Military Extraterritorial Jurisdiction Act (MEJA) (18 U.S.C. § 3261), which allows for the prosecution of persons "employed by or accompanying the armed forces" overseas for crimes punishable by imprisonment of more than one year. They might also include the 2001 [Joint Resolution on Authorization for Use of Military Force](#) (Public Law 107-40) and the 2002 [Authorization for Use of Military Force Against Iraq Resolution](#) (Public Law 107-243). Finally, the National Defense Authorization Act for Fiscal Year 2008 (NDAA) (Pub. L. 110-18) brought all civilian contractors in Iraq under the military's jurisdiction. The first conviction under that new authority came on 22 June 2008 when a US military court in Iraq convicted Alaa "Alex" Mohammad Ali, an Iraqi-Canadian translator, of aggravated assault for the February 2008 stabbing death of a fellow military contractor in Iraq (See *JURIST - Paper Chase*, [US military court convicts first civilian since Vietnam](#), 23 June 2008).

In journalist Anne Flaherty's opinion, the State Department's position on coalition operations "reaffirm[ed] the administration's position that it does not need international or congressional approval to conduct military operations anywhere in the world, particularly when going after terrorists." (See Flaherty, Anne, [UN Mandate In Iraq Not Needed](#), *USA Today*, 8 Mar. 2008).

Nevertheless, such an approach to international law and overseas operations, in the absence of some type of immunity or arrangement, seemingly contradicts the principle that "forces that find themselves in another nation's territory must comply with that nation's laws." (See Gerhard Von Glahn, *Law Among Nations* 238 (1992), at 225-6, cited with authority in JA 422, [Operational Law Handbook](#), The Judge Advocate General's Center & School (2007), at

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In a few months there will arguably be a legal “vacuum” created when the UN mandate for runs out for coalition forces in Iraq. That mandate, established under UNSCR 1511 (2003) mentioned earlier, has been renewed annually by UNSCRs 1546 (2004), 1637 (2005), and 1723 (2006). As I noted in a JURIST *Forum* article on **Rethinking Rule of Law Efforts in Iraq**, Iraq is endeavoring to establish and sustain a constitutional and democratic rule of law capacity – via its law enforcement, justice, and corrections systems, along with Iraqi Security Force (ISF) capability. Increasingly, Iraq has sought to assert its sovereign authority as a nation and delineate the limitations of coalitional forces remaining in Iraq.

At Iraq’s request to extend the mandate “for the last time,” the UN Security Council decided unanimously via Resolution 1790 (2007) that actions under Chapter VII of the United Nations Charter would be reviewed at the request of the Government of Iraq or no later than 15 June 2008. The UN mandate would expire on 31 December 2008 or be terminated earlier if the Iraqi government requested the Council to do so (See UN Press Release, **Security Council, Acting On Iraq’s Request, Extends ‘For Last Time’ Mandate of Multinational Force**, 18 December 2007).

One possible way to fill the legal “vacuum” after expiration would be a Status of Forces Agreement (SOFA), sometimes also referred to as a Status of Mission Agreement (SOMA) under UN Chapter VII auspices (e.g., the African Union **SOMA for the UN Mission In Somalia** – UNMIS). The Council on Foreign Relations has noted that historically SOFAs have served as a “legal framework that defines how foreign militaries operate in a host country.” Typically SOFAs are established by executive agreement, rather than treaty, but are “without uniform or standard format for the document, which can vary in length and specificity” (See Bruno, Greg, **Background - U.S. Security Agreements and Iraq**, Council on Foreign Relations, 6 June 2008).

SOFAs may delineate, amongst other things, who is subject to criminal and/or civil jurisdiction of the host country to which they are deploying, as well as civil liabilities such as taxation (See, e.g., Army Regulation (AR) 715-9, Contractors Accompanying the Force, 29 October 1999, at para. 3-1(g)). Neither the US nor Iraq have SOFAs with every nation with which they operate, and indeed, there are missions for which other forms of bilateral agreements (like an exchange of diplomatic notes) or multilateral instruments (like treaties) or even no formal instrument may be more suitable. Nonetheless, by at least one account,

the U.S. had permanent SOFAs with more than 90 nations, or 46 percent of the world's 190 nation-states (such as the North Atlantic Treaty Organization [NATO] nations, Bosnia, Japan, and Korea) (See Pike, John, GlobalSecurity.org [Status-of-Forces Agreement \[SOFA\] Webpage](#), 26 April 2005).

The draft US-Iraqi SOFA proposal has been a point of negotiation since 2004, but pursued in earnest since March 2008, tentatively addressing immunity of American troops from Iraqi prosecution, the operations of over 60 military bases in Iraq, continued power to detain Iraqi prisoners, and protections for civilian contractors, (even though American contractors do not enjoy such immunity from local laws elsewhere). (See Shanker, Thom and Myers, Steven Lee, [Contractors Working With The American Military Granted Protection From Local Laws](#), *New York Times*, 25 January 2008); JURIST readers will find superb expositions examining contractor liability in Professor Byron L. Warnken's 12 November 2007 *Forum* contribution entitled [Blackwater, Garrity, and Immunity: What Does It All Mean?](#) and Attorney Tara Lee's 24 April 2008 *Forum* piece entitled [Don't Kick Contractors Off the Battlefield: Just Hold Them Accountable.](#))

If a SOFA is in fact concluded with Iraq, the signatories may well look to the NATO SOFA as a model for emulation; that SOFA sets forth three general classes of sending state personnel: 1) Members of the "force," i.e., members of the armed forces of the sending state; 2) Members of the "civilian component" (i.e., civilian employees of the sending state); 3) "Dependents" (i.e., the family members of the force or civilian components dependent upon them for support (JA 422, *supra*, at 130). Customarily excluded from the second category, contractor employees may well require special technical arrangements or international agreements so they enjoy rights and privileges associated with SOFA status (JA 422, *supra*, at 130).

Also under negotiation is a so-called "strategic framework," details of which still remain sketchy, but purportedly include political and economic initiatives to "increase investment into Iraq; foster debt reduction; and encourage cultural, education, and scientific exchanges between the countries." (See Bruno, *supra*).

In an extraordinary confluence of current events and legal developments, federal courts in the May and June 2008 timeframe have rendered significant opinions involving international law, SOFAs, and both civil and criminal jurisdiction in Iraq.

The US Court of Appeals for the Fifth Circuit ruled in *Lane v. Halliburton, et. al.*, (No. 06-20874, filed 28 May 2008) to reverse and remand to the District Court a case brought against military contractors in Iraq, holding that the case "needed further factual development before it can be known" that the "political question doctrine" is "actually an impediment" to reviewing tort claims against those contractors. In so doing, the three-judge panel from the Fifth Circuit court said it "may be possible to resolve the claims without needing to make a constitutionally impermissible review of wartime decision-making."

More recently, the US Supreme Court handed down a unanimous decision on 12 June 2008 in the case of *Munaf et Al. v. Geren, Secretary Of The Army, et al.*, 553 U.S.____ (2008). That case upheld basic legal rights for Americans held abroad by the U.S. military, but did not find such safeguards extended to dual Iraqi-US citizens tried and convicted by Iraqi authorities for crimes committed in Iraq. The case upheld Iraqi criminal jurisdiction over Shawqi Omar for assisting a terrorist network, and Mohammad Munaf for kidnapping Romanian journalists.

Petitioners argued that under *Valentine v. US ex rel. Neidecker*, 299 U.S. 5 (1936), the Executive [the President] lacks discretion to transfer a citizen to Iraqi custody unless "legal authority" to do so "is given by act of Congress or by the terms of a treaty." The Court distinguished *Valentine*, an extradition case from the US. Petitioners also argued precedent from *Wilson v. Girard*, 354 U. S. 524, 529 (1957) applied to Munaf, where that case stated a "sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders" and a SOFA between Japan and the US seemed to give the habeas petitioner a right to trial by an American military tribunal, rather than a Japanese court."

The Court distinguished *Wilson* from *Munaf*, as in no small part because there was a SOFA extant between the US and Japan, unlike the present state of relations with Iraq, and in the present case of *Munaf* there was a transfer to a sovereign's authority of an individual captured and already detained in that sovereign's territory. In his majority opinion, Chief Justice Roberts wrote that "To allow United States courts to intervene in an ongoing foreign criminal proceeding and pass judgment on its legitimacy seems at least as great an intrusion as the plainly barred collateral review of foreign convictions." (See Yost, Pete, **Court rules against 2 US citizens in Iraq**, *Washington Post*, 12 June 2008).

Perhaps of even greater significance to ongoing US-Iraqi SOFA negotiations, the *Washington Post* reported on 13 June 2008 that the US administration "suffered two major setbacks ... when Prime Minister Nouri al-Maliki publicly rejected key U.S. terms for an ongoing military

presence and anti-American Shiite cleric Moqtada al-Sadr called for a new militia offensive against U.S. forces." (See Paley, Amit R. and DeYoung, Karen, **Key Iraqi Leaders Deliver Setbacks to U.S.**, *Washington Post*, 14 June 2008).

Prime Minister al-Maliki was quoted as saying the SOFA drafts proposed "left us at a dead end and deadlock, so we left these and the negotiations will continue with new ideas until the sides reach a formula that preserves Iraq's sovereignty" (See Negus, Steve and Morris, Harvey, **Iraq forces talks reach 'dead end,'** *Financial Times*, 13 June 2008). Further delineating the prerequisites for progress, al-Maliki said "Any agreement that infringes on Iraq's sovereignty and its components will be dismissed and will not be acceptable," noting that any agreement would require the Iraqi Parliament's final approval (See **Maliki rejects draft US 'security' pact**, *Morning Star*, 14 June 2008).

In contrast, injecting an element of optimism and forward progress, Iraqi Foreign Minister Hoshyar Zebari said of the SOFA and Security Agreement efforts on 15 June 2008 that "These talks are ongoing. They're not dead ... Definitely, there hasn't been an impasse ... I'm confident that we will be able to secure the strategic framework agreement by the end of July." (See **US-Iraq security pact 'not dead,' deal ready in July: Iraqi FM**, AFP, 15 June 2008).

In efforts to propel negotiations forward, the US has purportedly agreed that foreign contractors in Iraq will no longer have immunity from Iraqi law, according to Iraqi Foreign Minister Hoshyar Zebari, as reported on 18 June 2008 (See Cockburn, Patrick, **Iraq deal with US to end immunity for foreign contractors**, *The Independent*, 18 June 2008).

In a tip as to possible further SOFA concessions, news sources reported Iraq's oil minister Hussain al-Shahristani as saying on 18 June 2008 that Iraq is insisting on the right to veto any US military operations throughout its territory, and that the agreement would last for a maximum of two years and could be terminated by either side with six months' notice. (See Steele, Jonathan, **Baghdad insists on right to veto US operations**, *The Guardian*, 18 June 2008).

Despite this progress, a strong voice of opposition has emanated from the Iraqi Parliament. Husayn al-Falluji, Leader of Iraqi Accordance Front (the largest Sunni bloc in Iraqi Parliament) said on 11 June 2008 of the possible SOFA that "We have found a formulation marked by arrogance, dictates, and coercion toward the Iraqi side ... If we have to choose

between this agreement and Iraq remaining internationalized under Chapter 7 [of the UN Charter], we are for keeping Iraq at the mercy of Chapter 7 rather than the mercy of a U.S. presence entailing a more uncertain future than at present" (See Recknagel, Charles, **Iraq: Debate Flares Over U.S. Security Pact**, RFE/RL, 12 June 2008).

Another significant voice raised on this SOFA has been that of Grand Ayatollah Ali al Sistani. While not a *de jure* elected leader, he is the *de facto* spiritual leader of Iraq's Shi'ite population (some three times larger than the Iraqi Sunni population). Al Sistani has pledged he would not allow Iraq to sign such a deal with "the US occupiers," noting his strong objection to Prime Minister al-Maliki in May of 2008 (See **Ayatollah will not allow US-Iraq deal**, PressTV Website, 24 May 2008).

* * *

The following complimentary yet inconclusive comments, made after an exceptionally brief 30-minute US-Iraqi Presidential meeting at the White House, express the ambitions as well as limitations on advancing stability, security, and the legal authority for coalition forces to remain in – or withdraw from – Iraq:

"We talked about a strategic framework agreement that suits the Iraq government. We talked about elections and different laws that have been passed ... We talked about the fact that the economy is improving, and that the attitude of the people there has improved immeasurably over the years ... I'm proud of what [President Talabani has] done, and I thank [him] for the tough decisions, so that the people of a free Iraq can realize hopes and dreams."

- President George Bush, 25 June 2008 (See Transcript, **President Bush Meets with President Talabani of Iraq**, White House, 25 June 2008)

and

"I'm grateful for what he said about me, but I agree with him that we are going to work together for having this agreement – security agreement between the United States and Iraq, and also to continue our cooperation in our struggle against terrorism, for promotion of democracy in Iraq and Middle East ... I think we have – we were able to go the steps towards reaching to finalize this agreement. And we continue our struggle to -- our efforts to reach –

Inshallah – very soon this agreement.”

- President Jalal Talabani, 25 June 2008 (*Id.*)

Kevin Govern is a professor at Ave Maria School of Law. He began his legal career as an US Army Judge Advocate, serving 20 years at every echelon during peacetime and war in worldwide assignments involving every legal discipline. He has also served as an Assistant Professor of Law at the United States Military Academy and has taught at California University of Pennsylvania. Unless otherwise attributed, the conclusions and opinions expressed are solely those of the author and do not reflect the official position of the U.S. Government, Department of Defense, or Ave Maria School of Law

July 02, 2008

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