

The U.S.-Iraq Security Agreement

and the Changing Nature of U.S. Military Operations in Iraq

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Change is the law of life. Those who only look to the past or to the present are certain to miss the future.

—President John F. Kennedy

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PHOTO: The Security Council voting to adopt, unanimously, resolution 1790 (2007), extending the mandate of the multinational force in Iraq until 31 December 2008. (UN Photo, Paulo Gilgueiras)

THE PAST 24 MONTHS have been a period of dynamic change in Iraq. Beginning with the U.S. troop surge in 2007, a number of factors have combined to create improvements in Iraq's security situation that would have been all but unimaginable only a few years ago.

In addition to gains brought about later by the "surge," the Anbar Awakening and the subsequent Sons of Iraq program helped bring stability to areas of Iraq that had previously been hotbeds for Al-Qaeda and sectarian violence.¹ Similarly, the cease-fire declared by Shi'ite cleric Muqtata al Sadr significantly reduced attacks on coalition forces by Sadr's *Jaish al-Mahdi* and other militias. Finally, intensive training and partnering efforts between coalition forces and Iraqi security forces have begun to pay dividends, as the Iraqi forces steadily developed into a highly capable force.²

With the improved security situation, the Iraqi government has taken steps to reinforce Iraq's status as a sovereign, independent nation. The most notable of these steps was implementing the U.S.-Iraq Security Agreement.³

This article looks at selected provisions of the U.S.-Iraq Security Agreement, focusing on the portions of the agreement that affect U.S. military operations at the tactical level. It examines how, under the terms of the agreement, U.S. forces in Iraq have largely transitioned from intelligence-driven, unilateral combat operations to warrant-based operations led by Iraqi security forces. The article also discusses Iraqi jurisdiction over U.S. forces—an area of significant concern to U.S. commanders.

From Blank Check to Strict Guidelines

From April 2003 through December 2008, the U.S.-led coalition in Iraq operated under the broad, permissive mandate of a series of UN Security Council Resolutions (UNSCRs). The last of these resolutions—UNSCR

1790—was issued in December 2007.⁴ Like its predecessors, UNSCR 1790 authorized the coalition to “take all necessary measures to contribute to the maintenance of security and stability in Iraq.”⁵

The resolution’s “all necessary measures” language gave coalition forces in Iraq a tremendous amount of latitude. Acting under the resolution’s broad mandate, coalition forces conducted unilateral combat operations, captured and held detainees indefinitely, built bases, and stationed military forces throughout Iraq, often without the consent or approval of the government of Iraq.

By the spring of 2008, Iraq’s security situation had vastly improved, and increasingly competent Iraqi security forces began to take the lead for security in many of the country’s key provinces. In the United States, the 2008 presidential election was in full swing, and with popular support for the war ebbing, the leading candidates from both parties pledged to make wholesale changes to U.S. Iraq policy if they were elected in November.⁶ Just as importantly, the coalition’s legal authority to operate in Iraq—UNSCR 1790—was set to expire on 31 December 2008. Without a new UNSCR or some other grant of international legal authority, the United States would be without a legal basis for conducting operations in Iraq in 2009.

Given the overall lack of enthusiasm among the international community for U.S.-led operations in Iraq, obtaining a new UN Security Council Resolution seemed highly unlikely. Accordingly, U.S. and Iraqi officials began the difficult task of constructing an agreement that would outline not only the conditions for U.S. withdrawal, but also the status of U.S. forces in Iraq from 2009 forward.

U.S. negotiators entered into talks hoping to buy enough time for U.S. and Iraqi forces to capitalize on the hard-fought security gains of the past two years. For its part, the Iraqi government quickly asserted its newfound sense of independence by proposing a number of restrictions on U.S. operations along with a date certain for U.S. forces withdrawal. As is normally the case when nations negotiate with each other, the end result was a grand compromise.

Iraq’s cabinet approved the final version of the U.S.-Iraq Security Agreement on 16 November 2008. The following day, U.S. and Iraqi officials signed the agreement making it binding on both countries. The final agreement was contained in two separate documents:

- The Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States of America and the Republic of Iraq.

- The Agreement between the United States of America on Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq.

The first document is a broad statement of principles, the second (the one now commonly referred to as the Security Agreement) includes 30 separate articles covering a wide range of topics, from Iraqi criminal jurisdiction over U.S. personnel, to taxes, licenses, and property rights. On 1 January 2009, the new agreement replaced UNSCR 1790 as the legal authority for U.S. military operations in Iraq.

In contrast to the broad authority granted to the U.S.-led coalition by UN resolutions, the U.S. Iraq-Security Agreement unquestionably puts the Iraqi government in the driver’s seat. From the outset, the agreement makes it clear that U.S. presence in Iraq is both temporary and at the invitation of the Iraqi government. Not only does the agreement contain a number of very specific constraints and limitations on U.S. personnel and operations, it also includes dates for the withdrawal of U.S. combat forces from Iraqi cities, villages, and localities, and for the withdrawal of all U.S. forces as a whole.⁷

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The Security Agreement and U.S. Operations

The articles of the Security Agreement with the most profound effect on U.S. operations are Articles 3, 4, and 22. A brief synopsis of these articles follows:

- Article 3: Respect for Laws. This article requires U.S. military forces and civilians working with the military in Iraq to “respect Iraqi laws, customs, and traditions.” The U.S. interpretation of this article is that it does not require strict obedience to every Iraqi law; rather, it requires U.S. forces to conduct operations in accordance with Iraqi law to

the extent possible, and to adhere to the Security Agreement in good faith.

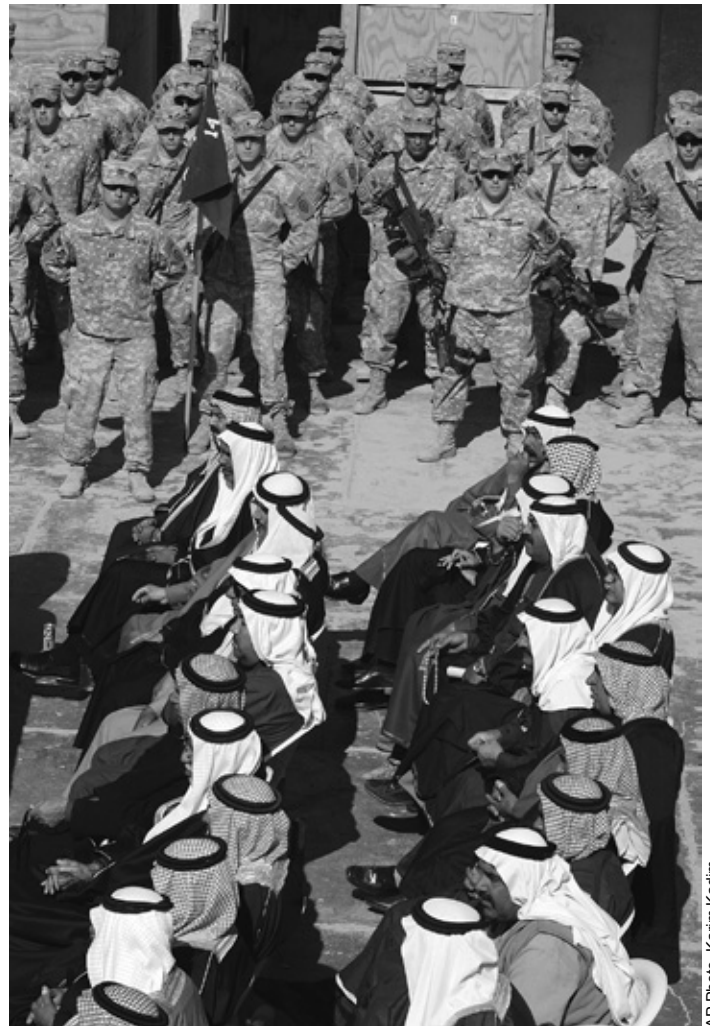
- **Article 4: Missions.** Article 4 is one of the agreement's most important provisions. It spells out the baseline rules for U.S. military operations, stating, "the Government of Iraq requests the temporary assistance of U.S. forces for the purposes of supporting Iraq's efforts to maintain internal security and stability, to include combat operations against Al-Qaeda, other terrorists and outlaw groups." It further states that "U.S. combat operations will be carried out with the agreement of the Government of Iraq and will be fully coordinated with Iraqi authorities." Finally, this article reiterates the idea expressed in Article 3 by stating, "U.S. Military operations will be conducted with full respect for the Iraqi Constitution and the laws of Iraq."

- **Article 22: Detention.** This article addresses an area that is particularly sensitive to Iraqis—the detention of Iraqi citizens by U.S. forces. Key provisions state that "no detention or arrest may be carried out by U.S. forces except through an Iraqi decision issued in accordance with Iraqi law" and "in the event U.S. forces arrest or detain an individual, they are required to turn the detainee over to a competent Iraqi authority—preferably an Iraqi judge—within 24 hours." Most important, this article also states, "U.S. forces will not search houses or other real estate without a search warrant issued by an Iraqi judge."

Article 4 of the U.S.-Iraq Security Agreement

Article 4 is one of the more unique aspects of the U.S.-Iraq Security agreement. Unlike other international agreements to which the United States is a party, the U.S.-Iraq Security Agreement authorizes U.S. forces to conduct combat operations in the host nation. While some have cited Article 4 as blanket authority for U.S. unilateral combat operations in Iraq, a closer examination of its language shows that the permission granted by this article is not without its limitations. In fact, the parameters set by Article 4 differ markedly from the *carte blanche* operational authority granted by the security resolutions that preceded it.

Article 4 begins by stating that U.S. assistance to Iraq will be temporary. While "temporary" is not defined in the agreement, it is reasonable to conclude that the term indicates Iraq's desire to



U.S. soldiers stand in formation as local sheiks attend a ceremony transferring Joint Security Station Al-Awad to Iraqi control near Taji, Iraq, 4 February 2009.

AP Photo, Karim Kadim

limit the period of time that U.S. combat forces remain in Iraq. Article 4 also singles out a relatively specific enemy set, stating that U.S. assistance to Iraq will include "cooperation in the conduct of operations against Al-Qaeda, other terrorists, and outlaw groups." This provision arguably keeps U.S. combat forces from being involved in operations outside the counterterrorist realm.

Finally, and perhaps most importantly, Article 4 requires the government of Iraq to agree with U.S. operations, which the United States must coordinate with the Iraqi authorities and conduct with respect for the Iraqi Constitution and Iraqi law. Because most U.S. units habitually partner with Iraqi security forces, the approval and coordination requirements of Article 4 are not as onerous as they might initially seem. This fact notwithstanding, it is undeniable that Article 4 has significantly curtailed U.S. forces' ability to conduct unilateral combat operations in Iraq.

As discussed in the next section, current U.S. conventional operations in Iraq are conducted almost exclusively “by, with, and through” Iraqi security forces, with the vast majority of missions executed pursuant to arrest warrants issued by Iraqi courts.

Warrant-Based Operations

The provisions of Articles 3 and 4 that mandate the United States to conduct operations with respect for Iraqi law and the concomitant warrant requirements of Article 22 have had a significant impact. In the new operational environment, some commanders have even quipped that the old military axiom, “intelligence drives maneuver,” should be changed to “evidence drives maneuver.” While this observation is in jest, it contains a certain amount of truth. A brief look at how commanders obtain warrants illustrates how much things have changed in Iraq.

In the Iraqi legal system, an investigative judge normally issues arrest warrants. The investigative judge is similar to a magistrate in the U.S. system, one of his primary functions being to review evidence or criminal complaints to determine whether probable cause exists to issue an arrest warrant. Investigative hearings are relatively informal, with the investigative judge asking most of the questions of the witnesses. Once a judge issues a warrant and Iraqi security forces detain an individual, investigative judges review the evidence and determine whether to incarcerate the detainee pending trial. If the investigative judge feels further detention is necessary, he will issue a detention order.

Since the implementation of the Security Agreement, U.S. commanders have become well versed in obtaining arrest warrants and detention orders from investigative judges. Most U.S. divisions and brigades have formed law enforcement task forces made up of individuals with the relevant expertise. The organization of each task force varies slightly; however, most include judge advocates, military police, intelligence analysts, and one or more U.S.

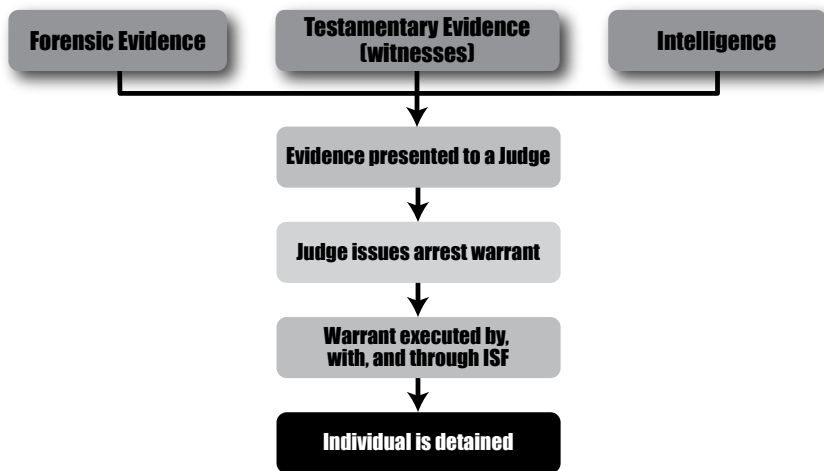
contractors known as law enforcement professionals or “LEPs.” These professionals are a relatively new addition to the fight in Iraq. Most are retired police officers from cities around the United States who assist U.S. forces with law enforcement-related tasks and training. The expertise and experience these law enforcement professionals provide has been invaluable during the transition to warrant-based operations.

To obtain warrants, U.S. units routinely use three kinds of information: testimony and sworn statements from witnesses, forensic evidence, and information obtained through various intelligence-collection methods. Because the Iraqi criminal justice system has traditionally been testimony- and confession-based, Iraqi investigative judges are generally most comfortable with testimonial evidence. As a result, U.S. forces secure most warrants and detention orders by presenting witness testimony and sworn statements to an investigative judge. U.S. forces can also obtain warrants by going to the local provincial court or by going to the Central Criminal Court of Iraq. The chart on the following page provides an overview of the process.

Methods for presenting witness testimony vary. Some units bring the investigative judge and the necessary witnesses to the nearest forward operating base and allow the judge to conduct the hearing there. For many, this is the most preferable course of action, since it provides a secure location for the hearing and helps protect the identity of the judge and the witnesses. In other cases, units help transport local witnesses to the provincial courthouse where the investigative judge takes their testimony—usually in his office.

As noted above, forensic evidence is sometimes used to secure Iraqi arrest warrants. However, forensic evidence is still a relatively new concept to many Iraqi judges, and many are uncomfortable using fingerprints, ballistic evidence, blood typing, or DNA as a substitute for testimony. To address this challenge, U.S. forces—primarily Army judge advocates and military police—have developed innovative programs to train Iraqi judges and Iraqi prosecutors on forensic evidence. In a companion effort, U.S. police training teams have worked to train Iraqi police on basic crime scene investigation techniques and the fundamentals of actually securing forensic evidence. Finally, U.S. explosive ordinance disposal experts have made great

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Overview of the Warrant Process

strides in teaching the Iraqi Army how to collect basic forensic evidence at the site of improvised explosive device blasts and at the point of origin and point of impact of rocket and mortar attacks. While undoubtedly still the exception, not the rule, Iraqi judges are slowly but surely beginning to understand and accept forensic evidence as the basis for arrest warrants.

By far, the most difficult and sensitive task for U.S. commanders involves using information gathered through various intelligence collection methods to secure Iraqi arrest warrants. The threshold issue, of course, is that very few Iraqi judges are vetted and cleared to view U.S. intelligence products. In a perfect world, each Iraqi province would have at least one judge vetted and cleared—much like the judges assigned to the Foreign Intelligence Surveillance Court in the United States.⁸ In reality, though, there are very few judges with the proper U.S. security clearance, and the vetting process is lengthy, complex, and rife with bureaucratic impediments. Some U.S. special operations units have had limited success in this realm; U.S. conventional force units rarely have.

Once the judge issues the warrant, most U.S. units act on the target in a combined operation with their Iraqi security force partners. By and large, Iraqi security forces take the lead in these operations, with U.S. forces in support. In addition to their overall competence, the Iraqis bring local knowledge, cultural sensitivity, and the ability to speak the language. In turn, U.S. forces provide

intelligence, surveillance, and reconnaissance, long-range communications, and lift aviation.

Generally speaking, U.S. forces set the outer cordon, and Iraqi security forces execute the warrant and detain the individual or individuals sought, and take them into Iraqi custody in an Iraqi detention facility. Because Article 22 of the Security Agreement mandates that the U.S. turn over captured Iraqis to a competent Iraqi authority within 24 hours, there is little or no utility in U.S. forces actually taking physical custody of detainees. Should U.S.

forces need to interrogate the detainee later, they can do so in the Iraqi facility with permission from the Iraqi authorities.

Iraqi Jurisdiction over U.S. Personnel

The Security Agreement's provisions on Iraqi legal jurisdiction over U.S. personnel are a major area of concern for U.S. commanders. As previously discussed, U.S. forces and the civilian personnel who support them are "invitees" to Iraq. The Security Agreement inaugurated a new relationship between two sovereign nations. Iraq insisted on its right to exercise legal jurisdiction over U.S. personnel for violations of Iraqi law. During negotiations, the United States was obliged to make certain concessions in this area.

Article 12 of the Security Agreement establishes Iraq's primary right to exercise jurisdiction over U.S. personnel. U.S. personnel fall into three categories as defined by Article 2 of the agreement: members of the U.S. forces, members of the civilian component, and U.S. contractors and U.S. contractor employees.⁹ Members of U.S. forces and members of the civilian component enjoy very limited exposure to Iraqi legal jurisdiction. For Iraq to exercise legal jurisdiction over these individuals, certain criteria must be met. The individual must first be suspected of committing a grave premeditated felony.¹⁰ That suspect must also have committed the felony while the individual was in an off-duty status and outside of any agreed upon U.S.-controlled facility or area.¹¹ An important point to emphasize is that members of the U.S. Armed Forces will not expose themselves to Iraqi legal

jurisdiction for actions they take in self-defense situations as defined by U.S. rules of engagement. The agreement considers these actions as having occurred while in duty status, with no exceptions.

An additional protection U.S. forces and civilian component members enjoy is minimal exposure to Iraqi custody. All individuals are required to carry a chit card, which they are to produce in the case of an attempted arrest by Iraqi authorities. This card states that the individual is in an on-duty status, is not to be arrested, and is to be returned to U.S. military control immediately. Article 12 mandates that in the event Iraqi authorities arrest an individual, they must transfer him to U.S. custody within 24 hours of the arrest.

U.S. contractors and contractor employees do not enjoy the same limited exposure as U.S. forces and civilian component members. Article 12 provides that Iraq has the right of primary jurisdiction over these individuals for any suspected violation of Iraqi law. This is regardless of the individual's duty status or location, i.e., U.S.-controlled facility or not, at the time of the alleged violation. In addition, Iraq has the right to maintain custody of these individuals during the investigation and prosecution of their alleged crimes. There is no chit card for U.S. contractors and their employees. They are unauthorized to carry the card provided to U.S. forces and government civilians.

Although security has drastically improved and attacks against U.S. forces have significantly declined, it is difficult to imagine a circumstance when a U.S. military or civilian component member would be off-duty and outside an agreed upon facility or area. However, in the future, as relations and security improve, such a circumstance is more conceivable. The more likely current situation involving Iraqi legal jurisdiction and custody will involve a U.S. contractor or contractor employee providing services outside a U.S.-controlled facility or area.

The implementation of the U.S.-Iraq Security Agreement has created a host of novel issues for U.S. commanders in Iraq. True to form, commanders, staffs, and troops at every level have risen to the occasion, and successfully adapted to a new and very different operational environment. Commanders bound for Iraq should become familiar with the United States-Iraq Security Agreement, as this document will unquestionably shape and frame U.S. operations for the foreseeable future. **MR**



AP Photo, Khalid Mohammed

Paratroopers carry chairs after handing over their base in central Baghdad, Iraq, to the Iraqi security forces 22 May 2009.

NOTES

1. The "Sons of Iraq" are primarily young Sunni males who volunteered to assist Iraqi security forces and coalition forces with security in their local neighborhoods in exchange for a modest salary.

2. As one set of experts has noted, "The size and competence of . . . Iraqi [security] forces have allowed U.S. commanders to maintain population security even as U.S. troop strength has declined significantly since the surge." Stephen Biddle, Michael O'Hanlon, and Kenneth Pollack, "How to Leave a Stable Iraq," *Foreign Affairs* 5, October 2008.

3. In this article, the term U.S.-Iraq Security Agreement refers to The Agreement Between the United States of America on Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq.

4. The UN Security Council adopted UNSCR 1790 on 18 December 2007 during its 5808th meeting.

5. The UN Security Council adopted UNSCR 1511 on 16 October 2003 during its 4844th meeting. UNSCR 1511 authorized the creation of "a Multi-National Force under unified command to take all necessary measures to contribute to the maintenance and stability of Iraq."

6. "Barack Obama Pledges to End the War in Iraq if Elected President," Associated Press, 21 April 2007.

7. Article 24 states: "All the United States forces shall withdraw from all Iraqi territory no later than December 31, 2011" and that "[a]ll United States combat forces shall withdraw from Iraqi cities, villages, and localities . . . no later than June 30, 2009." The agreement does not define "combat forces" nor does it define what constitutes a "city, village, or locality."

8. The Foreign Intelligence Surveillance Court (FISC) was established by the Foreign Intelligence Surveillance Act of 1978 (50 USC §1803). The FISC oversees requests for surveillance warrants against suspected foreign intelligence agents inside the United States by federal police agencies.

9. *Members of the U.S. forces*: any individual who is a member of the United States Army, Navy, Air Force, Marine Corps, or Coast Guard (Security Agreement, Article 2). *Member of the civilian component*: any civilian employed by the United States Department of Defense. This term does not include individuals normally resident to Iraq. *U.S. contractor and U.S. contractor employees*: any non-Iraqi persons or legal entities, and their employees, who are citizens of the United States or a third country and who are in Iraq to supply goods, services, and security in Iraq to or on behalf of the United States forces under a contract or subcontract with or for the United States forces. However, the terms do not include persons or legal entities normally resident in the territory of Iraq.

10. Article 12, paragraph 8, states that a Joint Committee is responsible for establishing the list of grave, premeditated felonies. Until this occurs, Iraq may not exercise legal jurisdiction over members of the U.S. forces and of the civilian component.

11. Article 12, paragraph 9, provides that U.S. forces' authorities will certify whether the individual was in off-duty status. *Agreed facilities and areas* is a list of locations owned by the Government of Iraq, but negotiated to be occupied and controlled by U.S. forces.