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# The Future of U.S. Military Presence in Iraq

Unit for Political Studies

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### Unit for Political Studies

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## Introduction

The US strike on a Hezbollah camp in the Al-Qaim region on the Iraqi-Syrian border 29 December 2019, the subsequent raid targeting General Qassem Soleimani and, finally, Washington's decision on the US presence in Iraq, represented an opportunity to raise the problematic issue of Iraqi sovereignty, a subject that has long been the subject of Iraqi debate. These events have also drawn attention to the deliberately neglected issue of the legal framework governing the actions of US forces in the country.

## Is There a Legal Framework for the Presence of American Forces in Iraq?

It is well known that US law does not allow any of its military forces to be subject to any kind of foreign command and in reference to this, Iraq and the United States of America signed two agreements in 2008.

The first was the Status of Forces 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 (SOFA), signed on 17 November 2008 by Hoshiyar Zebari, the Iraqi foreign minister, and Ryan Crocker, the US ambassador to Iraq. The main provisions regulating the temporary presence of US forces in Iraq start from the date of the agreement's entry into force on 1 January 2009 and continue for three years (Article 30/1). There is no article in this agreement that allows for its extension, indicating that "All the United States Forces shall withdraw from all Iraqi territory no later than December 31, 2011" (Article 24).<sup>(1)</sup>

The second agreement, the Strategic Framework Agreement (SFA), relates to cooperation between Iraq and the United States, coming in line with the declaration of principles of the long-term relationship of cooperation and friendship between Iraq and the United States. This declaration, signed on 26 November 2007, includes principles on cooperation in the defense and security field with Section III stating the following: "The parties shall continue to foster close cooperation concerning defense and security arrangements without prejudice to Iraqi sovereignty over its land, sea, and air territory. Such security and defense cooperation shall be undertaken pursuant to 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*."<sup>(2)</sup> The agreement clearly did not specify the mechanisms of this cooperation, nor did it link it with the first agreement. Thus, there is no framework for this cooperation after the withdrawal of American forces from Iraq with the entry into force of this agreement in 2011.

Following the ISIS takeover of Mosul on 9 June 2014, and the group's expansion into control of over a third of Iraqi territory, there was no direct US response.<sup>(3)</sup> Barak Obama waited nearly two months to

1 Geneva Centre for the Democratic Control of Armed Forces (DCAF), *Status of Forces Agreement between The Republic of Iraq and the United States of America*, accessed on 15/1/2020 at: <https://bit.ly/2S9sloJ>.

2 The Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States of America and The Republic of Iraq, accessed on 15/1/2020 at: <https://bit.ly/2RQEoII>.

3 The US approach at that time was based on the premise that the fall of Mosul was a direct result of the sectarian policies practiced by former Iraqi Prime Minister Nuri al-Maliki, which created an environment conducive to the emergence of ISIS in Iraq. Hence, the Americans believed that the Iraqi government



announce, for the first time, on 7 August, the direct involvement of US forces in military operations, with limited US air strikes against ISIS,<sup>(4)</sup> after the latter attacked Peshmerga forces in Makhmur, and this was explained as an attempt to enter Erbil. In addition, the US aircraft in Iraq dropped aid to the Yazidis trapped in Sinjar Mountain. But Obama was clear that “these military operations did not amount to a full-scale re-engagement in Iraq,” and confirmed that: “As commander in chief, I will not allow the United States to be dragged into another war in Iraq.”<sup>(5)</sup>

Following that, however, the US seemed to become more engaged with the war. On 10 September 2014, Obama announced the formation of the Global Coalition to Defeat ISIS, declaring that “this is not our fight alone”, in addition to saying, “our objective is clear: We will degrade, and ultimately destroy, ISIL through a comprehensive and sustained counterterrorism strategy.”<sup>(6)</sup> He affirmed that this would include air strikes and other support for the ground forces in Iraq and Syria<sup>(7)</sup> with operations launched by other coalition countries beginning in Iraq. On 19 September 2014, French aircraft launched from their bases in the United Arab Emirates, and carried out the first air strikes targeting ISIS in Mosul.<sup>(8)</sup> The first official meeting of the coalition was held in Brussels, on December 3, 2014, in the presence of 60 countries, attended by Iraqi Prime Minister Haider al-Abadi and Foreign Minister Ibrahim al-Jaafari. In this meeting, work was organized according to five main “lines of effort”, within which at least two countries lead each of these lines:<sup>(9)</sup>

- First Line: Supporting military operations, capacity building and training led by the United States and Iraq.
- Second line: stopping the flow of foreign terrorist fighters led by the Netherlands and Turkey.
- Third line: cutting off ISIS access to financial resources and funding led by Italy, Saudi Arabia and the United States.
- Fourth Line: Addressing associated humanitarian relief and crises led by Germany and the United Arab Emirates.
- Fifth Line: Exposing the true nature of ISIS led by the United Arab Emirates, the United Kingdom and the United States.

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must adhere to a political approach that restores Sunni public confidence in the Iraqi state, as a necessary precursor to defeating ISIS. The main idea in this context was the formation of local forces, with local leaders (the “National Guard”), which could be a prelude to tackling the crisis of trust existing between the populations of the governorates under ISIS control, the Iraqi government, and the military and security forces.

4 Helene Cooper, Mark Landler & Alissa J. Rubin, “Obama Allows Limited Airstrikes on ISIS,” *The New York Times*, 7/8/2014, accessed on 15/1/2020, at: <https://nyti.ms/2uNX6Yd>.

5 Ibid.

6 The White House Office of the Press Secretary, “Statement by the President on ISIL,” 10/9/2014, accessed on 15/1/2020, at: <https://bit.ly/2tpqB2m>.

7 Pamela Quanrud, “The Global Coalition to Defeat ISIS: A Success Story,” *the Foreign Service Journal*, January/ February 2018, p. 36, accessed on 15/1/2020, at: <https://bit.ly/30kOeXF>.

8 “France launches first air strikes on IS in Iraq,” BBC NEWS, 19/9/2014, accessed on 15/1/2020, at: <https://bbc.in/2Tr1CGC>.

9 Kathleen J. McInnis, “Coalition Contributions to Countering the Islamic State,” *Congressional Research Service* (August 24, 2016), p. 1, accessed on 15/1/2020, at: <https://bit.ly/30swmZ5>.



It seems, then, that these goals are related to the entire international community, and not only Iraq, but that Iraq has become a party to this alliance without having the ability to set, or even negotiate, its own conditions, because of its difficult position and urgent need for international assistance to counter ISIS.

James Jeffrey, the former US ambassador to Iraq (2010-2012), and the special envoy appointed by President Donald Trump after Brett McGurk's resignation, in his article "Behind the U.S. Withdrawal from Iraq"<sup>(10)</sup> explained Barack Obama's decision in January 2011 regarding the retention of US forces in Iraq. They had been supposed to withdraw completely at the end of that year according to the agreement signed between the two parties in 2008. In June 2011, Obama also decided that 5,000 soldiers must stay in Iraq and announced that he had obtained the approval of the former Iraqi Prime Minister Nouri al-Maliki to hold new talks in this regard. But the two problems of legal immunity for these forces, and the difficulty of passing the new agreement in the Iraqi parliament, contributed to this attempt being aborted. In his article, Jeffrey describes the legal status of the redeployment of what he calls "the small number of non-combatant US forces" in Iraq in 2014 (i.e. after ISIS took over a third of Iraq) that this constitutes an exception in emergencies for the usual status of forces agreement policy.

There was no official clarification of the legal framework governing coalition forces, US forces in particular, in Iraq. Rather, everyone sought to evade such clarification. In the media exchange between Al-Maliki and Al-Abadi, Al-Abadi claimed that the US forces to Iraq had taken place in Al-Maliki's mandate, and that these forces were present more than two months before he took up his duties. Al-Maliki responded by claiming that this was purely false allegations, and laid blame with the Abadi government for welcoming these forces and giving them permanent bases on Iraqi soil and the authority to use Iraqi air space and territory with impunity. This blame shifting by the two former prime ministers reflects their tendency to evade direct responsibility for the absence of any legal framework for the work of the coalition forces in Iraq. Because of this absence, the nature of the relationship and the working contexts between the two parties were only implicit, unspoken understandings, and perhaps based on a *fait accompli* rather than a specific, clear and binding legal framework for both.

Article 2 (1) of SOFA describes "agreed facilities and areas" in US forces locations as "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." However, this description applies exclusively to military bases in the 2009 - 2011 period, and there was no new legal description for establishing these rules at that time. Does the US still rely on these Iraqi facilities, as Trump stated in his speech after the recent air strikes on Ein al-Assad and al-Harir bases? And if that was the case, why did Trump talk about compensation for the expenses that were paid to build these "Iraqi" bases? And most importantly, how can the presence of US forces in these bases be described — are they combat forces, advisors or training personnel? But the most critical question in this context relates to the

<sup>10</sup> James Franklin Jeffrey, "Behind the U.S. Withdrawal from Iraq," *The Wall Street Journal* (November 2, 2014), accessed on 15/1/2020, at: <https://on.wsj.com/30mRPCJ>.

issue of legal guardianship; SOFA gave the short-term jurisdiction to the United States, not to Iraq, and it is known that the issue of legal guardianship was the decisive factor in aborting negotiations to keep US forces in Iraq after 2011.

It is true that Article 12 (1) of the agreement states that “Iraq shall have the primary right to exercise jurisdiction over members of the United States Forces and of the civilian component for the grave premeditated felonies enumerated pursuant to paragraph 8, when such crimes are committed outside agreed facilities and areas and outside duty status.” But this article has no value in reality. These personnel, due to serious threats, cannot be outside these facilities to begin with, except within the framework of specific duties. There are other articles that cancel out this provision, because the article itself robs Iraqi authorities have the right to detain accused parties (paragraph 5), while Paragraph 3 of this article gives the United States absolute jurisdiction within agreed facilities and areas, and during the state of duty outside the agreed facilities and areas, and in conditions not covered by the text of Paragraph 1.

It seems clear that there is no legal framework for a US presence that has reached roughly 5,200 soldiers.<sup>(11)</sup> In addition to this presence, the US forces present in Syria are logistically linked to those in Iraq, and the “Iraqi” bases served as sites for the consolidation and redeployment of these forces in Syria previously. The US forces in Iraq also carry out many special missions, covert or not, on Syrian soil.

The US State Department describes its mission in Iraq as “dedicated to our enduring strategic partnership with the Government of Iraq and the Iraqi people. In coordination with the Global Coalition to Defeat ISIS, the United States assisted Iraq’s efforts to achieve the December 2017 milestone of liberating the country from ISIS [...] The United States maintains vigorous and broad engagement with Iraq on diplomatic, political, economic, and security issues in accordance with the U.S.-Iraq Strategic Framework Agreement (SFA).” It also states that “Embassy Baghdad maintains the Office of Security Cooperation – Iraq to further these goals and to facilitate Iraq’s role as a responsible security partner, contributing to the peace and security of the region.”<sup>(12)</sup> But it does not explain why this agreement was not “enforced” by the United States after ISIS entered Mosul? Why did Washington wait about two months before intervening and why was that intervention not committed to the agreement, but rather subjective factors imposed on the ground? How can a few lines of military and security cooperation in this agreement constitute a legal framework for US forces in Iraq?

Other parties in the coalition appear to be more objective in describing their mission in Iraq, as is the case with the Netherlands. The Dutch Ministry of Defense, which has military trainers stationed in Iraq, says the Netherlands, “in concert with a number of other countries led by the United States, is helping to break the fighting power of the ISIS terrorist organisation.”<sup>(13)</sup>

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11 “Trump vows to hold Iran ‘fully responsible’ for assault on embassy in Iraq,” MarketWatch, 31/12/2019, accessed on 15/1/2020, at: <https://on.mktw.net/2NtGWd1>.

12 “U.S. Relations with Iraq,” U.S. Department of State, 13/11/2019, accessed on 15/1/2020, at: <https://bit.ly/2QVgD1J>

13 “Current missions,” Defensie.nl, accessed on 15/1/2020, at: <https://bit.ly/2RjB7Qp>



## The Official Iraqi Position on the US Presence in Iraq

There has not been any attempt since 2014 by the Iraqi parliament, or any authority within the Iraqi state, to question the legal framework governing the coalition forces in Iraq, despite this issue being controversial when President Trump visited US forces at Ein al-Assad base during Christmas celebrations in 2018. None of the complainants presented the matter seriously in the House of Representatives, or in front of any other state authority.

Only after the United States killed the leader of the Revolutionary Guard Corps' Quds Force, Qasem Soleimani, and Deputy Chairman of the Popular Mobilization Forces, Abu Mahdi Al-Muhandis, near Baghdad airport on 2 January 2020, did the US presence turn into a fundamental issue in the political debate. This prompted the Council of Representatives on 5 January 2020 to take a decision that requires the Iraqi government to terminate the request for assistance from the Global Coalition to Defeat ISIS, and asks it to work to end the presence of any foreign forces on Iraqi territory, and to prevent them from using Iraqi land, water and airspace for any reason.<sup>(14)</sup> Of course, this decision can only be understood as a performative display and does not reflect a serious will to withdraw US forces in particular from Iraq. The representatives are fully aware that the Council does not have the power to issue "decisions" binding to the executive in any way. The Iraqi constitution defines the functions of the Council of Representatives as enacting federal laws, monitoring the performance of the executive authority, electing the president and so on. The constitution does not indicate that the Council can issue decisions that have the force of law and are binding for the executive branch (Article 61 of the Constitution). Council of Representatives' procedural rules, stipulated in Articles 60 and 61, do not give the Council authority to take decisions that have the force of law.

In practice, this means that the Council of Representatives does not have any authority to issue decisions, which was confirmed by the Federal Court itself that had previously issued two decisions in this regard.<sup>(15)</sup> The first decision on 23 December 2018 ruled on the constitutionality of Article 17 (4) of the "Council of Representatives and its Formations" law stipulating Council's capacity to issue legislative decisions. The Federal Court recognized that the Iraqi constitution in Article 61 stipulated the functions of the Council of Representatives to legislate federal laws and did not empower it to issue legislative decisions other than those the constitution stipulates. Therefore the text of Article 17 (4) of the Law has no basis in the Constitution.<sup>(16)</sup> The second decision was issued on 28 October 2019, i.e. under the mandate of the current parliament, and also ruled that the issuance of legislative decisions by the parliament has no constitutional basis, except regarding areas stipulated exclusively by the constitution, which does not include issuing legislative decisions as an alternative to laws.<sup>(17)</sup>

<sup>14</sup> As the resigned Prime Minister announced at the voting session, Iraq sent two letters to the Security Council: the first on 25 June 2014, and the second on 20 September 2014. But clearly the international coalition did not form on 10 September in response to the letter. First, it formed in response to various objective factors mentioned in the main body of this article and the second message cannot be counted as a "request" in this context, because it came after the coalition forces' practical intervention in the war. Hence, it is difficult to count these letters as a legal framework for the presence of US forces in Iraq.

<sup>15</sup> The Iraqi judiciary does not rely on case law.

<sup>16</sup> Federal Court Decision No. 140, 2018, accessed on 15/1/2020, at: <https://bit.ly/2RikvIX>.

<sup>17</sup> Federal Court Decision No. 89, 2019, accessed on 15/1/2020, at: <https://bit.ly/35ThwMg>.





The Department of Legal Studies and Legislative Drafting in the Council of Representatives has previously published its legal opinion on the subject of the representatives' decision and how mandatory it really is on the Council's own website. This states that "the authority to issue a parliamentary decision by the Council of Representatives in Iraq requires a constitutional text that includes a reference to this, given that the competencies of the parliament defined by Article 61 of the Constitution are devoid of the authority to issue a decision [...] In addition, it must be stipulated that this decision shall be enforceable by the executive branch [...] Otherwise, these decisions issued by the House of Representatives may be challenged and not valid."<sup>(18)</sup>

On the other hand, besides the lack of constitutionality of this decision in the first place, how can the Council of Representatives make demands from a resigned government with no powers, since it is a caretaker government, as described in the Iraqi constitution, and therefore with no authority to take legal decisions that are binding for the next government? The resigned Prime Minister himself already stated that his government will not submit the Federal Budget Bill for 2020, because it is a caretaker government and that it "tried to find a legal way out of sending the budget bill to the Council of Representatives but we could not."<sup>(19)</sup> So why did he declare that there is no legal way out of sending the budget, yet at the same time did not object to dealing with an illegal decision?

## Different Iraqi Positions on the US Forces Remaining

It seems clear that there is no national consensus on the withdrawal of US forces from Iraq. The US-Iranian confrontation on the ground in Iraq has re-polarized the country along nationalist and sectarian lines within the sovereign institutions of the state, despite historic attempts to downplay this polarization. The vote on the decision to remove the US forces from Iraq revealed a clear bias on this issue according to sub-national identity; the Kurdish and Sunni blocs rejected the motion, while Shi'i blocs approved almost unanimously. This confrontation also showed the stark variations between the main Shi'i political forces about the type of state they want. While some lean towards the Iranian project, others see the necessity of putting a distance between the "national" interests of the Iraqi state and the interests of the Iranian state, regardless of the Shi'i identity binding them, with the latter struggling to announce a coherent project that can stand up to the former.

## Conclusion

From the above, it seems that there is no seriousness in the request to withdraw US forces and that the Council of Representatives' vote here is not binding on the government. Besides Iraq, US forces still have a presence throughout the region, especially the US Air Force, which played a prominent role

<sup>18</sup> "The Council of Representatives Decision and the Extent of Its Authority over the Executive," Council of Representatives, Republic of Iraq, 14/1/2018, seen on 15/1/2020, at: <https://bit.ly/30nOK77>.

<sup>19</sup> "Abdul-Mahdi: We tried to find a legal way out of sending the draft budget to the Council of Representatives, but we couldn't," Rudaw, 4/12/2019, accessed on 15/1/2020, at: <https://bit.ly/2QSZjdq>.



in defeating ISIS. The “early” exit of these forces could re-create the 2014 scenario, i.e. the return of ISIS, thus posing a real threat. Also, any decisive political decision regarding the exit of US forces may open the way for a Kurdish rejection of such a decision and the subsequent decision of the US forces to remain in the Kurdistan region, especially if the US decides to reconsider its decision regarding the “independence” of this region<sup>(20)</sup> or if it directly encourages Sunni forces to declare their commitment to US forces remaining in Iraq, seriously threatening the country’s unity. In addition, Iran believes that any US withdrawal from Iraq may lead to real US sanctions on Iraq, especially with its inability to adhere to the US sanctions on Iran (Iraq has a temporary American exception, renewed every 90 days, in relation to its imports of Iranian gas and electricity). This could lose Iran its main economic artery supplying it with hard currency;<sup>(21)</sup> at a time when the country aspires to raise its sales to the equivalent of 20 billion dollars annually. This means lost hard currency from Iraq may compete with hard currency from oil sales in the wake of the blockade<sup>(22)</sup> and, in addition, the absence of the Iraqi political will to achieve this.

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**20** The United States has openly opposed the unilateral referendum conducted by the Kurdistan region on 25 September 2017.

**21** The Iraqi Minister for Trade stated that trade exchange between Iraq and Iran in 2018 amounted to 10 billion dollars, without accounting for undeclared military imports.

**22** According to the estimates of the Rasanah International Institute for Iranian Studies, Iran’s budget for 2020 is expected to export one million barrels per day at \$60 a barrel of oil. This means an income of nearly \$22 billion, at best. See: Hashem Barouti, “A look at Iran’s budget for the new year”, 3/1/2019, accessed on 15/1/2020, at: <https://bit.ly/3890sUe>.