



US-Afghan Security Agreement: Competing Notions of Sovereignty? (Part I)

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On 2 May 2012, US President Barak Obama and President Hamid Karzai of Afghanistan signed a Joint Partnership Agreement (JPA) that reiterated the two countries' shared commitment to Afghanistan's future and a continued diplomatic partnership between nations. More importantly, the partnership agreement called for the United States and Afghanistan to commence negotiations on a Bilateral Security Agreement (BSA) that would detail the specifics, attributes and goals for a U.S. troop presence in Afghanistan beyond the 2014 security transition deadline.¹ According to the JPA, the BSA negotiation process should take no more than one year from its initial commencement, which began in mid-November 2012. Already, however, the BSA negotiations have been fraught with challenges and it is clear that significant obstacles stand in the way of a signed document.

This article is the first part in a two part series analysing the challenges facing and potential impact of the impending US-Afghan Bi-Lateral Security Agreement. This note will offer a brief examination of the most prominent challenges facing the Bilateral Security Agreement negotiations. As some of the key issues are slowly emerging from the talks – namely jurisdiction of U.S. forces in Afghanistan, custody of detainees, and Afghan Airspace – one cannot help but wonder whether the type of Afghan sovereignty demanded by the nation's leaders is fundamentally at odds with the U.S.' post-14 vision for itself in Afghanistan.

Challenges Facing Negotiations

U.S. Deputy Special Representative for Afghanistan and Pakistan, Ambassador James Warlick, and Afghan Ambassador to the United States, Mr. Eklil Hakimi, are the appointed negotiators for the talks. The negotiations take place behind closed doors, but officials close to the negotiations on both sides have made public statements regarding the countries' top priorities and bottom lines. Such statements are a key political component to the negotiation process as they outline priorities and indirectly signal points where the potential for compromise exists.

Thus far, the United States has made it clear that immunity for U.S. troops who remain in Afghanistan beyond 2014 is a fundamental necessity. The U.S. maintains *Status of Forces* agreements with all countries in which it maintains a military presence of any kind. In that sense, a request for troop immunity is not abnormal for the U.S. However,

¹ *Enduring Strategic Partnership Agreement Between the United States of America and The Islamic Republic of Afghanistan*, 2 May 2012, Sec. 3 Para. 2 pt. B.

several events, particularly the mass shooting of 17 Afghan civilians committed by Staff Sergeant Robert Bales in Panjwaye district of Kandahar in March 2012 brought the issue of jurisdiction to the forefront of political discussion. Afghan lawmakers and civilians alike were outraged when Sgt. Bales was immediately flown to the United States instead of handed over to Afghan authorities to stand trial inside Afghanistan. After all, they argue, the crime was committed in Afghanistan, in violation of Afghan laws, and against Afghans.

While responsibility for the Panjwaye killings is fairly straightforward and Bales will likely face the death penalty in the United States, the general issue of troop immunity is not always so clear. The U.S. appears concerned that soldiers could be imprisoned, severely punished, or even executed for crimes they committed unknowingly out of ignorance. For example, ISAF officials reported after the burning of the Qur'an that the soldiers responsible were unaware that the books in question were the Qur'an. Given strict penalties afforded under Afghan law and the many significant challenges facing the fledgling formal justice system, such concerns are not unfounded. At the same time, that individuals who commit crimes inside Afghanistan – regardless of nationality or profession – should be punished in Afghanistan in accordance with domestic law is a principle tenet of rule of law and a reasonable demand of the Afghan government.

Initially troop immunity appeared to be the central feature of the discussions when earlier this year, President Karzai suggested that Afghanistan would insist on local jurisdiction over U.S. troops. However, ahead of the second meeting Karzai backed off somewhat noting that, “Afghanistan is willing to consider immunity for [U.S. troops],” but only if certain conditions were met.² Among those interests, Karzai insisted were a general respect for Afghan sovereignty, law, and people as well as the “training and equipping of Afghan National Security Forces, the control of Afghan airspace by the Afghan government – not by NATO or the US – and the fulfilment of all those requirements that any independent sovereign nation state should have.”³ In addition, Karzai insisted that the US must turn over all detainees to the Afghan authorities in accordance with the JSA, and should not run any prisons or detention facilities on Afghan soil.⁴

With these recent statements, the issues of detention, airspace, and ANSF armament appear to have shifted to the forefront of the discussion. However, shortly after the 14 December negotiations, Ambassador Warlick reiterated US commitment to a sovereign and stable Afghanistan after 2014.⁵ He also insisted that Bagram and Kandahar Air Force

² Sharif Amiry, *Afghanistan to Allow US Troops Conditional Impunity*, TOLO News, 8 December 2012. <https://www.tolonews.com/en/afghanistan/864-afghanistan-to-allow-us-troop-impunity-under-certain-conditions>

³ id.

⁴ Amiry 2.

⁵ David Zucchino, U.S., Afghan Officials Discuss Troops' Post-2014 Legal Jurisdiction, L.A. Times, 15

Bases would belong to the Afghan government after the NATO withdrawal.⁶ However, Ambassador Warlick did not specifically say whether the US troops who remain in the country beyond 2014 would seek detention privileges. While US officials have continuously made statements that suggest an American presence would be largely in a mentorship capacity, detention has been a hot-button issue since the JSA was signed in March. Despite having agreed to hand over all detainees and control of Bagram Prison – now called The Detention Facility in Parwan (DFIP) – to the Afghan Government, the United States still holds over 600 detainees in the Parwan facility who were captured after the JSA was signed.⁷ The Afghan government interprets such reluctance as a lack of confidence in its ability and willingness to prevent detainees with credible insurgent connections from being released without charges, and has issued repeated condemnations of a continued US presence in DFIP.

Ultimately, if the US is truly seeking a mentorship presence in Afghanistan, it is likely that detention will be a key area of compromise. Ultimately the US is unlikely to care whether detainees are released without trial or a thorough investigation as long as their troops are not at risk in combat, seizure, and detention operations. Similarly, part of the overall security transition requires the United States and NATO countries to emphasize their faith in the Afghan state and the ability of the Afghan National Security Forces to adequately protect civilians and instill law and order. Rule of law is certainly part of this so it would only undermine this goal to insist on continued detention privileges because Washington trusts neither the ANSF to make arrests and keep them in prison nor the Afghan justice system to bring charges where warranted and release where evidence is inadequate. Thus, unless the US plans to significantly change its policy in Afghanistan, relinquishing detention privileges in the BSA is really the only option for the US to pursue its supportive relationship to the Afghan government in the long term.

Finally, The BSA talks will enumerate whether and to what extent the US will have use of any Afghan military bases throughout the country. While not stated explicitly, analysts and political officials in Kabul generally assume that Washington will request access to or an independent base from which it can continue its on-going drone strikes against militants in the tribal regions of Pakistan. Of course, such a presence would raise questions regarding the use and ownership of Afghanistan's airspace. Even if the US does agree to independent Afghan ownership of the airspace above its territory, the fact that most of the drones are launched by CIA operations makes it extremely unlikely that American intelligence officials would seek individual permission for each operation; it is more likely that the US would request an all-encompassing permission to use a specific

December 2012. <https://www.latimes.com/news/world/worldnow/la-fg-wn-us-afghan-talks-20121215,0,363398.story>

⁶ id.

⁷ U.S. Says Its Military Detained Captured Afghan Teens for a Year, Reuters, 8 December 2012. <http://www.reuters.com/article/2012/12/08/usa-un-rights-idUSL5E8N83LW20121208>

area near the eastern borders. Such permission though, even if approved by the Afghan government, would undercut the very notion of independent ownership of Afghan airspace.

Competing Visions of Afghan Sovereignty?

While both seem to be promoting the same concept – namely an independent Afghanistan post 2014 – specific statements released by top military and policy makers in both countries suggest that the vision of what actually constitutes a sovereign, fully independent Afghanistan varies significantly between Washington and Kabul. While some progress appears to have been made in the first two rounds of the Bilateral Security Agreement negotiations, the issues that remain suggests the two visions are fundamentally at odds with one another.

Afghan leaders have made it clear that the country should be fully independent with all the same privileges that any other state has. Of course, pre-eminence of domestic law throughout the territory and a monopoly on the use of force are principal elements of sovereignty. Accordingly President Karzai's request that the BSA must ensure US respect of the laws, property, and people of Afghanistan [is] in line with traditional understandings of sovereignty.⁸

The United States, on the other hand – at least in these preliminary rounds of negotiations – appears to have a slightly different picture of Afghan sovereignty following ISAF and US withdrawal. The United States undoubtedly wants a peaceful and stable Afghanistan and almost certainly welcomes the reduction in fiscal resources demanded by their presence in the country. At the same time, there is political pressure on American lawmakers to ensure that the enormous investment made by the US over the 13-year war – both in terms of dollars and lives – are not wasted when and if the Afghan state proves too weak to maintain security and rule of law post-2014. In this sense, the BSA and the subsequent troop presence is somewhat of an insurance policy for the US. Ironically, US policymakers and military officials undoubtedly view projected troop presence of 6,000-9,000 soldiers as a way to support Afghan state sovereignty and stability, but their very presence sends a clear message to the people of Afghanistan that their government does not fully control the use of force within their territorial borders.

The same argument can be made regarding rule of law and jurisdiction over soldiers. As mentioned above, that the US is requesting immunity – or rather the right to try soldiers accused of committing crimes under its own US domestic legal systems – is not unusual per US foreign policy. But in a country like Afghanistan where the justice system is widely known as fraught with challenges like corruption, lack of uniformly followed evidentiary procedures, and concerning prison sentences, such a request sends a powerful

⁸ Amiry 2.

message to the population. Giving US soldiers immunity from Afghan law is popularly equated with allowing them to act with complete impunity, even if this is not the case and soldiers like Sgt. Bales who are accused of crimes regularly find themselves in front of military or civilian courts in the States. It also undermines the Afghan government by suggesting that punishments are not necessarily proportionate to crimes. Clearly the Afghan government feels confident in its ability to carry out trials and impose law as a sovereign state, but the United States appears unwilling to serve as the example that proves its competence.

Conclusion

Clearly the BSA negotiations face some very real challenges, particularly on the topics of jurisdiction, detention, and airspace. These issues, however, are mere subsets to the overall inability of the two countries to construct a unified vision of Afghan sovereignty with which both sides can be satisfied. At present, President Karzai and Afghan policymakers are asserting their political independence with demands that the United States fully respect the sovereignty and people of Afghanistan. The US, on the other hand, does not seem so confident that the Afghan government truly has the capability to handle its affairs and ensure stability and rule of law with complete independence as it boasts. Consequently, both sides appear to interpret the meaning of a post-14 US presence. The language coming out of Washington suggests that the superpower sees itself as supporting Afghan independence with its military resources and expertise. Afghanistan, by contrast, feels undermined and worries that its national interests will still be largely determined from the outside as it has been since late 2001.

Only in the coming months will it become clear whether Kabul and Washington will be able to jointly construct a unified security agreement based on mutual respect, understanding, and commitment to a shared vision of Afghan independence.