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Starting Over—The New Iraqi Code of Military Discipline

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Introduction

Operation Iraqi Freedom ended Saddam Hussein's regime and with it the Ba'ath party's control of the Iraqi government. To achieve the goal of eradicating the Ba'athist influence in Iraqi government institutions, the Coalition Provisional Authority (CPA) dissolved many government entities previously controlled by the Ba'athists, including the Iraqi Armed Forces.² Noting that United Nations Security Resolution 1483³ called for member states to assist the people of Iraq in order to contribute to the stability and security in their country, the CPA, on 18 August 2003, created an all volunteer Iraqi Army.⁴ With the creation of a new Iraqi Army, commanders required a new discipline code to fill the gap created by the suspension of the old regime's military law.⁵ To help maintain good order and discipline in the new Iraqi Armed Forces (IAF),⁶ the CPA promulgated a *Code of Military Discipline (Code)* that was immediately applicable⁷ to all IAF members.⁸ Not surprisingly, the *Code* bears similarities to the American military justice system. This note describes the *Code*, comparing it with its American counterpart, and suggests possible improvements for a more complete, permanent Iraqi military law.

The *Code* details the jurisdictions and conditions under which IAF members may be prosecuted. It states that IAF members are subject to the *Code* from the date of attestation into the IAF until the date of termination of service.⁹ Iraqi Armed Forces members also remain subject to the jurisdiction of the civilian courts, though they are immune from civil prosecution and liability "for acts or omissions arising within the scope of their duties and authorized operations."¹⁰ These provisions have familiar counterparts in the American military justice system.

The *Code* also creates a substantive military criminal law and discipline system. The substantive law enumerates a number of military offenses, which are grouped into three categories. The first category, discussed in detail below, might be thought of as "true" military offenses, as they have no criminal counterpart in civilian society (e.g., absence without leave, disobeying lawful orders, and dereliction of duty).¹¹ The second category of military offenses is civilian criminal offenses. The *Code* adopts, by reference, the entire Iraqi civilian criminal code and re-labels the offenses as "military offenses."¹² The *Code* states that "[a]ny member of the Iraqi Armed Forces . . . who commits a civilian criminal offense shall be guilty, by reason of so doing, of a Military Offense . . ."¹³ The third and final category of military offenses is crimes or offenses against the law of war as adopted by Iraq or recognized as customary international law.¹⁴

In order to help Iraqi commanders maintain good order and discipline in their units, the *Code*, like the *Uniform Code of Military Justice (UCMJ)*, incorporates a number of military offenses that have no counterpart in civilian society.¹⁵ These

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² COALITION PROVISIONAL AUTHORITY, ORDER 2, DISSOLUTION OF ENTITIES 1 (June 18, 2003), available at www.cpa-iraq.org/regulations/#Orders.

³ S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg., U.N. Doc. S/RES/1483 (2003).

⁴ COALITION PROVISIONAL AUTHORITY, ORDER 22, CREATION OF A NEW IRAQI ARMY (Aug. 18, 2003), available at www.cpa-iraq.org/regulations/#Orders [hereinafter CPA ORDER 22].

⁵ Coalition Provisional Authority Number 22 suspended the Iraqi Military Law Code, Number 13, of 1940, the Iraqi Military Procedures Code, Number 44, of 1941, the Code of Legal Notification of Military Personnel, Number 106, of 1960, Punishment of Military Deserters Law, Number 28, of 1972, and the Penal Code of the Popular Army, Number 32, of 1984. CPA ORDER NO. 22, *supra* note 4, § 2.

⁶ The New Iraqi Army was renamed the Iraqi Armed Forces (IAF), and includes the Army, Air Force, Coastal Defense Force, the Iraqi National Guard (formerly known as the Iraqi Civil Defense Corps), Iraqi Counter-Terrorism Force, and associated headquarters. COALITION PROVISIONAL AUTHORITY, ORDER 67, MINISTRY OF DEFENSE § 2 (Mar. 21, 2004), available at www.cpa-iraq.org/regulations/#Orders [hereinafter CPA ORDER 67].

⁷ COALITION PROVISIONAL AUTHORITY, ORDER 23, CREATION OF A CODE OF MILITARY DISCIPLINE FOR THE NEW IRAQI ARMY (Aug. 20, 2003), available at www.cpa-iraq.org/regulations/#Orders [hereinafter CPA ORDER 23].

⁸ CPA ORDER 67, *supra* note 6, § 2.

⁹ CPA ORDER 23, *supra* note 7, § 2.

¹⁰ *Id.* § 2, ¶ 3.

¹¹ *Id.* § 3, ¶ 1.

¹² *Id.* § 3, ¶ 3.

¹³ *Id.*

¹⁴ *Id.* § 3, ¶ 4.

¹⁵ See, e.g., UCMJ arts. 85, 86, 87 (2002).

offenses and their elements are set forth in CPA Order 23, Section 3, paragraph 1. The military offenses include the following:

- (a) mistreatment of Members of the New Iraqi Army of inferior rank;
- (b) causing or engaging in a disturbance or behaving in a disorderly manner;
- (c) behaving in an insubordinate manner;
- (d) striking a Member of the New Iraqi Army or a member of another armed force of superior rank or civilian instructor placed in authority over the accused;
- (e) while on sentry duty either:
 - (i) engaging in misconduct, or;
 - (ii) failing to do the Member's duty;
- (f) disobeying a lawful order;
- (g) drunkenness if, owing the influence of alcohol or any drug, whether alone or in combination with any other circumstances, the Member is:
 - (i) unfit to be entrusted with his duty;
 - (ii) unfit to be entrusted with any duty which the Member was reasonably aware that he could be called upon to perform;
 - (iii) behaving in a disorderly manner, or;
 - (iv) behaving in any manner likely to bring discredit on the New Iraqi Army;
- (h) absence without leave;
- (i) avoiding the performance of a duty or negligently performing a duty;
- (j) making a false statement concerning any official matter relating to the IAF.
- (k) fighting with another Member of the New Iraqi Army;
- (l) willfully or by neglect damaging or causing damage to or the loss of any property of the New Iraqi Army;
- (m) conduct to the prejudice of good order or military discipline;
- (n) behaving in a manner likely to bring discredit on the New Iraqi Army.¹⁶

Elements for each military offense and minor discussions are contained in an annex to CPA ORDER 23.¹⁷

Enforcement of the *Code of Military Discipline*

The *Code's* enforcement mechanism for the true military offenses is similar to the American military nonjudicial punishment (NJP) process.¹⁸ A number of differences make a comparison to the American military justice system a worthwhile exercise in exploring features of the new Iraqi system and considering possible amendments for the future.

The *Code's* determination concerning who may administer military discipline¹⁹ is similar to the American military company and field grade NJP authorities.²⁰ In the Iraqi system, authority is divided between junior and senior disciplinary officers. Junior disciplinary officers are defined as officers at least a captain in rank who either command a company or an equivalent-size unit of which an accused is a member or are appointed in writing by a brigade commander to be the junior disciplinary officer of an accused.²¹ Senior disciplinary officers are defined as officers at least lieutenant colonel in rank who either command the battalion of which the accused is a member or are appointed by the commander of the IAF to be the senior disciplinary officer of the accused.²²

Junior disciplinary officers have jurisdiction over members of the IAF below the rank of lieutenant for true military offenses.²³ For company commanders, this includes all enlisted members of the command. The *Code* does not provide a mechanism for superior commanders to withhold authority to dispose of specific cases or certain types of cases, as American commanders often do for senior noncommissioned officer misconduct.²⁴ Brigade commander authority to appoint junior disciplinary officers has definite merit. In the American military justice system, NJP authority is tied to command; therefore, disputes occasionally arise over whether the NJP-imposing officer has proper command authority. The Army's governing regulation states, "[w]hether [the] officer is a commander is determined by the duties he or she performs, not necessarily by

¹⁶ *Id.* § 3, ¶ 1.

¹⁷ *Id.* Annex, Elements of Military Offenses Created Under Section 3.

¹⁸ See MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. V (2002) [hereinafter MCM].

¹⁹ CPA ORDER 23, *supra* note 7, § 4.

²⁰ MCM, *supra* note 18, pt. V, ¶ 2.

²¹ CPA ORDER 23, *supra* note 7, § 1.

²² *Id.*

²³ *Id.* § 4, ¶ 1.

²⁴ See MCM, *supra* note 18, R.C.M. 401c.

the title of the position.”²⁵ In the *Code*, a brigade commander can appoint, in writing, junior disciplinary officers to administer discipline in separate and other units that may not have a company commander available to fill this role.²⁶ Additionally, the Iraqi system clearly contemplates appointing junior disciplinary officers after the commission of an offense. In the event that a company commander is unavailable or disqualified from administering NJP, it is unnecessary to resort to the next superior commander, because a junior disciplinary officer can be appointed to administer the case.

A senior disciplinary officer’s authority is considerably different than that of an field grade’s NJP authority in the American military system. Senior disciplinary officers only have original jurisdiction over true military offenses concerning members of the IAF in the rank of lieutenant and above, as long as the senior disciplinary officer is at least one rank above the accused.²⁷ Senior disciplinary officers also have jurisdiction over appeals of junior disciplinary officer’s decisions.²⁸ The jurisdiction of Iraqi battalion commanders as senior disciplinary officers is much more limited than that of their American counterparts. American field grade NJP authorities have jurisdiction over all members of their command.²⁹ Although there are arguably many drawbacks to this limitation in a senior disciplinary officer’s jurisdiction, it enforces a strict application of the American military policy to dispose of offenses at the lowest appropriate level.³⁰

Maximum Punishments

For true military offenses, the *Code* shares many similarities with the American military NJP system. As with the commanders’ jurisdiction, however, the *Code* also contains significant differences, including available punishments for military offenses.

In the Iraqi system, a junior disciplinary officer can administer the following punishments in respect to each military offense of which he finds an enlisted IAF member guilty:

- (a) detention for a period not longer than seven days;
- (b) [a] fine not exceeding fourteen days’ pay;
- (c) a reprimand;
- (d) extra duties to a maximum of seven days;
- (e) in respect of a private first class, corporal, or sergeant, reduction by one rank;
- (f) stoppages of pay in respect [to] damage or loss caused by the act or acts which formed the basis of the Offense charged, not exceeding fourteen days’ pay.³¹

Similar to American military company grade NJP,³² a junior disciplinary officer may combine certain punishments; however, there are clear distinctions.³³ In the Iraqi system, reduction in rank may not be combined with any other punishment.³⁴ Only corporals and below may be detained, and detention can only be combined with stoppage of pay. Both a fine and a stoppage of pay can be combined to punish a single offense, but no more than twenty-eight days pay may be taken in a single disciplinary hearing.³⁵ The American and Iraqi punishments differ radically in that American military NJP punishments may be combined for each single NJP *case*;³⁶ the Iraqi system permits a combination of most punishments for each *offense* that the accused is found guilty of.³⁷

The maximum punishments available to the senior disciplinary officer also differ significantly from those of the American field grade NJP authority. As the senior disciplinary officer’s non-appeal jurisdiction is limited to IAF commissioned officers, the punishments available are very different from those of the American field grade NJP authority.³⁸ The senior disciplinary officer’s punishments, however, are very similar to the junior disciplinary officer’s punishment,

²⁵ U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE ¶ 3-7a (4) (6 Sept, 2002).

²⁶ CPA ORDER 23, *supra* note 7, § 4, ¶ 2.

²⁷ *Id.* ¶ 3.

²⁸ *Id.*

²⁹ MCM, *supra* note 18, pt. V, ¶ 2a.

³⁰ *Id.* R.C.M. 306 b.

³¹ CPA ORDER 23, *supra* note 7, § 11, ¶ 1.

³² The American military NJP system lists the following limitations on combination of punishments: (1) Arrest in quarters may not be imposed in combination with restriction; (2) Confinement on bread and water or diminished rations may not be imposed in combination with correctional custody (3) Correctional custody may not be imposed in combination with restriction or extra duties; (4) Restriction and extra duties may be combined to run concurrently, but the combination may not exceed the maximum imposable for extra duties. MCM, *supra* note 18, pt V, ¶ 5 d.

³³ Compare CPA ORDER 23, *supra* note 6, § 11, with MCM, *supra* note 18, pt. V, ¶ 5 d.

³⁴ CPA ORDER 23, *supra* note 7, § 4, ¶ 4.

³⁵ See *id.* § 11.

³⁶ MCM, *supra* note 18, pt. V, ¶ 5 d.

³⁷ CPA ORDER 23, *supra* note 7, § 11, ¶ 1.

³⁸ See MCM, *supra* note 18, pt. V, ¶ 5b.1.(B).

though detention is not authorized.³⁹ The rules for senior disciplinary officers combining punishments are otherwise identical to those of the junior disciplinary officers.⁴⁰

The punishments available to Iraqi commanders do not appear as nuanced as the American military justice system. The most notable demonstration of this is that unlike field grade NJP, senior disciplinary officers do not expose Soldiers to greater maximum punishments.⁴¹ Additionally, Iraqi commanders do not have the variety of punishments available as their American counterparts (e.g., restriction to specified limits).⁴² More importantly, unlike the American military NJP process, the *Code* lacks provisions to suspend, mitigate, remit, or set aside punishments.⁴³ These tools introduce an enormous amount of flexibility into the American military NJP system. They permit commanders to individualize NJP for Soldiers and meet the NJP purpose of promoting positive behavior changes in service members.⁴⁴ The addition of a suspension procedure may be one of the first areas for reform in the *Code*.

Despite these differences, a fair argument can be made that the Iraqi Discipline System has advantages over the American military justice system. As a junior disciplinary officer, an Iraqi company commander has a wider range of punishments available than his American counterpart. The American company commander's punishments are limited primarily to seven days confinement, seven days forfeiture, fourteen days extra duty, and a one rank reduction for enlisted,⁴⁵ however, an Iraqi company commander can administer seven days detention, seven days extra duty, up to twenty-eight days loss of pay, and reduction of IAF corporals and below to the lowest enlisted grade.⁴⁶ Perhaps an even more persuasive argument for the advantages of the Iraqi system is its relative simplicity. Providing accurate training on the *Code* to IAF members is a simpler task than teaching the rules of NJP to American service members, because only one set of punishments is available.

Disciplinary Hearings

The procedure for Iraqi disciplinary hearings is also similar to the procedures for American military NJP hearings. In the American military system, an accused is entitled to the following:

- (a) notice that the commander is considering NJP;
- (b) a description of the alleged offenses;
- (c) a summary of the evidence against him;
- (d) an explanation of his right to demand trial by court-martial;
- (e) the right to personal appearance before the NJP authority;
- (g) Article thirty-one rights;
- (h) to be accompanied by a spokesperson;
- (i) to present matters in extenuation or mitigation;
- (j) to present witnesses;
- (k) to request an open hearing.⁴⁷

An IAF member is entitled to similar protections, including:

- (a) 24 hours to prepare for the Disciplinary Hearing;
- (b) the assistance of an Officer of his choice, subject to reasonable availability, in preparing for and during the Disciplinary Hearing;
- (c) the right to have the charge explained by the Disciplinary Officer;
- (d) the right to question witnesses called to give evidence against him;
- (e) the right to present evidence in support of his case;
- (f) if convicted, to present evidence or speak in mitigation of his punishment
- (g) the right to remain silent and have no adverse consideration taken by the exercise of this right.⁴⁸

³⁹ CPA ORDER 23, *supra* note 7, § 11, ¶ 6.

⁴⁰ *Id.* § 11, ¶ 7.

⁴¹ *Id.* § 11, ¶ 6.

⁴² Compare CPA ORDER 23, *supra* note 7, § 11, with MCM, *supra* note 18, pt. V, ¶ 5 a(1)(A), d.

⁴³ MCM, *supra* note 18, pt. V, ¶ 6.

⁴⁴ See *id.* pt. V, ¶ 1. c.

⁴⁵ *Id.* pt. V, ¶ 5 b. 2.

⁴⁶ CPA ORDER 23, *supra* note 7, § 11, ¶ 1.

⁴⁷ MCM, *supra* note 18, pt. V, ¶ 4.

⁴⁸ CPA ORDER 23, *supra* note 7, § 10.

For the most part, each procedure's design is very similar. Both provide the accused fair notice of the proceeding, respect an accused's right to avoid self-incrimination, and permit the accused to present evidence on the merits and in mitigation of their punishment.⁴⁹

The differences between these procedures are nevertheless apparent. Unlike an American accused, an IAF member has the right to request the assistance of an officer of his choice to prepare for a disciplinary hearing.⁵⁰ This is a significant protection afforded to IAF members. The most similar right in the American military system permits a Soldier to have a spokesperson present at his disciplinary hearing.⁵¹ The right to request assistance of a specific officer in preparing for a disciplinary hearing may not be as effective as having trial defense counsel representation, but this officer could influence the commander and serve as a highly effective advocate for the accused.

A clear advantage to an accused Soldier in the American military justice system is that an accused may refuse NJP and demand trial by court-martial.⁵² This right effectively enforces a standard of guilty only beyond a reasonable doubt for NJP, and it gives the accused an alternate forum if he believes he will not receive a fair hearing from the NJP authority.

One last important distinction between the two systems is the appeals process. In American military NJP "any service member punished under Article 15 who considers the punishment to be unjust or disproportionate to the offense may appeal through the proper channels to the next superior authority."⁵³ The *Code's* appeal system is different and possibly less likely to be used by members of the IAF, particularly those convicted by senior disciplinary officers. Under the *Code*, accused who are convicted by junior disciplinary officers may appeal their case in writing within fourteen days to the senior disciplinary officer.⁵⁴ This process is nearly identical to the American military system, except the accused can appeal the conviction and punishment imposed by the junior disciplinary officer. Accuseds convicted by senior disciplinary officers have a more intimidating appeals process. The only appeal available is to the IAF commander.⁵⁵

Military Courts

The *Code's* lack of a military court-martial procedure is the most significant divergence from the UCMJ. Under the *Code*, a military court is one in name only and is defined as "a civilian court with a civilian judge who has been appointed as a military judge."⁵⁶ These "military courts" have jurisdiction over all military offenses and exclusive jurisdiction over many military offenses. Their exclusive jurisdiction includes military offenses that are also civilian offenses and war crimes.⁵⁷ These cases will be investigated and tried in accordance with the Iraqi civilian law of criminal procedure.⁵⁸ This arrangement demonstrates the ingenuity of CPA Order 23. Without re-writing the Iraqi military discipline code, CPA Order 23 established a system of military justice capable of disciplining the entire range of offenses, from simple military disorders to major felonies.

The present system of Iraqi military justice created by CPA Order 23 has apparent shortcomings. A paramount problem is that a military commander loses control of any offense that is not a "true" military offense, but a crime under the Iraqi civilian criminal code.⁵⁹ In the American military discipline system, commanders are encouraged to dispose of allegations of offenses at the lowest appropriate level.⁶⁰ Accordingly, commanders often dispose of minor non-military specific offenses (e.g., wrongful use of marijuana)⁶¹ using NJP procedures. In maintaining good order and discipline, American commanders have the discretion to keep otherwise good Soldiers at their duties by punishing minor misconduct using NJP procedures. Iraqi commanders do not have this flexibility or discretion. An Iraqi commander cannot use *Code* NJP procedures to punish any offense other than the military-unique offenses listed in CPA Order 23. Any other offense must be referred to the civilian criminal system acting as a military court.

⁴⁹ Compare *id.* § 10, with MCM, *supra* note 18, pt. V, ¶ 4.

⁵⁰ CPA ORDER 23, *supra* note 7, § 10, ¶ 2.

⁵¹ MCM, *supra* note 18, pt. V, ¶ 4. c.(1) (B).

⁵² *Id.* pt. V, ¶ 3. This right is inapplicable in the case of a person attached to or embarked on a vessel. *Id.*

⁵³ *Id.* pt. V, ¶ 7.a.

⁵⁴ CPA ORDER 23, *supra* note 7, § 12, ¶ 1.

⁵⁵ *Id.* § 12, ¶ 2.

⁵⁶ *Id.* § 1, definitions.

⁵⁷ *Id.* § 5, ¶ 1.

⁵⁸ *Id.* § 1, definitions.

⁵⁹ *Id.* § 13, ¶ 4.

⁶⁰ *Id.* § 5, ¶ 1.

⁶¹ MCM, *supra* note 18, R.C.M. 306(b).

⁶¹ UCMJ art. 112a (2002).

Conclusion

After the fall of the previous Iraqi regime, CPA Order 23 established a military discipline system for the new IAF. Coalition Provisional Authority Order 23 supports the command's obligation to maintain good order and discipline by enumerating true military offenses and creating a non-judicial system to enforce them. The military discipline system created by CPA Order 23 relies on the existing Iraqi civilian criminal justice system for disposition of all other criminal offenses, including disposition of minor criminal misconduct committed by IAF members. The current Iraqi Ministry of Defense recognizes the shortcomings of the present military discipline system and understands the *Code* established by CPA Order 23 is a useful interim system between the military justice system enforced by Saddam Hussein's regime and the future Iraqi government.⁶² The Iraqi Ministry of Defense General Counsel's office has already begun addressing the need for a more complete military justice system and is in the process of drafting a new Iraqi *Code of Military Justice*. The Iraqi Ministry of Defense intends to borrow heavily from the Iraqi 1941 Military Code for Substantive Crimes and from the American UCMJ for procedures to protect IAF members.⁶³ This new system will propose assigning military attorneys to all the field commands in order to provide free legal representation to all accused and also appoint independent military judges in each governorate.⁶⁴ The new Iraqi *Code of Military Justice's* goal is to preserve a commander's inherent right to maintain good order and discipline over the entire spectrum of misconduct and simultaneously preserving the rights of members of the new IAF.⁶⁵

⁶² Interview with Mr. Tariq Al-Aboudi, General Counsel to the Iraqi Ministry of Defense and staff, in Baghdad, Iraq (July 24, 2004) (on file with author).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*