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# HUMAN RIGHTS AND THE STRUCTURE OF SECURITY FORCES IN CONSTITUTIONAL ORDERS: THE CASE OF ETHIOPIA\*

James C.N. Paul\*\*

## I. INTRODUCTION

The main part of this contribution consists of a Working Paper that I presented to the Constitutional Commission of the Transitional Government of Ethiopia (TGE)<sup>1</sup> in Addis Ababa in August 1993. That paper had its origins in two projects organized by the International Third World Legal Studies Association. The first was a series of international seminars held in Africa and elsewhere during 1987-1989 on problems confronting the development of democratic constitutional orders.<sup>2</sup> A recurrent question raised in many of these seminars was whether it is possible to create

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The author served as founding Dean of the Law School of the University of Addis Ababa, then known as Haile Selassie First University, from 1962-1967; as Academic Vice President of that University from 1967-1969; and as an occasional consultant to its president from 1972-1974. Since the liberation of Ethiopia from the military dictatorship of Mengistu Haile Meriam, he has returned to Ethiopia on a number of occasions at the invitation of the Constitutional Commission of the Transitional Government of Ethiopia. The Commission is charged with the task of preparing a draft constitution, which will be reviewed and, presumably, ratified, as amended, by a popularly elected Constitutional Assembly later in 1994.

I am deeply grateful for the comments of Charles Smith, General Counsel of the United States Institute for Peace, Washington, D.C.; for the splendid work of Elizabeth Marshall and Lori Weiner, former students of the Rutgers University Law School in Newark, in preparing drafts of the Code of Universal Principles and accompanying commentary and annotations; and for the much-valued assistance of Michael K. Nolan, presently a law student at Rutgers School of Law, in both the research for and the preparation of this article. I am also very grateful for support received from the United States Institute for Peace, Washington, D.C., the Carter Center, Atlanta, Georgia, and the USAID Mission in Addis Ababa, enabling an ongoing study of the transition in Ethiopia.

<sup>1</sup> The TGE was legally established by the Transitional Period Charter of Ethiopia, which is, in effect, the interim constitution of a government created to "lead the country towards full democracy." *Transitional Period Charter of Ethiopia*, Proclamation No. 1, NEGARIT GAZETA pt. 4, pmbl., July 22, 1991 (Eth.) [hereinafter *Charter*].

<sup>2</sup> See James C.N. Paul, *Developing Constitutional Orders in Sub-Saharan Africa: An Unofficial Report*, 1988 THIRD WORLD LEGAL STUD. 1.

stricter controls over the security forces and make them more accountable.<sup>3</sup> This subject led to a second project reported in *Third World Legal Studies 1990: Police, Security Forces and Human Rights in the Third World*.<sup>4</sup> The proposed *Code of Universal Principles*, reproduced here, was first prepared for that project.<sup>5</sup>

Invited to discuss this subject in Ethiopia, I suggested to the Commission that it might well pay a good deal of attention to the laws governing the structure of the security forces<sup>6</sup> in Ethiopia's future constitutional order.<sup>7</sup> The term "security forces" is intended to include the army, which has played—and probably will play—a major role in maintaining public order, as well as the police and other organizations created to enforce the laws and maintain internal security.<sup>8</sup>

The Constitutional Commission of Ethiopia is explicitly charged with the task of producing a draft constitution to establish democracy and

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<sup>3</sup> See *id.* at 27.

<sup>4</sup> For a general background on this second project, see Abduluhi Ahmed An-Na'im, *Coordinator's Introduction*, 1990 THIRD WORLD LEGAL STUD. 1.

<sup>5</sup> James C.N. Paul, *Putting Internal Security Forces Under the Rule of Human Rights Law: The Need for a Code of Universal Principles Regulating Their Governance*, 1990 THIRD WORLD LEGAL STUD. 233.

<sup>6</sup> By "laws governing the structure of the security forces," I mean the aggregate of laws, often found in diverse bodies of legislation and administrative regulations, that create, organize, and empower the security forces; set out—or more often, fail to set out—standards governing the recruitment, training, and discipline of their personnel; and provide—or more often, fail to provide—for the transparency and accountability of these organs of government.

<sup>7</sup> By "constitutional order," I mean not only the formal constitution, but that body of law establishing institutions and processes necessary to implement, promote, and protect the principles of the constitution and the rights guaranteed by it.

<sup>8</sup> The term "internal security forces" as used here covers a wide spectrum of quite different organizations with different functions, including various kinds of police, prison officials, internal intelligence-gathering agencies (usually found within the Ministry of Interior), and various kinds of military units (usually found within a Ministry of Defense). *Draft Code of Universal Principles to Govern the Structure and Accountability of Internal Security Forces Operating in All States* art. 1(b) [hereinafter *Draft Code*] (appended). In Ethiopia and in much of Africa, the military is now, and long has been, used to quell serious internal disturbances. Thus, these forces have been concerned with internal policing and governance as well as external security; they have exercised powers of arrest, detention, interrogation, use of deadly force, and other law enforcement powers that affect basic human rights. Uncontrolled, they constitute a serious threat to civil government and civil society. While the specialized tasks of each of these units means that differing regimes of rules must be used to organize each unit, all forces should be organized and governed by a body of common principles. See *Draft Code, supra*, art. 1.

human rights and a rule of law to secure these conditions.<sup>9</sup> This general mandate has been underscored and given added content by Ethiopia's ratification, without reservations, of the International Bill of Human Rights<sup>10</sup> as well as most other major human rights instruments, including the United Nations *Women's Convention*.<sup>11</sup> Certainly, these goals are professed by all political factions now operating within and without Ethiopia, and probably also by the majority of Ethiopians, most of whom live in the countryside and derive their livelihood from agriculture.

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<sup>9</sup> Article one of the *Transitional Period Charter* incorporates the United Nations *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*], and particularly guarantees rights of "freedom of . . . expression, association and assembly," *Charter*, *supra* note 1, art. 1(a), and the "right to engage in unrestricted political activity." *Id.* art. 1(b). Proclamation No. 24 of 1992 established the Constitutional Commission with the "mission . . . to draft, in conformity with the spirit of the Charter, a constitution in Accordance [sic] with which the new democratic Ethiopia shall be established and administered. . . ." *A Proclamation to Provide for the Establishment of the Constitutional Commission*, Proclamation No. 24/1992, NEGARIT GAZETA art. 4, Aug. 18, 1992 (Eth.) [hereinafter Proclamation No. 24]. These goals were eloquently emphasized and discussed by Meles Zenawi, President of the TGE, in his Address at the Inter-Africa Groups Symposium on the Making of the New Ethiopian Constitution (May 17, 1993).

<sup>10</sup> The International Bill of Human Rights consists of the *Universal Declaration*, *supra* note 9; the *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) [hereinafter *ICESCR*]; and the *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter *ICCPR*].

<sup>11</sup> *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 194, U.N. Doc. A/34/180 (1979) [hereinafter *Women's Convention*]. Ethiopia ratified this treaty in 1980. In late 1993 the Council of Representatives of the TGE ratified the *ICESCR* and the *ICCPR*, *supra* note 10; the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. GAOR, 39th Sess., at 197, U.N. Doc. A/39/51 (1984); and the *Convention on the Prevention of the Crime of Genocide*, G.A. Res. 260A, U.N. GAOR, 3d Sess., pt. 1, at 174, U.N. Doc. A/810 (1948). Ethiopia has long been a party to the Geneva Conventions of 1949, and it has now ratified Protocol II of the Geneva Conventions. *Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, Dec. 7, 1978, 1125 U.N.T.S. 609. Information on these recent ratifications comes from the Constitutional Commission, which held a public seminar that I attended as a discussant, in December 1993 to discuss the incorporation of these and other international instruments into the future constitutional order.

## II. THE MILITARY IN ETHIOPIAN HISTORY

The “Derg,”<sup>12</sup> the military dictatorship that preceded the TGE, inflicted in the name of revolutionary, Marxist-Leninist socialism terrible harms upon most sectors of the population during its seventeen years of despotic rule. Its demise seems to have marked the end of the system of centralized, authoritarian rule that characterized the political development of the Ethiopian state during this century. There are now widespread popular demands for recognition and redress of regional, ethnic, and other historic grievances accumulated over many decades as well as for the decentralization of governance.<sup>13</sup> Free political space has been created, and talk about democracy and rights is widespread.

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<sup>12</sup> This Amharic word, sometimes rendered as “Dergue” in English, signifies a committee or council with powers to coordinate and control the activities of others. The original 1974 Derg was composed of over 100 members drawn from the military and the police, both commissioned and noncommissioned officers. Mengistu Haile Meriam, then a Lieutenant Colonel, emerged as Chairman after providing for the execution, sometimes personally, of his rivals for power. The power of the Derg gradually waned as Mengistu assumed full direction of the Government, but the term was used to describe his regime. See ANDARGACHEW TIRUNEH, *THE ETHIOPIAN REVOLUTION, 1974-1987* (1993), for a detailed history.

<sup>13</sup> Much of the resistance *within* Ethiopia to the rule of the Derg was organized regionally among those ethnic groups that predominantly populated particular regions. Among the more significant of these “liberation fronts” were the Eritrean Peoples Liberation Front (EPLF), which predated the Derg but grew in strength and commitment to total independence for Eritrea, a result of Mengistu Haile Meriam’s very aggressive and repressive policies in attempting to suppress the Eritrean movement; the Tigray Peoples’ Liberation Front (TPLF), which became an increasingly effective military and political force in the north and which, in the late 1980s, converted itself into the Ethiopian Peoples Democratic Revolutionary Front (EPDRF) in an attempt to establish a broader ethnic and political base; and the Oromo Liberation Front (OLF), which first organized in the western and southwestern regions and which claimed to be the party of all the Oromo peoples of Ethiopia—approximately 40% of Ethiopia’s population—dispersed widely in central and southern Ethiopia. The growing strength of these and other ethnic-regional political groups probably drew on historic grievances against the traditional system of centralized, authoritarian rule as well as the repressive agrarian policies of the Derg, including its attempts to “collectivize” farming and its forced “villagization” projects, which often wrought terrible hardships on peasant families. ALEMENEH DEJUNE, *ENVIRONMENT, FAMINE AND POLITICS IN ETHIOPIA: A VIEW FROM THE VILLAGE* (1990). For accounts of this period of civil warfare and its roots in past rebellions see AFRICA WATCH, *EVIL DAYS: 30 YEARS OF WAR AND FAMINE IN ETHIOPIA* (1991) (painstaking survey of the history of the Derg prepared by Alex de Waal, former Associate Director of Africa Watch); PAUL HENZE, *REBELS AND SEPARATISTS IN ETHIOPIA: REGIONAL RESISTANCE TO A MARXIST REGIME* (1985) (report prepared for the Office of the Under Secretary of Defense for Policy); GEBRA TAREK, *ETHIOPIA: POWER AND PROTEST—PEASANT REVOLTS IN THE TWENTIETH CENTURY* (1991).

Yet, the prospects for realizing the promised transition may be fraught with difficulties. In many respects, the institutions and practice of democratic methods of governance are new to Ethiopian political experience. Military force has long been a significant theme in politics and political culture. In earlier times, traditional political elites were often men who were known for their military prowess. In later times, many of the nobility titles bestowed by the Emperor Haile Selassie still connoted high military rank, perhaps as a reflection of the military traditions in politics.

Greater Ethiopia, the Empire created in the late nineteenth century, brought many different ethnic groups into an expanded imperial state. Some of the peoples in the southern half of the country were forcibly incorporated, creating historical legacies which now must be recognized and redressed. Personal and centralized rule, hierarchical and authoritarian methods of administration, secrecy, and an absence of participation have long characterized governance. Although Haile Selassie gradually modernized and professionalized the Government, in many respects his bureaucracy, and certainly his local governors, reflected a patrimonial system. Similarly, while the Emperor created important institutional foundations for developing a democratic system and the rule of law—an elected Chamber of Deputies and a nominally independent judiciary—these organs remained under his watchful eye. There were no parties. The nongovernmental press, such as it was, and parliamentary elections were closely controlled. Judges were appointed, transferred, or retired by imperial command. Rights of association were constrained; civil society,<sup>14</sup> while vibrant in many ways, was weak in terms of its capacity to nurture democracy.<sup>15</sup> The military forces, on the other hand, increased not only in size, but in professional status and potential political power. That power was illustrated when the Derg seized control in 1974 and proceeded to demonstrate the dangers of military rule. Whereas the autocratic rule of the

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<sup>14</sup> By “civil society” I refer particularly to organized social, economic, and political activities carried on independent of government and largely free from legal control, such as professional, civic, and political associations; cooperatives and workers’ organizations; the independent press; and other groups concerned with public affairs. The Ethiopian Church was allied with the Regime at the upper levels of the hierarchy, but perhaps less so at grassroots levels.

<sup>15</sup> A recent valuable one-volume history of the making of the modern Ethiopian state is BAHRU ZEWDE, *A HISTORY OF MODERN ETHIOPIA 1855-1974* (1991). Regarding Haile Selassie’s regime, see CHRISTOPHER CLAPHAM, *HAILE SELASSIE’S GOVERNMENT* (1969) and JOHN MARKAKIS, *ETHIOPIA: ANATOMY OF A TRADITIONAL POLITY* (1974), both of which contain interesting analyses of the military, the police, and styles of governance. On the constitutional history of the Emperor’s long years, see *ETHIOPIAN CONSTITUTIONAL DEVELOPMENT* (James C.N. Paul & Christopher Clapham eds., 1967 & 1971) (2 volumes).

imperial regime was relatively benign, the Derg ruled in a lawless, brutal, totalitarian way. The internal security system created by the Derg and perfected by its ultimate leader, the dictator Mengistu Haile Meriam, dominated all organs of government and civil society. Mengistu's regime was finally destroyed after a long civil war. The leaders of the victorious liberation forces orchestrated the creation of the TGE, a government whose legitimacy derives from its military supremacy, even as it seeks to become a surrogate for a participatory, democratic transition.

### III. THE TASK OF THE CONSTITUTIONAL COMMISSION

In light of this historical and social context, the tasks now confronting the peoples of Ethiopia, the TGE, and the Constitutional Commission—as well as the new government to be elected at some point in 1994—are formidable.<sup>16</sup> The challenges are made more difficult because the legitimacy of the TGE has been under attack from its beginning, but especially after the flawed regional and local elections held in June 1992.<sup>17</sup>

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<sup>16</sup> Not discussed above, but clearly a part of the context for the transition—and a source of constraints—is the nature of the Ethiopian economy and the social structure built upon it. Ethiopia is an agricultural country; the majority of its people live in self-provisioning peasant households, and this rural population is growing at an alarming rate. According to Samuel Huntington, successful transitions to democracy are most likely to occur if countries become urbanized in demographic terms: as the economy grows, diversifies, and becomes more complex; as the private industrial and commercial sector becomes independent from the state; and as a strong middle class emerges. SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991). Ethiopia, with a per capita GNP of less than \$150, lacks this kind of economic base and social structure. In a report to the USAID Mission in Addis Ababa, Huntington noted the absence of these conditions and the presence of other factors, e.g., ethnic divisions, lack of democratic traditions and experiences, and a weak civil society. He opined that the prospects for the transition depended on developing a “peasant-based” democracy, a model which might be built on a base of an independent, self-reliant, essentially land-owning peasantry, and on the commitment and power of a dominant political party that would establish links with the peasantry and the diverse ethnic groups at grassroots levels. Samuel P. Huntington, *Political Development in Ethiopia: A Peasant-Based Dominant Party Democracy?*, Report to USAID/Ethiopia and Consultations with the Constitutional Commission 28 March - 1 April, 1993 (May 17, 1993) (unpublished report). Huntington did not explore the constitutional implications of this approach, nor did he address some closely related and controversial issues now prominent on the Commission's agenda, such as the development of a system of ethnic federalism.

<sup>17</sup> The period from 1974 to the present may, in retrospect, come to be seen as one of continuing revolution. The relatively peaceful political upheavals that began in 1974 led to a short period of unprecedented political freedom and a commitment to democratic constitutional reforms by the imperial regime. This period ended with the Derg's intervention, followed by its attempt to impose a Communist system, and its brutal repression—or attempted repression—of opposing persons and groups. The Derg's

Also, the TGE is confronted with a number of pressing economic and social conditions, many of which are legacies of the prior regime. Efforts to address these problems and restructure the economy may impact harshly on some sectors of the population.<sup>18</sup>

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despotism in turn fueled regional rebellions, ethnic consciousness, and a bloody period of civil warfare culminating in the EPDRF's military victories and consolidation of its political power.

The TGE's legitimacy rests upon several factors: the EPDRF army's destruction of the Derg's and its emergence as the dominant force in May 1993 following its liberation of Addis Ababa; the prompt recognition and support of this government by the United States and other western powers; its orchestration of the Transitional Period Conference; and the adoption of the Transition Charter in July 1991. From the beginning of the transitional process, however, there was opposition to the TGE. The OLF, at first a junior partner in the new government, broke with the TGE over the conduct of the 1992 regional and local government elections, which were seriously flawed and were swept by the EPDRF and its surrogate local parties. Theodor Dagne, *Ethiopia: The Struggle for Unity and Democracy*, CONGRESSIONAL RESEARCH SERVICE REPORT (June 20, 1992). For a critique of the EPDRF's rise to power, see Alemante G. Selassie, *Ethiopia: Problems and Prospects for Democracy*, 1 WM. & MARY BILL RTS. J. 205 (1992).

Opposition to the TGE derives from various sources—mistrust of its ethnic base, its leadership, the erstwhile extreme and simplistic Marxist ideology of the TPLF during the civil war era, its apparent commitment to “ethnic federalism,” its occasionally heavy-handed policies against political opponents, its manipulation of the court system, and its sometimes serious abuses of human rights. *Id.* Recently, a coalition of opposition groups met in Addis Ababa at the National Conference for Peace and Reconciliation in Ethiopia, which was carried on behind closed doors, and established a Council of Alternative Forces on Peace and Democracy to work, peaceably, for the establishment of a new transitional government. Seven members of the Conference were placed under detention, illegally it would seem, by the TGE. Jennifer Parmelee, *Ethiopian Opposition: Rulers Stay Too Long*, WASH. POST, Dec. 23, 1993, at A16. A subsequent *Washington Post* editorial called for the release of those kept in custody and warned against the trend toward “politics controlled by the government,” a process enhanced by lawless security organizations that have practiced illegal detention with increasing frequency. *Free the Ethiopian Five*, WASH. POST, Jan. 27, 1994, at A26. Despite the above observations, there is unprecedented political freedom in Addis Ababa, and it seems likely that the TGE enjoys a wide base of popular support in many parts of the country, which may be attributable to the organizational capacities of the EPDRF. Quite obviously, however, the present situation underscores the need to put the security forces under a rigorous rule of law grounded in respect for the principles of democratic constitutionalism and human rights.

<sup>18</sup> One problem to be addressed is the privatization or reform of the enormous number of inefficient or inoperative state enterprises created by the last regime, including “retrenchment” of labor forces, rehabilitation of many seriously degraded rural areas, devaluation of the currency, and the development of a land law system that will provide security of tenure to peasants in possession and prevent fragmentations. *See, e.g.*, Transitional Government of Ethiopia, *Ethiopia's Economic Policy in the Transitional Period* (Nov. 1991).



The Constitutional Commission, as a first phase of its work, focused very broadly on identifying basic difficulties and issues confronting the promised transition.<sup>19</sup> The importance of the *process* to be followed in attempting to construct a draft constitution—the need to generate widespread public discussions on shared concerns and strategies to address them—was emphasized.<sup>20</sup> The Commission held a number of public sessions, often covered by the media, featuring discussions on a wide variety of subjects.<sup>21</sup> In public seminars held by the Commission that I have attended, certain general themes have recurred regularly, notably discussions of four interrelated tasks:<sup>22</sup>

1. How to build a *civil society* and *civic culture* that value, and become increasingly capable of maintaining, a democratic system of governance;

2. How to *decentralize and devolve* powers of government in a multi-ethnic polity where both needs and demands for powers of local self-administration seem urgent;

3. How to address the *grievances and claims of ethnic and religious groups* for greater political recognition and local autonomy and for recognition of their rights to maintain their language, culture, and customs, including control over their historic lands;

4. How to develop *governmental institutions and processes* that will promote democratic governance and protect human rights, including institutions and processes that will promote and secure the integrity of electoral processes.

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<sup>19</sup> The law establishing the Commission, see Proclamation No. 24, *supra* note 9, empowered it to organize and conduct “public discussions,” and “symposia” on constitutional principles. *Id.* art. 5(2).

<sup>20</sup> In one session that I attended in 1992, the principal topic was “Whose Constitution Is It To Be?” This theme was emphasized by President Meles in his address to the InterAfrica Symposium. Meles, *supra* note 9.

<sup>21</sup> Recently, the Commission prepared a number of questions to be submitted to local meetings to be held all over the country. These meetings were designed to pose various basic choices reflecting possible “models” to be followed in drafting a constitution, including whether to have an elected president and presidential system or a constitutional monarchy, and what form decentralization would take.

<sup>22</sup> The issues noted below also emerged as subjects of basic significance in the six international seminars organized by the International Third World Legal Studies Association on Building Constitutional Orders in Sub-Saharan Africa. See Paul, *supra* note 2.

It should be obvious that these tasks are quite interrelated. It also seems that in the Ethiopian context and perhaps elsewhere in Africa, the difficulties of building institutions often are glossed over. Discussions sometimes simply assume that parliamentary systems, independent courts, responsible political parties, and other institutions can spring from seeds sown by a liberal constitution. For example, there is wide agreement in Ethiopia that the courts must be made independent and somehow adequately empowered to protect rights and enforce a "rule of law." The difficulties, however, of spelling out, let alone promoting, this objective are not always appreciated.<sup>23</sup> Moreover, the constitutional role and powers of the courts are inevitably dependent on not only the remedies that courts can dispense to secure the rule of law, but on the legal structure and political positions of the police, the military, and other internal security forces. Indeed, it seems surprising that despite a large body of social science literature on the unhappy experiences with armies in Africa—there is much less literature on the police—little attention has been focused on policies and strategies needed to restructure and reconstitute the security forces in both legal and social terms for the purpose of transforming them into institutions that will support a democratic constitutional order and a respect for rights and the rule of law.<sup>24</sup> Ethiopian experience certainly seems to underscore this observation.

As noted above, the military looms large in Ethiopian history, not only as a preeminent source of the historic system of "personal rule," but as an instrument of law enforcement. Even today the TGE's army necessarily performs many policing functions since the Derg's police and security

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<sup>23</sup> These problems were developed in a draft report prepared by the International Human Rights Law Group (Washington) for USAID, Addis Ababa. The report contains much factual information of value in depicting problems of organization, recruitment, training, security, etc. of an independent judiciary and many other related matters. See International Human Rights Law Group, *Ethiopia in Transition* (1994).

During December 1993, I was asked by the Chief Justice of the Ethiopian Supreme Court to speak at several seminars of Supreme and High Court judges. At that time discussions were held on steps necessary to disengage the courts completely from the administration and supervision of the Ministry of Justice. Historically, the Ministry has exercised its "administrative" powers in ways that undermine judicial independence. Taking away this jurisdiction is a task of major significance, but one that reveals the complexities of establishing an accessible court system and an effective, competent, independent judiciary that can also be held accountable to standards of judicial conduct appropriate to the Ethiopian context.

<sup>24</sup> See, however, THIRD WORLD LEGAL STUDIES 1990: POLICE, SECURITY FORCES AND HUMAN RIGHTS IN THE THIRD WORLD for a collection of country studies reflecting some of the problems; see also Daniel O. Ntanda Nsereko, *The Police, Human Rights and the Constitution: An African Perspective*, 15 HUM. RTS. Q. 465 (1993), for a revealing study of the legal structure of security forces in East Africa, notably Uganda.

forces have been totally disbanded, and the army has been forced into the role of quelling unruly—or allegedly unruly—public disturbances and restraining regional liberation forces hostile to the Government.<sup>25</sup>

The experience of the direct military rule of the Derg has left terrible memories and legacies of brutal, lawless law enforcement. Beyond that, there is the history of the professional police created by Haile Selassie in 1942 following liberation from the Italian occupation.<sup>26</sup> While in some respects the police forces, which included a sizable paramilitary unit, may have been well-trained and efficient, their relationships with civil society were often characterized by patterns of human rights abuse familiar to all who have studied the pathologies of law enforcement in many Third World countries. Illegal detentions, coercive integration, mistreatment of prisoners and indeed sometimes harsh treatment of students and political dissidents, disdain for the poor and vulnerable, disrespect for the orders of courts—e.g., in habeas corpus cases—were all often alleged to be common phenomena, as were instances of petty corruption. It is probably also true that the training and acculturation of the police simply failed to emphasize or inculcate much respect for human rights and the rule of law. In various ways their conduct helped to generate popular mistrust of the legal system.<sup>27</sup>

Certainly the security forces of the Derg showed no respect for these values once the regime openly proclaimed and imposed its brand of socialism on the country. The Derg organized throughout much of the country a deliberate use of terror to sustain its rule, a large-scale system of summary executions, torture, and disappearances. Thousands perished, and many thousands more suffered physical abuse from this state-sponsored violence. One major task now confronting the TGE is to bring

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<sup>25</sup> For accounts of some of the army's policing activities, see *Ethiopia: The Status of Amharas Since May 1991*, DEP'T JUST. PROFILE SERIES PR/Eth/93.001 (Jan. 1993) (summarizing a large number of news reports on many conflicts and civil disorders involving the army that have occurred in many parts of Ethiopia during the period noted).

<sup>26</sup> *A Proclamation to Provide for the Organization Discipline Powers and Duties of the Police Force and for Matters Incidental Thereto*, Proclamation No. 6, NEGARIT GAZETA, Jan. 1, 1942 (Eth.) [hereinafter Proclamation No. 6] (providing for the creation, organization, duties, etc. of a national police force patterned after the police in British colonial territories, which put these forces under the control of the Governor General). British military advisors were prominent in Haile Selassie's government at this time.

<sup>27</sup> During my tenure as Dean of the Law School at the University of Addis Ababa, we organized programs to teach criminal and constitutional law to commissioned police officers. There were also opportunities to discuss the "rule of law" orientation of the police. For some revealing reported cases on police misconduct, see *ETHIOPIAN CRIMINAL PROCEDURE: A SOURCEBOOK* (Stanley Z. Fisher ed., 1969).

some of the major perpetrators of these crimes to justice.<sup>28</sup> Another task is to begin the process, *tabula rasa*, of creating security forces that can complement the institutions of democracy and the rule of law.

Experience outside Ethiopia surely underscores this point. Throughout much of Africa and elsewhere in the Third World, the security forces have played a destructive role in political and, often, economic development as instruments of authoritarian rule and despotism; often as perpetrators of widespread crimes against humanity, as that term is defined in the Nuremberg Charter; and as vehicles of continuing, systematic patterns of abuse in routine law enforcement.<sup>29</sup> Patterns of policing and maintaining internal security must surely have a direct impact on the kind of political order that exists in a country. It is certainly difficult to build a civil society, political culture, and institutions and processes supportive of democracy and the value of a humane rule of law when the police and military are essentially lawless and unaccountable organs of governance. Autonomous security forces, ungoverned by laws mandating respect and support for the constitution and strict adherence to a number of other principles, are, quite obviously, very serious threats to attempted transitions in many places.

Indeed, in Ethiopia, and surely elsewhere, it seems important to appreciate that the police and military must play a potentially affirmative role in helping to develop a transitional rule of law, respect for rights, democratic practices, and civil society. In Ethiopia there exists today a possibility of recourse to violence for a prolonged period because many social tensions exist. Conversely, the security forces have a major role to play in assuring the integrity of electoral processes. When these processes are seen to be unfair and marred by coercion and violence, the outcome may be the subversion of efforts to create democracy. It thus seems quite important to develop new patterns of policing, new concepts of "security," and new organs of government to perform these functions in

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<sup>28</sup> On some of these atrocities see, e.g., AFRICA WATCH, *supra* note 13, at 3-5; Amnesty International, *Ethiopia: End of an Era of Brutal Repression, A New Chance for Human Rights* (June, 1991). During December 1993 I worked with the Office of the Special Prosecutor charged with bringing to justice officials of the former regime who perpetrated summary executions, forced disappearances, and torture. The files and evidence in this office reveal that the Derg planned and organized such activities as part of a massive system of state terror, and when put in "high gear," these operations took on a life of their own. Thousands perished.

<sup>29</sup> See, e.g., *supra* note 24. The country reports of organizations such as Amnesty International and Human Rights Watch provide extensive and sobering evidence of the scale and intensity of violence used by military and civilian dictatorial regimes to maintain their authority.

the context of a liberated society in transition, as well as a new relationship between the security forces and civil society.

The following paper was originally prepared at the invitation of the InterAfrica Group, an Ethiopian civic association, when it organized a Symposium on the Making of the New Ethiopian Constitution, held in Addis Ababa in May 1993. I was invited by the Constitutional Commission to discuss the paper at a seminar with the Commission in August 1993. I have edited and annotated it for publication here.

## THE SECURITY FORCES IN ETHIOPIA'S FUTURE CONSTITUTIONAL ORDER

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The Need to Put Them Under a Rule of Law Derived  
From the International Bill of Rights

A Working Paper Prepared for the  
Constitutional Commission  
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The TGE has charged the Constitutional Commission with the task of preparing a constitution that will establish institutions and processes to institute democratic governance and the protection of universally recognized human rights. Presumably, the Commission must heed this mandate closely in the creation of all of the basic organs of government. Each of these organs must be put under a particular rule of law that will enable and obligate it to promote and protect human rights and the principles of a democratic system of governance.

In this context, the military, the police, and other law enforcement organizations, i.e., the "security forces," must be seen as basic organs of government, in many ways as important as the executive, the legislature, and the courts. Thus, it is necessary for the Commission to identify those principles that should be incorporated into the new constitutional order for the purpose of putting the security forces under a rule of law designed to assure *their* commitment to democracy and human rights. This paper addresses that task.

Part I sets out principles, derived from the International Bill of Human Rights and other basic international human rights instruments that Ethiopia has ratified, which can be used to develop both constitutional provisions and legislation governing the future security forces of the country, in-

cluding those of the regional and local governments. An appended suggested draft code of principles details these ideas. Principles of this kind should be incorporated into the future constitutional order. Part II focuses on the importance of this task in view of both the unhappy history of the role played by the military and the police in the governance of Ethiopia in the past and the need today to reconstitute them, *tabula rasa*. Part III suggests some strategies that the Commission might employ to address these difficult tasks.

#### I. DETERMINING THE PRINCIPLES THAT SHOULD GOVERN THE SECURITY FORCES IN A DEMOCRATIC CONSTITUTIONAL ORDER

The International Bill of Human Rights, to which Ethiopia is now committed, is more than a charter of basic rights. It is also a significant *source of constitutional principles* that helps people everywhere to define "democracy" as a system of government, to understand the symbiotic relationships between a democratic system and the realization of fundamental rights, and to appreciate the need for governmental institutions committed to the interrelated tasks.

The International Bill of Human Rights calls upon those who create constitutional orders to establish a "democratic society."<sup>30</sup> It calls for the creation of an elected representative assembly<sup>31</sup> and for governmental institutions and processes to provide for the realization of universal

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<sup>30</sup> The International Bill of Rights assumes the existence of a "democratic society." See, e.g., *Universal Declaration*, *supra* note 9, art. 29(2), which states:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare *in a democratic society*.

*Id.* (emphasis added). For analogous provisions in the Covenants, see *ICCPR*, *supra* note 10, arts. 14(1), 21, 22; *ICESCR*, *supra* note 10, art. 4; and, more recently, United Nations World Conference on Human Rights, *Vienna Declaration and Programme of Action* (June 25, 1993) pt. 1, pmb.; pt. 2, ¶¶ 5, 15, 21, in 32 INT'L LEGAL MATERIALS 1661 (1993).

<sup>31</sup> The *Universal Declaration* states:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. 2. Everyone has the right to equal access to public service in his country. 3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

*Universal Declaration*, *supra* note 9, art. 21; see also *ICCPR*, *supra* note 10, art. 25; *Women's Convention*, *supra* note 11, art. 8.

suffrage and fair and frequent elections.<sup>32</sup> It calls for the establishment of independent courts mandated and adequately empowered to protect human rights.<sup>33</sup> At a deeper level of analysis, the International Bill of Human Rights and other basic United Nations human rights Conventions that Ethiopia has ratified prescribe adherence to a body of constitutional principles, which facilitate democratic governance and which should be used to structure each organ of government in a way that obligates that organ to respect democratic practices and human rights when carrying out its particular functions. These principles also help to define a democratic system irrespective of whether the constitution creates a presidency, parliamentary, constitutional monarchy, or some other system of government. The principles call for institutions of government that will promote and protect:

1. *Respect for the sovereignty of the people*, secured, in part, by establishing the supremacy of a constitution that is derived from the exercise of rights of political participation<sup>34</sup> and self-determination,<sup>35</sup> which expresses the “will of the people,” and which provides for continuing opportunities to express that will,<sup>36</sup>

2. *Participation in governance*, secured through recognition of a wide array of political rights including freedoms of association, assembly, speech, and press; the rights to vote and participate in free electoral processes; and the right of access to responsible officials in all agencies of government in order to present grievances, demands, and proposals, or to seek information;<sup>37</sup>

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<sup>32</sup> See *supra* note 31.

<sup>33</sup> *Universal Declaration*, *supra* note 9, art. 8 (“Everyone has the right to an effective remedy by the competent national tribunal for acts violating the fundamental rights granted to him by the constitution or by law.”); *id.* art. 10 (“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charges against him.”); *id.* art. 11; *ICCPR*, *supra* note 10, arts. 2, 6(2), 9, 13, 14, 26; *Women’s Convention*, *supra* note 11, arts. 2(c), 15.

<sup>34</sup> See *supra* note 31 and accompanying text.

<sup>35</sup> *ICESCR*, *supra* note 10, art. 1(1), (3); *ICCPR*, *supra* note 10, art. 1.

<sup>36</sup> See *supra* note 31 and accompanying text; *Universal Declaration*, *supra* note 9, art. 18 (“Everyone has the right of thought, conscience and religion . . . .”); *id.* art. 19 (“Everyone has the right to freedom of opinion and expression . . . .”); *id.* art. 20 (“Everyone has the freedom of peaceful assembly and association.”).

<sup>37</sup> *Universal Declaration*, *supra* note 9, art. 19. (stating “[t]he right . . . to seek, receive and impart information”); *ICCPR*, *supra* note 10, art. 2.

3. *Representation in governance*, secured not only through the popular exercise of the right of participation, noted above, and the right to a representative legislative organ,<sup>38</sup> but also through respect for the right of groups to present their views on matters of concern to relevant agencies of government and to have these fairly heard;<sup>39</sup> and the rights of women and persons of different ethnic, cultural, or religious backgrounds to enjoy equal access to employment in all organs of government and to demand fair representation in government;<sup>40</sup>

4. *Equality of opportunity*, secured not only through bills of rights and legislation, but through *processes* that require each organ of government to hear claims challenging the legality of its actions or the actions of its personnel, and through laws that empower courts or other tribunals to impose adequate remedies when these claims are shown to be valid and unredressed by the wrongdoing agencies;<sup>41</sup>

5. *Equality of treatment to all elements of the population*, secured through respect for the right of all persons to enjoy equal access to positions of government and through appropriate actions to remove historic patterns of discrimination practiced against them;<sup>42</sup>

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<sup>38</sup> *Universal Declaration*, *supra* note 9, art. 21(3) ("The will of the people shall be the basis of the authority of government . . ."). *See supra* note 31.

<sup>39</sup> *See supra* note 33.

<sup>40</sup> *Universal Declaration*, *supra* note 9, art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction . . . such as race, color, sex, language, [or] religion. . ."); *id.* art. 7 ("All are equal before the law and are entitled without any discrimination to equal protection of the law."); *ICESCR*, *supra* note 10, art. 2(2); *ICCPR*, *supra* note 10, art. 2(1); *Women's Convention*, *supra* note 11, arts. 3, 7, 8.

<sup>41</sup> *See ICCPR* article 1(3), which states:

Each State Party to the present Covenant undertakes: (a) To insure that any person whose rights or freedoms as herein recognized are violated shall have effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority. . . .

*ICCPR*, *supra* note 10, art. 1(3).

<sup>42</sup> *See supra* note 40 and accompanying text; *Women's Convention*, *supra* note 11, art. 2(f) ("[T]ake all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."); *id.* art. 3 ("State Parties shall take . . . in the political, social, economic and cultural fields, all appropriate measures . . . to ensure full development and advancement of women. . ."); *see also id.* arts. 4-6.



6. *Transparency in the conduct of governance*, secured through the imposition of obligations to conduct lawmaking, adjudicatory, and regulatory proceedings in public; obligations to make and preserve prescribed records of official actions and to make these records readily available to the public; and obligations imposed on designated officials in all organs of government to meet with the press and public to explain decisions affecting particular citizens or groups, or the country as a whole;<sup>43</sup>

7. *Free, fair, and frequent elections*, secured through the rights of peoples to demand fair enforcement by impartial agencies of government, including the security forces, of laws designed to assure the peaceful, democratic character and integrity of all stages of the electoral process;<sup>44</sup>

8. *Imposition of accountability on all officials who violate these principles*, secured through recognition of the rights of people to demand the disciplining, removal, and imposition of criminal and civil liability on all offending officials, with appropriate powers and duties vested in the courts and other departments of government to enforce these sanctions against offending officials;<sup>45</sup>

9. *Respect for the constitution and the rule of law as a transcendent obligation imposed on all officials*, secured by requiring solemn commitments from all public officials to support the constitution and to obey the law as a condition for officeholding,<sup>46</sup> and through processes of recruitment and training, codes of conduct, and other methods that emphasize loyalty

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<sup>43</sup> See *supra* note 37, and particularly *ICCPR*, *supra* note 10, art. 25(b) (“[G]enuine periodic elections . . . shall be held by secret ballot, guaranteeing the free expression of the will of the electors.”).

<sup>44</sup> See *supra* note 31 and accompanying text.

<sup>45</sup> *ICCPR*, *supra* note 10, art. 2(3)(a) (“[E]nsure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”); *id.* art. 2(3)(c) (“[E]nsure that the competent authorities shall enforce such remedies when granted.”).

<sup>46</sup> Paragraph three of the Preamble to the *Universal Declaration* declares that “it is essential . . . that human rights[] be protected by the rule of law.” *Universal Declaration*, *supra* note 9, pmbl. ¶ 3. The *ICCPR*, article 2(2), imposes the obligation on each state “to take the necessary steps, in accordance with its constitutional processes . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” *ICCPR*, *supra* note 10, art. 2(2). The obligation to take steps to ensure protection runs through the *ICCPR* and is emphasized in the requirement of article 2(3)(b) of a legal system that provides remedies, see *supra* note 41, and “ensure[s] that the competent authorities shall enforce such remedies.” *Id.* art. 3(c).

to these principles above all other loyalties, including loyalties owed to the regime in power or to one's party, patron, or superior.<sup>47</sup>

If Ethiopia's human rights commitments are taken seriously, these principles will be reflected in the new constitutional order, notably in those bodies of law that establish the fundamental rights of peoples and in the laws that provide for the establishment, organization, governance, and accountability of each organ of government.

A key problem confronting the Commission is how to adapt and apply these prescriptions to the security forces. The first step may be to create a general framework of principles, which in turn can be used to draft the following: (i) provisions of the constitution relating to the security forces; (ii) the basic legislation, to be enacted at a later point, providing for their establishment, organization, finance, management, and oversight, and for the required standards of conduct, discipline, transparency, and accountability; and (iii) regulations promulgated by the relevant ministries to implement and adapt these legal commands to the army, police, and other law enforcement agencies. Viewed in this light, the proposed framework of principles can be seen as a projection of an important part of Ethiopia's future constitutional order.

An illustrative Draft Code of Universal Principles (Draft Code), to supply such a framework, is appended. This Draft Code is *not* intended as an idiosyncratic statement of personal preferences. Rather, provisions of existing international human rights law were the sources of the principles proposed, demonstrating that the law already calls for the action proposed. In addition to the International Bill of Human Rights, the Draft Code draws on the United Nations *Conventions on the Elimination of All Forms of Discrimination Against Women*<sup>48</sup> and the *Convention on the Elimination of All Forms of Racial Discrimination*.<sup>49</sup> Ethiopia has ratified all of these

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<sup>47</sup> The obligation to develop a civic culture that values and respects universal rights is often overlooked. Paragraph 8 of the Preamble to the *Universal Declaration* "[p]roclaims" the *Declaration* "as a common standard of achievement . . . to the end that every . . . organ of society . . . shall strive by teaching and education to promote respect for these rights." *Universal Declaration*, *supra* note 9, pmb. ¶ 8. Further, "[e]ducation shall be directed to the . . . strengthening of respect for human rights." *Id.* art. 26(2). See also *ICESCR*, *supra* note 10, art. 13(1). "Everyone is entitled to a social . . . order in which . . . [his] rights . . . can be fully realized." *Universal Declaration*, *supra* note 9, art. 28. The obligation of the state to ensure respect for universal rights surely includes an obligation to establish standards of conduct, training, and systems of accountability directed towards that objective.

<sup>48</sup> *Women's Convention*, *supra* note 11.

<sup>49</sup> G.A. Res. 2106, U.N. GAOR, 20th Sess., Supp. No. 14, at 47, U.N. Doc. A/6014 (1965).

international instruments. Important parts of the Draft Code are derived also from other international instruments, adopted unanimously by the United Nations General Assembly, that set out standards necessary for humane law enforcement, such as the United Nations *Code of Conduct for Law Enforcement Officers*.<sup>50</sup> These instruments were supported by Ethiopia in the United Nations, and in view of the Commission's mandate, they may deserve high visibility in Ethiopia's future constitutional order.

The Draft Code addresses a number of subjects, including the following:

1) *The Fundamental Mission of the Security Forces*. The security forces are created not simply to provide for "law enforcement" in the abstract, or law enforcement in blind obedience to the commands of the government of the day, but law enforcement subject to, and carried on in accordance with, the commands of the constitutional order. The overriding obligation of law enforcement is to protect and preserve that constitutional order.<sup>51</sup>

2) *Legislative Control*. The power to establish and abolish, organize, empower and limit powers, and provide for the financing and maintenance of all security forces must reside in the elected legislative branch, which must also enjoy powers of continuing oversight and review over all security forces in order to maintain its and the peoples' sovereignty over them.<sup>52</sup>

3) *Judicial Control*. The courts must be adequately empowered to hear and determine all cases alleging abuses of power by the security forces; to impose civil and criminal remedies on wrongdoers; and, when necessary, to provide other remedies requiring the correction of systematic abuses by particular units. These powers of judicial control in no way should preclude or deter the legislature and the executive from discharging their obligation to prevent and remedy systematic abuses and other faults in the governance or operation of security forces. Even so, a basic commitment to the rule of law as the means to secure democracy and rights implies that the courts or a counterpart independent tribunal must enjoy the power to protect rights when other organs fail to do so.<sup>53</sup>

4) *Executive Control*. The civilian chief executive, as well as his ministers and other delegates, should enjoy powers of command over the

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<sup>50</sup> G.A. Res. 169, U.N. GAOR, 34th Sess., Annex, U.N. Doc. A/34/169 (1979).

<sup>51</sup> See *Draft Code*, *supra* note 8, art. 1(a)(2), (3).

<sup>52</sup> See *id.* arts. II, III(b).

<sup>53</sup> See *id.* arts. III(c), IX(d).

security forces, but these powers must be exercised in accordance with the limitations imposed by the constitution and legislation governing the security forces and the decisions of the courts interpreting those laws. This concept of dependent and conditional executive control should replace the historic practice of exclusive and autonomous executive control in order to assure vindication of the democratic and human rights principles set out above.<sup>54</sup>

5) *Codes of Conduct*. The legislature should enact a fundamental law prescribing both the standards of conduct expected of every person in the various security forces and the processes of enforcing these standards. The legislation should require the relevant ministries to implement this law by promulgating detailed codes of conduct for each of the various branches. One purpose of these codes is to promote the protection of human rights in law enforcement by imposing strict discipline on those who violate or condone violations of the code. A second is to use the code as a basic element in the training and orientation of all ranks and elements, a point which may be crucial to the reorganization and reorientation of the future security forces.<sup>55</sup>

6) *Recruitment, Training, and Orientation*. These processes, as already suggested, must reflect commitments to the principles of equality of access and opportunity and to the duty to protect the constitutional order and to educate all persons with respect to its commands and the commands of the relevant codes of conduct.<sup>56</sup>

7) *Transparency*. Security forces must be required to keep—and make available to the public—prescribed records, such as records of arrests, detentions, and indeed, of all other activities which plainly affect the rights of the peoples. Designated officials must be available to the public to answer questions regarding these operations and other matters of public concern.<sup>57</sup>

8) *Liability, Criminal and Civil*. Liability must be imposed on all ranks for violations of codes of conduct or any other laws that impose duties designed to protect the rights and the security of civil society. Defenses

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<sup>54</sup> See *id.* art. III(a) (interpreted in the context of art. IX).

<sup>55</sup> See *id.* arts. IV, V(b).

<sup>56</sup> See *id.* art. V.

<sup>57</sup> See *id.* art. VII.

such as “obedience to superior orders” or “ignorance of the law” must be recognized only in regard to mitigation, not liability.<sup>58</sup>

9) *Empowering Civil Society*. The law governing the security forces should enable the press, non-governmental organizations, and other groups in civil society to monitor the governance and conduct of the security forces and to demand accountability for unlawful actions in accordance with the principles set out above.<sup>59</sup>

## II. THE IMPORTANCE OF THESE PRINCIPLES IN LIGHT OF THE ETHIOPIAN EXPERIENCE

Cynics or critics may suggest, of course, that all this is aspirational and academic—that the enactment of these laws cannot effectively change the ways of armies, police, and unscrupulous political leaders who use force to gain or maintain power. There are several answers to that charge. The need for principles is not academic. It is based on the requirements of international human rights law. It is also based on the lessons of experience: the history of military rule and past abuse of rights by the army and police in Ethiopia and many other countries; the fact that steps *must* be taken—and some have been initiated—to reorganize Ethiopia’s security forces in fundamental ways as part of the transition; the fact that this reorganization will provide a unique opportunity not only to reorient, reeducate, and retrain these forces, but to restructure and reconstitute them in legal terms; the fact that the security forces have a crucial, *positive* role to play in promoting the promised transition; and the fact that this transition will be flawed and put at risk to the extent that the security forces are left ungoverned by, and unaccountable to, the principles of a democratic order and the rule of law.

Military force surely looms large in the history of the creation, governance, and political economy of the modern Ethiopian state. At times, as is well known, the Emperor Haile Selassie depended on his armies to retain and extend his powers. One of his great achievements in modernizing the government and constitutional order was the development of a large, well-trained, professionalized military establishment, but the size of the army coupled with its autonomy from civil government and society seemed to lay the foundations for military intervention as the Emperor’s power inevitably waned.

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<sup>58</sup> See *id.* art. VIII.

<sup>59</sup> See *id.* art. X(c).

Under the constitutions of 1931 and 1955,<sup>60</sup> the Emperor commanded the armed forces and the police, and he retained exclusive executive powers to determine their size, organization, and cost; to establish the law governing their leadership and discipline; to decree emergency powers and martial law; and to deploy security forces, as he deemed necessary, to assure the integrity of the Empire. These powers were elaborated by various executive and legislative instruments promulgated over the years, though much of the detailed law governing the security forces seems obscure and unrevealed to the public. This body of law can be characterized in general terms as follows:

1. *Centralized Executive Control* exercised directly by the Emperor or by ministers and officers who, in turn, were appointed and dismissed by him;

2. *Autonomy*, in the sense that, subject to the control of the Emperor, the security forces were left free to govern themselves in accordance with their own regulations;

3. *Lack of Accountability to Civil Society*, in the sense that governance of both the police and the army were, for all effective purposes, beyond

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<sup>60</sup> The Constitution of 1931 (Ethiopia's first written constitution) is reprinted in 1 ETHIOPIAN CONSTITUTIONAL DEVELOPMENT: A SOURCEBOOK 326 (James C.N. Paul & Christopher Clapham eds., 1967), along with an unpublished commentary. *Id.* at 331. See Articles 11-13, reserving the Emperor's prerogative to command the armed forces, determine their size, and appoint and dismiss all officers. *Id.* The Revised Constitution of 1955 is reprinted in *id.* at 1. For provisions in the Constitution of 1955 that are similar to those in the 1931 Constitution, see Article 27 (The Emperor "determines the organization, powers and duties of all Ministries . . . and appoints, promotes . . . and dismisses officials of the same."); Article 29 (It is the Emperor's prerogative to declare war, "to decide what armed forces shall be maintained"[] to act as "Commander-in-Chief"[] to "organize" armed forces; to "confer military rank" on all officers; to "declare a state of siege, martial law or a national emergency"[] and to take "such measures as are necessary to meet a threat to the defense or integrity of the Empire."). See also 2 ETHIOPIAN CONSTITUTIONAL DEVELOPMENT: A SOURCEBOOK 498-505 (James C.N. Paul & Christopher Clapham eds., 1971) (commentary on these powers).

While neither constitution treats explicitly with the police, it would appear that these forces are equated with the armed forces for the purpose of determining constitutional powers to organize and control them. See Proclamation No. 6, *supra* note 26, for the "Proclamation" (actually an executive order) establishing the police. See also *A Proclamation to Provide for the Establishment and Government of a Force Styled the Imperial Army*, Proclamation No. 68, NEGARIT GAZETA, Mar. 11, 1944 (Eth.) (establishing the Imperial Army and creating military law governing army); *Imperial Territorial Army Order*, Order No. 21, NEGARIT GAZETA, Feb. 18, 1958 (Eth.) (creating the "Territorial Army" under the Ministry of Interior).

the reach of Parliament, and that these forces were also able to evade, or simply ignore, with impunity the orders of courts and enjoyed considerable *de facto* (if not *de jure*) immunity from the civil law;<sup>61</sup>

4. *The Absence of Law*, in the sense that rules requiring respect for human rights, obedience to the rule of law, and the constitution hardly figured in either the professional codes governing the security forces, or in the training and accountability of the security forces.

Experience in many countries suggests that this kind of legal structuring—the combination of the above characteristics—helps to create conditions within the security forces that lead not only to military intervention when the government of the day weakens, but to military rule—sustained military rule based on force—which can easily lead to systematic repression, and then to all the other abuses that ultimately attend rule by force of arms.

Centralized executive control, coupled with autonomy from the legislature and civil society, means that the security forces can become increasingly politicized if and when the leadership of the chief executive falters or becomes controversial and disputed. In this situation, loyalties tend to become divided; conspiracies emerge. In the face of political uncertainty, and when the army enjoys autonomy, the temptation to seize government and control its resources with little accountability becomes strong.

Legal autonomy for the security forces often breeds a sense of social autonomy and political separateness. The very fact that members of the security forces live, to some extent at least, in a distinct society of their own, isolated from the civil society they are supposed to police, creates risks of potentially hostile relationships between them and the public. These risks increase when the suppression of political discontent becomes a major internal security concern, when accountability to the public for the exercise of security powers is diminished, and when leaders of the security forces come to believe that civil society is infested with political and professional elites and others who become ideologically suspect when they appear to be hostile to the regime in power. Thus, professionals, intellectuals, students, and other particular groups, including ethnic groups, come to be seen by the security forces as potential enemies to be watched carefully, repressed by overt force, and controlled by terror, if necessary. The legitimacy of this kind of force against fellow citizens is more readily assumed by soldiers and police when their training and leaders appear to

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<sup>61</sup> See *supra* note 60.

condone it, and when the powers of civil society and the legal system to protest abuses and control the police and military are weak.<sup>62</sup>

Systematic use of force, particularly in the context of a large, pluralistic country, may breed recourse to force as the only apparent means of opposition to an authoritarian regime. Recourse to the politics of violence and civil warfare—arguably a venerable theme of Ethiopian history—became, perhaps, an inevitable response to the brutal rule of the Derg. But this kind of civil warfare perhaps has generated divisions within society which now threaten the unity of the state. The tasks of restoring not simply order, but confidence in, and support for, the new constitutional order may depend in part on the legitimacy accorded to the future security forces in the processes of transition.

The need to reconstitute the security forces has been recognized by the TGE as a task of central importance—important because, *de facto*, the TGE is itself a military regime even though it struggles to escape that contradiction by operating *de jure* under the transitional constitution, the Charter, as a civilian government.<sup>63</sup>

The army's leadership is also said to operate as an *éminence grise* in the non-transparent, ruling circles of both the ruling party, the EPDRF, and the Government. This apparent politicization of the army, whether fact or simply apparent fact, surely undermined the credibility and legitimacy of the role that it played in disarming the paramilitary units of other "liberation front" parties in earlier stages of the transition, in policing elections of the regional governments in 1992, and in the sometimes violent way it has put down other disturbances.<sup>64</sup> It could undermine the role that the army may have to play in securing the integrity of future elections.

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<sup>62</sup> On these phenomena, see, e.g., JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* 89-171 (1993); see also ROBIN LUCKHAM, *THE NIGERIAN MILITARY: A SOCIOLOGICAL ANALYSIS OF AUTHORITY & REVOLT* 161-67 (1971).

<sup>63</sup> Proclamation No. 8 of 1991 provided that "the Army of the EPDRF shall serve as the State Defense Army for the Transition Period," *A Proclamation to Provide for the Deployment of the State Defense Army of the Central Transitional Government and for the Establishment of Police Force*, Proclamation No. 8, NEGARIT GAZETA, art. 3(1), Jan. 16, 1992 (Eth.) [hereinafter Proclamation No. 8], and vested it with broad power to "bring under control any major subversion" threatening the TGE. *Id.* art. 3(2). It further provided for the establishment of regional police forces under the supervision of the TGE, which also established its own police force. Proclamation No. 9 of 1991 provided for the encampment and demobilization of the armed forces of other political organizations (e.g. the OLF). *A Proclamation to Provide for the Creation of Expeditious Conditions for the Election of National/Regional Self-Governments*, Proclamation No. 9, NEGARIT GAZETA, Jan. 27, 1992 (Eth.).

<sup>64</sup> See, e.g., Africa Watch, *Ethiopia: Waiting for Justice—Shortcomings in Establishing the Rule of Law* (May 8, 1992).



Moreover, the TGE's army is hardly a national one in demographic terms, and, obviously, the attempt to police the entire country by an army largely composed of a minority ethnic group is fraught with risks. Further, there still appears to be, at present, little law governing the control, finance, operations, and accountability of this security force to civil society.<sup>65</sup>

These concerns are reflected in a candid, thoughtful paper apparently prepared under the aegis of the Ministry of Defense for the February 1993 Bujumbura Conference, "Democratization in Africa: The Role of the Military."<sup>66</sup> The paper makes the following points: (1) in a democracy, civil society must enjoy an ultimate power to govern the army; (2) the army must be a truly national army composed of people from all regions and ethnic groups, so that all elements of the population will see it as "their" army; (3) insofar as the army engages in local, internal security operations, it should enlist the participation of affected people in concerned communities in devising appropriate strategies to protect them; (4) the army must be completely separated and disengaged from politics and political parties; (5) the army must be under the control of, and accountable to, the civil organs of government; and (6) the overriding mission of the army must be to sustain the country's constitution, and its loyalties must be rooted in that objective.<sup>67</sup>

These points take on particular force when considered in the context of the transition yet to come in Ethiopia. Obviously, the promulgation of a new constitutional order will not, by itself, produce the aspired goals. In realistic terms, a transition must be seen as a long, difficult period. Quite

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<sup>65</sup> See Tsadkan Gebre Tensae, *The Unique Experience of Army-Building in Ethiopia* 4 (Feb. 1, 1993). This paper was presented to the February 1993 Bujumbura Conference, "Democratization in Africa: The Role of the Military," by Tsadkan Gebre Tensae, Chief of Staff of the Armed Forces of Ethiopia. The Transitional Charter is silent on the organization and governance of the security forces for the TGE. While the Council of Representatives of the TGE has enacted laws calling for the encampment and demobilization of the military forces of other "liberation fronts," notably the OLF, and for the ultimate reorganization of the security forces of the TGE and its successor, this legislation is silent on the organization and governance of this future army. See Proclamation No. 8, *supra* note 63.

<sup>66</sup> Tsadkan, *supra* note 65. This paper was revised and presented as Tsadkan Gebre Tensae, "A Vision of a New Army for Ethiopia," at the InterAfrica Group's Symposium on the Making of the New Ethiopia Constitution in Addis Ababa on May 17-21, 1993.

<sup>67</sup> See Tsadkan, *supra* note 65, at 8 ("I would like to stress the point that the relationship between the constitution and the military must be defined on the basis of clear principles."). General Tsadkan's views are striking in that, as far as I know, few military leaders in Sub-Saharan Africa have been so outspoken and explicit in setting out principles governing the constitutional position of the armed forces in a country undertaking establishment of a democratic system.

possibly, the introduction of democracy and competitive politics will also introduce a time fraught with possibilities of rather unprincipled political conflict, wrongdoing by party zealots, and abuse of rights in contested elections—civil disorders that blight the prospects of democracy. The restructuring of Ethiopia's economy, even if governed by humane policies, may lead to severe hardships imposed on workers and to the risks of violence from strikes and demonstrations. The introduction of freedom coupled with severe economic hardships may create new problems of crime and banditry. The creation of ethnic federalism may generate manifestations of xenophobic ethnic politics and attempts by dissident groups to create unrest and to resort to the politics of violence in some regions. The migrations of peoples from one area to another, mostly southward, may increase as inevitable population growth and pressures on land force this event and create attendant needs for governments to find ways to adjust to it and address the obvious risks of new forms of ethnic conflict. Finally, there is, unfortunately, the inevitable risk that, at some future point, the regime of the day may subtly seek to convert the security forces into an instrument to maintain its political ascendancy.

These and perhaps other undesired scenarios must surely be anticipated in planning the reconstitution of the state, including its security forces. These challenges create the need and opportunity to develop new models for the organization and governance of the security force, creating a vision of police and soldiers better trained and disciplined to deal with foreseeable emergencies while retaining public confidence in their commitment to democracy and human rights. Indeed, if the security forces cannot preserve order through methods that are seen by the public to be fair and lawful, if they use the abusive and brutal methods of the past, they may easily contribute to the subversion of democracy by undermining popular faith in the possibilities and utility of the goals proclaimed by the constitution.

In this context, then, the need may be urgent for security forces acculturated and trained to show scrupulous respect for human rights and the rule of law while performing the difficult security tasks which may confront them. Training to respect human rights means learning new techniques in crowd control that reflect forbearance and strict limitations on the use of force, particularly excessive retaliatory force. So, too, there may be the need for recruitment policies designed to secure the effective integration of different groups into cohesive, disciplined units, including the integration of women into all ranks. It is doubtful that these and similar objectives can be realized in the absence of law mandating them. The very existence of such law empowers civil society to demand its effective implementation.

In a broader context, confidence in the possibilities of democracy can be strengthened, perhaps greatly, to the extent that there is a public belief that those entrusted with weapons and powers to use them can be held accountable to civil society through the legislature, the courts, the press, and other processes of political participation. As the TPLF's<sup>68</sup> own civil war experience in Tigray demonstrates, techniques can be devised to facilitate dialogue between the army and the communities it polices over local security concerns. So, too, there can be dialogue with the public at large over security concerns. This fundamental orientation, when clearly mandated by the law, may help to deter the efforts of power-hungry politicians to seize or exercise illegal powers, or the efforts of others to resort to the politics of violence.<sup>69</sup>

### III. STRATEGIES FOR DEVELOPING AND IMPLEMENTING THE PRINCIPLES

Obviously, it is not enough to formulate general principles concerned with the governance of security forces. The principles must be translated into specific legislative provisions, and they must be reinforced and implemented by detailed regulations. Further, this "law in the books" must be given visibility and public support; it must become known and respected. Achieving these goals is a formidable task, and it is one which, in part, must be addressed by those responsible for preparing the new constitutional order.

Several suggested strategies for realizing these goals are briefly outlined. They are directed toward:

1. *The processes employed to develop public participation in the making of the new constitutional order.* It repeatedly has been suggested that the new constitutional order must reflect a popular consensus developed through extensive public participation in its making. The principles embodied in the International Bill of Human Rights calling for "self-determination" and a legal order based on "the will of the people"<sup>70</sup> require this kind of participation. Indeed, if the new constitution is to be promulgated in the name of the people of Ethiopia, an emphasis on the processes used to create it may be just as important as the work of drafting the final product.

One way to enlist participation is to encourage full discussion of widely shared public grievances concerned with past and present modes

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<sup>68</sup> See Tsadkan, *supra* note 66.

<sup>69</sup> See *id.* at 7 (presenting strategies to "create an army which belongs to the people").

<sup>70</sup> See *supra* note 31 and accompanying text.

of governance—grievances to be redressed by the new constitutional order. The very process of addressing historic grievances may help to create a popular understanding that the new constitutional order can be seen as a resource for the people; as something that they can use to define, defend, and promote widely shared social interests; as a law empowering the people to demand protections against recurrence of the abuses of the past.

Certainly, the historic behavior and role of the security forces in governance is a subject that may provide a fertile source of popular grievances, of shared public concerns to be addressed. In the same way, discussion of new ways to organize, govern, and impose accountability on the security forces may be a matter of great interest to ordinary people. Since the Constitutional Commission is obligated to develop public discussion over its project, perhaps it should put the problems of reconstituting the security forces high on the agenda of issues to be raised in these discussions.

*2. The processes employed to reorganize, reorient, and retrain the security forces.* Over the past year in Ethiopia, there have been several conferences and seminars focussing on the need to provide “human rights education” for governmental and nongovernmental groups. Indeed, “human rights education” has become a popular international activity to be promoted by the United Nations and other agencies.

It may be doubtful, however, that “human rights education” in the abstract produces much meaningful effect on human behavior. If the purpose of this education is to change behavior and cultures in the police and the military, the education attempted must be fully integrated with the rules of conduct and the customs that actually govern the security forces, and with the systems of discipline and accountability that are employed to enforce those rules. The central purpose of this training must be to secure both respect for and obedience to commands of the law that governs them: Training and discipline—education and the creation of new values and loyalties—must all be seen as interrelated, interdependent means and ends to enforce the law.

All this underscores the importance of mandating not only codes of conduct and discipline grounded in human rights law to govern all ranks of the security forces, but mandating a system of education, training, and retraining designed to give effect to the codes. The principles prescribed by the Constitutional Commission can call for this result.

*3. Techniques that the Constitutional Commission can use to elaborate principles that will put the security forces under the Rule of Law.* The essential purpose of this paper is to urge that attention be given to the need for principles controlling the governance of the security forces to be estab-

lished in a reconstituted Ethiopian state. The details and content of these principles may be a matter for debate, but the need to address this task, as part of the process of constitution-making, seems compelling. These principles will be more intelligible, easier for people to grasp and debate, than a “long-form” document, which can easily become like a complex code requiring extended study—and considerable literacy—for comprehension.

While a “short-form” constitution may be desirable, a democratic order and the full protection of rights and the effective rule of law can only be established if the constitution is implemented, and its principles reinforced, by various bodies of legislation elaborating its different provisions. In the absence of these bodies of law, the constitutional order will be incomplete and flawed with ambiguity. So, too, the work of the Commission might itself be regarded as incomplete and flawed if it failed to elaborate the content of the constitutional order envisioned by the constitution proposed.

The Commission cannot, of course, prepare drafts of all the legislation needed to create the new constitutional order envisioned, but it can provide directions and guidance for that purpose. This guidance might take the form of a report describing the work needed to complete the constitutional order. Alternatively, guidance could be provided, and action mandated, by appending to the constitution a body of “directive principles” that call upon the future government to adopt legislation addressing subjects of major, enduring concern and that set out basic principles to be secured through that legislation.

Directive principles have been incorporated in some constitutions in a form that gives them an effect similar to a preamble. In this approach, the directive principles are cast in the form of abstract, aspirational goals of social justice to which the state is pledged. These kinds of directive principles are often treated as “soft” law in the sense that, unlike other constitutional prescriptions, they are regarded as unenforceable by the courts and often are written in such general terms that they carry an uncertain meaning, thus little legal effect.

Another way to use directive principles is to cast them in the form of specific commands to the future government to enact legislation on designated subjects that will incorporate certain principles deemed crucial to the ongoing development of the future constitutional order. In this approach, the directive principles provide an important framework for the further development of the constitutional order, a set of *imperative* directions for the ongoing evolution of essential institutions, processes, and principles of governance. Further, the courts can be empowered to use these principles for guidance in constitutional interpretation.

Directive principles of this character have the virtue of providing a proposed map depicting steps necessary to complete the transition. They

also provide a text that can be used by public leaders and activists in the ongoing processes of developing that kind of popular civic education and political participation that may be essential to sustain the transition over time.

The appended Draft Code was prepared on the assumption that the principles of the kind prescribed by it are mandated by international human rights law. Experience the world over surely suggests we should no longer tolerate unregulated police or armies as semiautonomous organs of government. Putting the army and the police under a rule of law may be a task of the highest priority to those committed to the cause of building human rights and democracy.

## APPENDIX

### DRAFT CODE OF UNIVERSAL PRINCIPLES TO GOVERN THE STRUCTURE AND ACCOUNTABILITY OF INTERNAL SECURITY FORCES OPERATING IN ALL STATES

#### *Introductory Note*

This proposed code and the annotations to it have been prepared by Elizabeth Marshall and Lori Weiner, former students of the Rutgers University Law School at Newark, under the general supervision of James Paul, William J. Brennan Professor of Law at Rutgers University.

The proposed Code sets out a body of principles to govern the legal structure of the police and all other organizations, including military units, that regularly exercise police powers to protect the internal security of a country. These principles are drawn from sources of international human rights law and are intended to reflect universal norms that should be followed in all countries committed to the establishment and maintenance of a democratic constitutional order, protection of widely recognized international human rights, and the rule of law.

The fundamental premise of the Code is that international human rights law mandates the creation of governmental organs that will promote and protect internationally recognized human rights, not subvert them, and that *all* organs of government must be legally structured so as to assure this objective insofar as possible. Since the police and other internal security forces (ISFs) are such important organs of government, exercising powers that, if abused, so obviously may lead to serious subversions of human rights, particular care must be taken in drafting constitutional and legislative provisions and subsidiary legislation—rules and regulations—that create, organize, and empower an ISF and provide for its governance and accountability to the rule of human rights law and to civil society.

The Code is hardly a novel enterprise. The *United Nations Code of Conduct for Law Enforcement Officials* was intended by the U.N. General Assembly, without dissent, to have universal applicability. That *Code of Conduct*, combined with other international human rights instruments adopted within the United Nations system, shows us how ISFs must be structured to make them accountable to the goals sought. This proposed Code is simply intended to synthesize these existing mandates.

This Code is simply a draft. The principles stated are suggestions. The purpose is to promote wider interest and debate over the need for a body

of universal principles of the character of those proposed here to be developed as an important additional body of international human rights law.

### **Article I. The Nature, Purposes, and Scope of this Code**

- a) **The Principles set out in this Code:**
- 1) are derived from existing International Human Rights law;**
  - 2) are designed to assure that all Internal Security Forces (as that term is defined below) of all states will be established in accordance with, governed by, and held accountable to rules of law that secure the protection of universally recognized human rights;**
  - 3) should be incorporated into the constitutions and/or other laws that create, organize, empower, and otherwise provide for the existence of all ISFs established by the State or by any of its subsidiary organs.**
- b) **The term Internal Security Forces (ISFs) as used in this Code refers to all police, military, intelligence gathering, custodial, and other organizations that are authorized to exercise any of the following police powers:**
- 1) arrest or detention of persons (including emergency powers of detention);**
  - 2) surveillance of persons or premises, or search for or seizure of evidence from persons or premises;**
  - 3) interrogation of people in order to secure evidence;**
  - 4) custodial functions, such as the administration of prisons or places of detention and the guarding or care of prisoners.**

### *Commentary*

ISFs are established to protect the constitutional order of the state and the rights of its people. They are *not* created to maintain the regime of the day in power or to advance its interests.

The principles enumerated herein should be incorporated into the laws relating to the establishment and governance of ISFs so as to make them accountable to the people at all times and to reinforce the obligations of all ISF personnel to protect the rule of law and human rights.

The definition of ISF organizations in this Code is purposely made broad enough to include military organizations that are regularly used to maintain internal security by exercising police powers as defined above.



### *Sources*

*United Nations Universal Declaration of Human Rights*,<sup>1</sup> art. 28.

“Law enforcement officials shall at all times fulfill the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.” *United Nations Code of Conduct for Law Enforcement Officials*,<sup>2</sup> art. 1.

“(a) The term ‘law enforcement officials’ includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention. (b) In countries where police powers are exercised by military authorities, whether uniformed or not, or by state security forces, the definition of law enforcement officials shall be regarded as including officers of such services.” *Code of Conduct for Law Enforcement Officials*, *supra* note 2, art. 1, cmts. (a), (b).

“The armed forces owe respect to the political order determined by the sovereign will of the people and all political or social changes generated by that will, in accordance with democratic procedures consistent with the Constitution.” *Peace Agreement Between the Government of El Salvador and the Frente Farabundo Martí para la Liberación Nacional*,<sup>3</sup> ch. I(1)(C).

“[The National Civil Police’s] mission shall be to protect and safeguard the free exercise of the rights and freedoms of individuals, to prevent and combat all types of crimes, and to maintain internal peace, tranquility, order and public security in both urban and rural areas.” *Peace Agreement*, *supra* note 3, ch. II(1)(A).

### **Article II. Source of Organic Legislation Establishing and Empowering ISF Organizations**

- a) Organic legislation. The law establishing and setting forth the functions and powers of every ISF organization (or expanding its functions and powers) should be:**

<sup>1</sup> G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/180 (1948) [hereinafter *Universal Declaration of Human Rights*].

<sup>2</sup> G.A. Res. 169, U.N. GAOR, 34th Sess., Annex, U.N. Doc. A/34/169 (1979); reprinted in 18 UN RESOL. 185 (Dusan J. Djonovich ed., 1985) [hereinafter *Code of Conduct for Law Enforcement Officials*].

<sup>3</sup> *The Situation in Central America: Threats to International Peace and Security and Peace Initiatives*, U.N. GAOR, 46th Sess., Annex, Agenda Item 31, at 1, U.N. Doc. A/46/864 (1992) [hereinafter *Peace Agreement*].

- 1) enacted by the representative, elected legislative organ of the Government, and never by decree promulgated by the executive organ without the advice and consent of the legislative body;
  - 2) the product of political participation, including processes enabling transparency and public debate;
  - 3) consonant with the principles of universal human rights law and the provisions of this Code.
- b) **Subsidiary legislation.** Rules, regulations, and all other subsidiary legislation promulgated by the Executive Branch (or by the Chief Officer of an ISF) pertaining to the organization, empowerment, governance, and monitoring of an ISF should be:
- 1) published in the official government journal that records legislation;
  - 2) made subject to legislative review; and
  - 3) clearly consistent with the ISF's organic legislation and with this Code.

### *Commentary*

In order to achieve the goals of this Code, it is important to establish and enforce a complete legal structure for each ISF that is consistent with the principles of this Code. It is important that the laws empowering ISFs incorporate the existing provisions of human rights law regarding surveillance, search, arrest, detention, imprisonment, the use of force, and other rights limiting the exercise of police powers. Often, the organic laws that create and govern ISFs are not the product of participation and debate. Requiring these laws to be enacted through an open democratic process will help to eliminate the granting of broad and ambiguous powers and will give a government and civil society committed to human rights a greater ability to control ISFs. The legislative review process should include public hearings so as to enhance the ability to revise rules governing an ISF, when appropriate in light of experience.

### *Sources*

“Everyone is entitled to a social . . . order in which the rights and freedoms set forth in this Declaration can be fully realized.” *Universal Declaration of Human Rights*, *supra* note 1, art. 28.

“(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. . . . (3) The will of the people shall be the basis of the authority of the government.” *Id.* art. 21. Similar provisions appear in the *International Covenant on Civil*

and Political Rights,<sup>4</sup> art. 25(a); *African Charter on Human and Peoples' Rights*,<sup>5</sup> art. 13; *American Convention on Human Rights*,<sup>6</sup> art. 23.

“[E]ach State Party . . . undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” *International Covenant on Civil and Political Rights*, *supra* note 4, art. 2(2). Similar provisions appear in *American Convention on Human Rights*, *supra* note 6, art. 2; *African Charter for Human and Peoples' Rights*, *supra* note 5, art. 1.

“(b) . . . [T]he effective maintenance of ethical standards among law enforcement officials depends on the existence of a well-conceived, popularly accepted and humane system of laws . . . .” *Code of Conduct for Law Enforcement Officials*, *supra* note 2, pmb1.

### Article III. Principles Governing Control of ISFs by the Basic Organs of Government

- a) **Executive Control.** Ultimate executive authority over all ISF organizations should be vested in a civil officer who is immediately accountable to the head of government. This civilian officer should have the power to appoint, remove, and order the discipline of all officials of whatever rank within ISF organizations, and such powers should be subject to the oversight of the executive head of government, so that he or she can be held accountable for systematic failures to comply with the Code.
- b) **Legislative Control.** The elected representative legislative body should be vested with power to:
  - 1) determine the size, functions, powers, and organization of all ISFs;
  - 2) enact a budget and appropriate funds for their equipment and operations;
  - 3) exercise financial oversight over their activities;
  - 4) investigate their activities in order to determine whether they are operating in accordance with the principles set out in this Code.

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<sup>4</sup> G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), reprinted in 6 INT'L LEGAL MATERIALS 368 (1967).

<sup>5</sup> O.A.U. Doc. CAB/LEG/67/3/Rev.5 (1981), reprinted in 21 INT'L LEGAL MATERIALS 58 (1982).

<sup>6</sup> O.A.S. Off. Rec. OER/Ser. L/V/II.23/Doc. 21/Rev. 6 (1979).

- c) **Judicial Control.** Courts should be vested with all judicial powers necessary to assure that all principals set out in this Code are followed.

### *Commentary*

Each branch of government should have powers of oversight and control over ISF organizations consistent with its essential constitutional role. By establishing a clear chain of command over ISFs, their operations will be less able to avoid accountability for wrongdoing. Continuing legislative oversight is necessary and appropriate because the legislature represents the voice of the people, who provide both the funds and authority for all organs of government in a democratic state committed to the protection of human rights. Thus, the ISFs remain responsive to the people they are supposed to protect.

### *Sources*

“States . . . should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well as promoting policies and mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts.” *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*,<sup>7</sup> art. 21.

“(a) . . . [E]very law enforcement agency should be representative of and responsive and accountable to the community as a whole . . . . (d) . . . [T]he actions of law enforcement officials should be responsive to public scrutiny . . . .” *Code of Conduct for Law Enforcement Officials*, *supra* note 2, pmbl.

## **Article IV. Enactment of a Code of Conduct as Part of the Law Governing All ISFs**

- a) **The legislative body should enact a Code of Conduct governing the internal operations of all ISF organizations and prescribing the conduct of each individual ISF member.**
- 1) **The obligations and restrictions set forth in the Code of Conduct should be clear and specific, so that all ISF personnel are aware of the limits on their power.**

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<sup>7</sup> G.A. Res. 40/34, U.N. GAOR, 40th Sess., Supp. No. 53, at 213, U.N. Doc. A/40/53 (1985), reprinted in 24 UN RESOL. 419 (Dusan J. Djonovich ed., 1988).

- 2) **The Code of Conduct should incorporate all relevant human rights standards and impose clear duties to assure adherence to these standards and protection of the rights prescribed.**
- 3) **The Code of Conduct should provide for internal discipline and punishment of violators of those rights.**
  - A) **Internal sanctions imposed under the Code of Conduct should reflect the gravity of the offense and should be publicized both within and without the ISF organization, so as to maximize the deterrent effect.**
  - B) **Such sanctions should never preclude civil or criminal liability in the courts, when necessary in order to vindicate and redress the rights of persons injured by violations of the Code.**
- 4) **No ISF official should be disciplined, either officially or unofficially, for refusing to follow an order that he or she reasonably believes would lead to a violation of the Code of Conduct or to a violation of human rights protected by the laws of the land.**
- b) **Members of ISFs should have a duty under the Code of Conduct to report violations of the Code or violations of any other law applicable to the ISF, to superior officers and, if necessary, to responsible civil officers of the government and to persons charged with ISF oversight.**
  - 1) **Failure to report known violations should be grounds for punishment under the Code of Conduct.**
  - 2) **The duty to report should transcend all other obligations grounded in loyalty and discipline.**
  - 3) **No ISF official should be disciplined, either officially or unofficially, for good faith attempts to discharge the duties imposed by this Article and the Code of Conduct.**
- c) **The civil officer with ultimate authority over an ISF should take appropriate steps to assure that the Code of Conduct will be understood and strictly enforced at all levels within the organization.**

### *Commentary*

Without a Code of Conduct governing the internal operations of ISF organizations, ISF members are left unrestrained and unguided in their enforcement of the laws. A Code of Conduct that sets forth the steps necessary to enforce rules that recognize, protect, and reinforce basic human rights and that explains the consequences for violations of these rights is necessary to provide guidance for all ISF personnel. The Code of

Conduct governing ISF members should incorporate all relevant human rights law regarding surveillance, search, arrest, detention, imprisonment, the use of force, and other rights limiting the exercise of police powers.

The requirement of reporting human rights violations emphasizes the overriding importance of protecting human rights as a paramount duty of all law enforcement officials. It must be recognized that the observance of basic human rights and the maintenance of the rule of law transcends norms commanding loyalty to the ISF. In furtherance of this, an official who reports such violations by fellow officials cannot be punished for doing so, whether by losing his job; not being promoted; being assigned only to less desirable, menial duties; or in any other way designed to penalize him or her.

### *Sources*

“[E]very law enforcement agency, in fulfillment of the first premise of every profession, should be held to the duty of disciplining itself in complete conformity with the principles and standards herein provided.” *Code of Conduct for Law Enforcement Officials*, *supra* note 2, pmbl., cmt. (d):

“Law enforcement officials shall respect the law and the present Code. They shall also to the best of their capability, prevent and rigorously oppose any violations of them. Law enforcement officials who have reason to believe that a violation of the present Code has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.” *Id.* art. 8.

“Governments shall prohibit orders from superior officers or public authorities authorizing or inciting other people to carry out any such extra-legal, arbitrary or summary executions. All persons shall have the right and the duty to defy such orders. Training of law enforcement officers shall emphasize the above provisions.” *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*,<sup>8</sup> art. 3.

## **Article V. Recruitment and Training**

### **a) Recruitment. The law governing each ISF should provide:**

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<sup>8</sup> E.S.C. Res. 1989/65, U.N. ESCOR, 1st Sess., Supp. No. 1, at 52, U.N. Doc. E/1989/89 (1989) (endorsed by the General Assembly Dec. 15, 1989).

- 1) that no person be barred from serving or advancing in any ISF organization because of race, ethnicity, color, sex, religion, or other status;
  - 2) that procedures be initiated to encourage the equitable representation of all racial, ethnic, and cultural groups at every level of the ISF organization; and
  - 3) that the full participation of women and their equal opportunity to be promoted to all ranks be ensured.
- b) Training. The law governing each ISF should provide:
- 1) that education and sensitization regarding human rights, and the obligation of ISF personnel to respect those rights, be fully incorporated into all relevant aspects of basic training;
  - 2) that additional training on the human rights obligations of ISF officials be repeated and emphasized throughout an ISF member's period of service.

### *Commentary*

ISF memberships often consist primarily, or solely, of male members of a majority (or a particular) ethnic, racial, or cultural group. This fact often tends to reinforce prejudices between ISFs and other groups and increases the risk of discrimination in the enforcement of laws against minorities and women. ISF organizations should strive for equality among the different groups and genders. By recruiting members from varying backgrounds, the ISF forces not only become ethnically mixed, but their members should become more sensitive to the need to respect cultural, linguistic, religious, and gender differences. This should result in more equal enforcement of the laws and diminish abuses against minority groups and women.

Proper training should also serve to sensitize members to the need to respect all citizens and to reinforce human rights obligations under existing international law.

### *Sources*

"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." *Universal Declaration of Human Rights*, *supra* note 1, art. 21(2).

"Every citizen shall have the right and the opportunity . . . [t]o have access, on general terms of equality, to public service in his country." *International Covenant on Civil and Political Rights*, *supra* note 4, art.

25(c). A similar provision appears in *American Convention on Human Rights*, *supra* note 5, art. 23(1)(c).

“Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.” *International Convention on the Elimination of All Forms of Racial Discrimination*,<sup>9</sup> art. 2(1)(a).

“State Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure, on equal terms with men, the right[] . . . [t]o participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government.” *Convention on the Elimination of All Forms of Discrimination Against Women*,<sup>10</sup> art. 7(b).

“Each State Party shall ensure that education and information regarding prohibition against torture are fully included in the training of law enforcement personnel, civil or military . . . and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.” *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,<sup>11</sup> art. 10(1).

“(e) . . . [S]tandards as such lack practical value unless their content and meaning, through education and training and through monitoring, become part of the creed for every law enforcement official.” *Code of Conduct for Law Enforcement Officials*, *supra* note 2, pmbl.

“Police . . . and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.” *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, *supra* note 7, art. 16.

## Article VI. Prohibition of Extra-Legal Security Forces

**None of the police powers defined in Article I(b), should be performed by any individual who is not a member of an authorized ISF organization.**

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<sup>9</sup> G.A. Res. 2106, U.N. GAOR, 20th Sess., Supp. No. 14, at 47, U.N. Doc. A/6014 (1965).

<sup>10</sup> G.A. Res. 34/180 (XXXIV), 34 U.N. GAOR, Supp. No. 46, at 194, U.N. Doc. A/34/830 (1979), *reprinted in* 19 INT'L LEGAL MATERIALS 33 (1980) (adopted at New York, Dec. 18, 1979).

<sup>11</sup> G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), *reprinted in* 23 INT'L LEGAL MATERIALS 1027 (1984).



- 1) **Exercise of police powers by persons other than members of an ISF organization, created in accordance with this Code, should be a criminal offense under State law.**
- 2) **No ISF official should be permitted to request that another person, other than a member of an ISF, perform the functions defined in Article I(b). The making of such a request should be a crime under State law, as well as grounds for internal discipline.**
- 3) **No ISF official should be permitted to perform functions while off-duty that he or she would be prohibited from performing while on-duty.**

### *Commentary*

Currently there is a problem in many countries concerning “unofficial” security forces that operate outside the existing laws of the country. Sometimes ISF officials are members of, or associated with, these extra-legal groups; sometimes they condone and cooperate with them. Officials must understand that the obligations to which they are bound while working as an officer bind them when they are off duty. Any officer caught cooperating in any way with an extra-legal security organization or encouraging its activities should be punished.

### **Article VII. Duty to Keep and Release Records**

- a) **Laws governing ISFs should:**
  - 1) **mandate the keeping of complete records regarding all arrests, detentions, interrogations, and other security activities directly affecting the rights of particular persons;**
  - 2) **require records on the internal standing orders of the ISF;**
  - 3) **provide for public access to these records; and**
  - 4) **provide for sanctions against responsible ISF officials for failure to comply with these provisions.**
- b) **Privileges protecting ISF records from public access or disclosure should not be allowed:**
  - 1) **to protect records concerning the arrest, detention, or surveillance of any person under any circumstances;**
  - 2) **to protect records concerning the internal operations and policies of ISF organizations unless there is a bona fide concern for national security or for the safety or protection of the basic rights of a third party.**
- c) **The Courts should be adequately empowered to secure enforcement of this Article.**

### Commentary

Security forces often are allowed to operate behind a veil of secrecy. This protection, often enabling concealment of wrongdoing, must be removed, and ISF organizations must be made to operate more transparently. Rules requiring certain record-keeping will assist concerned people and relevant government officials to maintain proper oversight and keep ISFs accountable. Privileges allowing the withholding of certain records from the public should be few and should be only allowed where clearly necessary to protect national security or the basic rights of persons. All limitations to public access to these records should be narrowly construed.

### Sources

“1. There shall be duly recorded: (a) The reasons for the arrest; (b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority; (c) The identity of the law enforcement officials concerned; (d) Precise information concerning the place of custody. 2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.” *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*,<sup>12</sup> princ. 12.

“1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law. 2. A detained or imprisoned person, or his counsel when provided by law, shall have access to [this] information.” *Id.* princ. 23.

“(1) In every place where persons are imprisoned there shall be kept a bound registration book with numbered pages in which shall be entered in respect of each prisoner received: (a) Information concerning his identity; (b) the reasons for his commitment and the authority therefor; (c) The day and hour of his admission and release. (2) No person shall be received in an institution without a valid commitment order of which the details shall have been previously entered in the register.” *Standard Minimum Rules for the Treatment of Prisoners*,<sup>13</sup> rule 7.

“Governments shall ensure that persons deprived of their liberty are held in officially recognized places of custody, and that accurate in-

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<sup>12</sup> G.A. Res. 43/173, U.N. GAOR, 43d Sess., Supp. No. 49, at 297, U.N. Doc. A/43/49 (1988).

<sup>13</sup> E.S.C. Res. 663 (XXIV) C, 24 U.N. ESCOR, Supp. No. 1, at 11, U.N. Doc. E/3048 (1957).

formation on their custody and whereabouts, including transfers, is made promptly available to their relatives and lawyer or other persons of confidence.” *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, *supra* note 8, princ. 6.

### **Article VIII. Liability of Officials for Violation of Rights**

- a) **The penal laws of a country should contain explicit provisions criminalizing the clear violation of the basic human rights of citizens by ISF officials acting under color of law.**
  - 1) **Punishments imposed by a court or other tribunal should reflect the gravity and depravity of the offense committed, the complicity of the perpetrator, the role and culpability of the perpetrator for the crime or crimes committed, and the need to deter such conduct.**
  - 2) **Defenses such as “superior order” should not be allowed.**
  - 3) **Mitigation of sanctions can only come after determination of guilt, and then only in accordance with criteria that reflect the gravity of the human rights violations.**
  - 4) **Amnesty or impunity should not be granted for violations committed under predecessor governments.**
  - 5) **Once the guilt of an offender has been admitted or established, the tribunal trying him or her (or the Executive Official with power to commute punishments) may, after a proper and full apology and a commitment regarding the offender’s future conduct, suspend any punishment when it is determined that this course is in the public interest and will not subvert the basic purposes of this Article or allow a grave violation of human rights to go unpunished.**
- b) **The civil laws of a country should provide adequate remedies, including the award of compensatory and punitive damages, for victims or families of victims of human rights violations by ISF officials.**
- c) **The award of a civil remedy should never preclude the possibility of criminal liability, and the imposition of criminal sanctions should never preclude the availability of a civil remedy.**

### *Commentary*

One of the most important ways to ensure that human rights are protected is accountability. ISF officials can only be held accountable if a variety of civil and criminal penalties face them if they are found to violate this Code or citizens’ rights. Without a method of enforcement,

including adequate punishment for the wrongdoer, the gravity of the violations is lost on the ISF officials, both the wrongdoer and his or her colleagues. Proper remedies must exist to serve as a deterrent factor for other ISF officials. Full enforcement of human rights law is only possible where a meaningful remedy is available to the victims of such violations. These remedies, either criminal or civil in nature, must be available against any and every violator of human rights or the fundamental rule of law.

Further, ISF officials should be held accountable for their own actions and be unable to blame their misbehavior on a higher, possibly unknown, officer by claiming "superior order."

### *Sources*

*Criminal liability*: "Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture." *Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 11, art. 4(1).

"The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." *Convention on the Prevention and Punishment of the Crime of Genocide*,<sup>14</sup> art. 1.

"International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State, [committing, participating in, directly inciting, conspiring, abetting, encouraging, or co-operating in the crime of apartheid]." *International Convention on the Suppression and Punishment of the Crime of "Apartheid,"*<sup>15</sup> art. III.

"Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences." *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, *supra* note 8, princ. 1.

*No immunity*: "Each State Party to the present Convention undertakes . . . [t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding

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<sup>14</sup> G.A. Res. 260, U.N. GAOR, 3d Sess., pt. 1, Annex, at 174, U.N. Doc. A/810 (1948) (adopted at New York, Dec. 9, 1948).

<sup>15</sup> G.A. Res. 3068 (XXVIII), 28 U.N. GAOR, Supp. No. 30, at 75, U.N. Doc. A/9030 (1974).

that the violation has been committed by persons acting in an official capacity.” *International Covenant on Civil and Political Rights*, *supra* note 4, art. 2(3)(a).

“Persons committing genocide or any of the other acts enumerated . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.” *Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 14, art. IV.

“The law must be enforced fully with respect to any law enforcement official who commits an act of corruption, as Governments cannot expect to enforce the law among their citizens if they cannot, or will not, enforce the law against their own agents . . . .” *Code of Conduct for Law Enforcement Officials*, *supra* note 2, art. 7, cmt. (a).

“The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.” *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, *supra* note 12, princ. 9.

“Superiors, officers or other public officials may be responsible for acts committed by officials under their authority if they had a reasonable opportunity to prevent such acts. In no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions.” *Principles of the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, *supra* note 8, princ. 19.

*No Defenses*: “[N]or may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.” *Code of Conduct for Law Enforcement Officials*, *supra* note 2, art. 5.

“(2) No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. (3) An order from a superior officer or a public authority may not be invoked as a justification of torture.” *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 11, art. 2(2), (3).

“Governments shall prohibit orders from superior officers or public authorities authorizing or inciting other persons to carry out any such extra-legal, arbitrary or summary executions. All persons shall have the right and the duty to defy such orders. Training of law enforcement

officers shall emphasize the above provisions.” *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, *supra* note 8, princ. 3.

*Civil liability*: “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.” *International Covenant on Civil and Political Rights*, *supra* note 4, art. 9(5).

“Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims.” *Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power*, *supra* note 7, princ. 11.

“Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules on liability provided by domestic law.” *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, *supra* note 12, princ. 35(1).

“Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.” *Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 11, art. 14(1).

“The families and dependents of victims of extra-legal, arbitrary or summary executions shall be entitled to fair and adequate compensation within a reasonable period of time.” *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, *supra* note 8, princ. 20.

#### **Article IX. Principles Governing the Monitoring and Maintenance of the Continuing Accountability of All ISFs by the Legislative, Executive and Judicial Branches**

- a) **The Legislature. Legislative oversight for regular ISF operations should be established and continuously maintained. This oversight should include powers to compel the production of records and the giving of testimony before the legislative body or its committees. The law should narrowly define and delimit privileges to withhold evidence from the legislature.**

- b) **The Executive.** The law should require the executive responsible for ISF's duties of oversight and powers to take all appropriate steps necessary to enforce these Principles. The executive responsible for ISFs should be under a legal obligation to maintain a close watch over daily operations.
- c) **The Attorney or Procurator General.** The attorney or procurator general should be vested with duties and powers to investigate and enforce criminal sanctions for violations of this Code and all other legislation pertaining to ISFs. This office must be empowered to maintain independence and objectivity in the enforcement of its duty.
- d) **The Courts.** Courts should be vested not only with the usual powers to hear cases and provide remedies, but with additional powers to assure adherence to the principles of this Code. These powers should include the power to appoint commissions to investigate allegations of systematic abuse and other serious conditions and practices. Courts should be able to frame appropriate remedial and equitable orders, when appropriate; to prevent ongoing abuses; and to compel individuals to comply with these remedial measures.
- e) **Internal Ombudsman.** An ombudsman or other independent official and office should be created within each ISF. This office should maintain independence from external forces. It should serve as a liaison between individual officials and their supervisors, other branches of government, or the public and should be available to receive reports of misconduct regarding ISF officials or superiors officers and to investigate such allegations.

### *Commentary*

All branches of government should be involved in maintaining daily oversight of ISF activities. This system of continuing checks and balances prevents one branch from taking over the ISF organizations and defeating the democratic objectives of the people. Ensuring accountability on all levels will serve to keep the ISFs in line.

The independence of supervising offices is vital to insure objective investigation of complaints and abuses. The ombudsman, while serving as an independent officer, also serves to allow access to ISF organizations. Designating a single individual to speak on behalf of the ISF will eliminate one aspect of the accountability problem—the fact that no one ever is available to speak about complaints.

### *Sources*

“States should periodically review existing legislation practices to ensure their responsiveness to changing circumstances, should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well as promoting policies and mechanisms for the prevention of such acts and should develop and make readily available appropriate rights and remedies for victims of such acts.” *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, *supra* note 7, art. 21.

“[P]laces of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.” *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, *supra* note 12, princ. 29. A similar provision appear in *Standard Minimum Rules for the Treatment of Prisoners*, *supra* note 13, rule 55.

“Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.” *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 11, art. 11.

“In order to prevent extra-legal, arbitrary and summary executions, Governments shall ensure strict control, including a clear chain of command over all officials responsible for apprehension, arrest, detention, custody and imprisonment, as well as those officials authorized by law to use force and firearms.” *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, *supra* note 8, princ. 2.

“Qualified inspectors, including medical personnel, or an equivalent independent authority, shall conduct inspections in places of custody on a regular basis, and be empowered to undertake unannounced inspections on their own initiative, with full guarantees of independence in the exercise of this function. The inspectors shall have unrestricted access to all persons in such places of custody, as well as to all their records.” *Id.* princ. 7.

“[States undertake t]o adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish . . . persons responsible for, or accused of, the acts defined . . . .” *International Convention on the Suppression and Punishment of the Crime of “Apartheid,” supra* note 15, art. IV(b).



“[T]he actions of law enforcement officials should be responsive to public scrutiny, whether exercised by a review board, a ministry, a procuracy, the judiciary, an ombudsman, a citizens’ committee or any combination thereof, or any other reviewing agency.” *Code of Conduct for Law Enforcement Officials*, *supra* note 2, pmb1.

“There shall be a thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions . . . Governments shall maintain investigative offices and procedures to undertake such inquiries.” *Principles on the Effective Prevention and Investigation on Extra-Legal, Arbitrary and Summary Executions*, *supra* note 8, princ. 9.

“[States undertake t]o ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, . . . and to develop the possibilities of judicial remedy.” *International Covenant on Civil and Political Rights*, *supra* note 4, art. 2(3)(b).

“Everyone has the right to an effective remedy by the competent tribunals for acts violating the fundamental rights guaranteed him by the constitution or law.” *Universal Declaration of Human Rights*, *supra* note 1, art. 8.

“Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.” *Body of Principles for the Protection of Persons Under Any Form of Detention or Imprisonment*, *supra* note 12, princ. 4.

“Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case.” *Id.* princ. 34.

“Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible.” *Declaration of Basic Principles for Victims of Crime and Abuse of Power*, *supra* note 7, princ. 5.

“Every person may resort to the courts to ensure respect for his legal rights.” *American Declaration of the Rights and Duties of Man*,<sup>16</sup> art. 18.

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<sup>16</sup> O.A.S. Off. Rec. OER/Ser.L/V/II.23/Doc.21/Rev.6 (1979), *reprinted in* INTERNATIONAL HUMAN RIGHTS INSTRUMENTS: A COMPILATION OF TREATIES, AGREEMENTS AND DECLARATIONS OF ESPECIAL INTEREST TO THE UNITED STATES 430.1 (Richard B. Lillich ed., 1990).

“Governments shall make every effort to prevent extra-legal, arbitrary and summary executions through measures such as diplomatic intercession, improved access of complainants to intergovernmental and judicial bodies, and public denunciation.” *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, *supra* note 8, princ. 8.

#### **Article X. Principles Governing the Monitoring and Maintenance of the Continuing Accountability by Press and the Public**

- a) **The Press.** The role of the press in monitoring ISF violations should be protected and encouraged, and standards and processes should be established to enable any member of the public to secure access to official records, detainees, and responsible officials.
  - 1) The law should establish a press privilege to protect informants.
  - 2) The office created under Article IX(e), should serve as liaison to the public and the press, who is available and knowledgeable to answer questions which may arise.
- b) **Independent Tribunals.** Human rights commissions or ombudsman agencies should be created and adequately empowered to monitor ISFs, investigate abuses, expose wrongdoing, refer cases for prosecution, and propose legal and administrative reforms that may enhance the accountability system. These commissions and its members should be separate and independent of all other branches of the government.
- c) **Public Participation and the Role of Citizen Organizations.** The law should protect and encourage the rights and power of citizens to form organizations to monitor ISFs; to publicize citizens' rights and ISF abuses of those rights; to represent victims of abuses before any investigative body; to bring class, as well as individual, actions before the courts to prevent or secure remedies for abuses; and to publicize grievances concerning the conduct of ISF personnel or of the organization as a whole.

#### ***Commentary***

Currently, citizens have virtually no input into how ISFs are created and governed. ISFs thus operate without fear of public opposition or any public control. They become insulated from the very people they are designed to protect. The establishment of public powers over ISFs are therefore central to long term efforts to control ISFs. In a rights-sensitive political system, citizen groups, peoples organizations, and the press are

integral components of the political system and constitutional order. Educating the public in human rights is perhaps the most effective tool in promoting observance of those rights. Together with a government that is accountable to the people, the public can work to develop principles and guidelines and effect changes for the internal operations of ISFs.

### *Sources*

“In some countries, the mass media may be regarded as performing complaint review functions . . . .” *Code of Conduct for Law Enforcement Officials*, *supra* note 2, art. 8, cmt. (d).

“An African Commission on Human and Peoples’ Rights . . . shall be established within the Organization of African Unity to promote human and peoples’ rights and ensure their protection in Africa.” *The African Charter on Human and Peoples’ Rights*, *supra* note 5, art. 30; *see also id.* arts. 45, 46.

“In cases in which the established investigative procedures are inadequate because of lack of expertise or impartiality, because of the importance of the matter or because of the apparent existence of a pattern of abuse, and in cases where there are complaints from the family of the victim about these inadequacies or other substantial reasons, Governments shall pursue investigations through an independent commission of inquiry or similar procedure. Members of such a commission shall be chosen for their recognized impartiality, competence and independence as individuals. In particular, they shall be independent of any institution, agency or person that may be the subject of the inquiry.” *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, *supra* note 8, princ. 11.

“(a) . . . [E]very law enforcement agency should be representative of and responsive and accountable to the community as a whole . . . . (d) . . . [T]he actions of law enforcement officials should be responsive to public scrutiny, whether exercised by . . . a citizens’ committee . . . or any other reviewing agency.” *Code of Conduct for Law Enforcement Officials*, *supra* note 2, pmbl.