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

Introductory Statement

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, who is the William J. Brennan Professor of Law at Rutgers University). It was first printed in *Third World Legal Studies 1990*, and is reprinted here because of its relevance to this issue's topic.

The proposed Code sets out a body of principles to govern the legal structure of the police and all other organizations (including military units) which 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 which 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 principles set out here are derived from existing sources of international human rights law. All of the principles are followed by citations from these sources. Some of these sources support the principles directly, others, by clear implication.

The fundamental premise of the Code is that international human rights law mandates the creation of governmental organs which 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 ISFs are such important organs of government, exercising powers which, if abused, can so obviously lead to serious subversions of human rights, particular care must be taken in the drafting of constitutional and legislative provisions and the subsidiary legislation (rules and regulations) which creates, organizes and

empowers an ISF and provides for its governance and accountability to the rule of human rights law and to civil society.

Accordingly, the Code rests on the theory that international human rights law *mandates* articulation and observance of principles of the kind formulated here. Hence this is a draft Code of *universal* principles, to be recognized and followed by all states. This is hardly a novel enterprise. There already exists a United Nations Code of Conduct for Law Enforcement Officials which 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.

Experience in nearly all countries surely indicates that this enterprise is important. Given international recognition, a code of Principles along the lines proposed here could provide an important legal resource to groups and people, in many parts of the world, who are now struggling to reconstitute their states in order to secure protection of human rights and democratic processes and, in that context, to reconstitute the police and the military in ways which will make them responsive and responsible to these goals.

This Code is simply a draft. The principles stated are suggestive. 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 which secure the protection of universally recognized human rights;

3) should be incorporated into the constitutions and/or other laws which 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 which 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 which are regularly used to maintain internal security by exercising police powers as defined above.

Sources

Universal Declaration of Human Rights, Art. 28.

“Law enforcement officials shall at all times fulfill the duty imposed upon them by law, by serving the community 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*, Art. 1.¹

“(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*, Art. 1, Commentary.

“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 Marti para la Liberacion Nacional*, Ch. I(1)(C).²

“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*, 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:

- 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;

¹ G.A. Res. 169, U.N. GAOR, 34th Sess., Annex, (Dec. 17, 1979; reprinted in 18 UNITED NATIONS RESOLUTIONS 1979-80 (Djonovich ed. 1985).

² Signed Jan. 16, 1992. U.N. Doc. A/46/864 S/23501/Annex (Jan. 30, 1992).

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 and should be:

- 1) published in the official government journal which records legislation;
- 2) made subject to legislative review;
- 3) clearly consistent with the ISF's organic legislation and with this Code.

Commentary

It is important, in order to achieve the goals of this Code, to establish and enforce a complete legal structure for each ISF which 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 which create and govern ISFs are not the product of participation and debate. Requiring these laws to be enacted through 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, where 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*, Art. 28.³

(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

³G.A. Res. 217 A, U.N. GAOR, 3rd Sess., at 71 (adopted Dec. 10, 1948), U.N. Doc. A/810 (1948).

government.” *Id.*, Art. 21. [Similar provisions appear in: *International Covenant on Civil and Political Rights*,⁴ Art. 25(a); *African Charter on Human and Peoples’ Rights*,⁵ Art. 13; *American Convention on Human Rights*.⁶]

“[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*, Art. 2(2). [Similar provisions appear at: *American Convention on Human Rights*, Art. 2; *African Charter for Human and Peoples’ Rights*, Art. 1.]

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

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;

⁴ G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967); reprinted in 6 I.L.M. 368 (1967).

⁵ Adopted at Banjul, June 26, 1981. Entered into force, Oct. 21, 1986. O.A.U. Doc. CAB/LEG/67/3 Rev. 5; reprinted in 21 I.L.M. 59 (1982).

⁶ Signed Nov. 22, 1969. Entered into force, July 18, 1978. O.A.S. Treaty Ser. No. 36, O.A.S. Off. Rec. OEA/Ser. L/V/II.23 doc. 21 rev. 6 (1969).

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.

C) **Judicial Control:** Courts should be vested with all judicial powers necessary to assure that all principles 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*, Art.21.⁷

“(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*, Preamble.

⁷ G.A. Res. 34, U.N. GAOR, 40th Sess., Annex (Nov. 29, 1985); reprinted in 18 UNITED NATIONS RESOLUTIONS 1985-86 (Djonovich ed. 1988).

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.

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, where 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 which 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 which sets forth the steps necessary to enforce rules which recognize, protect and reinforce basic human rights, and which 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, Preamble, Comment (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.*, at 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*, Art. 3.⁸

Article V. Recruitment and Training

A) Recruitment: The law governing each ISF should provide:

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;

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 and cultural

⁸ G.A. Res. 159 and G.A. Res. 162, U.N. GAOR, 44th Sess. (Dec. 15, 1989).

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 opinions, national or social origins, property, birth or other status.” *Universal Declaration of Human Rights*, 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*, Art. 25(c). [Similar provisions appear at: *American Convention on Human Rights*, Art. 23(1)(c); *Declaration on the Elimination of All Forms of Racial Discrimination*, Art. 6]

“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*, Art. 2(1)(a).⁹

“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 implementation thereof and to hold public office and perform all

⁹ Adopted at New York, Mar. 7, 1966; entered into force, Jan. 4, 1969. 660 U.N.T.S. 195; reprinted in 5 I.L.M. 352 (1966).

public functions at all levels of government.” *Convention on the Elimination of All Forms of Discrimination Against Women*, Art. 7(b).¹⁰

“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*, Art. 10(1).¹¹

“[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*, Preamble.

“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*, Art. 16.¹²

Article VI. Prohibition of Extra-Legal Security Forces

A) 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.

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 another person, other than a member of an ISF, to 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.

¹⁰ G.A. Res. 180, U.N. GAOR, 34th Sess., Supp. No. 46, at 194, U.N. Doc. A/34/830 (1979); reprinted in 19 I.L.M. 33 (1980).

¹¹ G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51, Annex, at 197, U.N. Doc. E/CN.4/1984/72/Annex (Dec. 10, 1984); reprinted in 23 I.L.M. 1027 (1984).

¹² G.A. Res. 34, U.N. GAOR, 40th Sess., Annex (Nov. 29, 1985); reprinted in UNITED NATIONS RESOLUTIONS, *supra* note 7, at 419.

3) No ISF official should be permitted to perform functions while off-duty which he or she would be prohibited from performing while on-duty.

Commentary

Currently there is a problem in many countries concerning "unofficial" security forces, which 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;
- 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 are often 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 maintain proper oversight and keep ISFs accountable. Privileges allowing the withholding of certain records from the public should be few and 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 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*, Prin. 12.¹³

"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.*, at Prin. 23.

"(1) In every place where persons are imprisoned there shall be kept a bound registration book with numbered lines 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 therefore; (c) The day and hour of his admission and release. (2) No person shall be received in an institution without a commitment order of which the details shall have been previously entered in the

¹³ G.A. Res. 173, U.N. GAOR, 43rd Sess. (Dec. 9, 1988).

register.” *Standard Minimum Rules for the Treatment of Prisoners*, Rule 7.¹⁴

“Governments shall ensure that persons deprived of their liberty are held in officially recognized places of custody, and that accurate information on their custodial whereabouts, including transfers, is made promptly available to their relatives and lawyer or other persons in confidence.” *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, Prin. 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 where 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.

¹⁴ Adopted July 1, 1957. E.S.C. Res. 663 C, U.N. ESCOR, 24th Sess., Supp. No.1, at 11, U.N. Doc. E/3048 (1957).

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 Punishment*, 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*, Art. 1.¹⁵

“International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State [for 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*, Art. III.

“Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that 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*, Prin. 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 that the violation has been committed by persons acting in an official capacity.” *International Covenant on Civil and Political Rights*, 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*, 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 against the citizens if they cannot, or will not, enforce the law against their own agents.” *Code of Conduct for Law Enforcement Officials*, Art. 7, comment (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 Principle for the Protection of All Persons Under Any Form of Detention or Imprisonment*, Prin. 9.

¹⁵ Adopted at New York, Dec. 9, 1948; entered into force, Jan. 12, 1951. 78 U.N.T.S. 277.

“Superiors, officers or other public officials may be responsible for acts committed by such officials under their hierarchical 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 a person allegedly involved in extra-legal, arbitrary or summary executions.” *Principle of the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, 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*, 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 for torture.” *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Art. 2.

“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*, Prin. 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*, 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*

Principles of Justice for Victims of Crimes and Abuse of Power, Prin. 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*, Prin. 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*, Art. 14(1).

“The families and dependents of victims of extra-legal, arbitrary or summary executions shall be entitled to full and adequate compensation, within a reasonable period of time.” *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, Prin. 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 ISFs 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, where 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 legislative 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 Principle of Justice for Victims of Crime and Abuse of Power*, 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*, Princ. 29. [Similar provisions appear at *Standard Minimum Rules for the Treatment of Prisoners*, Princ. 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 all 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*, 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 the 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*, Prin. 2.

“Qualified inspectors, including medical personnel, or 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, and to all their records.” *Id.* at Prin. 7.

“[States undertake] to 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*, 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 citizen’s committee or any combination thereof, or any other reviewing agency.” *Code of Conduct for Law Enforcement Officials*, Preamble.

“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 of Extra-Legal, Arbitrary and Summary Executions*, Prin. 9.

“[States undertake] to ensure that any person claiming 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*, 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 constitution or law.” *Universal Declaration of Human Rights*, 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*, Prin. 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.* at Prin. 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*, Prin. 5.

“Every person may resort to the courts to ensure respect for his legal rights.” *American Declaration on of the Rights and Duties of Man*, Art. 18.

“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*, Prin. 8.

Article X. Principles Governing the Monitoring and Maintenance of 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 which 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 which 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 review functions.” *Code of Conduct for Law Enforcement Officials*, Art. 8, comment (d).

“An African Commission on Human and Peoples’ Rights...shall be established with the Organization on African Unity to promote human and peoples’ rights and to ensure their protection in Africa.” *The African Charter on Human and Peoples’s Rights*, Art. 30. [See also Art. 45 and 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 independent commissions 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 from any institution, agency or person that may be the subject of the inquiry.” *Principles on the Effective Prevention of Extra-Legal, Arbitrary and Summary Executions*, Prin. 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*, Preamble.

