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# Putting the Governance of African Internal Security Forces Under the Rule of Law

James C.N. Paul

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## Guest Editor's Introduction

# PUTTING THE GOVERNANCE OF AFRICAN INTERNAL SECURITY FORCES UNDER THE RULE OF LAW

James C. N. Paul\*

This volume is *not* intended as just one more chronicle of the human rights abuses of the police and military in Sub Saharan African countries. An endless number of valuable but depressing non-governmental organization (NGO) reports treat with that subject.

Rather this volume falls within the genre of constitutional law in the broad sense of that term. It is intended as a contribution to the study of the *legal structure and governance* of the police, military and other organizations in African countries (such as secret surveillance units) which exercise "police powers" (i.e. powers to use force against citizens, to detain and interrogate, to arrest, to search for and seize evidence, and to administer imprisonment).<sup>1</sup> The focal concepts – "legal structure" and "governance" – are defined more fully below. They point attention to the need to analyze the norms and processes which are supposed to control the creation and management of these very important governmental organs and to require their accountability to the principles of the constitution and the law.

Very little attention has been paid to this subject and this gap in knowledge seems surprising in view of the deplorable, lawless roles played by the police and military in the political and constitutional development of so many African countries.

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\* William J. Brennan Professor of Law (Emeritus), Rutgers The State University of New Jersey; Trustee and Secretary, International Center for Law in Development (New York). I wish to record my deep appreciation for the help of Ms. Helene Wright, of the Rutgers Law School staff, for her help in preparing this paper, and others in this volume, for publication.

<sup>1</sup> Of course there are significant differences between the police and the army, although these become increasingly obscure when one examines the paramilitary police and the special units of the army discussed in papers in this volume. In most states at least some units of the army have often been used to exercise the police powers noted above. In apartheid South Africa the distinctions were particularly blurred. International human rights law makes no distinction as to who exercises police powers when it comes to the duty to protect the rights guaranteed, nor do other United Nations human rights instruments. Indeed, in view of the extensive use of armies in Africa as *internal* security forces, as well as the extensive history of military rule in the African context, it seems particularly important to put the *governance* of the military under a new, more rigorous rule of law.

The papers published here were among those presented at an INTWORLSA-organized seminar held in Addis Ababa in 1995. As described more fully in Professor An-N'aim's Report (which follows), the Addis seminar was composed of representatives from thirteen human rights NGOs in seven African countries. They contributed reports which examined the structure and system of governance of internal security forces (ISFs) (notably the police) in their respective countries. They were also invited to discuss the need for an international (or regional), Code of Universal Principles to guide efforts to reconstitute them and, to facilitate this deliberation, a draft of such a code was circulated in advance.<sup>2</sup>

This introduction sets out:

- (1) A more detailed description of the INTWORLSA project which generated the Addis seminar;
- (2) Some observations generated by the Addis seminar and other literature on African ISFs;
- (3) Some observations on the importance of creating a new body of law for the governance of ISFs.

The last point - particularly the need for an international code of universal principles addressing this subject - is examined in more detail in the concluding paper of this volume.

## I. A DESCRIPTION OF INTWORLSA'S PROJECT:<sup>3</sup>

INTWORLSA's project on Human Rights and the Structure and Governance of ISF grew out of an earlier undertaking - a series of international workshops on "Building Democratic Constitutional Orders in SubSaharan Africa."

In those meetings a great deal of attention was focused on strategies to develop more effective processes and institutions to promote the democratization of governance, rule of law and promotion of human rights, e.g. the need to establish: independent, accessible and adequately empowered judiciaries, legislatures and human rights

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<sup>2</sup> This code was first published in *THIRD WORLD LEGAL STUDIES - 1990: Police Security and Human Rights in the Third World* at p. 237. That volume, too, contains valuable country studies of the structure of ISF in African (and other) countries.

<sup>3</sup> The text in this section is an edited version of the description sent to the participants in the Addis Ababa seminar.

commissions; agencies to secure free and fair elections; broad-based political parties structured to provide more meaningful popular participation in the political processes; and institutions and processes to strengthen civil society's capacities to impose accountability on rulers. In pondering these needs, it became clear, too, that much more attention should be paid to the problem (urgent in many countries in light of continuing experience) of reconstituting the internal security forces (ISF's) of the state: the police, the prison administrators, the secret intelligence agencies and the military wherever and whenever soldiers are extensively used for internal police functions and exercise of police powers.<sup>4</sup>

The present project grew out of those concerns. It focuses on the law which structures and provides for the governance of ISFs, that is, that rather amorphous body of rules found in the constitution, and legislation of countries (e.g. the organic acts establishing the police; the criminal procedure code), and the internal law of ISFs (such as regulations, standing orders, manuals, etc.) which cumulatively provides for:

- the plenary legislative power to create (or authorize creation), finance, empower, and establish the responsibilities of all ISFs units, and the power to abolish or restructure each;

- a clear definition of the mission and duties of each unit, emphasizing the overriding duty of all ISFs to protect and support the existing constitutional order and respect all laws enacted pursuant to it;

- the continuing control and oversight of all ISFs by the legislature and courts, and by the chief executive subordinate to their powers, and by other civil institutions of government established by law (such as Human Rights Commissions);

- the recruitment and composition (e.g. in terms of gender, geography and ethnicity) and the training and professional orientation of all ISF personnel;

- codes of conduct, applicable to all ranks of ISFs, which prescribe duties to provide scrupulous protection of all guaranteed human rights and the rule of law, and which provide for the discipline, including

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<sup>4</sup> See THIRD WORLD LEGAL STUDIES 1988: *Building Constitutional Orders in SubSaharan Africa*, (and in particular the thematic report by James Paul); THIRD WORLD LEGAL STUDIES 1990, *Human Rights and the Structure of Police and Internal Security Forces*. (Coordinator's Introduction.)

criminal punishment of those who violate the code or sanction violations or (in the case of commanders) who negligently fail to detect and prevent or punish violations;

-the accountability of all commanders of all units, and of the agency as a whole, to all laws governing the management of ISFs, and their liability for a unit's failure to adhere to prescribed standards of conduct;

-transparency, including laws requiring the keeping of accessible records and full disclosure to any interested person of information regarding detentions, charges, treatment of prisoners and disclosure of all other categories of information prescribed by law;

-effective remedies (administrative, civil, and criminal) for victims of all violations of the Code and other laws governing ISF operations;

-the adequate empowerment of civil government organs (including legislatures, courts, human rights commissions and other designated bodies) to investigate ISF activities and enforce this accountability;

-recognition and protection of the rights of organs of civil society (e.g. the press, NGOs) to monitor ISFs, and demand continuing compliance with all these provisions, and to apply to the courts or other agencies for remedies to redress systemic violations of standards prescribed by the Code of Conduct or other laws.

These are only suggestive elements of a legal structure designed to put ISFs under a rule of law geared to democratic governance and respect for human rights. These elements deserve the attention of Constitution-makers and legislators and concerned civil society groups seeking to create a constitutional order that establishes democratic participation in all basic spheres of governance, human rights and the rule of law as interdependent goals.<sup>5</sup>

Several further hypotheses elaborated the project:

- (1) In many countries (in all parts of the world) there are gaps in the law - and often *no* provisions of law - governing the structure of ISFs in respect to most, if not all of the concerns listed above. Further, much of the law structuring ISFs is law characterized by immense, unbounded delegations of

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<sup>5</sup> A more detailed listing of the elements of an appropriate structure is appended to Abdullai An-Na'im's Report, *infra*. That list was sent to each participant in the Addis Seminar to guide preparation of the country reports.

discretionary power to the executive which have the effect of immunizing these organs from civil control. Hence ISFs are, to a significant extent, ungoverned by law; they are “lawless” organs of government.

- (2) The existence of “lawless” legal structures contributes to well-known, widely documented systemic patterns of abuse of basic rights, the violent repression of civil society, discriminations against women, ethnic groups and the poor and vulnerable, and to corruption and the subversion of good governance and to poverty and maldevelopment - and sometimes to the breakdown of the state and anarchical conditions.
- (3) If these and other harmful consequences are to be avoided, and in any event if democratization and respect for rights are goals of the constitutional order, then there is a need to put ISFs under a more rigorous rule of law which attends to the elements of structure noted above.
- (4) Towards that end, it is important to establish an authoritative body of basic principles which can provide the framework for constitutional and legislative provisions creating the desired rule of law;
- (5) The draft “Code of Universal Principles” (reproduced in this volume) is intended to respond to this need. Its provisions, drawn from existing international law, are designed to apply universally accepted standards of governance to all agencies of a state which exercise police powers.

Of course the above assumptions need to be examined, and that is the task of the INTWORLSA project. Country studies are needed which analyze both the existing law and, especially, the absence of law structuring ISFs. The legal immunity and autonomy of ISFs - the absence of law, imposing strict accountability to constitutional principles, to other organs of government and to civil society - can be documented, and the human rights and other political and economic consequences of these gaps in the law can be estimated in a more informed way.

A further objective is to encourage the process of formulating a comprehensive body of interrelated principles (drawn from international human rights law) which should be used to frame

constitutional principles and other laws to restructure ISFs. The hope is that the draft in "Code of Universal Principles" (reproduced in this volume) would lead to further, more informed, efforts to formulate a more nuanced Code of "universal principles" geared to the concerns reflected by the country studies - and then to efforts to convince international human rights organizations of the need for such a code, and to international efforts to press for this result.

## II. SOME THEMES SUGGESTED BY THE ADDIS ABABA SEMINAR REPORTS AND OTHER LITERATURE

The existing literature on ISFs pays very little attention to the elements of structure and governance noted above. As several scholars of the police have noted: apart from extensive documentation of abuses, "very little is known about the police in Africa."<sup>6</sup> While there is a large literature on "the military," much of it is devoted to theorizing about the political behavior of the armies examined, and this scholarship seems quite soft when it comes to depicting norms relating to the management and governance of the armies examined.<sup>7</sup>

The result, as one masterful survey concludes, is a striking paucity and superficiality when it comes to studies which focus on "ways of bringing the states repressive apparatuses ... under effective *democratic* and not just *civilian control*."<sup>8</sup>

The emphasis, above, on "*democratic control*" is important from both normative and historical perspectives. The Universal Declaration states<sup>9</sup> that the will of the people, manifested through *continuing* exercise of all rights of political participation (not just elections), and respect for all universal rights, must be the sole basis of the authority of government including the authority and accountability of all ISFs.

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<sup>6</sup> See Alice Hills, *Towards a Critique of Policing and National Development in Africa*, 34 J. MODERN AFRICAN STUD., 271 (1996) quoting Otwin Marenin, *Policing African States: Towards a Critique*, COMPARATIVE POLITICS 395 (1982). Hills' article is an interesting survey of the literature. For an informative article on the structure of the Ugandan police in the 1960s, and on the need for new constitutional provisions to provide for the independence of the police from executive and political control, see Daniel Ntanda Nsereko, *The Police, Human Rights and the Constitution: An African Perspective*, 15 HUMAN RIGHTS QUARTERLY 465 (1993).

<sup>7</sup> Robin Luckham, *The Military, Militarization and Democratization in Africa: A Survey of Literature and Issues*, 37 AFRICAN STUDIES REVIEW 13 (1994).

<sup>8</sup> *Id.* at 65.

<sup>9</sup> Universal Declaration of Human Rights, Art. 27.

Further, experience throughout Africa suggests that civilian control (i.e., control by an elected chief executive) has never been equivalent to democratic control, nor to a rights-sensitive, rule-of-law control. Yet prominent scholars continue to ignore this experience, and they continue to tell us that civilian control is the dominant objective, and, if given proper professional training (an undefined concept) and adequate resources and pay, ISFs will leave politics alone.<sup>10</sup> History suggests that this is a gross simplification of a most serious problem.

### *A. Historical themes*

From their origins in the making of colonial states into the beginnings of post-colonial states, ISFs in Africa were organized as rather autonomous units of governance under the “control” of civilian chief executives - e.g. the Governor General in colonial times. Indeed, colonial police and paramilitary forces were small, but in many ways quite professional organizations; they were created and commanded by seasoned colonial civil servants under the control of the Governor General – usually a civilian official. Discipline was strict, and their efficiency in enforcing their primary mission - maintaining the security of the colonial regime - was notable. Thus, enforcement of the ruler’s commands defined the central purpose, and characterized the training and indoctrination, of these forces.<sup>11</sup>

As shown by papers herein (and other studies), during the process of framing independence constitutions very little, if any, attention was focused on any need to redefine the mission, size, composition, training and accountability of these security organs of the new state. It seems to have been assumed that the duly elected chief executive of an independent state would assure the political neutrality and lawful behavior of these erstwhile instruments of authoritarian colonial rule.

Indeed, prominent political theorists stressed the importance of having a professional police and army at the disposition of the leaders of the new, post-colonial governments; the ability of ISFs to impose political order was said to be of paramount importance in view of the

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<sup>10</sup> See e.g. Samuel Huntington, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991); Huntington, *Reforming Civil-Military Relations*, 6 *J. OF DEMOCRACY* 9 (1995).

<sup>11</sup> The colonial legacies are emphasized in country studies which follow, and in similar studies in *THIRD WORLD LEGAL STUDIES - 1990*, *supra* note 2. See also Luckham, note 7 *supra*.



assumed fragility of these states.<sup>12</sup> Cold war politics reinforced this view. Western (or Eastern) governments were willing to provide assistance and arms to help strengthen the ISFs of regimes which, whatever their other merits, were perceived as bastions against communist (or pro-western) takeovers.

The predatory character of post-colonial politics, the ambitions of executives to establish their continuing personal rule, and the authoritarian impulses of political elites in power - these and other factors - contributed to the establishment of many, increasingly despotic civilian regimes, usually commanded by powerful Presidents under the aegis of *de jure* or *de facto* one-party rule.

ISFs were essential to this political and constitutional transition. During the '60s (and beyond) the size (and costs) of security forces in most countries increased dramatically. The weakness or complicity of legislative bodies and the repression of civil society facilitated executive management of this expansion. So did the use of executive decrees establishing "emergency powers" which extended the role of ISFs in governance and politics. Often, too, other executive decrees (frequently promulgated in secrecy), created new paramilitary and secret surveillance units. Thus, the orientation of ISFs (their misconceived mission to support the security of the existing regime) and the assumed constitutional prerogatives of the executive to establish and control them, enabled their steady development as institutions of authoritarian rule and increasingly, to the "lawless" enforcement of a widening range of security objectives.<sup>13</sup>

A price was often paid for this growing involvement of ISFs, notably the army, in political affairs. They, too, we are told, became politicized - a term used to denote many different impulses, depending on the context: for example, demands for better pay and perks; an enhanced awareness of ethnicity in politics; a desire for a bigger share of the spoils of office and corrupt activities; or, conversely, a professed

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<sup>12</sup> See Samuel Huntington, *Political Order in Changing Societies* (1968) (the need for political stability); Luckham, *supra* note 7 on foreign "aid" to "strengthen" the military and police in African countries.

<sup>13</sup> See H. Kwasi Premph, *A New Jurisprudence for Africa*, 10 J. OF DEMOCRACY (No. 13) 135 (1999) for a critique of African "judiciaries" which have "served as passive instruments of authoritarian rule" by failing to appreciate the judicial role in a constitutional democracy and by establishing an "illiberal" "constitutional jurisprudence" which condones the "supremacy of the executive" to determine what must be done to preserve the "security of the state."

desire to cleanse the Augean stables; a desire to impose some ideology on the state - some form of radical populism or socialism, or, conversely, some kind of anti-socialist regime; or simply a desire to seize power for self-aggrandizement - or, some combination of these.<sup>14</sup>

By the mid-'70s, most of Africa was ruled by the barrel of a gun – by military regimes or by civilian leaders who depended on ISFs to maintain their power.<sup>15</sup> Some of the consequences of this kind of rule have been surveyed in various ways<sup>16</sup> and some are made painfully apparent by papers herein.

Created to secure “security,” ISFs have in fact often become the primary sources of civil insecurity: the longer they have ruled (whether overtly or as the indispensable instrument of an authoritarian “civilian” regime), the more uncertain becomes the security of persons and property and the long-term stability of the state; the more repression - and sometimes terror - are substituted for law as the means of governing, the more prisons and burial grounds have become populated with increasing numbers of innocent victims of illegal detention, physical abuse and torture and disappearances; and the more important it becomes to settle accounts for these abuses when liberation finally occurs. The more brutality becomes the ordinary method of criminal law enforcement, the more violent crime becomes a new feature of social life. Prolonged rule by emergency decrees which, in effect, treat fundamental rights with contempt, immunize police and marginalize courts and silence dissent may well have even longer-term consequences: the experience of gradually building workable democratic, and rule of law, institutions is lost; discrimination, bad governance and corruption become more widespread; the economy fails; internal displacement, diaspora and “brain drain” ensue; ethnic tensions are exacerbated and the prospect of civil conflict looms; political and economic reconstruction become more costly and difficult.

Moreover, the ISFs of a despotic regime often continue to exist after its collapse; nor will they, *mutatis mutandi*, become organs of

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<sup>14</sup> See Luckham, *supra* note 7.

<sup>15</sup> RUTH FIRST, *THE BARREL OF A GUN: POLITICAL POWER IN AFRICA AND MILITARY COUPS* (1970).

<sup>16</sup> The socio-economic costs of military rule in Africa have never been comprehensively assessed and probably cannot be. A number of consequences are discussed and quantified in Luckham, *supra* note 7.

rule of law just because a new constitution prescribes democracy and human rights. Rather, if these aspirations are to become rooted, ISFs must first be reconstructed in fundamental ways.

*B. The Structure and Governance of ISFs Today.*

Using the elements of legal structure noted above as a framework, participants in the Addis seminar were asked to describe and analyze the law establishing the organization, functions, and the governance of ISFs in their countries. Their reports suggest that, with the notable exception of post-apartheid South Africa, very little law exists which is addressed to these subjects. Conversely, the initial attempts in reconstituted South Africa to establish an unprecedented, extensive rule of law for the governance of that country's ISFs seem to underscore the need to take this field of constitutional law more seriously.

The lawless character of the governance of ISFs often begins with the constitutional failure to define with care the very *raison d'être*, discrete roles and fundamental obligations of these organs of government. The preservation of security of the state is often said to be their purpose. As one survey notes: "the assumption prevails that it is the state which soldiers and policemen are there to defend" but in this calculus both the concept of "security" and "the state" are ill-defined at best.<sup>17</sup> Thus, Abdullai An-Na'im's report notes how some Addis participants simply assumed that preserving the state's security is the overriding mission of ISFs, and this mission inevitably conflicts with the goals of democratic constitutionalism. But the task, of course, is to ask: what does "security" of "the state" really mean? Why and how should this goal be pursued? If a rule of law to promote human development, universal rights and democratic institutions and processes are prescribed as the paramount constitutional goals of the state, then, presumably, every officer and organ of government must be obligated, first and foremost, to respect and protect the constitutional order establishing those goals; and specific ISF duties (e.g. to understand, value and protect guaranteed rights and the constitutional authority of civil officers and organs) can be articulated,

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<sup>17</sup> See Luckham, *supra* note 7 at 22.

*and* the entire system of their governance can be oriented toward these roles in obedience to the constitutional mandate.

Location of constitutional powers to create, empower, regulate, finance and control the very existence of all ISFs is also important. As noted, it has too often been assumed that these are essentially executive prerogatives; and, certainly, it would appear that legislative organs, so often dominated by the executive, have seldom exercised these powers. At a conference composed largely of military officers from West African countries, the idea that elected legislators could debate determine and control their army's budget came as a great surprise to most. Nevertheless, constitutions can explicitly separate these plenary powers to create, finance and control ISFs from the executive's power to command them; and they can be exercised pursuant to transparent legislative processes – for example, by requiring continuing public oversight, open debate on the need for, size and costs of each ISF unit, and by relating their security roles to other national goals and budgetary priorities.<sup>18</sup>

The processes of recruiting ISF personnel have seldom been explicitly regulated by law, yet their composition in terms of gender, geography, and ethnicity is, surely, a matter of great importance.

While positions in the police may, often, be nominally open to women, reports in this volume (and others) suggest that the problems of retention, promotion and empowerment within the police are routinely neglected if not deliberately ignored. A review of literature of African armies reports that most (if not all) are bastions of male power; not only are women excluded from significant roles, but this discriminatory exclusion reinforces their general subordination in the political system.<sup>19</sup> Thus ISF recruitment practices reflect a flagrant disregard of the UN Women's Convention (CEDAW) which has been ratified by most African states.

Further, it is said that most African ISFs are “driven by ethnic and regional factionalism.” Their composition is controlled by the ruling

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<sup>18</sup> See Professor William Foltz's able report entitled *Overview of the [Bujumbura] Conference*, in *Bujumbura Conference on Democratization in Africa: The Role of the Military 19* (African-American Institute 1993). The World Bank has repeatedly deplored the high ration of “defense” expenditures to total public expenditure in Sub-Sahara Africa. See e.g. World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth* (1989) at 167-68. See also, Luckham, *supra* note 7 at 59.

<sup>19</sup> Luckham, *supra* note 7 at 22.

regime and reflects its ethnic base; and excluded, suspect ethnic groups are often marked for surveillance.<sup>20</sup> At the Bujumbora international conference on the "Role of the Military in Democratization," the army officer participants recognized that removal of ethnic biases (in terms of composition) was "one of the biggest [present] challenges" – calling for a wholly new body of "recruitment procedures" which are "public, equitable and transparent."<sup>21</sup>

At the Addis seminar much emphasis was laid on training – as both a cause of the lawless behavior of ISFs and the most important potential cure for it.

There is surprisingly little literature which examines this thesis with care, but an interesting article in the *NAIROBI LAW MONTHLY*<sup>22</sup> describes the indoctrination, from initiation into service through formative experiences, of a Kenya police officer. It describes a period of "Rambo-type" basic training, with emphasis on physical and martial arts, unquestioning obedience and repeated drill on the legal powers of police to use force. In this transitional period, the officer came to see many members of civil society more as targets than as the beneficiaries of policing: the marginalized poor, beggars, street boys, rebellious youth, political "mobs," "insolent" students, "arrogant" intellectuals and hostile politicians all became "enemies." So did all those suspected of any serious crime. Indeed, the trainee soon learns that the police are almost universally feared and despised.

"It is an indoctrination that totally removes [him] from his society" and creates a "we vs. them" perception.<sup>23</sup> Receiving little instruction in forensics and the science of organized criminal investigation, the officer learns that coerced confessions and trespassory searches are normal methods of investigation. Thus, the use of various forms of violence - or the threat of it - against suspect people is a primary theme of his acculturation.

The conditions of work, low pay, rigid discipline and the constant threat of summary dismissal also contribute to stress, and a harsh outlook. But the new recruit also learns that "the political system

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<sup>20</sup> *Id.* at 23.

<sup>21</sup> Foltz, *supra* note 18 at 112-13.

<sup>22</sup> Paul Mwangi, *Police Brutality*, *NAIROBI LAW MONTHLY* NO. 49 (JULY 1993) 10-14.

<sup>23</sup> *Id.* at 11.

offers immunity” from citizen complaints of brutality and corruption in return for his obedience to superiors. Indeed, corrupt practices are often initiated and made “customary” by civilians who seek particular favors and immunities for themselves. Thus, receiving these rewards becomes part of the “system,” a practice sanctioned by “custom”.

Human rights training can obviously do little to counteract this kind of indoctrination unless it is related to other changes in the whole system of recruitment, training and governance. If reform is the goal, human rights and anti-corruption training must be seen as one basic element of a much larger reform effort directed towards the basic reorientation and reconstruction of ISFs: training must be integrally related to a reformulation of a unit’s basic mission, to strict comprehensive codes of conduct, to inculcating an appreciation of the social value of protecting human rights and the sovereignty of the constitutional order. Further training and codes of conduct will only be effective if they are demonstrably tied to incentives and sanctions; to criteria for promotion and, conversely, to grounds for discipline.

Such systems do not now exist. Codes of conduct, modeled on the UN code for Law Enforcement officers, are absent even though African governments have regularly supported UN Resolutions calling for such codes. Discipline, rigid in some respects, is lax in regard to other abuses of power. It has been said of Kenya: “The government ... has used the police to enforce its will on the people in exchange [for] ... [police] immunity from prosecution for misconduct.”<sup>24</sup> Papers herein and other reports suggest that a similar tacit understanding exists in many countries.

Command responsibilities within ISFs appear to be structured hierarchically, whereby duties and authority are delegated in straight lines downward to particular operational units which are expected to carry out assigned tasks, and if this is done, no questions will then be asked by superiors on how it was done. There is often no serious effort to create an inspectorate unit with comprehensive, global powers and duties to monitor all units and all officers in the several chains of command. Superior officers are seldom held accountable for abuses perpetrated at lower levels. Officers who attempt to institute

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<sup>24</sup> *Id.* at 14.

unwelcome reforms may face risks of transfer or worse. "Whistle-blowers" are regarded as "traitors."<sup>25</sup>

Country reports herein portray little if any legislative oversight of abuses and little vigorous monitoring by independent commissions adequately empowered to investigate allegations of abuse. In theory, in anglophonic countries, the courts can provide habeas corpus and tort remedies to citizens whose rights are violated. But these remedies may be circumscribed in many ways: by the terms of executive decrees establishing emergency or martial rule, by liberal interpretation of police "privileges" and official "immunities," by well known barriers which deter the access of poor people to the courts, by burdens of proof needed to overcome organized lying and "stonewalling" by the police, by the aggressive hostility of governments to citizen allegations of police abuse, by unexplained but flagrant police failures to obey court orders. Two particularly important measures to empower courts seem undeveloped: provision for "standing" enabling concerned groups to bring class actions to redress systemic abuses, and provisions enabling courts to require police units to initiate institutional reforms within ISF units in order to remedy systemic abuses. Country studies of possible law reforms to enhance judicial powers to regulate policing behavior are notably lacking.<sup>26</sup>

### III. THE IMPORTANCE OF LAW

The Addis participants generally agreed on the need to establish a new body of principles requiring restructuring of ISFs. In general terms, if not in all specifics, they agreed that the principles set out in the draft Code of Universal Principles should be incorporated into the constitutional orders of African states.<sup>27</sup>

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<sup>25</sup> *Id.*

<sup>26</sup> Cf. Kwasi Premph's essay *supra*, note 13. Compare the power exercised by courts in India to remedy systemic abuses — and the procedures adopted by the Supreme Court to enable poor and illiterate victims of abuse to seek such remedies. See Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India* in THIRD WORLD LEGAL STUDIES - 1985: DEVELOPING LEGAL RESOURCES WITH THE THIRD WORLD POOR.

<sup>27</sup> See also the "Report" of the Uganda "Commission of Inquiry" into "Violations of Human Rights" during the period 1962 to liberation. Its Recommendations, published in 3 EAST AFRICAN JOURNAL OF PEACE AND HUMAN RIGHTS 140 (1966) are discussed in the concluding paper in this volume; in many

Of course there will be critics or skeptics of this emphasis on law. Naysayers may argue that it is useless to attempt to legislate reformed governance unless changes in political culture and behavior first occur - notably changes in the behavior of political elites, including those in ISFs. They may also point out that the process of reconstituting African states is seldom a tabula rasa situation. Rather that process is usually dominated by an interim, "liberation regime" which, while rhetorically committed to democratization, is also quite determined to establish its ongoing power; hence new liberation regimes may well be unwilling to surrender too much control over the very forces which have, historically, been used to entrench the political hegemony of the rulers, of the moment. Thus, it is unlikely that any regime in power, even one which professes respect for rights, will allow adoption - or implementation - of the principles proposed by the draft code unless powerful pressures are applied by both civil society and the international community. Moreover, the prospects for mobilizing these pressures are diminished where the state and civil society are so disconnected, where the state is so autonomous, autocratic and unaccountable, and civil society so disempowered and lacking unity, where the state and its people are not an organic unit.

However it is precisely because of this disempowering gap between state and people that so many states in Sub-Sahara Africa have failed in their essential mission - the provision of meaningful security, law and essential services; the creation of political and legal environments which enable "human development."<sup>28</sup> The existence of "failed states" in Africa has become not only a subject of much scholarly discourse, but a source of growing awareness, in political circles, that the crisis plaguing the region is political, not simply

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respects the legislative and constitutional measures proposed reflect the principles proposed by the Draft Code.

<sup>28</sup> "Human development" is used here as a term of art, as it now is in development circles, notably in UNDP publications, particularly its annual *Human Development Report*. "Human development" connotes a holistic concept of "development for, by and of people," focusing on such interrelated objectives as poverty alleviation with emphasis on enhanced participation, civic capacitation and empowerment; the integration of human rights objectives into all development policies and programs; the initiation of democratized and "good" governance in all spheres which affect people; affirmative efforts to redress gender discrimination and address the needs of women and excluded groups - and the creation or reform, of many governmental institutions and processes to achieve these ends. Arguably, "human development" is now a mandatory obligation of states imposed by the UN Declaration on the Right to Development of 1986 and numerous other international instruments. See James C.N. Paul, *The United Nations and the Creation of an International Law of Development*, 36 HARVARD INT'L LAW J, 307 (1995).



economic; and the reconstitution of states in both political and legal terms is a pre-condition to long term economic rehabilitation.

The international community - acting through regional and global intergovernmental, and non-governmental organizations - has a very real interest in addressing these issues and facilitating struggles to reconstitute states in ways which will integrate their governance with the interdependent goals of "human development," "human rights," "democratization" and an African-oriented rule of law tailored to these purposes.

ISFs have critically important roles to play in creating conditions essential for human development and democratization: the establishment of more effective security for persons and property (a condition now sadly lacking in many communities thanks to the degradation of the police); the alleviation of communal hostilities; the promotion of effective political participation including facilitation of public assemblies; the administration of fair elections; the enforcement of "good" and "accountable" governance - and respect for human rights. Needed is a new model structuring ISFs, one which relates their tasks to essential goals of the state - and an articulation of the new kind of rule of law necessary to implement these goals.

These themes are more fully developed in the concluding chapter of this volume.

