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Comments on the "Universality" of the Code of Conduct for Law Enforcement Officials

Luis F. Molina

COMMENTS ON THE "UNIVERSALITY" OF THE CODE OF CONDUCT FOR LAW ENFORCEMENT OFFICIALS

Luis F. Molina*

In the inaugural issue of the Journal of Human Justice, W. Gordon West elucidated some Third World perspectives, ones which "challenge many of the assumptions embodied in our concepts about crime and social control, [and which demand] that we be more specific and globally relevant in our claims."[1] West indicated four "problematic[s] of conceptual concerns," one of them State and Law.[2] In particular, West evokes the ghosts of ideological imperialists like Thomas Macaulay, R.A. Wright and Sir James Fitzjames Stephen,[3] when he writes that "[t]he colonial imposition of 'modern' formal codes in most third world states indicates the inadequacy of a simply formal legal analysis towards understanding law, justice and crime."[4]

The purpose of this article is to demonstrate that the imposition of such codes is not an archaic colonial practice. On the contrary, it is very much alive and well, but the imposition of Western values is difficult, and may not be appropriate, in societies with legacies and practices different from those of North America and Western Europe.

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1. W. Gordon West, *Towards a Global Critical Justice Problematic*, 1 J. HUM. JUST. 99, 110 (1989).

2. *Id.* at 101 & 105-6. For a broader exposition of the conceptual difficulties inherent in cross-cultural criminological and criminal justice evaluation, *see* M. FINDLAY & U. ZVEKIC, ANALYZING (IN)FORMAL MECHANISMS OF CRIME CONTROL, (UNSDRI Pub. No. 31, 1988), especially "Conceptual Concerns," at 30-58.

3. Thomas Babington Macaulay drafted the Indian Penal Code in 1859; R.S. Wright drafted a criminal code for Jamaica in 1876; and, of course, the moralistic Stephen was the major influence on the two drafters of the first (and current) Criminal Code of Canada, Department of Justice Deputy Ministers George Burbidge and Robert Sedgewick.

4. West, *supra* note 1, at 106.

My focus is the domestic incorporation of an international instrument, the United Nations *Code of Conduct for Law Enforcement Officials*[5] (hereinafter Code of Conduct), by certain Member States of both the United Nations and Commonwealth of Nations. My conclusion suggests that the concept of universality is a Euro-centric one which may not always be ideologically transferable to local socio-cultural practices.

First, I describe the Code of Conduct and the stated purposes for its promulgation and incorporation within domestic law and practice. Next, is an analysis of reportage by United Nations Member States, the relationship between reporting and compliance, and an exposition of some sociological features that may influence "compliance," or the meaning of "compliance," in an international, and particularly African, context. Finally, following West's banner proclaiming the legitimacy of structuralist arguments,[6] I offer some conclusions which may help explain the lack of, or difficulty with, "compliance" by certain Member States to values that are rhetorically considered to be "universal."[7]

The Code of Conduct

On December 17, 1979 the General Assembly of the United Nations adopted, without a vote,[8] the Code of Conduct. The adopting resolution recommended, among other things, that favorable consideration should be given to its use within the framework of national legislation or practice as a body of principles for observance by law enforcement officials. The Code of Conduct is explicitly concerned with setting standards which aim to eliminate human rights abuses by law enforcement officials.[9] The most comprehensive portion of the Code of Conduct is Article 5:

> No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment of punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat

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5. The full text of the *Code* is appended to this article.

6. *Id.* at 105.

7. It should be noted that this article is part of a wider study by the author on domestic "compliance" by some United Nations and Commonwealth Member States with the Code of Conduct.

8. Adoption without a vote is not unusual in the General Assembly, since declarations are not binding. An arguable exception, which was decided by a vote, is the Universal Declaration of Human Rights (UNHDR) of December 10, 1948. Many commentators, and the General Assembly itself, have treated the UDHR as part of customary international law and therefore binding on all Member States.

9. G.A. Res. 169, U.N. GAOR, 44th Sess., Supp. No. 46, at 185, U.N. Doc. A/34/46 (1980), particularly preambular paragraphs 5 and 6.

> 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.[10]

After a period of inattention to Code of Conduct dissemination, when much international focus was on global economic problems,[11] concern with Code of Conduct incorporation into national laws and policies was raised again in the General Assembly in 1984,[12] and was discussed at the Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders.[13] That 1985 Congress resolved to give greater attention to the Code of Conduct and, importantly, invited Member States to inform the U.N. Secretary-General of progress in achieving the aims of the Code of Conduct every five years beginning in 1987.[14] This request for information was reiterated by the U.N. Economic and Social Council (ECOSOC) in May, 1986.[15] The Secretary-General reported on Member State responses[16] in preparation for the Eighth U.N. Congress on Crime and the Treatment of Offenders, held from August 27-September 7, 1990 in Havana, Cuba.

As of July 29, 1988, 78 Member States had submitted information concerning domestic legislative and regulatory compliance with the Code of Conduct.[17] The reporting states are grouped by each of the five U.N. regions as follows:

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10. "Torture" as defined in the accompanying *Commentary* to Article 5 of the Code (and reproduced here in Appendix - 1) is consistent with the definition of torture adopted in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR, 39th Sess. (1984). The Torture Convention entered into force 26 June 1987 after ratification by twenty states.

11. For example, concern with the Substantial New Programme of Action for the Least Developed Countries (SPNA), which was adopted by the United Nations Conference on Trade and Development on June 3, 1979. The first SPNA conference in Paris from September 1-14, 1981 identified 31 U.N. Member States as Less Developed Countries, and a "Mid-Term Review" from September 30-October 11, 1985, was pessimistic about the possibilities for a rise in per capita GNP. *See* G.A. Res. 205, U.N. GAOR, 40th Sess., Annex, Agenda Item 84, at 46, U.N. Doc. A/40/989 (1986). Having said that, it should also be reported that in 1980, the Sixth Congress in Caracas noted the adoption of the Code of Conduct and called upon the General Assembly "to stimulate further development in so far as [sic] concerns law enforcement officials in the protection of human rights." G.A. Res. 12, U.N. GAOR, U.N. Doc. A/Conf. 87/14/Rev 1 (1981).

12. *Human Rights in the Administration of Justice*, G.A. Res. 118, U.N. GAOR, 39th Sess., Agenda Item 12, U.N. Doc. A/Res/39/118 (1985).

13. The Seventh Congress was held in Milan, Italy from August 26-September 6, 1985.

14. U.N. Doc. A/Conf 104/22/Rev. 1 (1985).

15. E.S.C. Res. 10, U.N. ESCOR, 1st Sess., Supp. No. 1, at 12. U.N. Doc. 10 IX (1986).

16. The reports are actually issued by ECOSOC's Committee on Crime Prevention and Control, located in Vienna, Austria.

17. U.N. ESCOR, 10th Sess., U.N. Doc. E/AC.57/1988/8 (1988) and U.N. ESCOR, 10th

	Reporting	Total[18]	%
Regions:			
African	13	50	26%
Asian	19	40	48%
Eastern European	7	10	70%
Latin American and Caribbean	15	33	45%
Western European and Other	18	22	81%
	72	155	
No regional affiliation:			
Israel, U.S.A. and U.K.[19]	3	3	
	75	158	
Non-Member States Reporting: Kiribati,[20] Republic of Korea and Switzerland	3		
	78		

The differences in percentages are illustrated by the following:

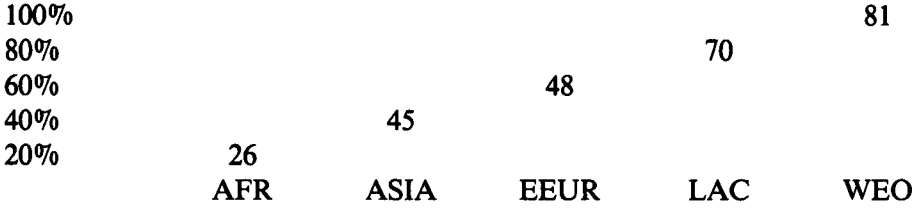

Figure 1: Percentage of U.N. Regional Reporting

The question becomes obvious: why have so few African states reported

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Sess., U.N. Doc. E/AC.57/1988/8/Add. 2 (1988), but the reported totals are wrong. The report of April 22, 1988 gives a total of 79 responses, but the total is 77. Both Argentina and China reported later, but Argentina is a duplicate count: the only addition is China, for a total reported by July 29, 1988 of 78.

18. UNITED NATIONS HANDBOOK 1989 (New Zealand Dept. of External Affairs, 1989). The group totals are current as of July 1, 1989.

19. The additional Member State without a regional affiliation is Turkey. There are a total of 160 U.N. Member States as of April, 1990.

20. Kirbati (formerly Gilbert Islands) is a member of the Commonwealth of Nations, but not of the United Nations. This exception is also not noted in the report of April 22, 1988.

or, the converse, why have so many Western European and Others (WEO's) reported? The immediate answer is, of course, money. Based on this rationale, it might be argued that whether law enforcement officials actually comply with the Code of Conduct cannot be accurately concluded on the basis of a failure to report, but that any failure to report is only a symptom of an impoverished bureaucracy, one without the ability and resources, to report. Such a view would seem to be supported by the GNP per capita figures:

GNP per capital income ($US)	<500	>501 – <1000	>1001 – <2000	>2001	Totals
	N %	N %	N %	N %	N %
Reporting African States	6 46%	3 23%	2 15%	2 15%	13 100%
Non-Reporting African States	30 81%	5 13%	1 3%	1 3%	37 100%

Figure 2: United Nations African Member States

Clearly those African countries which have chosen to reply to the U.N. questionnaire have a higher per capita GNP. The figures are even more illuminating within the Commonwealth Nations:

GNP per capital income ($US)	<500	>501 – <1000	>1001 – <2000	>2001	Totals
	N %	N %	N %	N %	N %
Reporting African States	1 20%	1 20%	2 40%	1 20%	5 100%
Non-Reporting African States	9 90%	1 10%	0 0%	0 0%	10 100%

Figure 3: Commonwealth African Member States[21]

21. The current (1990) African members of the Commonwealth of Nations are Botswana, The Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Namibia, Nigeria, Seychelles, Sierra Leone, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. Namibian GNP is not yet included in official statistics.

Moreover, two of the African states which reported, Mauritius and The Seychelles, are relatively wealthier non-"Sub-Saharan" states;[22] if they are excluded, the data are even more striking. There are 45 countries south of the Sahara and north of South Africa. At the end of the 1980's per capita income was lower than in 1960, although there were some optimistic rises in the 1985-90 period. Seventy percent of the world's poorest nations are in black Africa.[23]

The assumption that there may be actual compliance with the Code of Conduct, without reporting compliance, is not likely because of the obvious gains for national governments in documents accession.[24] Although I will offer specific country examples of a lack of compliance with Code of Conduct provisions, particularly Article 5, the major political issues affecting compliance are grounded in the governmental structures of the Sub-Saharan states. Robin Luckham writes that "[a]lmost the only generalization one can safely advance, in sum, is that there is no country in Africa where power is beyond the reach of the soldiers. . .[and] [c]ivilian regimes, like military ones, rely heavily on the apparatus of organized force to stay in power."[25]

It would be possible to end this note at this point, but to do so would be to ignore the multidimensionality of human social and political behavior, to ground an explanation in a unitary "development" model. On such a view, effective sociological development can be socially and politically engineered in LDC's in general, and Commonwealth Sub-Saharan states in particular, by the metropolitan core countries.[26] A unitary development model holds that the Code of Conduct reflects universally held values of human rights,[27] and of course "universality" is tautologically hegemonic.

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22. Both are located in the Indian Ocean off the east coast of Africa. The 1988 GNP per capita of Mauritius was US $1,490, of the Seychelles US $3,180.

23. B. Harden, *Africa's Great Black Hope*, WORLD MONITOR 31-41 (Aug. 1990). *See also* D.L. Sparks, *Economic Trends in Africa South of the Sahara, 1989*, in AFRICA SOUTH OF THE SAHARA 24-29 (1989).

24. Although the difficulties for states meeting reporting deadlines are many, they are exacerbated by the increase in treaties to which a state may be a party and which require periodical reporting. The subject of "reporting overload" has recently been constructively addressed by P. Alston, *Effective Implementation of International Instruments in Human Rights Including Reporting Obligations Under International Instruments on Human Rights*, U.N. GAOR, 44th Sess., Agenda Item 109, at 18-23, U.N. Doc. A/44/668 (1989).

25. R. Luckham, *Political and Social Problems of Development* in AFRICA SOUTH OF THE SAHARA 1990 42-54 (1989)

26. G. Hyden, *Africa: The Challenge of Getting Politics Right*, in ONE WORLD OR SEVERAL? 109-127 (L. Emmeru ed. 1989).

27. The International Bill of Human Rights is generally considered to consist of three major

Or is it? Just as Raymond Williams has taught us that the concept of hegemonic understanding requires exceptional comparison,[28] so too are West, and others, teaching us that indigenous development may espouse different values than those that have been considered "universal."[29] It is no doubt true that poverty is a major influence on the ability of states to incorporate Code of Conduct provisions into domestic law enforcement practices, but it is not the singular influence. Embedded within GNP rankings are issues influencing domestic "compliance" such as the social construction of national and international relations, the role of legal authority in the state, and the fundamental characteristics of social interaction. In order to glimpse a broader picture of sociological legacies and current practices influencing Code of Conduct compliance and incorporation, the following section of this note will review those issues, grounded in examples from three states: Nigeria, Kenya and Uganda.

The Social Construction of National and International Relations

A problem with post-colonial sub-Saharan African states is that their sociological construction is not congruent with their geographical demarcation. While in Europe nation-states were largely indigenously forged on the basis of natural geographic barricades, with mercantile penetration of those barricades occurring subsequently, the present Sub-Saharan African nation-states were not indigenously determined. In Nigeria, for example, the home of one out of every four black Africans, there are over 350 identifiable ethnic groups and languages.[30] In Uganda, until independence

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and one subsidiary instruments: the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural rights (1966), and the International Covenant on Civil and Political Rights (1966) with its Optional Protocol. In fact, the Code of Conduct makes reference to these and other international human rights instruments in its preambular paragraphs.

28. The theoretical conception of hegemony is usually attributed to Antonio Gramsci, but it has been elucidated and deconstructed by, among others, Raymond Williams, who wrote that "[a] lived hegemony is always a *process*. . .never either total or exclusive efforts and contributions of those who are in one way or another outside of at the ends of the terms of the specific hegemony." *See* RAYMOND WILLIAMS, MARXISM AND LITERATURE 112-113 (1977).

29. For example, no less an ideologically invested organization than the Organization For Economic Co-operation and Development (OECD) has recently published a collection, ONE WORLD OR SEVERAL (1989). However, it is important not to be smug about these revelations. In 1970 Lefever wrote that "the new [African] states should not be judged by Western norms. . .[m]ore modern and complex cultures than that [sic] of Africa cannot provide appropriate guides to political development in Africa." ERNEST W. LEFEVER, SPEAR AND SCEPTER: ARMY, POLICE AND POLITICS IN TROPICAL AFRICA 9 (1970).

30. S. WRIGHT, NIGERIA: THE DILEMMAS AHEAD, A POLITICAL RISK ANALYSIS 6 (Economist Intelligence Unit Report No. 1072, 1986).

in 1966, the most traditional institution was the Kabaka, or King of the Baganda, but the Baganada were only one linguistic grouping of the Bantu family, and those differences were replicated as between those groups and others.[31] As between Kenya and Uganda, in the last century the southern and western centralized tribal authority of Uganda was in contrast to the decentralized systems of northern and eastern present Uganda and most of present Kenya,[32] a political fact which has important human rights implications still today.[33] In Christopher Clapham's terms, African states are artificial, and that artificiality makes it extremely difficult to generate widely held, shared political values.[34]

In a paradoxical way, European colonialism encouraged supra-tribal ideological affiliations; in the nineteenth century all of diverse Africa fell under a colonizing political system of some fifty administrative territories and six European language zones.[35] In the historical event, sixteen countries have become members of one ideological affiliation, the Commonwealth of Nations. Colonization of much of Africa was rapid and disruptive. "Kenya's first president, Jomo Kenyatta, was born before the British established control of the territory. Before passing away, he ruled his country for 15 years."[36] The ideological confusion resulting from colonialism was succinctly expressed by then Tanzanian President Julius Nyerere at the founding conference of the Organization of African Unity (OAU) in 1963: "[O]ur boundaries are so absurd that they must be regarded as sacrosanct."[37]

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31. UGANDA NOW: BETWEEN DECAY AND DEVELOPMENT 5 (H.B. Hansen & M. Twaddle eds. 1988). In his essay, *Is Africa Decaying: The View from Uganda*, in the same volume, at 336, Ali A. Mazrui reports that the Kabaka Mutesa II was overthrown by a member of the rural Lango people, Milton Obote, who had taken his first name after the English poet John Milton.

For some reports of indigenous Uganda, see in the same volume the essay by D.A. Low, *The Dislocated Polity*, 36-54. *See also* WINSTON S. CHURCHILL, MY AFRICAN JOURNEY, 226 (1908).

32. R.M.A. VAN ZWANENBERG & ANNE KING, AN ECONOMIC HISTORY OF KENYA AND UGANDA, 1800-1970 x (1975).

33. There are several rebel groups in the northeastern part of Uganda which are ethnically based: the Uganda People's Democratic Army, the Uganda People's Army and the Holy Spirit Mobile Force. As of December, 1989 there were "over 2000" prisoners held by the Museveni government without charge in ordinary and military prisons (the former called "lodgers"), the majority of them villagers suspected of supporting rebels. Officially sanctioned torture and extra-judicial killings were common. *See* AMNESTY INTERNATIONAL, REPORT, 241-243 (1990). For additional background which exposes British and German influences contributing to the present situation, see Nabudere, *External and Internal Factors in Uganda's Continuing Crisis* in UGANDA NOW, *supra* note 31, 299-312.

34. C. CLAPHAM, THIRD WORLD POLITICS: AN INTRODUCTION 139 (1985). *See also*, Low, *supra* note 31, at 39.

35. LEFEVER, *supra* note 29, at 3. *See also* Low, *supra* note 31, at 36.

36. Hyden, *supra* note 26, at 114. *See also* CLAPHAM, *supra* note 34, at 16.

37. R. Emerson, *African States and the Burdens They Bear*, 10 AFR. STUD. BULL. 1 (1967).

Ali Mazrui writes that the colonial economic values of liberal capitalism, with its attendant political value of individual dignity, synthesized with a pan-African collectivist ethic to provide a rationale for *national* dignity (1977:25).[38] As one expression of this dignity, incorporating the examples of other regional international arrangements already in place,[39] the OAU Charter was promulgated in May, 1963.[40] Its most important purpose was to encourage the complete decolonization of the continent, but there were other purposes as well, reflecting some sentiment towards eventual geo-political definition which would be more consistent with indigenous divisions:

> The OAU Charter represents a compromise between the minority of African leaders who wanted to bring about immediate unification of the continent in the early 1960's and the majority who merely wanted a loose framework for cooperation and gradual integrity.[41]

This compromise is reflected in Article III of the OAU Charter, which balances a regard for state sovereignty with a non-alignment requirement for Member States.[42]

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38. Mazuri, *supra* note 31, at 336.

39. There are three regional international political organizations: the Organization of American States, formed in 1948, the Council of Europe, formed in 1957, and the Organization of African Unity.

40. The OAU Charter was signed at Addis Ababa on May 25, 1963 and entered into force on September 13, 1963. Commentator U.O. Umozurike, *The African Charter on Human and Peoples' Rights*, 77 AM. J. INT'L L. 902 (1983)) cites as the origin of the OAU a resolution adopted at a meeting of African jurists held under the auspices of the International Commission of Jurists at Lagos, Nigeria in January, 1961. However, Justice Mbaye, then President of the International Commission of Jurists, cites support for pan-African union as far back as 1943. *See* K. Mbaye, *Keynote Address on the African Charter on Human and Peoples' Rights* in HUMAN AND PEOPLES' RIGHTS IN AFRICA AND THE AFRICAN CHARTER 19-50 (1985).

41. E. Kannyo, *The OAU and Human Rights*, in THE OAU AFTER TWENTY YEARS 162 (Y. El-Ayouty & I. W. Zartman eds. 1984).

42. The text is as follows:

> Art. III. The Member States, in pursuit of the purposes stated in Article II, solemnly affirm and declare their adherence to the following principles:

1. the sovereign equality in the internal affairs of states;
2. non-interference in the internal affairs of states;
3. respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence;
4. peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration;
5. unreserved condemnation, in all its forms, of political assassination as well as of subversive activities on the part of neighboring states or any other state;
6. absolute dedication to the total emancipation of the African territories which are still dependent;
7. affirmation of a policy of non-alignment with regard to all blocs.

THE INTERNATIONAL LAW OF HUMAN RIGHTS IN AFRICA: BASIC DOCUMENTS AND ANNOTATED BIBLIOGRAPHY 29 (M.Hamalengwa, C. Flinterman & E.V.O. Dankwa eds. 1988).

However, as a result of the majority emphasis on sovereignty and a parallel reluctance to interfere in domestic affairs, a number of massive rights violations by Member States were not officially recognized:

> Before instance, the massacres of thousands of Hutu in Burundi in 1972 and 1973 were neither discussed nor condemned by the OAU, which regarded them as matters of internal affairs. The notorious regimes of Idi Amin of Uganda (1971-1979), Marcias Nguema of Equatorial Guinea (1969-1979), and Jean-Bedel Bokassa of the Central African Republic (1966-1979) escaped the criticism of the OAU and most of its members, Tanzania, Zambia and Mozambique being the exceptions.[43]

In fact, rather than experiencing unified criticism or sanction, Idi Amin was elected chairman of the OAU in 1975.[44]

By 1979, however, African leaders had become concerned with the international problems caused by interstate conflicts, particularly between Tanzania and Uganda.[45] Between 1979 and 1981, the OAU drafted the African Charter on Human and Peoples' Rights ("African Charter"), and it was approved in June, 1981. As of January 1, 1989 there were 36 State Parties to the African Charter,[46] Nigeria, Kenya and Uganda among them.[47]

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43. Umozurike, *supra* note 40, at 903.

44. Not all African leaders acceded to this demonstration of sovereign hypocrisy.

> There were, however, a few notable exceptions, apart from Nyerere, Kaunda, Seretse Khama, and Samora Machel who also opposed Amin on political grounds. In 1977, President Dawda Jawara of Gambia condemned the deaths of Archbishop Janani Luwum of the Anglican Church in Uganda while under the custody of the Amin regime's agents. Later in the year, President William Tolbert of Liberia vainly appealed to Amin to show clemency for fifteen men who were condemned to death and publicly executed by firing squad for allegedly plotting to overthrow his regime.

Kannyo, *supra* note 41, at 165.

However, lest the tragic history of Uganda be thought to have reached its apex during Amin, "[t]he material devastation and sheer scale of atrocities perpetrated by the second Obote government (1980-5) and its short-lived successor in late 1985 are now widely considered by Ugandans to have matched anything suffered under Amin's earlier murderous regime." UGANDA NOW, *supra* note 31, at 3.

45. Kannyo, *supra* note 41, at 166.

46. *See* M.J. Bowman & D.J. Harris, MULTILATERAL TREATIES: INDEX AND CURRENT STATUS, Treaty 806, at 150 (6th Cum. Supp. 1989). A number of previously ratifying states have revoked their ratifications, among them Commonwealth States Sierra Leone, Tanzania and Zambia. Note that these revocations are not reflected in the AMNESTY INTERNATIONAL REPORT 289 (1990).

47. It should be noted that the non-interventionist position of the OAU is softening. On February 20, 1990, then OAU Secretary-General Salim Ahmed Salim urged Member States to play a constructive role in resolving both internal and interstate conflicts in Africa. "[Salim] has placed a

The African Charter differs from both the European and American Charters in several identifiable aspects.[48] Specifically, Mbaye identifies components of the African concepts of law and human rights incorporated within the African Charter:

1. *The relationship between rights and duties*: in Africa, laws and duties are "two facets of the same reality: two inseparable realities";

2. *The community is a privileged subject of law*: this concept "reinforces the solidarity between members of the same [clan, ethnic group or tribe]";

3. *Aversion to the adoption of judicial solutions*: "[a]ccording to African conception of the law, disputes are settled not by contentious procedures, but through reconciliation."[49]

The following section will expand on these components of the African concept of law and human rights.[50] Their interpretation within the context of a colonial legacy helps us to understand some of the indigenous rationale which may influence *Code of Conduct* incorporation.

The Role of Legal Authority

Any notion, therefore, that the received laws result from any agreement between the Africans and the Europeans who conquered them, is untenable.[51]

In his exceptionally broad and sophisticated analysis of African law, Chijioke Ogwurike[52] takes a Weberian position that the received colonial law was and is coercive authority enforced by designated persons:[53] "[i]n

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high priority on what he has termed the 'prevention, management and resolution of conflict.'" See AFR. ECON. DIG., 4 (Feb. 26, 1990). This view was echoed in a declaration of the OAU leaders following their annual summit in Addis Ababa on July 11, 1990. *See* AFR. ECON. DIG. 3 (July 16, 1990).

48. THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 188 (1988).

49. Mbaye, *supra* note 40, at 26.

50. Indigenous authorities use the term "Africa" and I am following that lead. However, my concern is with Sub-Saharan Africa, excluding Botswana and South Africa (*see infra*, note 95), and particularly with Nigeria, Kenya and Uganda.

51. C. OGWURIKE, CONCEPT OF LAW IN ENGLISH SPEAKING AFRICA 174 (1979).

52. Prior to Idi Amin, Dr. Ogwurkie was the Dean, Faculty of Law, Makerere University in Kampala, Uganda. At the time, Makerere University was a leading regional academic institution, particularly the Faculty of Law, a role which Makerere is currently attempting to recover. For the early history of Makerere, see Dinwiddy & Twaddle, *The Crisis at Makerere*, in UGANDA NOW, *supra* note 31, at 195.

53. Weber wrote that "an order will be called *law* if it is externally guaranteed by the probability that coercion (physical or psychological) to bring about conformity or avenge violation, will be applied by a *staff* of people holding themselves specially ready for that power." *See* Rheinstein cited in Cotterrell, *The Sociological Concept of Law*, 10 J. L. & SOC'Y 241, 246 at note 17 (1983).

the area of public law the aim was complete domination by the imported law to enhance the British monopoly of force in the colony."[54] Initially, this received law did not operate throughout the entire colonial territory, only in those areas in the "colonial enclave," areas where mercantile interests were served by imported, rather than indigenous, law. As British law expanded into subsistence areas, and came into contact with a customary law with quite different root sociological assumptions, a kind of perverse legal pluralism developed. For example, when British law was established in Nigeria in 1876, the Supreme Court of the Gold Coast decided as follows:

> [T]he common law, the doctrine of equity and the statutes of general application which were in force in England on the date when the colony obtained a local legislature, that is to say, 24th July 1874, shall be in force within the jurisdiction of this court.[55]

The distinction of root metaphors,[56] in what I have called elsewhere the meta-theoretical assumptions which inform semiotic systems like law,[57] is between what David Zilberman describes as a "rational" apodictic position and a "family" one.[58] In British law, with its strong colonial Austinian positivist flavor, the root metaphor was what would later be understood as Weberian rationality. But in African customary law, respected outside the colonial enclave, the law was a *personal* one: "[t]he rules of customary law of an ethnic group attach to the members of the group, wherever they go to govern their marital status, heredity and succession lives."[59] An example is that in Nigeria, customary polygamous marriages provided a challenge to the British law governing competent

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54. OGWURIKE, *supra* note 51, at 175.

55. Cited in OGWURIKE, *supra* note 51, at 179.

56. Stephen C. Pepper originated the phrase "root metaphor" in his classic WORLD HYPOTHESIS: A STUDY IN EVIDENCE 348 (1942).

57. For a detailed discussion *see* Chapter 3 of my work, L.F. MOLINA, THE SOCIAL CONSTRUCTION OF CRIMINAL PUNISHMENT IN CANADA AND SAUDI ARABIA 88 (1989) (available in Centre of Criminology, University of Toronto).

58. An exposition of meta-theoretical influences is beyond the scope of this work, but I refer the interested reader to the recently published work of the late Society semiotician David Zilberman, THE BIRTH OF MEANING IN HINDU THOUGHT 368 (R.S. Cohen ed. 1988). Zilberman's theoretical position of "family" as the indigenous cultural imperative is empirically reinforced by Tolani Asuni. *See* T. Asuni, *Family* in ANALYZING (IN)FORMAL MECHANISMS OF CRIME CONTROL, *supra* note 2, 99-115. Finally, Zvekic and Mattei report "it would appear that in developing countries family is almost consensually considered as the most informal mechanism of crime control." UGLJESA ZVEKIC & AURELIO MATTEI, RESEARCH AND INTERNATIONAL CO-OPERATION IN CRIMINAL JUSTICE 157 (1987).

59. OGWURIKE, *supra* note 51, at 181.

and compellable witnesses. As a result of differenting arrangements, section 161 of the Nigerian Evidence Act reads as follows:

> When a person charged with an offence is married to another person by a marriage other than a monogamous marriage such last named person shall be a competent and compellable witness on behalf of either the prosecution or the defence.[60]

Ogwurike reports that a similar provision occurs in the Ugandan Evidence Act (1955), § 119,[61] and cites numerous examples of how received British law served to fragment customary land allocation practices.[62]

To this imposed fragmentation of a personal, customary law can be added a second effect of colonialism: the elimination of an oral tradition. Roland Colin writes:

> One of the most distinctive features of many traditional societies is the determining role played by the oral tradition in social communication. . .The fundamental changes occur when the producer of the message. . .no longer retains any personal link with the messages provided, which therefore acquires an 'inherent power' and becomes anonymous or abstract.[63]

Another author also makes the point:

> At the *communication* level the public agent has become anonymous; he is no longer a member of society. Bearer of unknown wisdom, of the message, of information, the *griot* or elder of the African societies is an important person with whom dialogue is engaged according to a reciprocally assimilated code.[64]

Of these two aspects which influence the reception of imported law, first, a kind of balkanization of imported law, and second, a *prima facie* denial of oral tradition, the second is much more consequential for the present discussion. Its implications are greater, influencing the disintegration of social control systems which leads to the inefficacy of "universal"

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60. Cited in OGWURIKE, *supra* note 51, at 185.

61. *Id.*

62. *Id.* at 182-184.

63. R. Colin, *Social Communication and the Participation of People in Development: Tradition and Modernity*, in STRATEGIES FOR ENDOGENOUS DEVELOPMENT 95-113, 101-102 (H.C. Tri et al eds., 1986).

Colin goes on to exemplify this importance as the African greeting custom of speaking the patronymic of the other. "The statement of the patronymic — or the name of the clan — amounts to situating the interlocutors in a process of communication in which each is seen to be the hearer of the characteristics of his clan." *Id.* at 113.

64. P.G. N'Diaye, *Cultural Development in Africa: Evolution, Experiences and Prospects*, in CULTURAL DEVELOPMENT: SOME REGIONAL EXPERIENCES 1, 23 (1981).

regulatory declarations like the Code of Conduct.[65] The following section will discuss the effects of a denial of an oral tradition.

The Fundamental Characteristics of Social Interaction

Although he is African, when P.N.L. Walakara writes that "[c]orruption and tribalism are recognized features of African administration"[66] (1982:85) his perspective is Western. This is not to suggest he is incorrect. In a recent international survey African states, as a whole, rate corruption as the most serious crime.[67] But other authors such as N'Diaye,[68] Mazrui,[69] and Kennedy,[70] have provided a deeper analysis, particularly commenting on the effects of a money economy in African social systems. Just as received law interrupts the oral transmission of personal authority, so too does a money economy disrupt the primary relations which characterize a barter or exchange system.[71] The result is alienation, or "cultural disappropriation," the "inegalitarian logic of the State system."[72]

As indigenous African society is traditionally localized through oral tradition, it is also, and ideologically consistent with the tradition, an "all-pervasive system of patrimonial rule."[73] "The vast majority of the continent's leaders insist on personal loyalty and unquestioned support of their own positions. The result is not only the stifling of public debate. . .[but also reduces] societal conflicts to a single discussion: for or against the leader."[74] From the African perspective, it is argued that the colonial imposition of artificial geopolitical boundaries has necessitated a strong centralized rule:

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65. For a sophisticated summary of the characteristics of an oral tradition, see *id.* at 58.

66. P.N.L. Walakira, *The Relevance of Socio-Cultural Factors to Public Administration and Management: The East African Experience and Beyond*, in PUBLIC ADMINISTRATION AND MANAGEMENT: PROBLEMS OF ADAPTATION IN DIFFERENT SOCIO-CULTURAL CONTEXTS 75-91, 85 (1989).

67. ZVEKIC & MATTEI, *supra* note 58, at 164.

Not surprisingly, the African countries participating in this survey are generally wealthier. Of the three exemplary countries in this article, Uganda participated once in 1976, Kenya also once in 1982, and Nigeria twice in both 1982 and 1986. On this, see ZVEKIC & MATTEI at 33-44.

68. *Supra* note 64, at 17.

69. *Supra* note 31, at 23.

70. M. Kennedy, *Law and Capitalist Development: The Colonization of Sub-Saharan Africa*, in LAW AND SOCIETY: A CRITICAL PERSPECTIVE 31-53, 38-41 (1989).

71. Ali Mazrui insightfully describes how the imposition of a taxation system was used by British authorities to motivate socialization into a money economy. *See supra* note 31, at 339-340. On this point see also Colin, *L'Ecole et l'Argent: Messages Ambigus dans le Tissu Social*, (*The School and Money*) 4 RECHERCHE, PEDAGOGIE ET CULTURE 3 (1976).

72. Colin, *supra* note 63, at 111.

73. Hyden, *supra* note 26, at 114.

74. *Id.* at 120.

> Some African leaders see the task of nation-building — that is, of creating loyalty to the nation rather than to a tribe or ethnic group — as the first necessity if their countries are to have any kind of a stable future. They fear that allowing untrammeled dissent among the populace will make it much more difficult to build this sense of nationhood.[75]

The result is frequently a one-party state which becomes a personality cult, evidence of Weber's patrimonial authority.[76] In Kenya for example, residents can be ordered to pay a fine if a picture of President Daniel T. Arap Moi, required in all public and private business establishments, is not kept sufficiently clean.[77] There are no members of the civil service that cannot be dismissed at the discretion of President Moi.[78] In Kenya, to continue a specific focus, currying favor with those in powerful positions has become institutionalized as a system called "pay tribute," sharing profits with elite persons in exchange for business opportunities and protection: "[t]he crucial link is to the district level, where the common features of politics continue to be bossism and allegiance to a few local big men who have contacts upwards."[79] The system extends to the police, as demonstrated by the following anecdote:

> I was with a client who was driving me through downtown Nairobi one mid-day in a rather expensive Mercedes, and he narrowly avoided getting hit by another driver. A police officer immediately stopped our car and began to lecture and warn my client on the hazards of his driving. After going on like this for a few minutes he insisted on receiving the gentleman's business card and indicated that he would soon be calling at his office to discuss the matter further. On driving away, my client advised me that the officer intended to come by to receive a payment or would threaten to harass my client. He indicated that the only reason the police officer didn't insist on immediate payment was that I, a white foreigner, was sitting in the car taking in the whole scene.[80]

All of Nigeria, Kenya and Uganda are one-party states, and they all have provisions for detention without trial.[81]

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75. U.S. DEPARTMENT OF STATE, BUREAU OF PUBLIC AFFAIRS, HUMAN RIGHTS ISSUES IN AFRICA 6 (Current Policy No. 1148, 1989).

76. Patrimonial authority can be contrasted with both charismatic authority and rational-legal authority when authority is ascribed to a person (rather than an office-holder) who is anchored in an ethnic order. *See* CLAPHAM, *supra* note 34, at 47.

77. Personal communication of Mar. 23, 1990. The writer must remain anonymous.

78. *Ten Years of President Daniel Arap Moi in Kenya*, 4 HUM. RTS. WATCH 5 (Oct.-Nov. 1988).

79. N.N. MILLER, KENYA: THE QUEST FOR PROSPERITY 100 (1984).

80. *Supra* note 77.

81. In Nigeria, the State Security (Detention of Persons) Decree (Decree 2 of 1984); in Kenya,

To summarize, this article is concerned with glimpsing some possible explanations for the comparative lack of Code of Conduct reporting and compliance from African States. Although physical and administrative resources may contribute to the lack, such an explanation is far too superficial and simplistic. African police practices are representations of a cultural context, one which is grounded in a complex etiology that includes both the remnants of destroyed indigenous systems and the legacy of exploitative colonialism, what Ali Mazrui calls a "crisis of viability for Western civilization in Africa."[82] The results are societies which do not fit a Euro-centric conception of universality: they are societies with ideologies and practices different from those which inform Western interactions between citizens and law enforcement officials. The following section of this article will focus particularly on characteristic police organizations and practices, grounded again in the three exemplary Commonwealth States of Nigeria, Kenya and Uganda.

Military and Police Organization in Africa

> African armies have rarely been cohesive, nontribal, Westernized, or even complex organizational structures. . .[i]ndeed, many African armies bear little resemblance to a modern complex organizational model and use instead a *coterie of distinct armed camps owing primary clientist allegiance to a handful of mutually competitive officers of different ranks seething with a variety of corporate, ethnic and personal grievances.*[83]

Earlier I discussed indigenous African society as characterized by both local and oral traditions, and I have explained how those traditions have been layered over with incomplete Western systems of political adminis-

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the Preservation of Public Security Act; in Uganda, the Public Order and Security Act (1967). As well, and parenthetically, it should be noted that from many African perspectives there are good reasons for one-party states; multi-party systems tend to form along indigenous divisions, and such divisions can be divisive within admittedly artificial, but realistic, geopolitical boundaries within which African states must govern. This issue of one-party or multi-party rule is the "official point of much unrest now sweeping the continent," but a comment on the issue was not forthcoming from the last annual summit of OAU leaders in July, 1990. *See* AFR. ECON. DIG. (AED) 3 (July 16, 1990). For a good synthesis of the ideological evolution of the one-party African state, see *supra* note 25, at 47.

82. Mazrui, *supra* note 31, at 344.

83. S. DECALO, COUPS AND ARMY RULE IN AFRICA: STUDIES IN MILITARY STYLE 14 (1976). This characterization is currently echoed by Robin Luckham: "[a]rmies are themselves unstable amalgams of different groups which are sometimes economically and sometimes regionally based. In them the unfinished agendas of decolonization have often been turned into factional conflict within the armed forces themselves." Luckham, *supra* note 25, at 48.

tration. African administrations get it, as it were, half right in emulating the Western model; to paraphrase Mazrui, there is one thing worse than having a complete Western criminal justice system, and that is having a Western police administration.[84] Although of the three illustrative countries only one, Nigeria, is currently under direct military rule,[85] all three have secret police organizations. In Nigeria, under General Babangida, the military and national police are supplemented by the State Security Service (SSS).[86] In Kenya, under President Moi, the military and police are interwoven with the Government Service Unit (GSU), the controlling secret police organization.[87] In Uganda, under President Yoweri Museveni, internal security is controlled by the National Resistance Army (NRA), which has its own detention centres outside the jurisdiction of Ugandan law.[88]

Of the three illustrative countries, only Kenya has submitted a *Code of Conduct* report, but in the authoritative annual *Freedom At Issue* survey Kenya is rated "least free" of the three states.[89] Although there is no specific explanation for the rating, it may be explained by two recent Kenyan developments: the elimination of a secret ballot,[90] and the exten-

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84. Ali Mazrui writes "[t]here is one thing worse than being made fully capitalist — being made a minimal capitalist." *Supra* note 31, at 354.

85. In 1983 a civilian transitional election was accompanied by violence and accusations of voting irregularity. Consequently, on December 31, 1983 senior army officers, called the Supreme Military Council (SMC), staged a successfully coup. Then on August 27, 1985 a member of the SMC, General Ibrahim Babangida, took power and renamed the SMC the Armed Forces Ruling Council. The Council was dissolved in February, 1989. *See* NIGERIA COUNTRY PROFILE 1989-90 53 (The Economist Intelligence Unit 1989). An unsuccessfully coup was attempted on April 22, 1990, and at least 22 persons were later executed.

86. Formerly the Nigerian Security Organization (NSO). There are also several paramilitary forces: the Port Security Policy (12,000) and the Security and Civil Defence Corps.

87. Some public awareness of the interdependency and controlling influence of the GSU was gleaned under former president Jomo Kenyatta, the founder of Kenya's "African Socialism." A Parliamentary Commission report on the 1975 murder of Member of Parliament and Kenyatta opponent J.M. Kariuki "accused the Kenya police of a massive cover-up and named the commander of the paramilitary Government Service Unit (GSU) as 'the person who took an active part in the murder himself or was an accomplice of the actual murderer or murderers.'" *See supra* note 79, at 53.

88. *Supra* note 75, at 390. The history of Uganda's internal security is complicated and primarily, but not exclusively, tribal-based. The current NRA numbered only 27 soldiers in 1981, but is estimated at 35,000 in mid-1988. *See* UGANDA COUNTRY PROFILE 1989-90 6 (1989). The police force has 15,000 officers. *Id.* at 388.

89. Both Nigeria and Uganda are rated "Partly Free" states, Uganda slightly better than Nigeria. Kenya is rated "Not Free," with a 6 rating on a scale of 1-7. *See* FREEDOM AT ISSUE (Jan./Feb. 1990).

90. Achieved through the practice of "queuing," ostensibly to aid illiterates. Voters are required to line up publicly in front of pictures of political candidates. There is only one authorized party, the Kenya Africa National Union (KANU).

sion of police custody without judicial review for suspected capital offenders from 24 hours to 14 days.[91] Amnesty International reports that "[m]ost victims of torture [in Kenya] have reported that they were tortured by officers of the Special Branch. . .a special police unit responsible for internal security."[92] At the end of 1989 there were at least 24 political prisoners, but there were no reported executions in that year.[93]

From a Western (and rhetorically "universal") human rights perspective, all three countries are monitored very closely by appropriate agencies because of past and present human rights abuses. Most abuses are perpetuated by state police organizations in violation of, *inter alia*, Code of Conduct Article 5.[94]

Are There Solutions?

Ensuring compliance by Sub-Saharan police[95] with human rights instruments like the Code of Conduct[96] requires an ideological understanding by the West of the problems of a colonial legacy more than misguided and inappropriate financial aid, although responsibly planned financial aid is certainly essential. Western colonial penetration of the continent destroyed indigenous social control and criminal justice systems. After independence, devastated societies were expected to aspire to, and achieve, Western normative practices which have evolved from substantially different ideologies and experiences. Sub-Saharan Africa is poor and becoming poorer economically, weak and becoming weaker sociologically, both

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91. HUM. RTS. WATCH 99-101 (1989).

92. AMNESTY INTERNATIONAL, KENYA: TORTURE, POLITICAL DETENTION AND UNFAIR TRIALS, 12, 8 (1987).

93. AMNESTY INTERNATIONAL 139-40 (1990).

94. The annual human rights reports usually consulted, and which were the core reports consulted for this work, are the annual AMNESTY INTERNATIONAL REPORTS, particularly 1989 and 1990; the annual U.S. COUNTRY REPORTS OF HUMAN RIGHTS PRACTICES (1989); and the annual HUMAN RIGHTS WATCH, Critique: Review of the Department of State's Country Reports on Human Rights Practices (1989).

95. A major exception to the dismal picture of sub-Saharan human rights practices is Botswana, the only state in Africa to be rated "Free" by Freedom House. *See supra* note 89. Botswana is also wealthier than our illustrative countries, with a GNP per capita of US $1,030. It has also submitted a Code of Conduct report, and has reported no citizens or law enforcement officials killed or seriously injured in the period 1985-1986. *See* U.N. ESCOR, 10th Sess., U.N. Doc. E/AC.57/1988/8/Add. 1 (1988).

96. Another draft instrument which has evolved from the Code of Conduct, and which will be a major discussion topic at the Eighth UN Congress, is the draft Basic Principles on the Use of Force and Firearms.

evolving situations now becoming catastrophic with the onslaught of AIDS.[97]

It is paradoxical that as developed Western countries strive to solve the "crime problem," unfortunately almost always popularly characterized as predatory crime, they turn to an examination of what are called, often pejoratively, informal systems such as mediation or reconciliation. This is paradoxical because these are indigenous African solutions, grounded in a communitarian ideology, but they have been lost except in rhetoric, effectively destroyed by the ratiocinative ideology of formal criminal justice systems.[98]

Perhaps in the pragmatic spirit of international association, African states rate police training as the most urgent criminal justice system priority.[99] This is because "the law-enforcement machinery in Africa seems to be crumbling. In many African countries the police is [sic] getting more corrupt rather than less."[100] The United Nations generally, and Western nations particularly, should be cautious in their responses, since a quick response may be an ignorant, insensitive one.[101] Police conduct in Sub-Saharan African is conduct in context, and the consequent contradictions are reflective of that confused context, an Africa "caught up

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97. A somewhat less pessimistic economic forecast has recently been published by the World Bank. *See* WORLD BANK, SUB-SAHARAN AFRICA: FROM CRISIS TO SUSTAINABLE GROWTH: A LONG PERSPECTIVE STUDY 300 (1989). A review of this work can be found in WORLD HEALTH 30 (Mar. 1990).

Regarding AIDS, the World Health Organization (WHO) estimates that Africa has the highest global area number of AIDS cases, 280,000, as of October 1, 1989. This is 54% of the estimated world total. As well, the estimate of Africans infected with HIV is 2.5 million. *See* WORLD HEALTH 6 (Oct. 1989); *see also* WHO Resolutions WHA42.33 and WHA42.34, U.N. WHO 42d World Health Assembly, U.N. Doc. WHA42/1989/REC/1 (1989). Because the pattern of HIV spread in Africa is heterosexual, with a 1:1 ration of infected females:males, the former director of WHO's Global Program on AIDS has noted that, because of the (so-called "Pattern II") African heterosexual epidemiology, an increase in child mortality of 25 percent can be expected. The relative costs to governments are enormous: in some African countries, for example, the cost of one blood test (US $4.00) is approximately the total per capita health expenditure. *See*, DAVID SPURGEON, AIDS: THE CHALLENGE TO DEVELOPING COUNTRIES 6-7 (1989).

98. For a personal account of pre-colonial reconciliation, *see supra* note 31, at 341-342.

99. ZVEKIC & MATTEI, *supra* note 58, at 164.

100. Mazuri, *supra* note 31, at 341.

101. The application of anthropological appreciations to legal systems generally, and criminal justice systems specifically, is a key perspective in the emerging school of Critical Legal Studies (CLS), but most work has been concerned with North American urban anthropology. For the application of anthropological techniques to an evaluation of development assistance, see LAWRENCE F. SALMEN, LISTEN TO THE PEOPLE: PARTICIPANT-OBSERVER EVALUATION OF DEVELOPMENT PROJECTS 149 (1987/1989). Salmen's work is mostly concerned with Latin America, but some application methodology in both Africa and Asia is described.

between Shylock and Shaka, between greed and naked power."[102]

One constructive suggestion is that issues of human rights and development must be linked, but to recognize the relationships between "naked power" and "greed" is very difficult. An example of a broad, well-intentioned but inarticulate link is found in a recent major foreign aid policy statement by the Government of Canada: "Where there are systematic, gross and continuous violations of basic human rights, Cabinet will deny or reduce government-to-government aid."[103]

A more productive beginning solution to this "complex and many-sided" relationship would be to define more specifically a "base" right, perhaps starting with a link between what are called "integrity" or "first-priority" human rights, and development assistance. These are rights which flow from, among others, Henry Shue's concept of a fundamental right to personal security, one which comes closest to a genuinely "universal" human right.[104] While the specific formulation of first-priority rights is a matter of some debate, they quite clearly include ones which are the subject of Code of Conduct provisions such as freedom from wanton acts of violence, and from summary execution, disappearance, and cruel and degrading treatment and torture.[105] Where first-priority rights can be agreed with recipient countries, Code of Conduct reporting compliance and actual, verified compliance should be required for development assistance.

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102. Mazuri, *supra* note 31, at 345.

103. CANADIAN INTERNATIONAL DEVELOPMENT AGENCY (CIDA), SHARING OUR FUTURE: CANADIAN INTERNATIONAL DEVELOPMENT ASSISTANCE 93 (1987). Although conceptually mistaken, this position must be recognized that such policies are a beginning, a progressive move away from a simple linear and technical conception of development as expressed currently, for example, by the Structural Adjustment Programmes (SAPs) implemented by many African countries, including Nigeria. SAPs are implemented on advice from the World Bank and International Monetary Fund in order to correct national debts, but their effect on ordinary people can be catastrophic. In Nigeria, for example, "last year [1989] primary-school enrolment plummeted 20 percent in Lagos as parents withdrew their children to send them to the villages or put them to work care." *Sapping Nigeria's Poor*, in NEW INTERNATIONALIST (Special Issue: *Burden of Hope: Africa in the 1990's*) 22 (June, 1990).

Other progressive human rights-development linkages have been enunciated by the Netherlands (1979) and Norway (1984). Recently CIDA vice-president Lawis Perinbam stated "[developing countries] seek partners, not patrons, in their quest for a better life. The paternalism of the past must be replaced by a vision of development based on mutual respect." The Globe and Mail, Aug. 17, 1990, at B6.

104. H. SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND U.S. FOREIGN POLICY 20, 13-20 (1980).

105. G. SCHMITZ, HUMAN RIGHTS: CANADIAN POLICY TOWARD DEVELOPING COUNTRIES 4 (1988).

Finally, it is important to note that the foregoing should not be taken as an apology for human rights abuses which might be perpetrated by governmental authorities anywhere; abuses as understood within a local cultural context must be condemned. But precisely because there are a plurality of cultural contexts, one aim of this article is to suggest that to achieve a diminished occurrence of abuses is a far more complex matter than 'universal'' promulgations would lead us to believe.

APPENDIX - 1

Code of Conduct for Law Enforcement Officials[106]

Article 1

Law enforcement officials shall at all times fulfil 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.

Commentary:

(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.**

(c) **Service to the community is intended to include particularly the rendition of services of assistance to those members of the community who by reason of personal, economic, social or other emergencies are in need of immediate aid.**

(d) **This provision is intended to cover not only all violent, predatory and harm acts, but extends to the full range of prohibitions under penal statutes. It extends to conduct by persons not capable of incurring criminal liability.**

Article 2

In the performance of their duty, law enforcement officials shall

106. U.N. Doc. DPI/665—19972 (1988).

respect and protect human dignity and maintain and uphold the human rights of all persons.

Commentary:

***(a)* The human rights in question are identified and protected by national and international law. Among the relevant international instruments are the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, the Convention on the Prevention and Punishment of the Crime of Genocide, the Standard Minimum Rules for the Treatment of Prisoners and the Vienna Convention on Consular Relations.**

***(b)* National commentaries to this provision should indicate regional or national provisions identifying and protecting these rights.**

Article 3

Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.

Commentary:

***(a)* This provision emphasizes that the use of force by law enforcement officials should be exceptional; while it implies that law enforcement officials may be authorized to use force as is reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders, no force going beyond that may be used.**

***(b)* National law ordinarily restricts the use of force by law enforcement officials in accordance with a principle of proportionality. It is to be understood that such national principles of proportionality are to be respected in the interpretation of this provision. In no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved.**

***(c)* The use of firearms is considered an extreme measure. Every effort should be made to exclude the use of firearms, especially against children. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender. In every instance in which a firearm is discharged, a report should be made promptly to the competent authorities.**

Article 4

Matters of a confidential nature in the possession of law enforcement officials shall be kept confidential, unless the performance of duty or the needs of justice strictly require otherwise.

Commentary:

By the nature of their duties, law enforcement officials obtain information which may relate to private lives or be potentially harmful to the interests, and especially the reputation, of others. Great care should be exercised in safeguarding and using such information, which should be disclosed only in the performance of duty or to serve the needs of justice. Any disclosure of such information for other purposes is wholly improper.

Article 5

No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor 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.

Commentary:

(a) **This prohibition derives from the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly, according to which:**

"[Such an act is] an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights [and other international human rights instruments]."

(b) **The Declaration defines torture as follows:**

"torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners."

(c) **The term "cruel, inhuman or degrading treatment or punishment" has not been defined by the General Assembly but should be interpreted**

so as to extend the widest possible protection against abuses, whether physical or mental.

Article 6

Law enforcement officials shall ensure the full protection of the health or persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required.

Commentary:

(a) **"Medical attention," which refers to services rendered by any medical personnel, including certified medical practitioners and paramedics, shall be secured when needed or requested.**

(b) **While the medical personnel are likely to be attached to the law enforcement operation, law enforcement officials must take into account the judgment of such personnel when they recommend providing the person in custody with appropriate treatment through, or in consultation with, medical personnel from outside the law enforcement operation.**

(c) **It is understood that law enforcement officials shall also secure medical attention for victims of violations of law or of accidents occurring in the course of violations of law.**

Article 7

Law enforcement officials shall not commit any act of corruption. They shall also rigorously oppose and combat all such acts.

Commentary:

(a) **Any act of corruption, in the same way as any other abuse of authority, is incompatible with the profession of law enforcement officials. 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 and within their agencies.**

(b) **While the definition of corruption must be subject to national law, it should be understood to encompass the commission or omission of an act in the performance of or in connection with one's duties, in response to gifts, promises or incentives demanded or accepted, or the wrongful receipt of these once the act has been committed or omitted.**

(c) **The expression "act of corruption" referred to above should be understood to encompass attempted corruption.**

Article 8

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.

Commentary:

(a) **This Code shall be observed whenever it has been incorporated into national legislation or practice. If legislation or practice contains stricter provisions than those of the present Code, those stricter provisions shall be observed.**

(b) **The article seeks to preserve the balance between the need for internal discipline of the agency on which public safety is largely dependent, on the one hand, and the need for dealing with violations of basic human rights, on the other. Law enforcement officials shall report violations within the chain of command and take other lawful action outside the chain of command only when no other remedies are available or effective. It is understood that law enforcement officials shall not suffer administrative or other penalties because they have reported that a violation of this Code has occurred or is about to occur.**

(c) **The term "appropriate authorities or organs vested with reviewing or remedial power" refers to any authority or organ existing under national law, whether internal to the law enforcement agency or independent thereof, with statutory, customary or other power to review grievances and complaints arising out of violations within the purview of this Code.**

(d) **In some countries, the mass media may be regarded as performing complaint review functions similar to those described in subparagraph *(c)* above. Law enforcement official may, therefore, be justified if, as a last resort and in accordance with the laws and customs of their own countries and with the provisions of article 4 of the present Code, they bring violations to the attention of public opinion through the mass media.**

(e) **Law enforcement officials who comply with the provisions of this Code deserve the respect, the full support and the co-operation of the community and of the law enforcement agency in which they serve, as well as the law enforcement profession.**