



GENEVA CENTRE FOR THE DEMOCRATIC CONTROL OF
ARMED FORCES (DCAF)

POLICY PAPER

Towards a Code of Conduct for Armed and Security Forces in Africa: Opportunities and Challenges

Adedeji Ebo

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About the Author

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TOWARDS A CODE OF CONDUCT FOR ARMED AND SECURITY FORCES IN AFRICA: OPPORTUNITIES AND CHALLENGES

Adedeji Ebo

Introduction

A fundamental feature of the pattern of civil-military relations (CMR) in most of Africa has been the historical trading of places between the military and the civilian population. Rather than being under the control of civilians as constitutionally required, the military often took control of not only the civilian population, but the entire machinery of state. A major direct outcome of prolonged military rule in many African states, therefore, is the inversion of civil-military relations, with the structure of the relationship literally standing on its head. The civilian populace, whose constitutional duty and right it is to supervise the military, themselves became subjects and victims of military dictatorship. The military, which was supposed to be subject to civilian control, became master of not only its own destiny, but also the destiny of the entire nation. This reversal of roles has had disastrous consequences for political stability and national development.

Demilitarization remains central to democratization on the African continent. Changes in the domestic and external factors underpinning CMR in Africa have however created opportunities for democratic transformation, particularly with regard to democratic control of the armed and security forces. Normative frameworks such a code of conduct for armed and security forces facilitate the infusion of democratic norms, such as transparency and accountability, into the exercise of state power.¹ The draft Code of Conduct for Armed and Security Forces in Africa, drawn up in 2002, is an effort to fill the expanded democratic space with specific confidence building measures and minimal behavioral requirements by the armed and security forces.²

The aim of this paper is to account for the evolution of the draft Code, and to examine its relationship (if any) to similar initiatives within and beyond Africa. Following this brief introduction therefore, the paper attempts to place the draft Code within the context of general trends in civil-military relations in Africa. It then traces the evolutionary process of the African Code, within the context of similar and related initiatives and processes in Africa. The paper also identifies the main provisions of the Code. It compares the OSCE Code to the draft African Code, pointing out similarities and differences and the extent to which the former was a model for the latter. The paper then identifies matters arising in the drive to achieve the adoption and implementation of the present draft African Code. The paper is concluded with recommendations which could enrich the CoC and create the basis for more viable articulation of the agenda of democratic control of armed and security forces in Africa.

¹ See Hänggi, H., 'Good Governance of the Security Sector: Its Relevance for Confidence-Building', in Hänggi, H. (ed.), 'Practical Confidence-Building Measures: Does Good Governance of the Security Sector Matter?', Geneva Centre for the Democratic Control of Armed Forces, Working Paper №107, January, 2003.

² See attached document.

General Trends in African Civil Military Relations: The Political Economy of Trading Places

Civil-Military relations refer to the web of relations between the military and the society within which it operates, and of which it is necessarily a part. Such relations encompass all aspects of the role of the military (as a professional, political, social and economic institution) in the entire gambit of national life. Civil military relations involve issues of the attitude of the military towards the civilian society, the civilian society's perceptions of, and attitudes to the military, and the role of the armed forces in relation to the state.

The utility of the concept of *civil-military* relations in capturing the seemingly ever increasing array of actors and the complexity of relationships involved in the interaction between *les gens d'armes* and the rest of society has become both limited in scope and limiting in application. Though the military has featured prominently in the sociology of power, other security actors have been part of the security establishment, which need to be accommodated within the trajectory of civil-military relations. It has therefore been rightly observed that:

Non-military actors who nevertheless constitute part of the broader security community- the gendarmerie, militia forces, the police, intelligence organizations, paramilitary forces and guerilla armies- also need to be accommodated within the ambit of good governance and national policy management. In reality, it makes more conceptual and practical sense to broaden the scope of 'civil-military relations' to include all civil/civilian-security relations.³

Rocky Williams has usefully suggested that 'ultimately it may be more appropriate in many developing countries to speak either of *civilian-military* relations or even *civilian-security relations* rather than simply focusing on civil-military relations in the narrower institutional sense of the word'.⁴ It may therefore be appropriate to consider the extent to which the draft Code of Conduct for Armed and Security Forces in Africa adopted such an inclusive perspective of civil-military relations. At this juncture, it is sufficient to note the limitations of a narrow conception of civil-military relations.

Indeed trends in civil-military relations in Africa have been characterized by contradictions and are further qualified by the fact that the military (and for that matter the security sector) is not necessarily a cohesive entity, but comprising a diverse set of individuals, groups, and interests, often with as many divisions as exist in the larger society. In several instances of military rule therefore, while the segment of the military that had political power took many decisions, and committed numerous atrocities in the name of the military, the reality was that there were several elements who were not part of the 'political military' and who perceived their interests as being better served under a constitutional order. The most damaging consequence of praetorianism was the effect of the former on professionalism in the forces, arising from the politicization of the military, and a division within the military itself. In the same vein, a large section of the elite component of the civil populace also benefited from, and was an accomplice to military rule, motivated and fuelled by a crude and systemically corrupt network of client-

³ 'Consolidating Democratic Civil-Military Relations' (Editorial), *African Security Review*, Vol. 11, № 2, 2002, Institute for Security Studies, Pretoria.

⁴ Williams, R., 'Conclusion: Mapping a New African Civil-Military Relations Architecture', in Williams, R., Cawthra, G., and Abrahams, D. (eds.), *Ourselves To Know: Civil-Military Relations and Defence Transformation in Southern Africa*, Institute for Security Studies, Pretoria, 2003. p. 279.

patron linkages. The point to be made is that the web of relations between the armed and security forces and the larger society is a complex and multidimensional one.

Indeed the pattern of civil-military relations in Africa has not been a bifurcated one. The military was not the devil, nor the civilians saints. While individuals benefited directly and immensely from military rule and the consequent trading of places which resulted, nations at large have suffered incalculably and have been paying a heavy price for the contradictions which arose as a consequence. The military (and indeed the entire armed and security forces) became *politicized*, while the civil populace became, to various degrees, *militarized*. Political instability, kleptomania, manipulation of ethno-religious cleavages, economic doom, and systemic, and brutal human rights abuses have been the net effect of military rule. It must however be conceded that the revolutionary and arguably progressive military governments were often enabled and given some degree of credibility by the gross abuse of power by civilian governments.

From one perspective, the military is an accurate mirror of society, while from another, the institution has a unique institutional culture which sets it apart from the rest of society.⁵ This paper argues that the relationship approximates to one of mutual reinforcement, and by the same token, mutual degradation. Just as the military is itself a reflection of the larger society, the civilian sector is affected by the policies, actions, and activities of the military, particularly when the military has directly ruled the country for a prolonged period. Therefore the military and the larger society affect, and are affected by each other through a dynamic and complex web of socio-cultural, economic, and political linkages.

The immediate post-colonial period in most African states featured military institutions which were virtually clones of their colonial masters and thus remained within the confines of their constitutional roles. With the inability of the civilian elite to meet the challenges and contradictions of the post-colonial state, coupled with the inherently domineering character of the military, military takeovers became increasingly commonplace in Africa in the 1960s and 1970s, with successful coup plotters justifying their regimes on the altar of corrective revolutions and patriotism. Apart from the domestic environment, the factors that sustained military rule in Africa relate to the strategic imperatives of the Cold War. By the 1990s however, the global strategic environment had changed significantly while within most African states, the military rulers had established themselves as being largely unable to address the challenges of governance and in most cases, were more in need of correction than the civilian regimes they had overthrown.⁶

At the very core of civil-military relations is the issue of the control and regulation of the armed and security forces by the larger society, based on the principles of transparency and accountability. The objective is to have armed and security forces which are effective and efficient in the performance of their constitutional duties and according to the dictates of a civilian, and ideally, democratic governance (See Box 1). Within this context,

⁵ See Ngoma, N., 'Civil-Military Relations: Searching for a Conceptual Framework With An African Bias' in Ngoma, N. et al (eds.), *Civil-Military Relations in Zambia: A Review of Zambia's Contemporary Civil-Military Relations History and Challenges of Disarmament Demobilization and Reintegration*, Institute for Security Studies, Pretoria, 2004, p. 5.

⁶ See Bathily, A. and Hutchful, E. (eds.), *The Military and Militarism in Africa*, CODESRIA Books Series, Dakar, 1998.

the terms ‘civilian control’ and ‘democratic control’ are often used interchangeably, albeit erroneously, to describe this oversight function. The vague use of these terms often produces confusion and ambiguity on the level to which democratic models of civil-military relations are being established. Democratic Control is civilian oversight of the military by the legitimate, democratically elected authorities of the state, in a manner consistent with the basic tenets of transparency and accountability. Civilian control may be exercised in an undemocratic, non-responsive and non-responsible manner. Thus, civilian control is a necessary, but not sufficient condition for democratic control.

Box №1: Ten Key Principles of Democratic Governance of the Security Sector

- Accountability of security forces to elected civil authorities and civil society.
- Adherence of security forces to international law and domestic constitutional law.
- Transparency in security-related matters.
- Adherence of the security sector to the same principles of public-expenditure management as the non-security sectors.
- Acceptance of clear hierarchy of authority between civil authorities and security forces, clear statement of mutual rights and obligations between civil authorities and security forces.
- Capacity among civil authorities to exercise political control and constitutional oversight of security sector.
- Capacity within civil society to monitor security sector and provide constructive input into political debate on security policies.
- Political environment conducive to an active role on the part of civil society.
- Access of security forces to professional training consistent with requirements of democratic societies.
- High priority accorded to regional and sub-regional peace and security by policy makers.

Adapted from Department for International Development, *Security Sector Reform and the Management of Military Expenditure: High Risks for Donors, High Returns for Development*, (Report of the International Symposium on Security Sector Reform, Sponsored by DFID, London, 15-17 February, 2000, p. 46.

Furthermore, the increasing utility and relevance of military and security services beyond national boundaries, for example through regional peacekeeping and the multiplicity of cross border security threats such as Small Arms and Light Weapons (SALW), human trafficking, illegal exploitation and transfer of natural resources, and within states for non-traditional tasks, point to the need for regional perspectives on society’s relations with armed and security forces in Africa. The increasing role of Non State Actors (NSAs) such as civil society organizations and, private security and military companies, and various armed groups, confirm the need to interrogate the exclusive focus on the military and the state in discussions of civil-military relations in Africa.

Evolution of the Draft Code of Conduct for Armed and Security Forces in Africa

Particularly since the end of the Cold War, a body of overlapping instruments has been and is being developed which seek to lock in democratic gains and to prevent the inherently destabilizing effects of a return to autocratic rule in Africa.⁷ The end of cold war rivalry further exposed the imperative of bringing (not necessarily returning) the

⁷ Piccone, T.J., ‘International Mechanisms for Protecting Democracy’, p. 3, <http://www.clubmadrid.org/cmadrid/fileadmin/8-Piccone.pdf>, accessed on 24 February 2005. 15.30 GMT.

armed and security forces under democratic governance. This has been a most challenging task for African states, particularly in view of the fragility of the post-colonial state and the entrenchment of militarism and militarization. After the various national conferences, constitutional reviews, and elections, civilian regimes could only be in government, but not in power, if strategic instruments of statehood, such as the use of legitimate force, remained outside civilian control.

Various mechanisms exist for exercising democratic control of the armed and security forces. Such mechanisms include but are not limited to parliamentary oversight (including and particularly the power of the purse and the power to declare war), a vibrant and resilient civil society, and a free press. They also extend to the promotion of democratic culture and principles within the military organization that contribute to raising awareness of and respect for democratic values and institutions as well as human rights principles.⁸ While various states have usually been directly responsible for taking steps toward democratic control of armed and security forces, African states have also found it necessary to take collective steps in the bid to bring armed and security forces under democratic control. From an African perspective, Liberia, and certainly the effects of failed peace enforcement in Somalia (post Mogadishu syndrome, as demonstrated in Rwanda) pointed to a 'strategic devaluation' of the continent, defining a need for more self reliance in peace and security matters. Events in the West African Mano River axis had since the late 1980s pointed to the loss of the imperial security umbrella over African states which had been provided by the imperatives of the Cold War. In other words, the start of the Liberian civil war coincided with a period in which the Cold war protagonists were either preoccupied with celebrating victory (the West) or licking the wounds of defeat (the East). It marked the beginning of introverted international relations. Thus, in the 2000 Lome Declaration of the 36th Ordinary Session of the Assembly of Heads of State and Government, African leaders clearly expressed dissatisfaction with the prevailing global environment:

deploring the fact that the international community does not always accord due attention to conflict management in Africa, as it has consistently done in other regions of the world, and that the efforts exerted by Africans themselves in the area of peacekeeping, as provided for under Chapter VII of the United Nations Charter, are not given adequate financial and logistical support.⁹

Since then, African states had, at times arduously, and only after the loss of thousands of lives, taken measures to accelerate the pace and volume of demilitarization and democratization. The prevalence of brutally violent conflicts mostly within states has set a defining character on civil-military relations. In conflict-ridden societies, civil-military relations are largely antagonistic, characterized by a high degree of social polarization and a 'public security gap'. Transitional democracies tend to enjoy more stable and harmonious civil-military relations, featuring an opening up of democratic space, active role of civil society, with military forces increasingly coping with the challenges of democratic control.¹⁰

⁸ See Born, H. *et al* (eds.), *Parliamentary Oversight of the Security Sector: Principles, Mechanisms and Practices Handbook for Parliamentarians*. Handbook for Parliamentarians № 5, DCAF/IPU, Geneva, 2003. p. 149.

⁹ Paragraph 4, CSSDCA Solemn Declaration, AHG/Decl.4, XXXVI, Lome, 2000.

¹⁰ See Lilly, D. *et al*, 'A Goal Oriented Approach to Governance and Security Sector Reform, International Alert, London, 2002, pp. 11-14.

Table 1: Regional Normative Instruments for Democratic Control of Armed and Security Forces in Africa

Year, Place & Reference	Title of normative instrument	Main provisions
July 1999, Algiers AHG/Dec. 141, 142 XXXV	Declarations and Decision Adopted by the 35 th Assembly of Heads of State and Government (Algiers Declaration)	<ul style="list-style-type: none"> • 'Recalls further the spirit of the Harare Declaration on unconstitutional removal of Governments' • 'recognizes that the principles of good governance, transparency and human rights are essential for building representative and stable governments and contribute to conflict prevention'
July 2000, Lome AHG/ Decl. 4, XXXVI/(AHG/Dec. 150 XXXVI)	Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA) Solemn Declaration	<ul style="list-style-type: none"> • Human Security definition of <i>security</i>¹¹ • Affirmed that 'The executive, legislative and judicial branches of government must respect their national constitutions and adhere to the provisions of the law and other legislative enactment promulgated by National Assemblies ... No one shall be exempted from accountability' • CSSDCA is a not an event but a process (para 6)
July 2000, Lome AHG/Decl. 5, XXXVI/(AHG/Dec. 150 XXXVI)	Declaration on the Framework for an Organization of African Unity (OAU) Response to Unconstitutional Changes of Government	<ul style="list-style-type: none"> • Rejection of any unconstitutional changes as anachronistic • Agreed to elements of Framework of Action for an OAU (now AU) response to unconstitutional changes of government • Elements of the framework include a set of common principles for democratic governance, definition of unconstitutional change, measures and actions to be taken, and an implementing mechanism¹²
July, 2000 Lome	African Union (AU) Constitutive Act	<ul style="list-style-type: none"> • Principles of the Act include 'condemnation and rejection of unconstitutional changes of governments'¹³ • 'Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union'¹⁴
February 2004	Solemn Declaration on A Common African Defence and Security Policy	<ul style="list-style-type: none"> • 'condemnation and rejection of unconstitutional changes of governments'¹⁵ • 'provide for transparency and clarity on national defence and security policies, as well as cost effectiveness'¹⁶

¹¹ Section b of the 'Specific Principles' of the CSSDCA Declaration stipulates that 'the concept (of security) must embrace all aspects of society, including economic, political and social and environmental dimensions of the individual, family and community, local and national life. The security of nations must be based on the security of the life of the individual citizens to live in peace and to satisfy basic needs while being able to participate fully in societal affairs and enjoying freedom and fundamental human rights' (AHG/Decl.4, XXXVI).

¹² The framework elements include immediate and public condemnation of the takeover by the AU Secretary General and Chair, 6 months ultimatum during which the erring state is suspended from AU Policy Organs, and subsequently cutting of diplomatic ties, economic sanctions and visa denials to perpetrators. Unconstitutional change was defined as (i) military coup, (ii) intervention by mercenaries to replace a democratically elected government, (iii) replacement of democratically elected government by armed dissident groups and rebel movements, and (iv) refusal by an incumbent government to relinquish power. See Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government.

¹³ See Article 4 (p).

¹⁴ Article 30 of Constitutive Act.

¹⁵ Article 11 (m) of CASDP, Principles and Values Underlying the CADSP.

¹⁶ Article 13 (g), Objectives and Goals of the CADSP.

One reality that cuts across is that democratic control of the security sector is essential for all states. It may be for different immediate objectives but the goals and principles are the same: accountability and transparency. It is within this context that the process for the articulation of a draft Code of Conduct for Armed and Security Forces in Africa commenced in 2001 as part of the attempt to pursue democratic control of armed and security forces. Prior to the drafting of the CoC, a body of instruments has evolved which defines the context and expose the challenges presently facing the CoC. At its July 1997 Summit, the OAU (now AU) in Harare adopted a resolution which stood against unconstitutional changes of government. The 1997 Harare Declaration stands out markedly as a significant point in the codification of normative frameworks for democratic control at the continental level and became the reference point for norms building in Africa. Table 1 summarizes the African regional instruments which form the basis of a collective normative framework for democratic control.

The basic principle behind these declarations is the supremacy of constitutionalism and an affirmation of the illegality of militarism. It is worthy of mention that while the CoC is a continental document, there have been on-going attempts at sub-regional levels to adopt and implements similar principles of civilian supremacy.

The draft CoC derives its relevance from these various normative instruments, and evidently manifests some of their inadequacies. It could therefore be said that the draft CoC contributes to the evolution of the overlapping body of provisions which seek to prescribe and govern the available space for democratic control, particularly of the security sector in Africa. The origins of the draft CoC can be found in the remarkable success of the Malian post-conflict reconstruction process, particularly the reintegration of the armed and security forces. The reservation and reluctance of the civilian constituencies to reintegration of the armed and security forces in the Malian peace process informed the need to create a forum for dialogue (in the form of a five day workshop) between the Malian civil populace and the military hierarchy. In the process, a CoC emerged as one of the mechanisms for achieving more stable and harmonious civil-military relations in Mali. This experience informed the decision by United Nations Regional Centre for Peace and Disarmament in Africa (UNREC) to include the idea of a Code of Conduct in its proposed Action Plan, which was submitted to the Africa Division of the United Nations Department for Disarmament Affairs in January, 1999, which was subsequently approved.¹⁷

The draft CoC is the product of two UNREC-hosted meetings which were held in Lome, Togo, in 2001 and 2002. With the theme 'Promoting Civil Military Relations in Africa: A Factor for Peace and Security', the first of the two meetings was held from 21-31 October, 2001, with the collaboration of the African Union, the Government of Togo, the National Democratic Institute (NDI), and the African Centre for Strategic Studies (ACSS). The organizers received financial assistance from the embassies of France, Gabon, Germany, and the United States in Togo. The format for participation was based on countries which had experienced military takeovers or 'exemplary

¹⁷ Telephone interview with Dr. Ivor Fung, Director, UNREC, 08 December, 2004. UNREC's Action Plan (comprises four elements of Peace and Security, Disarmament and Arms Control, Research and Publication, and Institutional Coordination and Advocacy). The CoC project fell under the Peace and Security cluster of the Action Plan, under the heading of 'Harmonization of Civil Military Relations'.

democratic transition'.¹⁸ The 2001 conference was to explore mechanisms for implementation of the 1999 Algiers Declaration, in particular, to identify and articulate the elements of a Code of Conduct for Armed and Security Forces in Africa. In recommending the adoption of such a Code, the seminar also created a Technical Drafting Committee with assistance from the AU, UN, technical partners and the international community, to be assisted by resource persons.¹⁹ Subsequently four consultants were recruited and charged with the preparation of a Draft Code of Conduct for Armed and Security Forces in Africa.

In May (27-29) 2002, a second meeting was held in Lome, titled 'Experts Workshop on Validating the Code of Conduct for Armed and Security Forces in Africa'. The objective of the workshop was to, using the report of the Consultants as a working document, draft a Code of Conduct, and to deliberate on the best strategy for disseminating the CoC.²⁰ The final document which emerged as the draft CoC is a set of confidence building measures which attempt to regulate the behaviour of the armed and security forces in the exercise of their duties and also recognizes the responsibilities and duties of the civilian authorities towards the armed and security forces. The Draft CoC comprises of 34 articles, divided into 5 chapters, as summarized in Table 2 below.

The Draft African Code and the OSCE Code: a Tentative Comparison

It is clear therefore that Africa has witnessed efforts at building normative frameworks for democratic governance, including of the security sector. Using the OSCE Code as a point of comparison with the draft African Code, it becomes evident that significant areas of similarities and differences exist between the two normative instruments.

Both instruments perform a pioneering function in terms of filling normative gaps in the democratic control and use of armed and security forces. The OSCE Code and the draft African CoC encroach on a subject traditionally considered taboo: the security sector. By putting forward common yardsticks of conduct for armed and security forces. They also share similarities in terms of the principles on which democratic control is predicated. In this regard, the principle of constitutional civilian power over military power is clearly stated in paragraphs 21-26 of the OSCE Code and in Articles 2, 7, and 14 of the draft African Code. For example, while paragraph 21 of the OSCE Code stipulates that 'each participating state shall at all times provide for and maintain effective guidance and control of its military, paramilitary and security forces by constitutionally established authorities vested with democratic legitimacy', the draft African similarly provides that 'the armed and security forces shall be at the disposal of the constitutionally established political authority' (Article 2).

¹⁸ Apart from the host country Togo, seventeen African countries are on record to have participated at the 2001 meeting. These included Benin, Burkina Faso, Burundi, Cameroon, Central African Republic, Congo, Cote d'Ivoire, Ethiopia, Ghana, Guinea Bissau, Lesotho, Mali, Niger, Nigeria, Democratic Republic of Congo, Senegal, and Sierra Leone. There were also participants from France, United States, and Belgium, UN, AU, and ECOWAS. An African former head of State and a former OAU Secretary general were also in attendance. See 'Report of the Seminar on the Promotion of Civil-Military relations in Africa: A Factor for Peace and security in Africa', Lome-Togo, 29-31 October, 2001.

¹⁹ Report of the 2001 Conference.

²⁰ Final Report of Experts Workshop on Validating the Code of Conduct for Armed and Security Forces in Africa', 27-29 May 2002, Lome, Togo, p. 3. A DCAF Representative attended the Workshop and contributed to the drafting of the Code.

A second major principle common to both normative instruments is the subjection of armed and security forces to international humanitarian law (IHL). This is contained in paragraphs 29, 30, 31, 34 and 35 of the OSCE Code and articles 4, 5, 9, 10, 11, 28 and 30 of the draft African CoC. Both stipulate that the personnel of the armed and security forces shall assume responsibility for individual acts that violate IHL and human rights.²¹ Indeed, the provisions of the draft African Code relating to IHL indicate that it was significantly informed by, and modeled after the OSCE document. It is evident that paragraph 30 of the OSCE Code was split into two, to become Articles 4 and 5 of the African Code, with marginal changes to the language contained in the OSCE document. Specifically, paragraph 30 of the OSCE Code provides that:

Each participating state will instruct its armed forces personnel in international humanitarian law, rules, conventions and commitments governing armed conflict and will ensure that such personnel are aware that they are individually accountable under national and international law for their actions.

Almost identically, Article 4 of the draft African document stipulates (as in the first part of paragraph 30 of the OSCE Code) that ‘the personnel of the armed and security forces shall receive specific education in international humanitarian law, human rights, rules, conventions and instruments that regulate armed conflicts’. Article 5 of the draft Africa Code is, essentially, the second half of paragraph 30 of the OSCE Code cited above: ‘the personnel of the armed and security forces shall assume responsibility for individual acts that violate international humanitarian law and human rights’.

Respect for the human rights of military and security personnel is another principle which is common to both instruments. In the same vein, paragraph 32 of the OSCE Code corresponds with Article 8 of the draft African Code in terms of the similarity of language and the essence of provisions. Both documents are also based on the principle of commensurability of the use of force with enforcement needs and prohibition of the use of force aimed at restricting the peaceful and lawful exercise of human rights or at depriving people of their individual or collective identity. However, while the OSCE Code provides that ‘the armed forces will take due care to avoid injury to civilians or their property’ (paragraph 36), the draft African Code proceeds further to stipulate the nature of action to be taken in case of injury, particularly cases involving the use of firearms:

...after the use of firearms and in the event of injuries, the personnel of the armed and security forces shall assist the wounded without discrimination. The families of the victims shall be informed. A public enquiry shall be opened. And a report shall be produced.²²

Thus, while the OSCE Code has considerably informed and influenced the drafting of the African Code of Conduct, it would be a gross exaggeration and oversimplification to conclude that the latter is a mere replica of the former. As one of the consultants responsible for the drafting of the African instrument has commented, ‘by the time I made my input, I had not looked at the OSCE thing. I had a look at it afterwards and it

²¹ Article 5 of draft African CoC and paragraph 30 of OSCE Code.

²² See Article 32.

did not lead me to alter what I had done in any significant way. The initiative probably had a Western motivation, but it was essentially African content”.²³

Table 2: Summary Contents of the draft Code of Conduct for Armed and Security Forces in Africa

Chapters/Articles	Issue Area	Main elements
Chapter I (Articles 1-15)	Regulatory Framework	<ul style="list-style-type: none"> • Individual responsibility for illegal acts (Art. 5) • Professionalism of armed/security forces (Art. 6) • ‘Professional secrecy’ (Art. 7) • Rule of law, according to IHL, Human Rights, and national laws (Arts. 9-11) • Civilian responsibility, for finance (Art. 12), to restrain from using forces to contain legitimate dissent (Art. 13) • Illegality of unconstitutional change, as detailed in AU instruments (Art. 14)
Chapter II (Articles 15-20)	Relations between the armed forces and the security forces	<ul style="list-style-type: none"> • Cooperation between armed forces and security forces (Art. 15) • Security is primary responsibility of police in peacetime and crisis (Arts. 16, 17) • Use of armed forces in crisis at the request of political authority and as last resort (Arts. 17, 20)
Chapter III (Articles 21-26)	Relations between the armed and security forces and the civilian population	<ul style="list-style-type: none"> • Armed and security forces to show respect, protection, assistance to civilian population (Art. 21) • Armed and security forces to inform and educate the public on their unclassified operations (Art. 22) • Armed and security forces shall avoid disreputable behaviour (Art. 23) • Transparency and accountability form the basis for democratic control particularly in defence planning, budgeting, and procurement (Art. 24) • Regular interaction between civilian, political and administrative authority, civil society including NGOs and media
Chapter IV (Articles 27-32)	Armed and Security Forces, Human Rights and International Humanitarian Law	<ul style="list-style-type: none"> • Personnel shall be given education in constitutional law, human rights, IHL, and peacekeeping (Art. 27) • Both civilian and armed/security forces individually responsible for illegal instructions, orders, and actions (Art. 28) • Armed and security forces shall show no discrimination (Art. 29) • Armed/security forces shall refrain from murder, torture, corporal punishment, rape, mutilation, cruel, inhuman degrading treatment, hostage taking, collective punishment (Art. 31) • In enforcing internal law and order, use of firearm as last resort; in the event of injuries, assistance to victim, public enquiry and report (Art. 32)
Chapter V (Articles 33-34)	Implementation	<ul style="list-style-type: none"> • CoC to be integrated into training curriculum of AU members and shall be widely disseminated (Art. 33) • Periodic meetings at various levels to assess implementation (Art. 34)

²³ Telephone Interview with Prof. Isawa Elaigwu, 7 December 2004.

Significant areas of differences exist between the two instruments with regard to the context, the evolutionary process, and the areas of emphasis of each instrument. In the first place, the regional politico-security concerns and priorities of the Europe and Africa which informed the evolution of the two normative instruments differ considerably. As Ghebali has noted, the OSCE Code

aimed at responding to the security vacuum concerns expressed by the former Warsaw Pact states and the independent states coming from the dissolution of the USSR...Furthermore since the collapse of Communism, the democratic control of armed forces, which is at the heart of security sector reform, has become one of the preconditions that emerging countries have to meet in order to accede to European and transatlantic organizations.²⁴

While the focus of the OSCE Code has been to monitor democratic control of armed forces in Europe, the politico-security context in Africa has been defined by unconstitutional changes of power, usually through military coups.

It is therefore not surprising that bringing an end to the proliferation of military takeovers emerged a main priority of the draft African CoC.²⁵ In this regard, it could be concluded that the strength of the OSCE Code is indeed the weakness of the draft African CoC and vice-versa. In other words, while the OSCE Code is commendable for its clear articulation of the principles of democratic control and use of armed forces, it essentially overlooks the issue of unconstitutional changes of power. In his analysis of the OSCE Code, Ghebali observed that ‘it fails to establish that in the case of usurpation of political control by armed forces in any participating state, the other governments will consider such an action as “a source of concern” and take urgently some appropriate action...’²⁶

The differences between the OSCE Code and the African CoC are indeed extensive. One is a politically binding document, adopted by the relevant political authorities, while the other remains at the level of a working document of which the relevant political authorities remain, arguably, largely unaware.²⁷ Furthermore, the OSCE Code is the product of extensive negotiations among and between the parties to the Code. It witnessed relatively extensive discussion and input before receiving the blessing of the political leadership in Europe. However, the OSCE Code ‘does not contain provisions expressly regulating the use of armed forces during a state of public emergency’.²⁸ On the other hand, the African draft expressly makes provisions for ‘times of crisis’, and ‘exceptional circumstances such as state of emergency’.²⁹

It would appear that one main difference between the two documents is the scope of their application. The draft African CoC passes for a domestic regulatory framework, while the OSCE Code has explicit international applications. In comparing the two

²⁴ Ghebali, V.-Y., *The OSCE Code of Conduct on Politico-Military Aspects of Security (1994): A Paragraph-By-Paragraph Commentary on Sections VII and VIII (Democratic Control and Use of Armed Forces)*, DCAF, Geneva, p. 1, p. 12.

²⁵ See Articles 6, 14.

²⁶ Ghebali, V.-Y., *op. cit.*, p. 10.

²⁷ The OSCE Code of Conduct was negotiated within the Vienna Forum for Security Cooperation (FSC), from November 1992 to late 1994. The FSC adopted the last version of the text in December 1994, and finally presented to the Budapest Summit in December 1994. See Ghebali, *op. cit.*, p. 5. The draft African CoC, on the other hand, is yet to be subjected to any political negotiation.

²⁸ Ghebali, V.-Y. *op. cit.*, p. 11.

²⁹ See Articles 17, 30.

normative instruments, therefore, it is also noteworthy to observe the seeming different audiences being addressed by the two instruments. While the OSCE Code addresses itself to 'participating states', the draft African CoC addresses itself directly to 'armed and security forces'. In addition, while the OSCE code commits its 55 participating states to a regular exchange of information on the status of the democratic control of their armed forces as well as such inter-state issues as international fight against terrorism and the stationing of armed forces, the African draft Code does not contain a corresponding feature. Rather, it merely offers that 'periodic meetings shall be convened to assess its implementation' (Article 34).

From Draft to Adoption and Implementation: Matters Arising

The challenges of codification and implementation of norms in international relations have been generally acknowledged as arising out of the fact that the international legal system has no law-making mechanism equivalent to the legislative branch of government within states. This is further complicated by the competing national interests of states. Nonetheless, norms are a significant element in the architecture of the international system because they both enable and constrain behaviour. They prescribe and certify certain actions while setting others apart as being inappropriate.³⁰ Both the process of the evolution, and the content of the draft CoC for Armed and Security Forces in Africa raise specific issues which confront the task of creating and implementing normative standards and frameworks in Africa.

The process through which the draft CoC emerged can be characterized as being limited in consultation, inadequate in input, and therefore lacking in ownership. Without prejudice to the evidently laudable drafting work of the consultants and the participants at the two Lome conferences, the draft could have benefited from additional input from several other sources such as military staff colleges and training institutions, ministries of defence, and the civilian leadership. In its present form, document is the product of two conferences, attended in each instance, by less than half of African states. Even within the context of the two conferences, some of the major actors who participated in the conferences have opined that 'the document was not discussed in any form of thorough fashion'.³¹ It would appear therefore that the present draft suffers from a crisis of ownership which has hampered the adoption and implementation of the CoC, and which would need to be addressed if it is to have any appreciable impact on the behaviour and use of African armed and security forces.

Related to the crisis of ownership is the fact that the draft Code has lacked a driving force to ensure its adoption and implementation. Since the second Lome conference of May 2002, the document has not featured on the agenda of any continental or sub-regional organization in Africa. The document is reported to have been sent to the AU Secretariat since 2002, and it is evident that there is more to account for its late coming

³⁰ McDonald, G. and Cattaneo, S., 'Moving from Words to Action: Small Arms Norms', in *Small Arms Survey 2003: Development Denied*, Graduate Institute of International Studies, Geneva, 2003. See also Mervyn, F., 'A Turn Not to be Taken in International Relations at the Millennium', *Review of International Studies*, Vol. 24, №5, December 1998, pp. 119-132.

³¹ Telephone interview with Dr. Nancy Walker on 29 December 2004.

than the institutional transformation in Addis Ababa from OAU to AU.³² It has not been helpful that many senior African military officers and civilian leaders are not aware of the draft Code, and that Articles 33 and 34 of the draft Code (dealing with Implementation) make no clear provision on responsibility for carrying the draft Code forward. Given the fact that the two conferences were hosted by UNREC, the assumption could be that UNREC would sustain this responsibility. Such an assumption however has not been supported by UNREC's own institutional limitations in both human and financial resources.

The content of the draft code also presents major challenges for the codification of norms and principles. The first of such challenges in this regard relates to the need to broaden the focus of the code from 'anti-coup' to being a 'democracy promotion'. In its present form, the draft CoC contains provisions for the protection of incumbent governments, and not necessarily for the protection of democracy. It could be interpreted as a regime protection mechanism designed to deter coups against any constitutional government, regardless of how democratic it is.³³ To be sure, an anti-coup clause is useful as it addresses a major issue in civil-military relations in Africa....peaceful, democratic and orderly transfer of power. Beyond democratic transition however, the CoC did not place unconstitutional change within a democratic governance framework. It fails to address the legality and norms on 'undemocratic democracies' in which the instruments of democracy and constitutional rule have been appropriated for personal and regime interests. Just as Article 30 of the AU Constitutive Act could inadvertently serve as a protective cover for a recalcitrant elected government, Article 14 of the draft CoC, if not adequately qualified, could serve a similar propose.³⁴

Article 7 of the draft Code sits rather uncomfortably within the context of democratic control of the armed and security forces as it seemingly violates the cardinal principle of transparency. It states that 'personnel of the armed and security forces shall be bound by professional secrecy except where exemption is granted by the appropriate authority'. While confidentiality may be essential for aspects of military and security duties, secrecy commands tenuous justification in the face of the overriding need for democratic control. Furthermore, it remains unclear who the 'appropriate authority' shall be for the purpose of granting exemptions to secrecy. In any event, democratic control demands that the reverse rationale is more applicable: the armed and security forces shall be bound by the principles of accountability and transparency, except where exemption for confidentiality is granted by the appropriate authority. The identification and definition of 'appropriate authority' can however not be left vague as is the case in the current draft.

³² Interview with Director, UNREC. The Director attributed the lack of progress on the adoption of the Code since 2002 to 'changes from OAU to AU'.

³³ See Piccone, T.J., 'International Mechanisms for Protecting Democracy', Paper prepared for the III Assembly of the Club of Madrid.

³⁴ Article 30 of the AU Constitutive Act provides that 'governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union'. The clause led the AU to condemn President-Elect Marc Ravalomanana in the Madagascar elections of December 2001 for his efforts to claim victory for the presidency, even though incumbent President Didier Ratsiraka manipulated the electoral process to stay in power and was eventually forced to flee. See Piccone, T.J., *op. cit.*, p. 32.

Conclusion and Recommendations

The paper set out to document and analyze the evolution of the draft Code of Conduct for Armed and Security Forces in Africa. In so doing, it identified the general trends in civil-military relations in Africa, positing that this was, until recently, characterized by a trading of places in terms of the hierarchy of authority between military and civilians, resulting in significant setbacks for political stability and socio-economic development.

The paper observed that, particularly since the end of the Cold War, a body of overlapping normative instruments has been, and is being developed which seek to lock in the gains of democracy and prevent the intrinsically destabilizing effects of a return to autocratic rule in African states. Prominent among these are the Algiers declaration, the CSSDCA Solemn Declaration, Declaration on the Framework for an OAU (now AU) Response to Unconstitutional Changes, the African Union Constitutive Act, and the Solemn Declaration On A Common African Defence and Security policy. The paper argued that the draft Code of Conduct derives its relevance from, and is part of this emerging body of normative frameworks for addressing politico-security challenges within and between African states.

Comparing the draft African Code to the OSCE Code of Conduct, the paper posits that while the latter considerably informed and influenced the drafting of the former, significant differences exist between them in terms of context, the evolutionary process, and the areas of emphasis of each document. It was further argued that the process of the evolution of draft African Code exposes the challenges confronting the codification and implementation of normative frameworks in Africa. Such challenges relate particularly to the level of consultation among, and input from stakeholders, resulting in a crisis of ownership and weak implementation. The lack of a visible driving force for the purpose of sustaining the momentum for the adoption and implementation of the draft CoC was also noted. The paper was critical of the draft Code's focus on the question of military takeover, at the expense of a broader agenda for democratic control and use of the armed and security forces. Reviewing the contents of the draft Code, it was posited that articles 7 and 14 contain undemocratic provisions which need further qualification and clarification.

The prospects for codification and implementation of normative frameworks in Africa would, to a large extent, depend on the governance environment and quality of leadership, both military and civilian. Experience so far (for example with the efforts to control the proliferation of illicit small arms and light weapons) demonstrate that sub-regional (as opposed to continental) approaches are more viable. This is because there are often disparities in sub-regional security environments and priorities. Normative frameworks emerge more easily where and when there are common security challenges. Such sub-regional arrangements then form the building blocs for continental frameworks.

It is also be useful to identify and encourage specific governments and organizations which could act as 'sponsors' within each sub-region for the purpose of keeping the issue on the political agenda and pushing for the necessary political will for a viable code of Conduct for Armed and Security Forces in Africa. With regard to the codification process of the specific initiative of the draft Code, there is an urgent need retrace steps so far taken, to address issues of consultation and ownership. The pioneering efforts of

UNREC in igniting the process is commendable but needs to be supplemented by contributions from other stakeholders. Given its considerable experience in sub-regional peace and security arrangements, and particularly within the framework of its Mechanism for Conflict Prevention, Management and Resolution, Peacekeeping and Security, ECOWAS, for example, is well placed to negotiate and adopt a viable code of conduct for armed and security forces which has both national and sub-regional applications. The Southern African Development Community (SADC) could play a similar role in Southern Africa. The draft African Code sponsored by UNREC is a useful premise on which such discussions could proceed. The Malian and the OSCE Codes could also form useful working documents for such a process. A viable Code would need to address contemporary security dimensions in Africa, such as the role of Non State Actors (including armed militia, private military and security companies, mercenaries), and the prevalence of increasingly sub regional concerns, such as the proliferation of roadblocks, mass refugee movements, corruption in the armed and security forces, and challenges of post conflict reconstruction.³⁵

In the final analysis, the entire agenda for the democratic control and use of armed and security forces in Africa would very much depend on the extent to which armed and security forces become more developmental and humanitarian, allowing them to respond more directly to the contemporary security needs of the populace than has hitherto been the case.

³⁵ See Report of the Secretary General 'On Ways To Combat Sub-Regional and Cross-Border Problems in West Africa', UN Security Council S/2004/200, 12 March, 2004.

Draft Code of Conduct for Armed and Security Forces in Africa

(Drafted at the Experts' Workshop on Validating the Code of Conduct for Armed and Security Forces in Africa, 27-29 May 2002, Lomé, Togo / <http://www.unrec.org/eng/Workshop.htm>)

CHAPTER I REGULATORY FRAMEWORK GOVERNING CIVIL MILITARY RELATIONS

Article 1

The armed and security forces are at the service of the Nation. Their mission shall be to guarantee, if necessary, by force of arms, defence of the Nation and its territorial integrity and ensure the protection of citizens and property.

Article 2

The armed and security forces shall be at the disposal of the constitutionally established political authority.

Article 3

The armed and security forces are the cradle of national unity and cohesion. In this regard, staff recruitment shall be conducted without discrimination as to race, ethnic or religious affinities.

Article 4

The personnel of armed and security forces shall receive specific education and training in international humanitarian law, human rights, rules, conventions, and instruments that regulate armed conflicts.

Article 5

The personnel of armed and security forces shall assume responsibility for individual acts that violate international humanitarian law and human rights.

Article 6

The personnel of armed and security forces shall be disciplined and loyal to the State at all times and shall show obedience and devotion to the constitutional authority.

Article 7

The personnel of armed and security forces shall be bound by professional secrecy, except where exemption is granted by the appropriate authority.

Article 8

In the exercise of their duties, the personnel of armed and security forces shall enjoy, within the limits of national law, their fundamental rights and freedoms as defined by the Constitution.

Article 9

In the conduct of defence and security affairs, the behaviour of armed and security personnel shall show respect for international humanitarian law, human rights and pertinent national laws.

Article 10

In the exercise of command, no order which is at variance with international humanitarian law, human rights and pertinent national law shall be given to or executed by armed and security personnel.

Article 11

The civilian, political and administrative authority shall ensure that the military operations it orders, including operations to maintain internal peace and order, shall be executed in conformity with the relevant provisions of international humanitarian law, human rights, national laws and this Code of Conduct.

Article 12

It shall be the responsibility of the national political authority to ensure that adequate financial resources and logistics are made available to armed and security forces to enable them carry out their missions successfully.

Article 13

Under no circumstance shall the civilian, political and administrative authority resort to armed and security forces to restrict the peaceful, legitimate and legal exercise of the individual and collective rights of the citizens as conferred by the Constitution.

Article 14

In accordance with the pertinent decisions of the Organisation of African Unity/African Union [AHG/Dec. 141 (XXXV) adopted in Algiers and AHG/Dec. 150 (XXXVI) adopted in Lome], the OAU Declaration on the framework for an OAU Response to an Unconstitutional Change in Africa, as well as the Solemn Declaration of the Conference held in Lome on Security, Stability, Development and Co-operation in Africa (SSDCA), any action or behaviour that undermines or seeks to overthrow the Constitution of the State is illegal and strictly forbidden.

CHAPTER II

RELATIONS BETWEEN THE ARMED FORCES AND THE SECURITY FORCES

Article 15

In the execution of their duties, armed and security forces shall co-operate in the context of their respective and complementary responsibilities and maintain permanent and harmonious relationships in times of peace, crisis or social upheavals, and armed conflicts.

Article 16

In peace time, the maintenance of law is the responsibility of the police. The other security forces shall co-operate in the exchange of intelligence.

Article 17

In times of crisis or social upheavals, the protection of life and property shall be the primary responsibility of the police, including the gendarmerie, where it exists. In exceptional circumstances, and at the request of the political authority, the armed forces may intervene, as a last resort, to support the police for a limited period.

Article 18

In times of armed conflict, the political authority shall define the rules of engagement for the security forces as well as the scope of their involvement in the defence of national security alongside the armed forces.

Article 19

Armed and security forces shall support humanitarian assistance operations at the national or international levels. In the execution of this mission, they shall respect the independence of decision and action of humanitarian organisations in charge of the operations.

Article 20

Armed forces may, alongside the security forces, be involved in combating criminal activities, as established by law and directed by the political authority and relevant international instruments such as illicit trade and proliferation of arms, terrorism, organised crime, drug trafficking, violence against women and children...

CHAPTER III

RELATIONS BETWEEN THE ARMED AND SECURITY FORCES AND THE CIVILIAN POPULATION

Article 21

Armed and security forces are to show respect and provide protection and assistance to the civilian population particularly to vulnerable groups, especially in times of armed conflict.

Article 22

The leadership of the armed and security forces shall ensure that relations between their personnel and the civilian population are harmonious and based on mutual trust. In this regard, the armed and security forces shall, in collaboration with the government, civil society, including non-governmental organisations and the media, endeavour to inform and educate the public on their unclassified programmes and operations.

Article 23

In their relationships with the civilian population, the personnel of armed and security forces shall avoid any act or behaviour that may bring their institutions into disrepute.

Article 24

The democratic control of the armed and security forces by State and public institutions shall be exercised with transparency and accountability, particularly in the process of security and defence planning, budgeting, and procurement.

Article 25

Armed and security forces contribute within the limits of their competence to the economic and social development of their country without prejudice to the principles of fair competition.

Article 26

Civilian, political and administrative authority, armed and security forces personnel, civil society, including non-governmental organisations and the media, shall engage in regular interactions at different levels through public fora to promote cordial relationships, enhance respect and mutual confidence between the civilian population and the armed and security forces.

CHAPTER IV ARMED AND SECURITY FORCES, HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW

Article 27

The armed and security forces shall build and strengthen their capacity to respond to rapidly changing threats. Consequently, the personnel, in addition to their occupational training, shall be given the appropriate education in constitutional law, human rights, international humanitarian law, and peacekeeping.

Article 28

Civilian and politico-administrative authority, personnel of armed and security forces and their commanders, shall be held individually responsible for instructions, orders and/or actions in violation of human rights and international humanitarian law.

Article 29

In the exercise of their duties, armed and security personnel shall provide adequate protection, refuge and assistance to all persons in need. They shall ensure that internally displaced persons, refugees, non-nationals, stateless persons, minorities, women, children, the elderly, and people with disabilities are not discriminated against. No discrimination shall be perpetrated because of race, identity, religion, political beliefs, status or condition.

Article 30

During exceptional circumstances, such as state of emergency, state of siege... as defined by the Constitution, armed and security forces shall conform with national law and international humanitarian law.

Article 31

Personnel of armed and security forces shall refrain in all circumstances from the following acts: murder, torture, corporal punishment, rape, mutilation, cruel, inhumane and degrading treatment, hostage taking, collective punishment, and any other act aimed at impairing the physical and psychological well-being of the individual.

Article 32

In enforcing internal law and order, armed and security forces shall use firearms as a last resort with maximum restraint, respecting the principle of minimum force, even in situations of self-defence. After the use of firearms and in event of injuries, the personnel of armed and security forces shall assist the wounded without discrimination. The families of the victims shall be informed. A public enquiry shall be opened. And a report produced.

CHAPTER V IMPLEMENTATION

Article 33

The present Code of Conduct shall be integrated in the training and educational programmes and taught to the armed and security forces of all Member States of the African Union. It shall be widely disseminated through the organisation of sensitisation campaigns within the respective territories of these States.

Article 34

Recognising the importance of this Code of Conduct and its potential to promote peace, security, stability, and the well-being of the African Nations, periodic meetings shall be convened to assess its implementation at the local, national, sub-regional and regional levels. Participants shall include experts, the representatives of governments, armed and security forces, and civil society, including non-governmental organisations and the media.

