the center for
constitutional
transitions at nyu law

International IDEA & The Center for Constitutional Transitions at NYU Law

Consolidating the Arab Spring: Constitutional Transition in Egypt and Tunisia

Series co-editors:

Zaid Al-Ali (International IDEA) & Richard Stacey (Center for Constitutional Transitions)

No. 7, June 2013

Security Forces Reform for Tunisia

Kent Roach

University of Toronto

The entire working paper series is available online at
http://constitutionaltransitions.org/consolidating-arab-spring/.

International IDEA
Strömsborg • SE - 103 34 Stockholm, Sweden
www.idea.int

The Center for Constitutional Transitions at NYU Law
139 MacDougal Street • New York, NY 10012
constitutionaltransitions.org

The International Institute for Democracy and Electoral Assistance (**International IDEA**) is an intergovernmental organization with 28 member states that supports sustainable democracy worldwide. **International IDEA**'s mission is to support sustainable democratic change by providing comparative knowledge, and assisting in democratic reform, and influencing policies and politics.

International IDEA produces comparative knowledge in its key areas of expertise: electoral processes, constitution building, political participation and representation, and democracy and development, as well as on democracy as it relates to gender, diversity, and conflict and security.

IDEA's work is non-prescriptive and **IDEA** takes an impartial and collaborative approach to democracy cooperation; emphasizing diversity in democracy, equal political participation, representation of women and men in politics and decision making, and helping to enhance the political will required for change.

The Institute brings together a wide range of political entities and opinion leaders. By convening seminars, conferences and capacity building workshops, **IDEA** facilitates the exchange of knowledge and experience at global, regional and national levels.

International IDEA is a Permanent Observer to the United Nations.

For more information, please visit www.idea.int.

the center for
constitutional
transitions at nyu law

The Center for Constitutional Transitions at NYU Law (***Constitutional Transitions***) generates and mobilizes knowledge in support of constitution building.

Agenda-Setting Research: ***Constitutional Transitions*** generates knowledge by identifying issues of critical importance to the success of constitutional transitions, where a lack of adequate, up-to-date research impedes the effectiveness of technical assistance for constitution building. ***Constitutional Transitions*** assembles and leads international networks of experts to complete thematic research projects that offer evidence-based policy options to practitioners.

Constitutional Transitions Clinic: ***Constitutional Transitions*** mobilizes knowledge through an innovative clinical program that provides "back office" research support to constitutional advisors in the field, and deploys faculty experts and field researchers for support on the ground. We meet existing field missions' needs for comprehensive research, dramatically enhancing their effectiveness and efficiency in their role as policy advisors and actors.

For more information, please visit constitutionaltransitions.org.

Consolidating the Arab Spring: Constitutional Transition in Egypt and Tunisia

This Working Paper Series, "Consolidating the Arab Spring: Constitutional Transition in Egypt and Tunisia", stems from the constitution building processes in Egypt and Tunisia in the wake of the Arab Spring. As one of the primary international institutions supporting constitution building in both countries, **International IDEA** commissioned leading international experts to produce research papers on specific issues of constitutional design on the agenda of the constitutional assemblies of Tunisia and Egypt.

International IDEA, together with ***Constitutional Transitions***, has brought these papers together in this Working Paper Series. The papers reflect recent constitutional developments, such as Tunisia's third draft Constitution (22 April 2013) and Egypt's post-revolution Constitution, approved by referendum and brought into force on 26 December 2012. This Working Paper Series aims to bring the experience of the Tunisian and Egyptian constitutional transitions to a broader audience, with each paper addressing a specific question of constitutional design.

"Security Forces Reform for Tunisia"

Abstract

This paper suggests that a new Tunisian Constitution should provide for constitutional principles to govern the security sector. One of these principles should be the need to respect the rule of law. It is suggested that even qualified immunities for security sector actors and the president are in tension with the rule of law principle. Other relevant principles include the need to respect human rights recognized in domestic and international law including a free press and civil society. Courts should be able to determine the proportionality of measures taken to limit rights, including during emergencies, and some rights such as the right against torture should not be subject to limitation or derogation. Other relevant principles are respect for the non-partisan professionalism and neutrality of security sector actors, and proper funding and training of such actors. There is also a need for effective yet transparent governance. It is suggested that police forces and intelligence services should report to a cabinet minister as opposed to the president. Ministerial directives should be in writing, should not be inconsistent with organic acts for each security agency, and should be reviewed by a legislative committee. As under Article 245(4) of the Kenyan Constitution, such directives should not involve specific operational matters with respect to policing. The legislature should play a role with respect to appointments and review of the work of security agencies and these review provisions should apply to any new security agency that is created. Finally, a constitutionally protected independent authority should review the work of security agencies after the fact. It should have access to relevant secret information, but judicial approval should be required for the disclosure of such information.

Author

Kent Roach is Professor of Law and Prichard-Wilson Chair of Law and Public Policy at the University of Toronto Faculty of Law. Professor Roach has been editor-in-chief of the Criminal Law Quarterly since 1998, and is the author of 12 books including *Constitutional Remedies in Canada 2 ed* (Canada Law Book, Toronto 2013; winner of the Owen Prize); *Due Process and Victims' Rights* (University of Toronto Press, Toronto 1999; short listed for the Donner Prize), *The Supreme Court on Trial* (Irwin, Toronto 2001; also

short listed for the Donner Prize); *Brian Dickson: A Judge's Journey,* with Robert J. Sharpe (University of Toronto Press, Toronto 2003; winner of the Dafoe Prize) and *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, Cambridge 2011; winner of the Mundell Medal). He served on the research advisory committee of Canada's commission of inquiry on the involvement of Canadian security officials in the rendition of Maher Arar and on Ontario's commission of inquiry into the police killing of an Aboriginal protester. He was director of research for the four-year long commission of inquiry in the failure of Canadian security agencies to prevent the terrorist bombing of Air India Flight 182. He is currently a member on an expert group appointed by the Canadian Council of Academies on the future of policing.

Security Forces Reform in Tunisia

Kent Roach

Table of Contents

* * *

Introduction

This report takes into account a paper prepared by Professor Jamil Sayah on security sector reform in Tunisia, entitled "Tunisia: Security Forces Reform, Competence, Respectful of Liberty".[1] It first outlines a series of principles and objectives for security service reform, taking into account both their historical and proposed treatment in Tunisian constitutional law and their basis in comparative constitutional law. These principles and objectives include respect for a democratic rule of law as opposed to an authoritarian rule by law. It is suggested that presidential and legislative immunities from prosecution are problematic from a rule of law perspective. Respect for the rule of law and the accountability produced by such respect is a particularly important principle that should inform security sector governance. Other principles include the need for democratic and transparent governance of police, intelligence and military services that avoids partisan domination. Achieving this difficult balance can be facilitated by respect for the professionalism of security professionals. There is also need to respect human rights, including the equal rights of unpopular minorities, a free press and free civil society. Finally, there is a need to respect international norms while also ensuring effective security, including when necessary proportionate and legally authorized limitations on rights.

The second part of this paper examines Tunisian constitutional history and the August 2012, December 2012 and April 2013 draft Constitutions, prepared by the Tunisian Constituent Assembly, as they relate to security services.[2] Following the examples of sections 198 and 199 of the South African Constitution and section 238 of the Kenyan Constitution, a new Tunisian Constitution should contain a special part on security services that includes general principles relating to the rule of law, human rights, transparency, accountability, professionalism and the lawful and proportionate protection of security. Concerns are also expressed about proposed presidential immunities as well as more limited immunities proposed for those who work in the security sectors. It is noted that no such immunities are contained in the Egyptian Constitution, the Kenyan Constitution or the South African Constitution.

The third part examines the three main types of security services. It is suggested that senior police officers should be appointed not by the President but by a responsible minister and with the legislature playing a role. Following the examples of section 245(4) and (5) of the Kenyan Constitution, the responsible minister should be able to give written directions to the police on policy matters but such directions should not include directions with respect to specific law enforcement actions or specific police officers. Such an approach balances the need for democratic direction with respect for the professionalism of the police to apply the rule of law in an impartial manner.

The police should be subject to review by an Ethics Commission, but this Commission should ideally have a constitutional status similar to those of the Constitutional Authorities in the April 2013 draft Constitution. Ideally one constitutional authority for the review of security services could review all the security services, though this authority should have expertise with respect to policing, intelligence and the military, as well as civil society and parliamentary representation. Such a constitutional authority should be able to see secret information, and it should be able to hear complaints and initiate its own investigations. It should only be able to make recommendations to the government and police about changes in policies or resolution of complaints. This approach recognizes the legitimate democratic interests of the government in establishing policies and the legitimate managerial responsibilities in disciplining police officers. Any new police force should be subject to these arrangements, but consideration should be given to a constitutional ban on the creation of a secret or presidential police force. The ban proposed in Art. 15 of the April 2013 draft Constitution on the creation of non-state military or para-military forces is also justified in part because of the difficulties of holding non-state actors to account for their activities.

Great care should be taken with respect to any new intelligence service. It should have a circumscribed statutory mandate and no law enforcement powers. The senior officials of the intelligence service should be appointed by the responsible minister with the approval of the legislature. An intelligence service should be subject to oversight by a legislative committee with representatives from different political parties, and review by an Ethics Commission or comparable constitutional authority. Both review bodies should be able to review the use of intelligence in other parts of government, including the police and military, in recognition of modern "whole-of-government" approaches to the use of intelligence and security. Both legislative and constitutional authority reviewers should have access to secret information. At the same time, they should only be able to make recommendations about how the intelligence service should exercise internal discipline and how the government should establish policies for the intelligence services. The review bodies should not provide pre-approval of intelligence activities, in order to maintain their independence from intelligence operations that they may subsequently review. A separate commission, or preferably the judiciary, should approve and supervise the use of electronic surveillance by the security service.

There is merit in having the new Constitution recognize the role of Chief of Staff of the Armed Forces, subject to control by the President or perhaps the Prime Minister. The Chief of Staff should have the option of requesting that the President or relevant minister reduce directions to writing to ensure accountability for such directions. There may be a case for recognizing a co-ordinating committee within the executive for the Armed Forces. Nevertheless the specific roles of the President and the Prime Minister and ways to resolve possible disputes between them should be clear. In addition, a legislative committee should be able to review and make recommendations about the Armed Forces. This committee should have access to secret information that is necessary to discharge this responsibility. Similarly the Security Forces National Authority proposed in this paper should have similar powers. Alternatively, the powers of the proposed Human Rights Authority should be clarified to extend to all security forces, including the military. These powers should include audit and monitoring of the security services by independent and impartial persons, in addition to settling individual complaints or referring them to competent authorities. The Human Rights Authority could also be given its own powers to devise remedies consistent with international law commitments to ensuring access to effective administrative as well as judicial remedies. It should be clear that the Human Rights Authority can when necessary have access to secret information. The proposed Constitutional Court or some other body should be able to resolve disputes over whether secret information can be made public. Although there may be a case for allowing the legislature to create new police or intelligence forces, the Armed Forces, as established by organic acts and the Constitution, should be the exclusive armed force in a democracy and it is appropriate to prohibit political parties and other non-state actors from having their own military and paramilitary units. There may also be a case for prohibiting the formation of special presidential security agencies. Any executive orders that amend or supplement the organic acts of security forces should be subject to legislative review and revision and should not be inconsistent with such legislation.

I have been greatly assisted and inspired by Professor Jamil Sayah's paper.[3] In Part I of this paper, I will start by outlining the various principles and objectives that Professor Sayah sets out for security services reform in the new Tunisia. As will become apparent, I agree with all of the principles eloquently articulated by Professor Sayah. I will add a few of my own, which stress the need to connect security sector reform with a free press and free civil society, respect for international norms, and transparent but effective governance. I will also suggest that all of these objectives are well supported in modern principles found in comparative constitutional law, and that they should be enshrined in a new Tunisian Constitution.

Part II will provide a very short outline of Tunisian constitutional history as it relates to the security forces and security forces reform, including comments on how proposals for the new Tunisian Constitution may affect this reform. I will suggest that the 1959 Constitution, to a lesser extent the August and December 2012 draft Constitutions, and most recently the April 2013 draft Constitution, are all too silent on the critical roles of the security sector. Although a constitution should not attempt to micro-manage security agencies, the recent examples of the South African and Kenyan Constitutions demonstrate how constitutions can establish a sound framework for the difficult task of democratic governance of security forces, and encourage such forces to respect human rights and democracy.

The following sections will contextually examine the role of the police, intelligence services and the military in a new Tunisia. For each institution, I will examine appointment and reporting procedures, constitutional oversight in both the legislature and executive watchdog or national authority sectors, and the funding and exclusivity of each service. In the final section, I will make a few focused recommendations for constitutional reform and governance of security services in the new Tunisia.

Part I: The objectives for reforming security forces in a democracy

The accountability and governance of security forces raise some of the most difficult challenges for any democracy. Democracies must reconcile the need to maintain the rule of law for security forces with the fact that extraordinary powers will often be granted to such forces. Security forces must be subject to democratic control, but there is a need to ensure that they are not used for partisan purposes. Finally all democracies must struggle with reconciling domestic and international demands for security with the need to protect the human rights of all, including those suspected of infringing security. Sections 198 and 199 of the 1996 South African Constitution and section 238 of the 2010 Kenyan Constitution [4] demonstrate that it is possible to reduce the most important principles and objectives affecting security forces into principles formally enshrined in the Constitution.

1. Democratic rule of law and not authoritarian rule by law

Professor Sayah has stressed the need for the state to be subject to and limited by the law. The idea that state officials are subject to law is the essence of the rule of law. The 1959 Tunisian Constitution contained departures from the rule of the law through Art. 27, which provided legislators with immunity from prosecution for crimes, and Art. 41, which provided the President with "judicial immunity." Article 23 of the April 2013 draft Constitution is promising because it requires the prevention of physical or moral torture and provides that those who order or commit the crime of torture will not benefit from a statute of limitations defense. Nevertheless, the April 2013 draft Constitution does not completely abandon troubling immunities that can undermine the rule of law. Article 58 provides a more narrowly tailored immunity for arrest or prosecutions for opinions or proposals made in the legislature, a kind of parliamentary privilege recognized in many established democracies, but Art. 59 may contemplate a broad and more traditional immunity.

Article 75 of the April 2013 draft Constitution provides that the President enjoys "judicial immunity" (the December 2012 draft Constitution proposed the alternate text "immunity against criminal prosecution") "throughout his Presidential term". This is so even though the President exercises strong executive powers tied to security. Article 75 of the April 2013 draft Constitution seems to follow the model of Art. 67 of the French Constitution, but lacks the clear statement in Art. 67(3) of the French Constitution that "all actions and proceedings" stayed as a result of the immunity "may be reactivated or brought against the President no sooner than one month after the end of his term of office." Although Art. 75 of the April

2013 draft Constitution of Tunisia does contemplate that limitations will be suspended during the presidential term, it also states that "The President of the Republic shall not be held accountable for acts executed as part of the office." This latter phrase could be interpreted as providing life-long immunity for presidential acts "executed as part of the office". It should be clarified or removed. More generally, the history of abuse of presidential powers in Tunisia combined with the importance of the rule of law and accountability in new democracies suggests that the entire presidential immunity provision should be re-considered.

The President's security powers are less expansive in the terms of the April 2013 draft Constitution than under the terms of the December 2012 draft Constitution, but they nevertheless include the power to act as "Commander in Chief" of the army (Art. 76: the December 2012 draft Constitution designated the President as Commander in Chief of the "internal security forces" as well), and the power to take "any measures necessitated by the circumstances" of "imminent danger" (Art. 78). The President's power to organize the army and the security forces by decree, contemplated in the December 2012 draft Constitution, has however been removed from the corresponding provision of the April 2013 draft Constitution (Art. 68). Article 87 provides a check on the President, allowing the Chamber of Deputies to impeach the President by a two-thirds majority, "for the deliberate violation of the Constitution", subject to a decision by the Constitutional Court (this replaces a provision in the December 2012 draft Constitution providing a similar process for accusing the President of "high treason"). Impeachment may be a restraint on some presidential abuses such as corruption, but it is less likely to be an effective restraint on presidential abuses of security powers especially against unpopular and feared groups and individuals. Civil or criminal prosecutions against the President might be more effective but would be prevented under Art. 75 of the April 2013 draft.

There are other significant changes between the December 2012 draft Constitution and the April 2013 draft Constitution, relevant to the entrenchment of the rule of law. Article 95 of the December 2012 draft Constitution, for example, established the general proposition of the immunity of security agents from judicial prosecution. Any immunity in my view is in tension with respect for the rule of law. The first proposed qualification of the immunity provision was that no immunity would apply if a security agent follows orders "of a clear[ly] illegal nature." Much aggressive activity and misconduct may often not be clearly illegal. Similar immunities are used in American law and have resulted in judicial findings that the authors of the infamous "torture memos" and those who participated in other post-9/11 abuses were not acting at the time in a manner that was "clearly illegal".[5]

The second proposed qualification in the December 2012 draft Constitution was that a security agent could be subject to judicial prosecution if ordered to "violate the physical sanctity of citizens, overthrow the democratic regime or electoral legality." The reference to physical sanctity complemented the prohibition on torture in Art. 17 of the December 2012 draft Constitution, but could also have presented some borderline issues about whether misconduct violates physical sanctity as opposed to other values such as privacy or security from threats.[6] The references to overthrowing democracy and undermining electoral legality are vague. Much misconduct by the security service might not reach these levels. Disputes and uncertainty could arise about whether the immunity contemplated in the December 2102 draft Constitution's Art. 95 would or would not apply. Security officials can engage in much misconduct, such as unwarranted surveillance, threats and intimidation, which may neither violate physical sanctity or democratic electoral legality nor be clearly illegal.

The South African and Kenyan Constitutions, as well as the 2012 Egyptian Constitution,[7] by contrast, do not contain such immunities. Section 198(c) of the South African Constitution provides that "national security must be pursued in compliance with the law, including international law" and section 238(2)(b) of the Kenyan Constitution provides "national security shall be pursued in compliance with the law and

with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms." Such positive statements rather than qualified immunities may better advance the rule of law.

Fortunately, the April 2013 draft Constitution does not reproduce these provisions from the December 2012 draft Constitution. In other words, the April 2013 draft does not establish a general or qualified immunity for defense and security forces. This is an important development that is consistent with international constitutional best practices as seen in South Africa's 1996 Constitution and Kenya's 2010 Constitution.

In addition, the April 2013 draft Constitution sets out important principles for the security sector. Article 15 provides that only the state shall establish military or paramilitary forces. If observed, this should help promote accountability for the use of public military and paramilitary forces both in the legislature and in the work of constitutional oversight authorities, by ensuring that all the military forces established in the country remain subject to public oversight. This avoids the danger posed by private military forces which, falling beyond the scrutiny of the legislature or constitutional authorities, may be only inadequately restrained by the ordinary criminal law.

Articles 16 and 17 provide, further, that the armed forces and national security forces must be committed to political impartiality, organized in accordance with the law, shall support the civil authorities in accordance with the provisions stipulated in the law and safeguard the freedoms listed in the Constitution.

2. The need to respect human rights

Because of the extensive and coercive powers that they must at times use, security forces are at a constant danger of infringing human rights. The August 2012 draft Constitution contained a broad array of rights including an absolute prohibition on torture (Art. 2.2) and broad protections for freedom of association (Art. 2.11), assembly (Art. 2.13), and expression (Art. 2.26). These rights and protections have been carried through into the December 2012 and April 2013 draft Constitutions. It is, however, sobering to reflect that the 1959 Constitution contained many of the same guarantees. Rights cannot exist only on paper. The legislature, civil society, the courts and executive watchdogs such as the proposed National Authority on Human Rights must vigilantly protect human rights.

The absence of an explicit enforcement power for these rights in all the drafts is troubling. Article 2 of the International Covenant of Civil and Political Rights provides a right to an effective remedy from competent judicial, administrative or legislative authorities. Many constitutions provide that courts can award appropriate and just remedies for violations of human rights and such remedies are especially important in the case of low visibility but coercive encounters between security forces and individuals who may not be popular. In addition, the Human Rights Authority contemplated in Art. 122 of the April 2013 draft does not have specific remedial power but only the power to "conduct investigations into the violation of any human rights with a view to settlement or referral to the competent authority." Rights without effective remedies will not be meaningful.

3. The need for a free press and civil society

Effective review and oversight of security forces often requires a free press and a strong civil society that can engage on these issues. Police brutality, improper collection and sharing of intelligence and military improprieties are complex and controversial matters that are understandably of little interest to most people in their daily struggles. In such situations, a free press and civil society is often necessary to

mobilize effective legislative review including the use of investigatory committees contemplated in all three draft Constitutions discussed in this paper (Art. 36 of the August 2012 draft Constitution, Art. 60 of the December 2012 draft Constitution, and Art. 65 of the April 2103 draft Constitution). Rights to free speech and a free press must be respected throughout a constitution, however. The constitutional recognition or creation of offences for defaming a public servant or undermining the reputation of the army will limit the scope of these rights, and could chill and hinder robust review.[8]

Article 34 of the April 2013 draft Constitution provides a "right to access information", which will often be critical for effective oversight of security agencies especially by the media and civil society. Unfortunately, this right seems not to apply when the information would "prejudice national security, public interest, or the personal information of others". The term "national security" is not defined. It has been defined broadly in many established democracies. Care must be taken that broad national security secrecy claims are not used to deny legislators and administrative watchdogs access to secret information that is vital to effective review of security activities.[9] Even public access to information should not be restricted on the basis of vague notions of national security. The danger to sources, methods and caveats should be more specifically defined and there should an ability to balance the competing interests in secrecy and disclosure. The reference to prejudice to the "public interest" is even broader than the reference to "national security". It could prevent civil society, the media and perhaps even legislators having access to information that is vital to holding security sectors (and other parts of government) to account.

4. The need for security but also liberty and equality

All democracies must balance the competing demands of liberty and security. Some might suggest that this should be done by recognizing competing rights to security and liberty. One danger of such an approach is that it may encourage a notion that the liberty rights of the few can be traded off in exchange for the security rights of the majority. The idea of a right to security may also be unrealistic. The state cannot protect against all violence from private actors in the same way as it can guarantee not to commit misdeeds or even provide positive rights to health and water.

There is a special temptation for security forces to act in an excessive and unlawful manner when they are perceived to be dealing with groups, including "extremists" and "demonstrators" that have little public support or if they are seen as failing to guarantee a right to security. In my view, security is best understood not as a right that the state owes to its citizens but as an important objective that can sometimes justify limits on rights. The burden should be on the government to legally authorize infringements on rights and to justify such limits as necessary and as limited as possible to achieve a precise objective. In addition, some rights such as the right not to be tortured should not be subject to limitation or derogation.

5. Compliance with international and regional norms

As Professor Sayah notes, the need for security has an international and foreign affairs dimension. Tunisia adopted a very broad and extensive counter-terrorism law in 2003 in response to UN Security Council Resolution 1373. Such broad laws frame the legal environment in which police and intelligence agencies act. It is especially important that international and regional security mandates and alliances not become an excuse for avoiding democratic domestic control of security forces or the need to respect human rights. International law also recognizes that some rights such as the right not to be tortured should not be subject to limitation or derogation.

6. Democratic control: not partisan domination

Security forces including the military must be subject to civilian and elected authority in a democracy. The absence of such control raises the specter of a police or military state. Nevertheless, democratic control presents a danger that the police or military will be directed in a way that secures the partisan advantage of elected leaders. Professor Sayah is alive to this danger when he argues that the police force is at the service of the whole State and not simply the political majority. The "General Principles" in Chapter 1 of the April 2013 draft Constitution directly address these concerns. Article 16 appropriately provides that the national army is "committed to political impartiality". Article 17 likewise provides that the security forces shall fulfill the duties of "maintaining public order and security; protecting individuals, institutions, and properties; law enforcement; and safeguarding the freedoms enlisted in the Constitution within the frame of utter impartiality".

The December 2012 draft Constitution contained a discrete section headed "Defence and Security", located within Chapter 4's provisions on "Executive Power". The provisions in this section (Arts. 95-99 of the December 2012 draft Constitution) reiterated the principles of neutrality and impartiality as formulated in the "General Principles" in Chapter 1. They no longer appear in the April 2013 draft Constitution, and indeed, they were largely repetitive of earlier provisions in Chapter 1 of the December 2012 draft Constitution. Constitutionally guaranteeing neutrality, however, does not always make it so. Effective accountability and review of security service operations is necessary to ensure that security services are actually in practice neutral towards all groups and respectful of human rights. While the repetitive and arguably unnecessary Arts. 95 to 99 of the December 2012 draft Constitution have been removed, it may be necessary to contemplate the addition of specific constitutional provisions that establish an institutional structure within which neutrality in the armed and security forces can be confirmed through effective review and oversight.

One way to ensure accountability is for the directions provided by elected officials to security forces to be written down. Such directions can be subject to legislative, administrative watchdog and public review. Minority parties should also participate in legislative review in order to avoid partisan domination. Section 199(8) of the South African Constitution provides that a "multi-party" legislative committee "must have oversight of all security services in a manner determined by national legislation or by the rules and orders of Parliament" and that such review is necessary "to give effect to the principles of transparency and accountability". Article 65 of the April 2013 draft Constitution provides for "standing and special committees" of the Chamber of Deputies as well as the formation of "investigation committees". It also provides that "[a]ll authorities shall assist such committees in undertaking their missions." As discussed below, however, it is not clear that such a committee would have access to secret information, thereby impeding its effectiveness. The April 2013 draft Constitution also does not appear to provide for dedicated committees for security sector review or to ensure the representation of opposition parties on such committees. Inclusion of a broad range of opposition parties not represented in the government will be an important means of ensuring the political neutrality of security sectors.

7. The need for transparent yet effective governance

Democracy requires transparent governance and open deliberation. In contrast, security measures must often be conducted in secret and must respond quickly to security threats. This creates a difficult dilemma for all democracies, but the administrative watchdogs, legislative committees and the courts provide important after the fact checks on security excesses. It is also important that even when a security

force has to act quickly that proper chains of command are respected. This will facilitate *ex post* accountability including prosecutions, when necessary to preserve the rule of law and the investigation of excesses and the introduction of new policies designed to prevent similar abuses in the future.

8. The need to respect security professionals

Elected officials should respect the professionalism of the police, intelligence and the military. Professor Sayah makes the important and sometimes neglected point that democratic police must be well paid and well trained, and for this reason supports unionization. I agree but would broaden the point to include that all security forces must be adequately paid and trained to do their difficult jobs. Interactions between the elected executive and legislators and security agencies will benefit if the relevant agency has a sense of professionalism so that they can act in accordance with principles of impartiality, equality, transparency, integrity and efficacy, as contemplated in Art. 13 of the April 2013 draft Constitution. All security agencies should be sufficiently resourced to ensure proper training as well as interaction with fellow professionals from other democracies.

Part II: Security services and the Tunisian Constitution

The 1959 Constitution was largely silent with respect to security functions. The April 2013 draft Constitution comes close to providing first principles to govern security services in Art. 17. These principles include the duty to maintain public order and security, to enforce the law and to protect property, institutions and property on the one hand and the need to protect "the freedoms enlisted in the Constitution within the frame of utter impartiality." This recognizes the need for security forces both to be effective in enforcing the law and preserving order but also to respect rights and to be impartial.

1. Emergency powers

The security forces will be affected by the broader constitutional context including the treatment of fundamental freedoms within a state. In particular, the treatment of emergencies in a new constitution will affect the behavior of security forces during such emergencies. Article 78 of the April 2013 draft Constitution gives the President emergency power in circumstances of "imminent danger" subject to some legislative and judicial review. The article provides that the President is empowered to "undertake any measures necessitated by the circumstances" of imminent danger, and that the Chamber of Deputies "shall be deemed in a state of continuous operation … after the elapse of a thirty-day period as of the implementation of the measures". Further, the Chair of the Chamber of Deputies or 30 members of the Chamber are entitled to resort to the Constitutional Court on the question of whether the circumstances of imminent danger "still exist". It is not clear on my reading whether 30 legislators must wait 30 days before asking the Constitutional Court to review whether the circumstances of imminent danger exist, or whether they can do so immediately upon any measures taken by the President.

The April 2013 draft Constitution is silent, moreover, on the specific procedures by which the Chair of the Chamber of Deputies or 30 members of the Chamber may trigger Constitutional Court review in terms of Art. 78, whether or not such a review proceeds automatically or becomes automatic after a certain time, and whether or not the Court's review is to be governed by special procedures.

The Constitutional Court's review of the emergency is limited in the second paragraph of Art. 78 to "verifying whether the circumstances [of imminent danger] still exist." This follows Art. 16(6) of the

French Constitution but would appear to preclude the Constitutional Court from ruling on whether particular emergency measures taken are "necessitated by the circumstances" as the President is required to do under the first paragraph of Art. 78. The problem here is some emergency measures may be illegal and disproportionate even if the Constitutional Court still concludes that there is an "imminent danger". Courts in democracies tend to defer to the executive on whether an emergency exists in part because they do not generally have access to secret intelligence about the threats to national security. Article 78 could be improved by allowing the Constitutional Court to review not only the existence of imminent danger, but also the proportionality or necessity of actions taken to respond to the emergency.[10] It should be clear that certain rights such as the right against torture cannot be taken away even in an emergency. The Constitution could also provide for after the fact review and compensation for what was done during the period of the emergency.[11]

Part III: The Security Services

1. The police

Professor Sayah's paper illustrates that there are a variety of police forces in Tunisia. This is common in democracies, but may become problematic if such police forces serve as the personal police force of the president or act as a secret police. The creation of a police force responsible to the head of state in 2006 in Tunisia raises these concerns.

1.1 Appointments and reporting lines

One of the dilemmas confronting a democratic police is that the police force must be accountable to elected officials yet at the same time, elected officials should not be able to use the police for their own partisan ends. Professor Sayah proposes that the senior members of police forces should be appointed by the cabinet after consultation with the legislature. The involvement of the legislature in such appointments provides an opportunity for democratic input and accountability. It is also consistent with section 245(2) of the Kenyan Constitution, which requires legislative approval of the most senior appointments. One issue that should be considered is whether once appointed, senior police officials should hold office for set terms and in good behavior as is contemplated under section 245(7) of the Kenyan Constitution.

Although Art. 76 of the April 2013 draft Constitution no longer designates the President as Commander in Chief of the "internal security forces", as the December 2012 draft Constitution did, the provision nevertheless empowers the President to appoint individuals to "senior military and security positions", subject to consultation with a parliamentary committee. The inclusion of police forces in the ambit of security services would mean that a parliamentary committee would be consulted before senior police appointments are made. Article 68, further, provides that the organization of the "internal security forces" must be determined by an organic law. Organic laws must meet stricter procedural and voting requirements in the Chamber of Deputies than ordinary laws (Art. 69). It may be helpful to define whether the police are an "internal security force" referred to in Arts. 68 and 76, and whether the police are included in the Constitution's regulation of internal security forces, and if so, which police forces are included.

The April 2013 draft Constitution introduces a number of welcome changes as compared to the December 2012 and August 2012 draft Constitutions. In my view, it would have been undesirable to have the President act as "Commander in Chief" of the internal security forces and police forces, as provided for by

Art. 71 of the December 2012 draft Constitution. Article 76 of the April 2013 draft Constitution designates the President as Commander in Chief of the armed forces only. Article 64 of the December 2012 draft Constitution contemplated that the President would be able to alter the organic act of the internal security forces by presidential decree; but this power does not appear in Art. 68 of the April 2013 draft Constitution. Nevertheless, the continued failure to define "internal security forces" in the April 2013 draft Constitution leaves questions remaining as to the constitutional architecture of the police force. Organic legislation should establish fundamental organizational matters within the police, and the police should have some degree of operational independence from elected ministers and the President.

At the same time, however, in order to diffuse power and recognizing that policing should not generally raise the same national security concerns as intelligence and the military, the police should report to a minister who is not the Prime Minister or the President and perhaps also be appointed by a minister as opposed to either the President or Prime Minister.

Although police in democracies enjoy operational independence from the elected executive, the executive should be able to provide policy guidance to the police. For example, section 245(4) and (5) of the Kenyan Constitution provides that the democratically responsible minister can issue written directions to the police on "any matter of policy" but not with respect to specific investigations, prosecutions or the employment of specific persons.[12] This provides sound guidance for balancing democratic accountability for policing policy while prohibiting political direction of law enforcement in specific cases. The fact that directives to the police must be written can also facilitate accountability.

1.2 Constitutional oversight

Professor Sayah suggests that an Ethics Commission should be established by law. Given the role that security forces played in the old regime, it may be advisable to give such a Commission constitutional status similar to that of the proposed Constitutional Authority for Human Rights. The Commission should have the power to investigate both complaints but also to conduct investigations at its own initiative. The reason for this is that citizens may be too intimidated by the police to complain or simply unwilling to complain. Moreover, individual complaints may reveal systemic flaws in policing and these should be examined by self-initiated reviews. Legislative appointment for a 6-year non-renewable term and financial and administrative independence similar to the other constitutional authorities would be appropriate for an Ethics Commission or a Security Forces National Authority. I agree with Professor Sayah that civil society and experts from outside the police should be members of this institution. The Ethics Commission or Security Forces National Authority could either discharge human rights and anti-corruption responsibilities for the police and other security authorities or be able to work with the relevant national authority on such matters.

The Ethics Commission, Security Forces National Authority or Constitutional Authority for Human Rights should only be able to make recommendations to the government and police about changes in policies or resolution of complaints in recognition of the government's legitimate democratic responsibilities for policy and the police's legitimate managerial responsibilities for discipline within the police.

1.3 Exclusivity and funding

It may be best for the Constitution to be flexible with respect to the creation of new police forces. The creation of any new police force, however, should be subject to the same ministerial line of reporting and also subject to the jurisdiction of the Ethics Commission or relevant constitutional authority. It should

also be done by legislation that can be debated. If the police are considered part of the "national security forces" or "any other forces", then Art. 15 will allow the creation of new police forces "as per the law", that is, by legislation.

If Tunisian circumstances warrant, however, it may be a legitimate act of transitional justice for the Constitution to prohibit the creation of certain police forces associated with past abuses. For example, a constitutional prohibition on the creation of a presidential police force or a political police force or the re-creation of the Department of State Security might assist in renouncing past abuses.

2. Intelligence services

Intelligence services pose a risk to dissent even in established democracies. They are not faced with the same prospect of eventual judicial review of their work as the police. The international sharing of intelligence may result in complicity in torture even if a particular jurisdiction does not directly engage in such crimes. I agree with Professor Sayah, however, that intelligence is required to warn of internal and external security risks including those to economic interests. I also agree that a new intelligence service in Tunisia must be appropriately trained and subject to a range of democratic controls. In addition, an intelligence service should have a circumscribed statutory mandate and should not exercise law enforcement powers.

2.1 Appointments and reporting lines

As with the police, there is merit to requiring consultation and even approval of the appointment of senior intelligence officials by the legislature. The creation of a National Intelligence Board could ensure that a variety of people are in charge of the day-to-day operations of any intelligence service. At the same time, however, the existence of a Board as opposed to a single Director could diffuse and fracture accountability. Most established democracies have one responsible Director of Intelligence. At the same time, the proliferation of intelligence capabilities within the modern state severely challenges the accountability function and suggests that reviewers should be able to examine the use of intelligence in any part of government. Whole-of-government approaches to security should be mirrored and matched by whole-of-government approaches to accountability.

As with the police force, concerns about whether the intelligence services are included within the meaning of "internal security forces" arise. Article 76 of the April 2013 draft Constitution gives the President power to appoint "senior military and security officials" after taking into consideration the opinion of a legislative committee if provided. The President's similar power to appoint the Head of the Intelligence Agency, as it appeared in the December 2012 draft Constitution, has been removed. There are no references to the Intelligence Agency in the April 2013 draft Constitution.

It can be argued that the intelligence services should report to the President because of the importance of intelligence to national security. In my view, however, this concentrates power too much. In parliamentary systems, the intelligence services generally report to particular ministers and not directly to the chief executive authority. An alternative would be for senior persons in the intelligence services and the police to be appointed by the President "on the precise suggestion of the Prime Minister" under Art. 76, along with other senior civil service positions. Another alternative would be to have a responsible minister or perhaps the Prime Minister appoint senior security officials. Civil service appointments may help ensure the neutrality and professionalism of those who serve in intelligence services. In any event, directions from the President, the Prime Minister or responsible minister should be reduced to writing.

Moreover, those who review the intelligence service should receive copies of such directions even if classified as secret.

2.2 Constitutional oversight

The basic principle should be that review should be able to match the intelligence function. In other words, review should be able to intensify and expand alongside the use of intelligence. Reviewers should have the same access to secret information as those they review. There will be a need for the courts, perhaps the Constitutional Court, or some other bodies to resolve disputes about whether secret information that the reviewers examine must remain secret or can be released in a public report.

The eight-person Parliamentary Intelligence Commission contemplated by Professor Sayah should have access to secret intelligence. If necessary, they should be assisted by security cleared experts. You cannot effectively review intelligence work without seeing secret information. Opposition political parties should have guaranteed representation on such a committee in order to guard against partisan misuse of intelligence.

Article 95 of the December 2012 draft Constitution contemplated that a legislative committee would be responsible for monitoring the observance and application of the principles contemplated in the section, which included the training, neutrality and legality of the work of the defense and internal security agencies. There was no definition of what constitutes an internal security agency, and as suggested above, it would be helpful to know whether the police are included. At the same time, the open-ended reference to internal security agencies may have had the positive effect of ensuring that the restraints and reviews in Art. 95 applied to any new security agencies.

Article 95 helpfully contemplated legislative review of security services. Unfortunately, there were no provisions governing the legislative committee's access to and treatment of secret information. As suggested above, a lack of access to secret information would undermine the effectiveness and scope of legislative review. Article 95 could also have been expanded to ensure that the legislative committee reviews for whether the services comply with human rights.

The provisions of Art. 95 of the December 2012 draft Constitution have been removed from the April 2013 draft Constitution. This is unfortunate, since legislative review of the security agencies is an important element of ensuring that principles of impartiality and respect for constitutional rights, as required by Art. 17, are upheld. In addition to legislative review, there should be full-time executive watchdog review by an Ethics Commission or Constitutional Authority for Human Rights as contemplated in Art. 122 of the April 2013 draft Constitution. Having a dedicated and independent national authority for all security forces would enable that authority to review how intelligence is transmitted to the police and the military. Security service experts and relevant civil society representatives could be included in the national authority.

Such a body should review state security action after the fact. It should not pre-approve intelligence operations including electronic surveillance because such a role risks co-opting the reviewers into what should be reviewed by impartial and expert observers. There may be independent merit to establishing a separate commission to authorize and monitor surveillance as is done in the United Kingdom, but in Canada such authorizations are made by judicial officials.

2.3 Exclusivity and funding

There should be some legislative control over funding of any intelligence service as this provides an opportunity for legislators to hold intelligence services to account both for abuses and failures to provide needed security warnings. The modern trend is for intelligence functions to proliferate within various parts of government (i.e., customs, immigration, foreign affairs, economic affairs) and this presents a severe challenge to accountability. The creation of any new intelligence function within government should be subject to the same legislative and national authority oversight as the main intelligence service.

Article 68 of the April 2013 draft Constitution contemplates organic laws for internal security agencies. Such a law could provide a transparent framework of legality for the agencies and it could build in restraints and review mechanisms. The excision from the article of language providing that "an order" could address "any special, fundamental organizational matter" (Art. 64 of the December 2012 draft Constitution) is a welcome change. It was not clear whether such orders would be public, debated or even whom (presumably the President) could make such orders. Such orders could potentially set up an alternative and perhaps secret regime to govern both security services and the army. In general, fundamental organizational change to security services should be debated and enacted by the legislature and not by presidential decree or order. While Art. 15 appears to contemplate the creation of new intelligence agencies or "any other forces as per the law", legislation that can be debated and voted on in public is preferable to possibly secret executive decrees.

3. The military

The military holds a special place in Tunisian constitutional traditions. Professor Sayah suggests that the army demonstrated "its deep-rooted attachment to Republican legality" by its conduct during the revolution.

3.1 Constitutional reporting lines and procedures

There is merit to the idea proposed by Professor Sayah that the professionalism of the army should be recognized through recognition of the Chief of Staff of the Armed Forces as the Commander in Chief of the army, subject to the direction of the President. At the same time, Art. 76 of the April 2013 draft Constitution and the South African Constitution recognizes the President as Commander in Chief. The recognition of the important position of Chief of Staff displays confidence in the professionalism of the army and may help to prevent any temptation to make partisan use of the army. Another safeguard would be to give the Chief of Staff an option to require the President or any other elected official to reduce any specific direction to the military to writing, with provisions for that direction to be transmitted to a relevant legislative or national authority review mechanism.

There is precedent for a Council for Defence and National Security (CDNS) in section 240 of the Kenyan Constitution, which creates a National Security Council. I am unclear, however, how the CDNS would interact with the General Secretariat for Defence and National Security (GSDNS) attached to the Prime Minister and proposed by Professor Sayah. I have some concern that two similar structures could create diffuse, fractured and less effective accountability. Thought should be given to what should happen if the President and the Prime Minister disagree on the deployment of the military. Thought should also be given to whether representatives of the military should be in a majority or minority on any council. Civilian control, including on budgetary matters, may best be served by having the military in a minority position.

I am also unclear how the National Intelligence Board proposed by Professor Sayah would effectively supervise military intelligence given that military intelligence would presumably still be subject to military command under the Chief of Staff. There is a need in constitutional arrangements to distinguish "real time" chain of command and operational responsibilities from "after the fact" review functions. Following this distinction, the operations of military intelligence can be subject to military command, but after the fact review of its work could be conducted by a legislative committee and/or national authority that reviews all intelligence work within government. Section 201 of the South African Constitution may be an attractive model, because it recognizes the ultimate authority of the President to direct the Armed Forces, but also requires the President to inform the legislature "promptly and in appropriate detail" about the deployment of the Armed Forces.

3.2 Constitutional oversight

Legislative review of the military by a specialized committee is an appropriate means of accountability used in established constitutional democracies, and was contemplated in Art. 95 of the December 2012 draft Constitution. There does not appear to be a corresponding provision for legislative oversight in the April 2013 draft Constitution. Such a committee, were one to exist, should in principle have access to secret information, but thought should be given about how to resolve disputes between the committee and the military about what information should be made public. One option would be to have the Constitutional Court resolve such disputes.

The use of investigative legislative committees, contemplated in Art. 65 of the April 2013 draft Constitution and Art. 122 of the 2012 Egyptian Constitution, may be a transparent and credible supplement to the power of the military justice system (including military tribunals) to deal with misconduct within the military, and especially misconduct involving alleged violations of human rights. Review by legislative or national authority committees could help restore public confidence. At the same time, matters of discipline, demotion and dismissal within the military should be the military's responsibility. Military courts should, as much as possible, have the same independence as civilian courts if they are to command public confidence. Civilians, however, should not generally be subject to military justice especially for speech-based offences such as undermining the reputation of the army. Article 97 of the December 2012 draft Constitution was helpful in recognizing that those in the military should enjoy the same constitutional rights as other citizens except when inconsistent with the neutrality of the military, but a similar provision is absent from the April 2013 draft Constitution. Article 104 of the April 2013 draft Constitution provides for a law organizing military courts and states that "military courts are responsible for military crimes". Unfortunately, the April 2013 draft Constitution does not define the nature of "military crimes" or whether they are limited to members of the military.

There are concerns in any military justice system about the influence of chain of command and transparency. Canadian legislation has been amended to recognize that commanders should not be able to interfere with military police investigations. There is also statutory recognition of the independent role that police and prosecutors should play in the military justice system.

Some democracies recognize ombudsman for the military in recognition of the specialized nature of the military. This may be warranted but my preference would be for a dedicated National Authority for all security services. In any event, some full time and independent review mechanism is warranted given that legislators will only be able to devote limited time to oversight despite their best efforts.

3.3 Exclusivity and funding

As suggested above, legislative review of spending on the military can provide an opportunity for accountability. The contracting out of military or indeed other security services should be subject to the same reporting and review mechanisms as the security services to avoid attempts to escape accountability through privatization. Article 15 may allow the creation of new armed forces "as per the law". This would allow legislation that could be publicly debated. Nevertheless, the existing Armed Forces may be of such fundamental importance and the danger of creating new armed forces so great that there is a case for making the existing Armed Forces a constitutionally exclusive source of military power. Article 68 contemplates an organic law for the organization of the armed forces. Such a law could provide a transparent framework of legality. Fortunately, the provisions of the corresponding article of the December 2012 draft Constitution, which contemplated that a presidential decree could determine "any special, fundamental organisational matter" relating to the national army and internal security forces, but without ensuring that such decrees would be public or subject to legislative review, have been dropped from the April 2013 draft Constitution.

Part IV: Conclusion: Proposed constitutional reforms

Security service reform and governance is critical to democratic transitions. The recognition of human rights alone in a new constitution will not be enough, as the 1959 Constitution also recognized a number of rights including those of humane treatment and fundamental freedoms.

Appointment and reporting lines provide the constitutional framework for security agencies. The December 2012 draft Constitution heavily favored presidential authority over security agencies, although the draft made it clear that some opinion in the drafting committee did not consider that security should be among presidential powers. Article 71 of the December 2012 draft Constitution would have established the President as Commander in Chief of both the Army and Internal Security Forces, perhaps including the police depending on the unclear definition of "Internal Security Forces". The President would have had the power to appoint senior officials to all security agencies after taking into consideration but presumably not having to follow the opinion of a legislative committee. The President, under Art. 64 of the December 2012 draft Constitution, could have altered the organic laws for the army and security forces by decree, even on fundamental organizational matters. There was no guarantee that the decree would be public or subject to legislative review or nullification. The President would also have enjoyed broad immunities under Art. 68 of the December 2012 draft Constitution for actions both during and after office and including those actions taken under a state of emergency.

Fortunately, these powers have been reduced in the April 2013 draft Constitution. The President is not the Commander in Chief of the internal security forces (Art. 76), and does not have any powers of decree in regard to the organization of the security forces. While the President still has the power to appoint senior military and security positions, the April 2013 draft Constitution makes no provision for the appointment of the head of an intelligence agency or the police.

There are some restraints on the above strong presidential powers on security matters, but their efficacy is doubtful. Under Art. 78 of the April 2013 draft Constitution, 30 members of the Chambers of Deputies can refer a question on the existence of circumstances of "imminent danger" to the Constitutional Court, but there are a number of questions that the April 2013 draft Constitution leaves open about the procedures and consequences of Constitutional Court review of the circumstances of imminent danger. In any event, the Constitutional Court's review is limited to a determination of whether or not circumstances of imminent danger exist. The Court should be explicitly authorized to review the necessity or

proportionality of emergency measures. Finally, a drastic restraint on flagrant abuses of presidential power would be a vote of two thirds of the members of the Chamber of Deputies to accuse him of deliberate violations of the Constitution which, if confirmed by the Constitutional Court, results in the removal of the President (Art. 87). This power would be difficult to use and would cause great instability if it were used.

Given the power wielded by security agencies and the threat they may pose to democracy, a case can be made for more diffuse reporting structures. The police and intelligence services could be appointed by and report to a minister or the Prime Minister rather than the President. These ministers should not enjoy the same immunities as the President. Legislative committees might have some decisive role in the selection of senior security officials such as compiling a short list for executive appointment. Alternatively senior appointments could be considered civil service appointments under Art. 76, requiring the Prime Minster's "precise suggestion". Ministerial directives to these agencies could be made in writing and be subject to review by a parliamentary committee.

Following the examples of sections 198-199 of the South African Constitution and section 248 of the Kenyan Constitution, Tunisia's April 2013 draft Constitution could be amended or expanded so that, in addition to the need to ensure that security services conduct their activities in a neutral and legal manner, they also ensure that:

- the security services respect the Constitution and the rule of law including human rights and democracy;

- the security services are subject to democratic control but such control should be exercised to respect transparency, accountability and the professionalism and impartiality of the security services;

- the security services are adequately funded and trained to protect the security of Tunisia in a manner consistent with its commitment to democracy and human rights; and

- legislators and constitutional authorities have adequate powers and resources to review the activities of the security forces for compliance with human rights and democratic policies, including the power to access to secret information when necessary.

A Constitutional Authority for Security Sector Oversight should be created, similar to the other independent authorities established in Chapter Six of the April 2013 draft Constitution. It should:

- consist of independent, impartial individuals with expertise in civil society engagement who are elected by the legislature for a non-renewable six year term;

- have financial and administrative independence to investigate the performance of the security services and to hear complaints about their performance;

- have powers to see secret information that is necessary for effective and complete review but not be able to make such information public without either governmental or judicial approval; and

- have the power to make public recommendations with respect to the adequacy of policies and the proper resolution of complaints and provide annual reports, but the decision to act on such recommendations would be for the relevant security service and the government.

A full time constitutional authority is warranted given the history and powers of security forces and the fact that legislators will understandably not be able to devote all their time to review. Separate authorities with respect to police, intelligence and military could be justified on grounds of expertise. In my view, however, a single constitutional authority would be more efficient and be able better to review the increasingly co-ordinated security activities of modern governments.

An alternative but second-best approach would be to confirm the competence of the proposed Constitutional Authority for Human Rights in Art. 122 to review security services. It should be clear that the Authority can see secret information, with the courts being able to rule on whether the Authority can release secret information after having balanced the comparative harms of disclosure or continued secrecy. The Authority should not only be able to hear complaints with a view to settlement or referral to a competent authority but to award remedies for the violation of human rights. The Constitutional Authority should also have the power to initiate its own investigation and audit of security sector practices. The hearing of complaints is important, but there is a need for the independent auditing of the often secret activities of security forces because some who are mistreated may not be willing to come forward to make complaints. The relevant constitutional authority should be able to examine patterns of complaints in order to make recommendations to ensure that security services respect human rights.

The proper constitutional governance of security sectors is vital to new democracies. There should be a clear commitment to the rule of law and accountability and this may require the removal of even presidential and other state immunities from civil or criminal prosecutions. Both the legislature and independent constitutional authorities should have power to review the conduct of security sectors. This requires that they have the ability to consider otherwise secret information about how the security sectors operate and interact with other agencies. Both legislative committees and independent constitutional authorities should also have the power not only to hear and resolve complaints but to conduct proactive audits of the propriety of security sector activities.

* * *

Notes

[1] Jamil Sayah, "Tunisia Security Sector Reform, Competence, Respectful of Liberty", (International IDEA, 2012), available online in the original Arabic from the International IDEA website, at www.IDEA.int (forthcoming 2013).

[2] Draft Constitution of the Republic of Tunisia, 22 April 2013, unofficial English translation prepared by International IDEA, available online at http://constitutionaltransitions.org/wp-content/uploads/2013/05/Tunisia-third-draft-Constitution-22-April-2013.pdf.

[3] Jamil Sayah, "Tunisia Security Sector Reform" (n 1).

[4] Section 198 of the Constitution of the Republic of South African, 1996, provides:

> The following principles govern national security in the Republic:
> (a) National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.
> (b) The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation.
> (c) National security must be pursued in compliance with the law, including international law.
> (d) National security is subject to the authority of Parliament and the national executive

Section 199(3) and (4) provide that security services must be established by national legislation. Section 199(5) provides that they must act and be taught "to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic." Section 199(6) provides that "No member of any security service may obey a manifestly illegal order." Section 199(7) requires impartiality by providing:

> neither the security services, nor any of their members, may, in the performance of their functions–
> (a) prejudice a political party interest that is legitimate in terms of the Constitution; or
> (b) further, in a partisan manner, any interest of a political party.

Section 199(8) speaks to accountability by providing: "To give effect to the principles of transparency and accountability, multi-party parliamentary committees must have oversight of all security services in a manner determined by national legislation or the rules and orders of Parliament."

Section 238(2) of the Kenyan Constitution provides:

> The national security of Kenya shall be promoted and guaranteed in accordance with the following principles–
> (*a*) national security is subject to the authority of this Constitution and Parliament;
> (*b*) national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms;
> (*c*) in performing their functions and exercising their powers, national security organs shall respect the diverse culture of the communities within Kenya; and
> (*d*) recruitment by the national security organs shall reflect the diversity of the Kenyan people in equitable proportions.

[5] *Padilla v Yoo* 678 F.3d 748 (9th Cir, 2012); *Ashcroft v Al Kidd* 131 S.Ct. 2074 (2011) (qualified immunity for torture memos and use of material witness warrants for preventive detention).

[6] *Price v Libya* 294 F. 3d 82 (D.C. Cir, 2002) (allegations of "beatings" not sufficient to constitute torture).

[7] Constitution of the Arab Republic of Egypt, 2012, unofficial English translation prepared by International IDEA, available online at http://constitutionaltransitions.org/wp-content/uploads/2013/05/Egypt-Constitution-26-December-2012.pdf.

[8] For a discussion of similar problems facing rights to freedom of speech and a free press in Egypt's new constitutional framework, see the contribution to this Working Paper Series by Zaid Al-Ali and Michael Dafel, "Egyptian Constitutional Reform and the Fight Against Corruption" in Zaid Al-Ali and Richard Stacey (eds) *Consolidating the Arab Spring: Constitutional Transition in Egypt and Tunisia,* Working Paper Series presented by International IDEA and the Center for Constitutional Transitions at NYU Law, June 2013, available online at http://constitutionaltransitions.org/consolidating-arab-spring/.

[9] For arguments that review of security activities cannot be effective or command public confidence if the reviewers do not have access to secret material see "A New Review Mechanism for the RCMP's National Security Activities", *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* (2006), available online at http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/EnglishReportDec122006.pdf.

[10] *A v Secretary of State* [2004] UKHL 56; [2009] ECHR 301 (courts upholding existence of a state of emergency but finding indefinite detention of terrorist suspects was a disproportionate and discriminatory response).

[11] See for example Emergencies Act of Canada R.S.C. 1985 c.22 Part V and VI.

[12] Section 245(4) provides:

> The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—
>
> (*a*) the investigation of any particular offence or offences;
>
> (*b*) the enforcement of the law against any particular person or persons; or
>
> (*c*) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.

International IDEA & The Center for Constitutional Transitions at NYU Law

Consolidating the Arab Spring: Constitutional Transition in Egypt and Tunisia

Series Co-Editors

Zaid Al-Ali is Senior Adviser on Constitution-Building in the Arab region at the International Institute for Democracy and Electoral Assistance (**International IDEA**), and is based in Cairo. He was previously a legal adviser to the United Nations Assistance Mission to Iraq and to the United Nations Development Programme (Iraq Office), where he advised on constitutional, parliamentary, and judicial reform. Mr. Al-Ali is a leading regional expert on constitutional reform in the Arab region, and has written extensively on constitutional reform in the Arab region, including on the Iraqi Constitution and the transition processes in Egypt, Libya, Syria and Tunisia. His publications include: *The Struggle for Iraq's Future: After the Occupation, Fighting for Iraqi Democracy* (Yale University Press, New Haven 2014, forthcoming); *The Iraqi Constitution: A Contextual Analysis* (Hart Publishing, Oxford 2014, forthcoming, with Jörg Fedtke); "Constitutional Drafting, National Uniqueness and Globalization", in Thomas Fleiner, Cheryl Saunders and Mark Tushnet (eds), *Handbook on Constitutional Law* (Routledge, London 2012, with Arun Thiruvengadam); "Constitutional Drafting and External Influence", in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing, Cheltenham 2011); and "Constitutional Legitimacy in Iraq: What role local context?", in Armin von Bogdandy and Rüdiger Wolfrum (eds), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (Oxford University Press, Oxford 2011).

Richard Stacey is the Director of Research at the Center for Constitutional Transitions at NYU Law (***Constitutional Transitions***). His publications include "Constituent Power and Carl Schmitt's Theory of Constitution in Kenya's Constitution-making Process" (2011) 9 *International Journal of Constitutional Law* 587, and "Independent or Dependent? Constitutional Courts in Divided Societies", in Colin Harvey and Alex Schwartz (eds), *Rights in Divided Societies* (Hart, Oxford and Portland 2012, with Sujit Choudhry). He serves as co-editor of the multi-author reference work *Constitutional Law of South Africa* 2 ed (Juta, Cape Town 2007-), to which he has contributed chapters on socio-economic rights and executive authority. Between 2005 and 2010 he acted as an advisor on administrative law to the South African Department of Justice, and has advised the South African Parliament on matters of legislative drafting. In 2009, he acted as a consultant to Kenya's Committee of Experts on Constitutional Review.

International IDEA & The Center for Constitutional Transitions at NYU Law

Consolidating the Arab Spring: Constitutional Transition in Egypt and Tunisia

Contributions in this Series

No. 1: Egyptian Constitutional Reform and the Fight against Corruption
Zaid Al-Ali & Michael Dafel

No. 2: Semi-Presidentialism as a Form of Government: Lessons for Tunisia
Sujit Choudhry & Richard Stacey

No. 3: Tunisian Constitutional Reform and Decentralization: Reactions to the Draft Constitution of the Republic of Tunisia
Jörg Fedtke

No. 4: Tunisian Constitutional Reform and Fundamental Rights: Reactions to the Draft Constitution of the Republic of Tunisia
Jörg Fedtke

No. 5: The Tunisian Judicial Sector: Analysis and Recommendations
Tom Ginsburg

No. 6: Preventing and Combatting Corruption: Good Governance and Constitutional Law in Tunisia
Juanita Olaya & Karen Hussmann

No. 7: Security Forces Reform for Tunisia
Kent Roach

No. 8: The Legislature under the Egyptian Constitution of 2012
Asanga Welikala

The entire working paper series is available online at
http://constitutionaltransitions.org/consolidating-arab-spring/.