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## War Powers Under the South African Constitution

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## CHAPTER 19

# WAR POWERS UNDER THE SOUTH AFRICAN CONSTITUTION

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It may seem strange to inquire into the nature of war powers under South Africa's Constitution – for surely South Africa is not a nation that considers itself embarked on a policy of war. But I believe the topic is important nonetheless.

As a matter of principle, there are few greater destroyers of rights, or creators of utter and arbitrary inequality, than war, which orders soldiers to kill, sacrifices others, and potentially rips apart the fabric of civil society. The power to make war is the power to protect and to destroy perhaps the most fundamental right of all, the right to live in an ordered society. A state which leaves this power loosely governed is a state where rights are not entirely secure, no matter how extensively that state protects rights in situations short of war.

Nor are these abstract considerations for South Africa. South Africa is not a warlike state, but it is, compared to other nations in Africa, a well-armed state.<sup>1</sup> Its spending to maintain that military strength is at the heart of a bribery scandal that as of 2008 still threatens to bring down Jacob Zuma, now President of the African National Congress, and may taint others as well.<sup>2</sup> Its troops are already serving, or have served, in peacekeeping or election-support missions in several other African states, including Burundi, the Democratic Republic of the Congo (DRC), and Darfur in the Sudan, as well as the Comoros, Côte d'Ivoire, Eritrea, Ethiopia, Lesotho, Liberia, Mozambique, and Uganda – and also in Nepal.<sup>3</sup> Some, fortunately a small number, have died in combat outside its borders, in an intervention in Lesotho in 1998 and more recently in the DRC.<sup>4</sup> War is not entirely absent from South Africa's politics, even today – and there is of course no telling what the future may hold. South Africa's peacekeeping efforts in fact have stretched the nation's current military resources,<sup>5</sup> and the goal of establishing an African Union peacekeeping force will certainly call on South African resources as well.<sup>6</sup>

The South African Constitution addresses the possibility of war, and the deployment of troops, but not at great length. The brevity of these provisions is entirely understandable. No doubt the reason for it was, at least in good part, that South Africa's constitution writers – like their counterparts in every nation – wrote a constitution not for abstract review but for the governance of their nation with its particular and painful history. The legacy of human rights abuses, especially in states of emergency, was fresh in the drafters' minds, and they addressed these dangers in detail in the new Constitution, but they did not envision their renewed country as a war-making state. Perhaps they also did not expect that the new South

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Africa would play as active a role as it does in deploying military force on behalf of peace – a constructive and admirable role, but one not without risks.

Meanwhile, we in the United States have re-encountered the issues of war powers, as we have faced an unconventional enemy and our government has pressed the boundaries of many uncertain constitutional powers while it fashions its response to this enemy and others. In the grim light of 9/11 and its aftermath, issues of war power that might at one time have seemed obscure or implausible have turned out to be present and pointed. War is hell, and havoc, and it is also extremely hard to govern constitutionally; the pressures of military necessity drive the meaning of constitutional language in ways that only experience may fully reveal. South Africa so far has, happily, had little occasion to encounter these questions in its own governance. But war is a great danger, even in a country that takes pride in its commitments to peace. While I will offer few prescriptions in this paper, I hope that it will be useful to South Africans as they develop the constitutional understandings that may someday guide the interpretation of their nation's powers of war.

Let me add one more word of explanation of the inquiry I make in this paper. It should surprise no one that South Africa's constitutional provisions dealing with war and fighting have some ambiguities – all texts have some ambiguities. I do not mean to score debater's points by highlighting linguistic possibilities that may be grammatically coherent but are inconsistent with the fundamental themes of the South African Constitution. On the contrary, where ambiguity in specific clauses can be interpreted by reference to general principles of South African constitutional law I will hope to do just that.

Three such general principles are particularly important. First, and most fundamental, all acts of the South African government are subject to the Constitution<sup>7</sup> – so the notion of war powers that are wholly beyond the reach of judicial review is implausible.<sup>8</sup> Moreover, the protection of human rights is an absolutely integral part of the South African constitutional order.<sup>9</sup> Second, the Constitution contains a specific commitment to subject military power to law. The Constitution declares that the security services (including military, police and intelligence services) 'must act ... in accordance with the Constitution and the law'.<sup>10</sup> This is not just an abstract sentiment; for the ANC the issue of the armed forces' loyalty during the constitutional transition was a critical and delicate one.<sup>11</sup> Third, the Constitution rejects the idea that war is the province of the executive alone. Section 198(d) lays out, as one of the 'governing principles' for the security services, that '[n]ational security is subject to the authority of Parliament and the national executive'.<sup>12</sup>

As important as these general principles are, however, they do not remove the need to look carefully at the specific provisions of the South African Constitution that deal with war. We will first look at the provisions governing the declaration of a state of national defence – the clearest route provided by the Constitution for South Africa to enter war. As we will find, the procedural requirements for such declarations are distinctly less demanding than those governing the declaration of a state of emergency. At the same time, the substantive powers conferred on the President by such a declaration – though not beyond Parliament's authority to regulate – are potentially far-reaching, both in military terms and in terms of their impact on at least some human rights. Next, we will ask whether South Africa can become involved in military action without a declaration of a state of national defence. The answer appears to be 'yes', and moreover it appears that the President



has authority to initiate a range of potentially risky military involvements without any direct approval by Parliament – although, again, Parliament may approve, or disapprove, if it so chooses. Finally, in light of the extent of military and Presidential authority that this analysis has identified, we will consider the role of Parliament's power over the budget as a check, albeit not a perfect one, on executive military decisions.

### **(1) The procedural requirements for a state of national defence**

The Constitution gives no explicit power to anyone to declare 'war'. Perhaps such an authority is still implicit in the general powers of the President and Parliament, but probably not. Instead, it appears that the drafters of the Constitution carefully avoided giving the nation a power to declare war, and instead gave it a power to declare a 'state of national defence'.<sup>13</sup> Does this mean that South Africa cannot fight a war, or engage its troops in combat 'hostilities'?<sup>14</sup> Surely not. There is no sign that South Africa chose to abandon its military when it abolished apartheid, and a country with a military is a country prepared, at least in some circumstances, to fight. If the country were to be attacked, the declaration of a state of national defence must have been meant as a way of declaring that the nation was going to fight to defend itself.<sup>15</sup> It may well be that South Africa has no constitutional power to fight a war of aggression,<sup>16</sup> but, as we will see, that constraint still leaves room for many potential military engagements.

What are the procedural requirements for the declaration of a state of national defence? The first part of the answer to this question is explicit, or almost explicit. Section 203(1) says that '[t]he President as head of the national executive may declare a state of national defence'. Although this language doesn't in so many words prohibit Parliament from also issuing such a declaration on its own, the overall content of § 203 (with its focus on the President's reporting to Parliament, and Parliament's approving the declaration after it has been made) makes clear that only the President has this authority.

More precisely, only the President, or whoever may be serving as Acting President, can exercise this authority. Because the authority is transferable, it is quite possible that a declaration of a state of national defence could be made by someone chosen by the President to serve as Acting President rather than by anyone elected by Parliament to play this role.<sup>17</sup> In actual fact, South Africa's intervention into Lesotho in 1998, though apparently not based on a declaration of national defence but simply on a decision to send troops on the mission, was ordered by Mangosothu Buthelezi in his capacity as Acting President while President Nelson Mandela was out of the country<sup>18</sup>; Mandela's choice of Buthelezi surely was related to the ANC's efforts to improve relations with this long-time opponent.<sup>19</sup>

It is striking that this power is given to the President. Clearly, explicitly, he or she can declare the nation's involvement in war without any prior approval from Parliament. (It may be that the President must obtain the approval not only of the relevant Cabinet minister but also, for a decision of this magnitude, of the Cabinet as a whole.<sup>20</sup>) Presumably the war can then be fought as well. But the declaration 'lapses unless it is approved by Parliament within seven days of the declaration'.<sup>21</sup> This requirement of affirmative approval by Parliament means that in South Africa, as has also been the practice in the United States,<sup>22</sup> a formal declaration of the



nation's martial intent (a declaration of war in the US, a declaration of a state of national defence in South Africa) rests on the approval of both of the political branches of government. But it must be said that within a week a lot can happen, politically and militarily. If the President begins the war on Monday, and South African troops have fallen by Saturday, will Parliament be prepared to withhold its approval? It has often been suggested that the Presidential power to involve the United States in fighting presents our Congress with something approaching a *fait accompli*.<sup>23</sup> In any event, the more firmly the executive maintains political control of Parliament – and that control in general seems considerably firmer under South Africa's system of government than it would be in the United States – the less likely that Parliament will withhold its approval.

Though Parliamentary approval is required for a declaration of a state of national defence, it is clear that overall the Constitution imposes much clearer and more stringent requirements for a declaration of a state of emergency than it does in connection with the declaration of a state of national defence. Specifically:

First, § 37(1) specifies the grounds on which a state of emergency can be declared (a threat to 'the life of the nation'), whereas no specific grounds are spelled out for declaring a state of national defence. A state of emergency can only be declared in terms of an Act of Parliament,<sup>24</sup> but no statute is required as a basis for declaring a state of national defence. In fact, the Defence Act does set out grounds for declaring a state of national defence,<sup>25</sup> but these are not mandated by the constitutional text.

Second, while a state of emergency can last for 21 days without legislative endorsement – compared to 7 days for a state of national defence – once initial approval has been given by Parliament for a state of emergency, this approval must be renewed at least every three months.<sup>26</sup> A state of national defence, by contrast, appears to extend indefinitely.

Third, § 37(2) spells out which chamber of Parliament has the power to give or withhold approval of a state of emergency – the National Assembly – whereas the allocation of this authority for states of national defence is not made explicit. What § 203(3) says is that 'Parliament' must approve the declaration, and § 42(1) declares that Parliament consists of the National Assembly and the National Council of Provinces (NCOP).<sup>27</sup> It is not easy to see why the National Assembly should be relied upon to approve or disapprove states of emergency, while the National Council of Provinces as well as the National Assembly are needed for approval or disapproval of states of national defence, but on its face this is what the text dictates.<sup>28</sup> Conceivably, however, the NCOP is not meant to play a part in approving a declaration of a state of national defence. It might be argued that the NCOP's powers are limited to 'legislative power', and that approval or disapproval of a declaration of a state of national defence is not actually legislation. Rather, this function might be seen as a form of oversight over executive power, a responsibility apparently reserved to the National Assembly.<sup>29</sup>

If, on the other hand, the NCOP does have a role to play in the approval of a declaration of a state of national defence, then how great is that role? If this decision is viewed as a form of legislation, presumably it is legislation of national rather than distinctively provincial concern.<sup>30</sup> If so, then even if the NCOP withholds approval of the declaration after the National Assembly has given its endorsement, the National Assembly can give *Parliament's* approval by re-enacting it.<sup>31</sup> But if this approval did count as legislation triggering the special NCOP powers applicable to



bills 'affecting provinces', then very different dispute resolution provisions would apply.<sup>32</sup> Finally, it could be maintained that the approval of a declaration of a state of national defence is not governed by either of the two sets of procedures for normal legislation, and that some further process, such as an absolute requirement of approval by each House of Parliament, must be inferred for this very special function. The failure to fully clarify this complex of issues is a significant omission, and a potential source of great difficulty should a state of national defence ever be declared.

Fourth, § 37(2) also forbids the National Assembly from approving or extending a state of national emergency without a public legislative debate. No such rule is imposed for approval of a state of national defence, though other sections require that Parliament's rules in general must have 'due regard' for 'transparency and public involvement'.<sup>33</sup> It is hard to accept the idea of a state of national defence being approved without a public debate – but perhaps the sheer unlikelihood of such a step makes the absence of this textual requirement less important.

Fifth, the required majorities for approval differ. The National Assembly can only approve a state of emergency by 'a supporting vote of a majority of the members of the Assembly', and can only extend it by 'a supporting vote of at least 60 per cent of the members of the Assembly'.<sup>34</sup> The Constitution imposes no supermajority voting requirement for Parliament's approval of a state of national defence. Presumably, therefore, Parliament is to treat this declaration according to one or the other of the two standard models the Constitution provides. If the declaration is treated as equivalent to a 'Bill', then the required quorum in the National Assembly is one-half of the members, and the required vote appears to be simply a majority of those voting.<sup>35</sup> If, on the other hand, the declaration is not treated as a bill, then the required quorum in the National Assembly is only one-third of the members; again, approval or disapproval would require simply a majority of the votes cast.<sup>36</sup>

Sixth, the Constitution explicitly provides for judicial review of the validity of states of emergency – their declaration, the approval and extension of their declaration, and any legislation or action taken in consequence of their declaration.<sup>37</sup> It is likely that some form of judicial review of a state of national defence is also available, because of the fundamental principle that all government action is subject to the Constitution.<sup>38</sup> But the Constitution contains no explicit, specific provision for such review, and that silence might well support arguments that the available judicial review must be particularly deferential.

## **(2) The powers granted by the declaration of a state of national defence**

To address this matter, we must consider three issues: (a) If Parliament approves a declaration, without more, what powers does the declaration confer on the President to wage war?; (b) To what extent can Parliament limit the authority that the declaration confers by adding restrictions to it?; and (c) To what extent can the President and Parliament together limit otherwise-applicable constitutional rights based on a declaration of a state of national defence? Let us take up these three questions in order.

*What powers is the President authorized to employ, if the President declares and Parliament authorizes a state of national defence?* The text does not explicitly



answer this question. The most straightforward inference from the text, however, is that when a state of national defence has been declared and authorized, the President has full authority (acting with the responsible cabinet minister and the cabinet as a whole) to deploy and direct the troops, as their Commander-in-Chief, at least until Parliament in some way restricts that authority.

The President is always the Commander-in-Chief, of course.<sup>39</sup> But what are the powers of a Commander-in-Chief? The text does not specify these authorities, but, again, the most plausible answer is that as Commander-in-Chief, the President has the authority to order any lawful military action,<sup>40</sup> from preparation for war to actual fighting. Suppose, for instance, that troops from one of South Africa's neighbors massed on the border. One might imagine that South Africa would move its troops to the border in response, and this positioning of forces would be an appropriate exercise of Commander-in-Chief powers under a 'state of national defence'. By the same logic, Parliament's approval of the state of national defence would also authorize the President to launch a preemptive attack on the threatening troops (assuming that such an attack could be justified under international law as self-defence against an imminent invasion). Similarly, it would allow the President to repel an attack and pursue the attackers deep into the attacking country's territory, assuming that such a response fell within legitimate self-defence under the UN Charter and other binding international law. On the same basis, Parliament's approval of the declaration of a state of national defence could authorize, without further legislative action, the President's taking the attacking country's capital by force and overthrowing the aggressor government.

It might be argued, however, that Parliament's approval is narrower than this. Section 203(1), which empowers the President to declare a state of national defence, also requires the President to report to Parliament:

- (a) the reasons for the declaration;
- (b) any place where the defence force is being employed; and
- (c) the number of people involved.

Parliament's approval of the declaration might be thought to be limited to approving the particular rationale and the particular level of troop engagement that the President has reported to it. This is a possible reading but not, I think, the most plausible one. Section 203 does not say that the President's use of troops lapses if it is not approved within seven days; rather, it says that the *declaration* lapses if not approved within that period. It seems inevitable that in a war, whatever uses are being made of troops in the first seven days will change over the next seven, or seven hundred, and there is no sign in the text that each such change requires a fresh declaration and a fresh Parliamentary approval.

It is important to add that the question of Presidential power is not only a question of 'what powers' but of 'against whom'. Who can be the target of a declaration of a state of national defence? The broader the range of potential targets, the wider the potential occasions when the war powers of the nation can be brought into play under this mantle. The text does not say who the targets of such declarations can be. It seems reasonable to infer, however, that in rejecting the rubric of 'declarations of war' the Constitution also puts to one side any possible argument that a declaration can only be directed against another nation-state, as might have been the case with a declaration of war. Assuming that the declaration must be against *someone* (rather than being, simply, a declaration that the nation is in peril, with no specification of the source of the danger), how well must that



someone be specified? Would it be constitutional for the President to declare a state of national defence against, say, all those who participated in an act of terrorism against South Africa, or who aided or harbored those who did? Or all those whom the President *concludes* or *finds* participated in the act of terrorism, or aided or harbored those who did?<sup>41</sup> Or who commit acts of terrorism in the future?<sup>42</sup> The answers to these questions will help measure the breadth of the President's, and Parliament's, authority under a state of national defence.

*Can Parliament limit the authority conferred on the President by its approval of a state of national defence?* If Parliament's approval of the declaration of a state of national defence ordinarily operates to authorize all lawful military action that the President may order, still it might be that Parliament can, if it chooses, impose limitations on this authorization. The text does not make clear whether Parliament has this power, and this is an important and potentially troublesome ambiguity. Given that only the President can issue a declaration of a state of national defence, it is possible (as a reader suggested) that Parliament's only power as to declarations is to approve them or disapprove them, since any Parliamentary modification of the declaration might begin to constitute a new declaration, issued by Parliament. The basic principle that national security is subject to both Parliamentary and Presidential authority, on the other hand, argues in favor of finding that Parliament *can* amend a declaration before approving it. Even if the division of powers with regard to declarations impliedly limits Parliament's authority in this respect, moreover, a sufficiently independent Parliament might be able to compel a President to modify and re-issue a declaration, in order to win Parliamentary approval for it.

In addition, Parliament might well retain authority to approve or disapprove the broad policies that the President undertakes by virtue of the declaration. So, for example, I would argue that Parliament could choose to forbid the President to invade the aggressor nation I imagined earlier, even if the President believed that invasion was necessary to erase the peril that nation posed to South Africa and even though Parliament had approved the declaration of a state of national defence in response to that peril.<sup>43</sup> The constitutional text does not spell out such a power to approve or disapprove military policies, but it is not precluded by the text, and the principle of joint Parliamentary-Presidential responsibility counsels in favor of it. Indeed, precisely because a declaration of a state of national defence can last for an unlimited time, principles of accountability strongly argue in favor of finding Parliamentary power to regulate what is done during the potentially extended duration of hostilities.

In this regard, it is noteworthy that the Constitution, in addition to requiring the President to provide Parliament with certain information in connection with a declaration of a state of national defence, also imposes in § 201(3) a requirement that the President provide information to Parliament concerning a range of 'employment[s] of the defence force', notably including employment 'in defence of the Republic'.<sup>44</sup> If this section is understood to create an ongoing duty of reporting, even during an already-approved state of national defence, and if the function of this reporting is inferred to be not simply to inform Parliament but to empower it to act, then we have reason to find a continuing Parliamentary authority to regulate the military course of a state of national defence.<sup>45</sup> (Parliament's funding power is a further check, as we will see.)<sup>46</sup> It is important to recognize, however, that this reading affirms Parliamentary review power but does not establish any requirement



of Parliamentary approval as a predicate for Presidential action. As long as Parliament does not order otherwise, it seems quite likely that the declaration of a state of national defence confers, or accepts, unlimited Commander-in-Chief authority bound only by general South African or international law.

Moreover, assuming that Parliament does have this implied authority to limit the President's freedom of action in a state of national defence, it would appear to be subject to a possibly significant limit: Parliament presumably cannot impose modifications that in effect prevent the President from performing the role of Commander-in-Chief. What this limit would entail is by no means certain, and I do not mean to suggest that aggressively expansive notions of executive war-making power would be compatible with South Africa's constitutional order. But still this limit does seem to have at least some content. Parliament probably could not, for example, require that Presidential military orders be co-signed by the Speaker of the National Assembly; the President, not the Speaker, is the Commander-in-Chief.<sup>47</sup> Parliament also cannot order the 'employment' of troops in defence of the nation; '[o]nly the President, as head of the national executive', has that authority, under § 201(2) of the Constitution.<sup>48</sup> If Parliament cannot order the 'employment' of troops, its power to order, or to compel the President to order, their 'deployment' during a state of national defence may also be limited. Thus, although I have already urged that Parliament would have the power to regulate the broad outlines of war (for example, to forbid an invasion as a form of self-defence), it is open to question whether Parliament could direct the President in a state of national defence to attack one base rather than another, to defend one town but not a second, or to use armored personnel carriers but not tanks.<sup>49</sup> Once a state of national defence has been declared and approved, some considerable authority may pass to the President in a way that Parliament cannot restrict.

*To what extent does the declaration of a state of national defence authorize limitations on otherwise protected human rights?* We can begin to answer this question by asking another: Does the declaration of a state of national defence also declare a state of national emergency? The answer to this question is clearly 'no'. A state of national defence is not a state of emergency, and a state of emergency is not a state of national defence. The brief constitutional text bearing on states of national defence does not suggest a recognition that constitutional rights would be subject to extensive abridgment, whereas the text addressing states of emergency focuses elaborately on exactly this prospect. It seems reasonable to say that in South Africa the only time that constitutional rights can be 'derogated' from is in a state of emergency, although the text of § 37 (on states of emergency) does not actually say this in so many words.

As we have seen, the constitutional provisions governing the declaration and continuation of states of emergency are in general more demanding than those governing states of national defence. It appears to follow, therefore, that in South Africa the government is considerably freer to engage troops in battle than it is to deprive people of constitutional rights. This statement is somewhat startling, but not necessarily cause for concern. It may be that states of national defence are so much less tempting as instruments of potential authoritarian oppression than states of emergency are that fewer constitutional limits need to be imposed on their use; *realpolitik* itself will protect the nation.

While this may be so, it is important to recognize that the powers employed in a state of national defence do have important human rights implications. Sending



troops into battle risks depriving them of their lives. Section 11 of the Constitution protects the right to life, which cannot be derogated from even in a state of emergency, under § 37(5)(c). It must follow that orders sending troops into battle in a lawfully-undertaken war are *justified* under § 36 as a limitation on the soldiers' right to life, and so can be issued without effecting a derogation from that right.<sup>50</sup>

There are other ways in which the violent clashes that a state of national defence would authorize would inevitably impair otherwise fully-protected constitutional rights, even if a state of national defence is not meant to authorize limitations of the sort contemplated in states of emergency. I will put aside here the possibility of military conflict so grave that the civil courts cannot stay open; there lies the ultimate recourse of martial law, unmentioned in the South African Constitution (as it is unmentioned in the United States Constitution) yet still present somewhere in the wings.<sup>51</sup>

Far from the realm of martial law, the existence of a state of national defence would raise other issues of limitation of constitutional rights. Suppose, for example, that South Africa faced the likelihood of imminent terrorist attack by a foreign terrorist group, and had declared a state of national defence as a result. Unless Parliament enacted limitations, presumably the President would be entitled to use all normally lawful military steps to ward off the attack. In an actual war, the armies of one side monitor the communications of the other, and they do not usually stop to obtain court authorization first. It would seem that the President, as commander-in-chief of the South African National Defense Force, would have the authority to order electronic surveillance of communications among members of this foreign terrorist group abroad, without case-by-case judicial review, though doing so would certainly impair their privacy of communications under § 14(d).<sup>52</sup> Would the President have the same authority as to communications by members of the group abroad to their (known? suspected?) confederates within South Africa, assuming those confederates are also not South African citizens? What about communications from outside South Africa into the country, when either the sender or recipient *is* a South African citizen? And what about communications going the other way?<sup>53</sup> And, finally, what if the group against which the state of national defence has been declared is a domestic, South African terrorist group?<sup>54</sup>

I don't mean that these questions are unanswerable, or that the exercise of such wartime authority would be beyond review by the courts or regulation by Parliament. But it is hard to believe that the rules governing surveillance in a state of national defence would be the same as those applying in ordinary circumstances; *some* limitations on normally available rights would likely be justified by the needs of the state of national defence. The power to declare a state of national defence means that military need and domestic constitutional liberty may overlap and conflict, and the exact contours of the boundary between them have not yet been worked out.

These inferences may seem feverish. In fact, however, the Defence Act appears to go considerably further. Section 91(1) gives the President broad authority to make regulations to deal with the tasks of a state of national defence, and § 91(2) makes clear that such regulations can have a very substantial effect on constitutional rights. It remains to be seen, of course, whether the powers conferred in these sections are constitutional, but the existence of the statute presumably reflects at least the view of Parliament and the President that the Constitution does permit these provisions.



The subsections of § 91 cover a considerable range of issues affecting human rights. To begin with, §§ 91(2)(a) – (f) appear to authorize the President to impose a draft (referred to as a ‘mobilization’). Section 91(2)(g) authorizes regulations dealing with ‘the security of national key points and other places that may be designated’, but does not specify what steps such regulations might require. Section 91(2)(h) provides for ‘censorship of information’, clearly a limitation on free speech. Section 91(2)(i) empowers the President to make regulations dealing with ‘the evacuation or concentration of persons, including curfew laws’. All such laws impinge on freedom of movement and association, and an American reader cannot help but think of the worst instance of the use of such power in our history, the exclusion of Japanese-Americans from the West Coast early in World War II, and their confinement in camps for years thereafter. A South African reader may think just as quickly of the disease-ridden concentration camps created by the British during the Boer War.

Finally, § 91(2)(l) addresses regulations of ‘places of custody or detention’. On this score, it is worth noting that § 37(8) of the Constitution makes clear that the many provisions of § 37 which protect detainees during states of emergency

do not apply to persons who are not South African citizens and who are detained in consequence of an international armed conflict. Instead, the state must comply with the standards binding on the Republic under international humanitarian law in respect to the detention of such persons.

Section 37(8) appears to apply whether or not a state of emergency is in place, and seems to say that the rules of detention applicable to foreigners detained in consequence of an international armed conflict are simply those required by international humanitarian law, not those that might otherwise be inferred from other provisions of the Constitution. Thus a non-South African detained in these circumstances would have neither the rights of a normal detainee under § 35 of the Constitution, nor the rights of an emergency detainee under § 37 (unless international humanitarian law binding on South Africa provided otherwise, either by directly mandating such protections or by requiring that non-South Africans receive the same protections as South Africans enjoy). And this would be true even if the non-South African was detained or (to use a more military term) taken prisoner on South African soil and thereafter detained inside South Africa as well.

To all of this, it is important to add that the list of topics in § 91(2) may not be exclusive. Indeed, the breadth of § 91(1)’s general authorization suggests that the specific powers given in § 91(2) might be viewed as exemplifying a range of other authorities to impinge, where necessary, on constitutional liberties. Whether § 91(2)’s provisions, or broader implications from them, are constitutional remains to be litigated, and of course the constitutionality of any particular exercises of the Defence Act powers will also be subject to constitutional review. But the statute does at least confirm the possibility that states of national defence will involve significant limitations on otherwise protected rights, limitations with some resemblance to the ‘derogations’ that are authorized, but much more carefully addressed, in the state of emergency provisions of the Constitution. It might be argued that the differences do not matter, since South Africa can always declare and approve declarations of a state of national defence and of a state of emergency simultaneously. A state of emergency is harder to start and harder to maintain,



however, and so the existence of this partially overlapping, less regulated authority is troubling.

### (3) Hostilities *without* a declaration of a state of national defence

Although the declaration of a state of national defence under § 203 of the Constitution appears to be the way that South Africa can declare its fullest engagement in the use of military force, it is clearly not the only path by which the country can employ its armed forces. Instead, § 201(2) creates another route, and one which the President may take the nation along without affirmative Parliamentary ratification. This section declares that:

Only the President, as head of the national executive, may authorize the employment of the defence force –

- (a) in cooperation with the police service;
- (b) in defence of the Republic; or
- (c) in fulfillment of an international obligation.

Action in defence of the Republic under § 201(2)(b) presumably is, or at least may be, taken pursuant to a declaration of a state of national defence. The distinction drawn in § 201(2) between such defence and the use of force ‘in fulfillment of an international obligation’, however, suggests that the latter is not encompassed in a ‘state of national defence’.<sup>55</sup> Moreover, this reading of §§ 201(2) and 203 accords both with the natural sense of the words ‘national defence’ – for surely national defence is not directly implicated by peacekeeping missions far from South Africa’s borders – and with South African practice, under which troops have been sent to a number of countries for peacekeeping purposes without, as far as I am aware, any declarations of a state of national defence.<sup>56</sup>

Peacekeeping missions do not seek combat, but combat can certainly arise in them. In point of fact, as we have seen, South Africans engaged in interventions of this sort have taken casualties in both Lesotho and the DRC. Once troops are deployed in a situation of potential strife, active fighting and war are always possibilities; indeed, even deployments under conditions of peace (say, a deployment of troops to Namibia as a check on any potential rise of territorial ambitions against Namibia in other nations) ultimately pose this risk.

Given that peacekeeping missions carry with them some risk of involvement in actual fighting, as might other military deployments ordered by the President<sup>57</sup>, is affirmative Parliamentary approval required for these steps? The answer seems clearly to be ‘no’; as long as Parliament does not affirmatively *disapprove* (and as long as funds are available), the military action can continue. This is apparent from section 201(3), which requires the President to ‘inform Parliament, promptly and in appropriate detail’, of a range of information about any employment of the defence force which he or she has ordered under 201(2). This reporting requirement is a wise one, but what the section requires is only reporting; it does not require any vote by Parliament on the matter. In fact, the text does not even explicitly authorize Parliament to vote on the matter, though I believe, as I have already argued in connection with declarations of a state of national defence<sup>58</sup>, that the principle of joint Parliamentary-Presidential control over the military does mean that Parliament *can* vote if it so chooses.<sup>59</sup>



It is important that Parliament have this authority. But it is also important to recognize that if Parliament has this authority, and chooses to take no action whatsoever, the President's decision stands. Only an affirmative decision by Parliament to modify or reject the President's choice constrains his power; inaction constitutes acceptance (at least as long as funds are available). As I have already suggested, it is also important to recognize that if the President makes decisions that embroil the nation in fighting, Parliament may find it very hard to respond then by demanding a reversal of the President's judgments. The President has the authority, as long as Parliament does not affirmatively object, to take the nation a substantial distance, perhaps politically an irreversible distance, along the road towards war.

Suppose now that in the course of a deployment of troops ordered by the President, and not objected to by Parliament, fighting does break out. Must a state of national defence now be declared, and Parliamentary approval obtained? Parliament might find it hard to withhold its approval, as I've just noted, but still it would have a chance, and indeed an obligation, to endorse or not endorse such a declaration if it was issued – and unless it gave its approval, the declaration would lapse.

But the constitutional text does not say that a state of national defence must be declared whenever actual fighting breaks out. The fact is that the text does not say that a declaration of a state of national defence is required as a prerequisite, or an accompaniment, even to a full-scale war. Nor is it clear that such a declaration plays any international law role (as a declaration of war might have, especially in earlier times), and so it may be that no implied requirement of such declarations can be inferred in the text based on international law. It would have been possible for the Constitution to have explicitly forbidden war or fighting in the absence of a declaration, but no such prohibition has been spelled out.<sup>60</sup> I would infer nevertheless that a full-scale war (unlike the sorts of smaller-scale hostilities discussed above) does need to rest on such a declaration, since the declaration process seems designed to provide notice to the nation and to insure that Parliament's assent is obtained as part of the country's going to war – but the point remains debatable because the text is not explicit.

As to lesser military engagements, moreover, I do not think the same inference follows. The Constitution empowers the President to send troops abroad for peacekeeping, as long as Parliament does not object. Peacekeeping can be violent. To authorize a peacekeeping mission, it seems to me, is to authorize some limited amount of actual fighting in the course of that mission – and the Constitution authorizes the President to undertake such missions so long as Parliament does not affirmatively object. There may, in addition, be legitimate reasons for a President's *not* wanting to declare a state of national defence. Such a declaration might trigger domestic powers that the President fears would burden, or upset, the country. It might also carry foreign policy connotations that would fuel a crisis atmosphere internationally that the President would like to dissipate, precisely in order to accomplish the peacekeeping objectives for which the troops have been deployed.<sup>61</sup> Finally, even after South African troops have been shot at, it may not really be the case that 'national defence' is at stake, and so the provision for a declaration of a state of national defence may not truly be applicable in these circumstances. For all of these reasons, it seems to me that some level of combat is possible in the course of an authorized employment of South African troops without the need for a declaration of a state of national defence and therefore, once again, without any need for Parliament to give or withhold its approval for the enterprise. Exactly what



level of combat triggers the need for a declaration remains, inescapably, unclear in the text.

Suppose, finally, that the President does declare a state of national defence, but Parliament refuses to approve it. Then must the fighting stop? Again, the text does not say this, but surely it must be the case that where a declaration is constitutionally required, its absence means the fighting must come to a halt. As we have just seen, however, it is not by any means certain just when a declaration is constitutionally required. Perhaps the President would argue that the fighting in question didn't actually rise to the level (whatever it might be) for which a declaration of national defence was required, and therefore that although he or she had issued the declaration and sought Parliament's approval as a matter of prudence, Parliament's failure to approve did not remove the President's prerogative to continue the fighting. That position would be especially forceful if Parliament did not actually disapprove the declaration, but simply never brought it to a vote and so failed to approve it. So, too, the President's position would have force if Parliament disapproved the declaration, but at the same time rejected a proposal to de-fund the fighting.<sup>62</sup> Or perhaps the President would argue that although Parliament's failure to approve the declaration meant that the fighting had to be brought to an end, Parliament couldn't possibly have meant that South African troops should be placed in jeopardy as the process of disengaging from the enemy took place, and therefore that the fighting would have to continue for a considerable period in order to insure the safe extrication of South African troops.<sup>63</sup> Whatever the correct view of this matter, it is quite clear that the text leaves it ambiguous, and that makes it equally clear that in a situation where this point became important, the President could claim various forms of authority to continue. Though a South African court might well be readier to review such claims of authority than an American judge today, still it would not be easy for a court to reject a President's claim of authority while battle actually raged.

#### **(4) The power of the purse?**

Let us begin our examination of Parliament's power to limit war by restricting spending somewhat indirectly, by considering the problem of how, once the President has declared a state of national defence, and Parliament has approved it, it comes to an end. No doubt, if the President wages war and achieves victory, both branches of government will be happy to recognize the end of the state of national defence. But can the President un-declare a state of national defence without Parliament's approval? If an Acting President declares it, can the President, on returning to his or her duties, revoke it? If the President has some revocation power, does it last only until Parliament has actually approved the state of national defence, or go on indefinitely? Perhaps more importantly, can Parliament withdraw its approval once it has given it? Can a single chamber of Parliament withdraw its approval, or must both chambers concur?

All of these points are left unspecified by the text. It is plausible to infer that since a state of national defence must rest on the assent of both political branches of South Africa's government, each branch can also revoke its consent. But as a practical matter, it may be very hard for either branch to overturn a state of national defence to which the other is committed, and, continuing as a practical matter, it



may be very hard in particular for Parliament to abrogate a state of national defence to which the President remains committed. Moreover, the logic of the basic inference of a power for a single branch of government to revoke the declaration is uncertain: once both branches have assented to the declaration of a state of national defence, it might be argued that only a decision by both branches can revoke it. Or (as a reader has suggested) perhaps the declaration of a state of national defence, once approved by Parliament, is so profound a vesting of authority in the President that only the President can end it.

The most important powers Parliament may have to control executive uses of military force may lie elsewhere. I have already argued that Parliament can disapprove the President's uses of force even after approving a declaration of a state of national defence under section 203 of the Constitution (as long as it does not interfere with the President's commander-in-chief authority). So, too, I've argued that Parliament can disapprove any Presidential employment of troops under section 201 of the Constitution. But Parliament does not have to exercise these powers. In contrast, Parliament also has authority to give or withhold funding for the nation's military engagements, and this power Parliament at least to some extent cannot escape exercising.

As a general proposition, the President cannot spend money without Parliament's having authorized it. The Constitution establishes this rule by requiring that all revenues received by South Africa must be paid into the 'National Revenue Fund', unless Parliament legislates to the contrary.<sup>64</sup> Once revenue has been deposited in this Fund, the Constitution specifies that it normally can only be withdrawn if Parliament appropriates or authorizes the withdrawal.<sup>65</sup> Hence even if the President engages in peacekeeping missions for which, say, the United Nations provides reimbursement, those UN funds apparently will go into the National Revenue Fund and become subject to Parliamentary control rather than unilateral Presidential disposition. Whether the revenues to be spent come from the United Nations or domestic taxes, unless Parliament has provided the President with spending authority, the President cannot carry on.<sup>66</sup>

In principle, this funding authority appears to be the strongest check on Presidential power in the field of war. I would assume – as elsewhere, in part on the basis of the fundamental principle of shared Parliamentary and Presidential authority – that this power applies whether or not the President has obtained approval of a declaration of a state of national defence, and even if the President is in the midst of exercising his or her commander-in-chief and foreign affairs authority in the prosecution of some military objective. The President is commander-in-chief only of those forces Parliament provides, as Justice Robert Jackson pointed out in an important war powers case in the United States.<sup>67</sup> In the United States, this power has on occasion been used with some effect, notably in bringing an end to the late Vietnam War bombing of Cambodia.<sup>68</sup> It has also been notoriously circumvented, in the Iran-Contra affair.<sup>69</sup>

Though it is possible to argue for an implied Presidential authority to take otherwise unauthorized action, including spending money, in a dire emergency,<sup>70</sup> I believe that a general argument for an implied Presidential power to fund wars without Parliamentary approval would be alien to South African constitutionalism, and therefore that Parliament can end a war by de-funding it. A more difficult issue is whether Parliament can use its funding power to constrict the President's commander-in-chief authority in a war that Parliament has not chosen to end. If



there are limits on Parliament's power to directly control the tactical choices the President may make in an ongoing, duly authorized war,<sup>71</sup> then Parliament might well also be barred from using its funding power to impose restrictions on the conduct of the war that it could not directly require. Exactly where the line is between Parliament's authority to decide what wars South Africa's money is to be spent on, and the President's authority to decide how to spend the money Parliament has appropriated for war, is no easy question. Despite this ambiguity, the power to end a war by ending its financing is a profound one.

Yet it will undoubtedly be difficult for Parliament to wield this authority, and probably more difficult, politically, than in the United States (given the greater overlap of the executive and legislature in South Africa than in the US). Moreover, there are two other reasons for some hesitation about the efficacy of this power in South Africa. The first is the special legislative authority that the executive holds in the area of budgeting, under the Constitution. Under § 73(2) 'only the Cabinet member responsible for national financial matters may introduce [a money Bill] in the Assembly'.<sup>72</sup> The United States Constitution, by contrast, provides that 'All Bills for raising Revenue shall originate in the House of Representatives'.<sup>73</sup> No member of Parliament seeking to end a war to which the President and the Cabinet are committed, therefore, can introduce a bill proposing to cut off the war's funds.

This limitation should not mean that Parliament is without power to make spending decisions.<sup>74</sup> Most clearly, Parliament can reject the Executive's war when the Executive proposes legislation to fund it. But this power is less salient than it would be in the United States, because the President may not need to apply to Parliament for more money for a considerable time. There does not appear to be a constitutional limit on the period of time for which Parliament can appropriate military spending funds (in contrast to the US Constitution's two-year limit),<sup>75</sup> and so, at least in theory, an extended appropriation at one point could fund a considerable length of military activity without further specific approval.<sup>76</sup>

In addition, Parliament should be able to amend a money bill already introduced, so as to include a provision barring any further spending for the military operation in question, and to revoke, if need be, any previously-granted appropriation. Section 77(3) of the Constitution seems meant to insure Parliament's authority to amend money bills, since it declares that '[a]n Act of Parliament must provide for a procedure to amend money Bills before Parliament'.<sup>77</sup> It is somewhat disquieting that this legislation has not yet been enacted, as of May 2008.<sup>78</sup> In practice, the result apparently is that money bills normally cannot be amended in the National Assembly.<sup>79</sup> While the National Assembly arguably might exercise the power to amend even in the absence of implementing legislation, it would seem that the practical value of amending appropriations bills as a tool for controlling executive war will be determined by the shape of that legislation, if and when it is enacted.

The second reason for hesitation about the efficacy of the funding power is, perhaps, simply an illustration of the political difficulties of wielding this authority: in practice, so far, it appears that the executive has at least on occasion been able to undertake military missions without seeking specific funding approval in advance. At a 2003 parliamentary committee discussion of the White Paper on Peace Missions, General Rautie Rautenbach, Budget Director for the Department of Defence, reportedly 'noted that for the most part peace missions were an unforeseen occurrence and that by that very nature there was normally no budgetary provision for this development. He informed the Committee that the DOD had a deficit of



R200 million that had been occasioned by peace-keeping expeditions noting that the current budget did not provide for this kind of money'.<sup>80</sup> That deficit may have been unusual, but budget adjustments to cover unanticipated spending are quite permissible under South African law.<sup>81</sup>

The National Assembly does, finally, have one further recourse: it can eject the President from office, by either of two possible routes. First, it can 'remove the President from office' under § 89. That step, however, requires a vote of two-thirds of the members of the Assembly. Moreover, it is not entirely self-evident that the President's determination to continue fighting an unpopular war would constitute one of the specified grounds on which a vote of no confidence can be based: serious illegal conduct, serious misconduct or inability to perform the functions of the office.<sup>82</sup>

Second, and more easily, the National Assembly can require the President (and the entire Cabinet at the same time) to resign, by approving a 'motion of no confidence'. But even this step is not altogether simple – even assuming Parliament is prepared to bring down the entire existing executive – because it requires 'a vote supported by a majority of [the National Assembly's] members'.<sup>83</sup> National Assembly members determined to end a war might find it easier to do so by exercising Parliament's appropriations power. To pass a bill cutting off funding for a war, as few as one-fourth-plus-one of the members of the Assembly would be sufficient,<sup>84</sup> even though they would also have to vote to override the National Council of Provinces, if that body opposed the legislation.<sup>85</sup>

## Conclusion

The text of the South African Constitution, in short, imposes only partial limits on the power of South Africa's President to involve the nation in fighting or war (within the limits of international law), and on the simultaneous potential for limitation of constitutional rights South Africa otherwise holds dear. Perhaps South Africa will not actually face the agonizing possibilities of war with any frequency. But it is difficult to be confident of such predictions. Moreover, it is hard to be confident that military power, if it exists and is used, will not be subject to misuse as well. In other areas of human rights protection, South Africa's constitutional drafters chose to take few chances; they defined a wide range of rights, mandated governmental protection and respect for them, and created a powerful Constitutional Court, among other institutions, to make those commitments enforceable. In these areas, South Africans developed an apparatus of constitutional protection that is profoundly impressive. In the field of war, however, the Constitution took fewer precautions.

South Africans themselves will be better suited than I to decide whether to seek changes in the constitutional text or instead to rely on the growing strength of South Africa's constitutional traditions to guide interpretation of the current text if and when these issues must be addressed. This paper has sought both to outline a rights-protective interpretation of the present text and to point to aspects of the text – the procedures for Parliamentary approval of a declaration of a state of national defence, and the absence of a requirement of affirmative Parliamentary approval for Presidential decisions to employ troops, particularly in peacekeeping abroad – where stronger provisions would be desirable. I hope this paper will suggest other



areas as well that may deserve attention, but I take very seriously a reader's caution that interpretation might be preferable to amendment, because efforts to amend the constitutional text today might increase rather than limit executive prerogative. Finally, I must close by saying that experience in the United States, hard experience, shows that to regulate killing and chaos – war – by law is always, to some extent, impossible.



<sup>1</sup> Even while recognizing that South Africa is a peaceful state, we should not overlook the considerable military force it is accumulating. See, e.g., Shaun Benton, 'First of SA's Three New Submarines Cruises into Simonstown After 49-Day Voyage', *AllAfrica.com*, Apr. 7, 2006 (available on Westlaw – WIRES database).

<sup>2</sup> See, e.g., Mandy Rossouw, Matuma Letsoalo & Rapule Tabane, 'Mbeki Faces Amnesty Pressure', *Mail & Guardian Online*, Mar. 20, 2008, available at [http://www.mg.co.za/articlePage.aspx?articleid=335115&area=/insight/insight\\_national/](http://www.mg.co.za/articlePage.aspx?articleid=335115&area=/insight/insight_national/); 'Cabinet Dismisses Arms-Deal Allegations Against Mbeki', *Mail & Guardian Online*, Mar. 20, 2008, available at [http://www.mg.co.za/articlePage.aspx?articleid=335107&area=/breaking\\_news/breaking\\_news\\_national/](http://www.mg.co.za/articlePage.aspx?articleid=335107&area=/breaking_news/breaking_news_national/); Sam Sole & Stefaans Brümmer, 'Arms Broker Did Give Cash to the ANC', *Mail & Guardian Online*, Mar. 14, 2008, available at [http://www.mg.co.za/articlePage.aspx?articleid=334629&area=/insight/insight\\_national/](http://www.mg.co.za/articlePage.aspx?articleid=334629&area=/insight/insight_national/) (all last visited Apr. 20, 2008).

<sup>3</sup> 'Foreword by the Honourable M.G.P. Lekota, Minister of Defence', in Department of Defence, Annual Report FY 2006 – 2007, pp. xiii, xiv, available at [http://www.info.gov.za/annualreport/2006/defence\\_annual\\_rpt07.pdf](http://www.info.gov.za/annualreport/2006/defence_annual_rpt07.pdf) (last visited Apr. 20, 2008); Parliamentary Monitoring Group, 'Transformation Management Developments; SANDF Deployment to West Indies, Nepal, Mozambique', available at <http://www.pmg.org.za/node/9056> (last visited Apr. 20, 2008); Mosiuoa Lekota, 'Address by the Minister of Defence, the Honourable Mosiuoa Lekota, at media breakfast at the Defence Headquarters, Pretoria', Sept. 5, 2005, available at <http://www.info.gov.za/speeches/2005/05090712451003.htm> (last visited Mar. 3, 2007); Clive Ndou, 'South Africa Beefs Up Peace Missions in Africa', *AllAfrica.com*, Mar. 23, 2006 (available on Westlaw – WIRES database). SANDF troops have also been employed in the Central African Republic. Shaun Benton, 'Cabinet Approves SANDF Deployment in Uganda', *BuaNews* (Tshwane), Mar. 20, 2008, available at <http://allafrica.com/stories/printable/200803200328.html>.

<sup>4</sup> At least nine South African soldiers died in the intervention in Lesotho in 1998. Suzanne Daley, 'How Did Pretoria Err? Lesotho Counts the Ways', *New York Times*, Sept. 27, 1998, 16. Ten have died in the Democratic Republic of the Congo more recently, mostly not in combat. See Boyd Webb, 'Defence Chief Visits Injured Soldiers', June 10, 2004 (SAPA); 'Five of Six Soldiers Drowned in DR Congo to Be Buried Saturday', Apr. 16, 2004 (SAPA); 'Full Military Honours for SANDF Soldier Killed in DRC', Apr. 6, 2004 (SAPA); 'South Africa: Army to Investigate Officer's Death', Mar. 31, 2004 (UN Integrated Regional Information Networks) (all available on Westlaw – ALLNEWS database).

<sup>5</sup> These resources have also been affected by AIDS, with an estimated 23 % of SANDF troops – and perhaps more – HIV-positive. Xan Rice, 'South African Army Facing HIV Crisis', *The Times* (UK), Aug. 19, 2004 (available on Westlaw – ALLNEWS database).

<sup>6</sup> See Peter Honey, 'Defence. Battle for Force Readiness', *Financial Mail*, Sept. 16, 2005, 46 (available on Westlaw – ALLNEWS database); Shaun Benton, 'Darfur Peace Mission Is Hurting AU, SA, Financially', *allAfrica.com*, March 16, 2006 (available on Westlaw – WIRES database). In 1999 South Africa anticipated employing one battalion (approximately 1000 soldiers) in peacekeeping operations outside its borders at any one time, see Department of Foreign Affairs, *White Paper on South African Participation in International Peace Missions*, 25 (approved by Cabinet, Oct. 21, 1998; tabled in Parliament, Feb. 24, 1999). In 2004-05, it had three times that number of soldiers stationed in other nations on such missions. Prakash Naidoo, 'African Peacekeeping Force. SA Stretched to Its Limits', *Financial Mail*, June 18, 2004, 24 (available on Westlaw – ALLNEWS database). South African troops are also part of the Southern African Development Community 'stand-by brigade', officially launched in 2007 and part of the larger African Union stand-by force. David Masango, 'Southern Africa: Stand-By Brigade to Maintain Peace in SADC', *BuaNews* (Tshwane), Aug. 17, 2007, available at <http://allafrica.com/stories/20070817075.html>.

<sup>7</sup> Sections of the South African Constitution, Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), are cited hereafter simply by section number; all other sources are fully identified. South African constitutional and statutory citations in this chapter are current as of the March 2008 update of Butterworths Statutes of South Africa, available on LEXIS.

<sup>8</sup> See, e.g., *Kaunda and Others v. President of the Republic of South Africa and Others*, 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC), para 78 (judgment of Chaskalson CJ). However, where issues primarily for other branches are involved – as is surely the case with foreign affairs and war -- courts'



review will be relatively more deferential. *See id.*, para 244 (judgment of O'Regan J). I am grateful to a reader for calling this decision to my attention.

<sup>9</sup> *Id.* para 66 (judgment of Chaskalson CJ); para 159 (judgment of Ngcobo J); para 221 (judgment of O'Regan J). *See* § 7(2) of the Constitution, declaring that "[t]he state must respect, protect, promote, and fulfill the rights in the Bill of Rights."

<sup>10</sup> § 199(5). *See generally* South African National Defence Union v. Minister of Defence and Another, 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC); South African National Defence Union v. Minister of Defence and Others, 2007 (8) BCLR 863 (CC) (both examining the constitutional rights of members of the South African National Defence Force).

<sup>11</sup> *See* Nico Steytler & Johann Mettler, 'Federal Arrangements as a Peacemaking Device During South Africa's Transition to Democracy', *Publius*, Oct. 1, 2001, 93, 95-96. Assuring the military's loyalty to civilian rule is essential in any democracy, and may still require attention in South Africa. *See* Max du Preez, 'SANDF Is a Crumbling Excuse for an Army: Strong Leadership and Discipline Are Needed to Validate This Force and Massive Expenditure', *Daily News*, Feb. 14, 2008, available at <http://www.dailynews.co.za/index.php?fArticleId=4253049>.

<sup>12</sup> Moreover, the Constitution provides that '[t]o give effect to the principles of transparency and accountability, multi-party parliamentary committees must have oversight of all security services'. (§ 199(8)).

<sup>13</sup> § 203. This language may owe something to the German Constitution's provision for declaration of a 'state of defence', though the relevant South African and German sections differ in many ways. *See generally* Grundgesetz, arts. 115a – 115l (available in English translation at <http://www.psr.keele.ac.uk/docs/german.htm>) (last visited Sept. 15, 2006). The same may be said of the Namibian Constitution, *see* Constitution of the Republic of Namibia 1990, art. 24, in Gisbert H. Flanz, ed., *Constitutions of the Countries of the World* (Dobbs Ferry: Ocean Publications, 2003), pp. 19-20. In any event, as a reader pointed out to me, South Africa's final Constitution here elaborates on an idea that appeared in the Interim Constitution as well, *see* Constitution of the Republic of South Africa, Act 200 of 1993, § 82(4)(b)(i) (empowering the President 'with the approval of Parliament, [to] declare a state of national defence'). (This Interim Constitution provision retained a tenuous legal existence under Schedule 6, Item 24(1) of the 1996 Constitution, *see* Iain Currie & Johan de Waal, with Pierre de Vos, Karthy Govender & Heinz Klug, *The New Constitutional & Administrative Law*, 2 vols. (Cape Town: Juta & Co., rev. ed. 2002), vol. I, p. 252 n.163.) The last Constitution of apartheid South Africa, by contrast, had authorized the 'State President' to 'declare war and make peace'. Republic of South Africa Constitution Act, No. 110 of 1983, § 6(3)(g).

<sup>14</sup> I do not seek here to precisely define the term 'war'. My focus is on the Constitution's provisions for the engagement of South African troops in combat, short or prolonged; exactly when the term 'war' becomes applicable to these engagements is not the central issue, for the Constitution itself does not make it so.

<sup>15</sup> Again, whether South Africa can also fight *without* a declaration of a state of national defence is a separate question, to which we will return. *See* text at notes 55-63 below.

<sup>16</sup> Currie and de Waal point out that wars of aggression are now violations of international law as well. Currie & de Waal, *The New Constitutional Law*, vol. I, p. 252.

<sup>17</sup> *See* § 90(2). The Acting President could even be a Minister chosen from outside Parliament, and thus entirely unelected. §§ 90(1) & 91(2)-(3).

<sup>18</sup> Buthelezi reportedly did, however, consult with both President Mandela and Deputy President Mbeki (who also was out of the country at the time), before ordering the military entry into Lesotho. Both 'approved the operation'. Gilbert A. Lewthwaite, 'South Africa Weighs Withdrawal from Messy Lesotho Intervention [-] Resistance Was Fiercer, and Intelligence Less Reliable Than Expected', *Baltimore Sun*, Sept. 26, 1998 (available on Westlaw – ALLNEWS database). South Africa apparently expected its entry to be quite uneventful, and initially its troops were supplied only with blank ammunition. *Id.*

<sup>19</sup> *See* Steytler & Mettler, 'Federal Arrangements', 102; Richard Ellis, 'Zulu Chief Keeps Low Profile on the Campaign Trail', *Scotsman*, June 2, 1999 (available on Westlaw – ALLNEWS database).

<sup>20</sup> Currie & de Waal maintain that the President must obtain the countersignature of the relevant Cabinet minister for any action within the sphere of that Minister's authority, *see* § 101(2), but also that '[i]f the issue has implications for government as a whole or concerns matters of real political importance, the President cannot act with the concurrence of a Minister, but the approval of Cabinet must be obtained', *see* § 85(2). Currie & de Waal, *New Constitutional Law*, vol. I, p. 246. Thus the President would need the signature of the Minister of Defence for orders to the troops, *see* §§ 201(1),



202(2), and perhaps the approval of the Cabinet as a whole for a declaration of a state of national defence or other commitments of troops to potential combat. It seems unlikely that these requirements would ordinarily prevent a President convinced of the need for warlike action from proceeding.

<sup>21</sup> § 203(3).

<sup>22</sup> See J. Gregory Sidak, 'To Declare War', (1991) 41 Duke L.J. 27, 81-85.

<sup>23</sup> In the United States, if the President undertakes military action without a declaration of war, the War Powers Resolution (a statute) normally requires an end to the operation if it does not receive Congressional approval – but 60 days can elapse before that approval is obtained. War Powers Resolution, § 5(b), 50 USC § 1544(b) (2000).

<sup>24</sup> § 37(1).

<sup>25</sup> Defence Act, Act No. 42 of 2002 (cited hereafter as "Defence Act"), § 89, says that the President may declare a state of national defence 'if, among other things, the sovereignty or territory of the Republic –

- (a) is threatened by war, including biological or chemical warfare, or invasion, armed attack or armed conflict; or
- (b) is being or has been invaded or is under armed or cyber attack or subject to a state of armed conflict'.

<sup>26</sup> § 37(2)(b).

<sup>27</sup> I am grateful to a reader for pointing this out to me.

<sup>28</sup> Abstractly, it might seem harder for the executive to obtain the approval of two houses of Parliament than of just one, and so a requirement of bicameral approval might be seen as a way of slowing the march towards war – though it would remain unclear why a similar check on the move to a state of emergency was unnecessary. As a practical matter, however, at least in today's South Africa, the chance of such disagreement between the two houses of Parliament seems small.

<sup>29</sup> See Steven Budlender, 'National Legislative Authority', in S. Woolman et al. (eds.), *Constitutional Law of South Africa*, 2 vols., 2d ed. (Lansdowne: Juta and Co., 2004), vol. I, pp. 17-1, 17-3 ('The national executive is accountable to the National Assembly and not to the NCOP'); compare § 68 (section on 'Powers of National Council' detailing only "legislative power") with § 55 (section on 'Powers of National Assembly' separately describing the Assembly's legislative power and its accountability/oversight power). Even if the NCOP does perform oversight functions in practice, perhaps its oversight role is not sufficiently secured by the Constitution to extend to 'oversight' of the declaration of a state of national defence.

<sup>30</sup> See §§ 75-76.

<sup>31</sup> § 75(1); Budlender, 'National Legislative Authority', p. 17-15.

<sup>32</sup> § 76. The NCOP also follows substantially different voting procedures ('one legislator, one vote' or 'one provincial delegation, one vote'), depending on which category of legislation it is considering. See §§ 65, 75(2); Budlender, 'National Legislative Authority', pp. 17-4 to 17-6.

<sup>33</sup> See *id.*, p. 17-37, citing §§ 57(1)(b), 70(1)(b).

<sup>34</sup> § 37(2). Bruce Ackerman characterizes the 60-percent majority requirement for extending a state of emergency as 'the first supermajoritarian escalator in the constitutional world', and sees in it a confirmation of the value of similar structures for the United States. Bruce Ackerman, 'The Emergency Constitution', (2004) 113 Yale L.J. 1029, 1055.

<sup>35</sup> § 53(1).

<sup>36</sup> See § 53(1). For the decision rules potentially applicable in the NCOP, see §§ 65(1), 75(2).

<sup>37</sup> § 37(3).

<sup>38</sup> But see Ziyad Motala & Cyril Ramaphosa, *Constitutional Law: Analysis and Cases* (Cape Town: Oxford University Press, 2002), pp. 218-20 (suggesting that the President's use of defence powers would be largely or entirely non-judicial).

<sup>39</sup> § 202(1).

<sup>40</sup> Lawful, that is, under South African law and also lawful under the international law of war to the extent South Africa is bound by it. §§ 231-32. So, for example, South African legislation or the Geneva Conventions would constrain the President's authority to direct the treatment of prisoners of war who were taken during the fighting that the declaration of a state of national defence authorized.

<sup>41</sup> Cf. Authorization for Use of Military Force (AUMF), Pub. L. 107-40, 115 Stat. 224, § 2(a) (Sept. 18, 2001) (authorizing the use of force against those the President 'determines' were connected to the September 11 attacks or to the attackers).

<sup>42</sup> Proposed language for the AUMF would have authorized the use of force not only against those connected to the September 11 attacks, but also to 'deter and pre-empt any future acts of terrorism or aggression against the United States'. Tom Daschle, 'Power We Didn't Grant', *Washington Post*, Dec. 23, 2005 (available on Westlaw – ALLNEWS database).

<sup>43</sup> Though US law on this question is decidedly ambiguous, there are early Supreme Court cases supporting the conclusion that Congress retained a power to limit Presidential warmaking discretion, in



undeclared wars and even in declared ones. See *Little v. Barreme*, 6 US (2 Cranch) 170 (1804); *Brown v. US*, 12 US (8 Cranch) 110 (1814). Language in an important Civil War decision, however, suggests a broader scope for Presidential discretion. See *The Prize Cases*, 67 US (2 Black) 635 (1863).

<sup>44</sup> These instances of employment of the defence forces are specified in § 201(2), and discussed further in the text at notes 55-63 below. For uses of the military covered by § 201(2), § 201(3) requires the President 'to inform Parliament, promptly and in appropriate detail, of –

- (a) the reasons for the employment of the defence force;
- (b) any place where the force is being employed;
- (c) the number of people involved; and
- (d) the period for which the force is expected to be employed'.

The Defence Act, §§ 18(2)(e) & (4), adds the requirement of a report on 'expenditure incurred or expected to be incurred'. This information is somewhat more extensive than what the President must report in connection with a declaration of a state of national defence; in that context, § 203(1)'s reporting requirements do not include discussion of the period for which the declaration is expected to last or of costs. I would view the several requirements as complementary rather than conflicting.

<sup>45</sup> § 18(5) of the Defence Act explicitly establishes Parliamentary review power over the President's uses of troops for a variety of purposes. It applies under circumstances specified in § 18(1), which provides:

In addition to the employment of the Defence Force by the President as contemplated in section 201(2) of the Constitution, the President or the Minister may authorize the employment of the Defence Force for service inside the Republic or in international waters, in order to –

- (a) preserve life, health or property in emergency or humanitarian relief operations;
- (b) ensure the provision of essential services;
- (c) support any department of state, including support for purposes of socio-economic upliftment;
- (d) effect national border control.

In these circumstances, under § 18(5), Parliament

may by resolution within seven days after receiving information [about the employment of troops in question] from the President or the Minister –

- (a) confirm any such authorization of employment;
- (b) order the amendment of such authorization;
- (c) order the substitution for such authorization of any other appropriate authorization; or
- (d) order the termination of the employment of the Defence Force.

As a reader has pointed out to me, however, this provision appears to cover only the employment of troops in South Africa or in international waters, and only for purposes in addition to those functions, notably including national defence and fulfillment of international obligations, for which § 201(2) of the Constitution authorizes the President to employ troops. It appears, therefore, that Parliament has not yet asserted the broader review power which I argue it possesses under the Constitution.

<sup>46</sup> See text at notes 64-81 below.

<sup>47</sup> Cf. Michael D. Ramsey, 'Torturing Executive Power', (2005) 93 Geo. L.J. 1213, 1241 (US 'Congress cannot appoint a commander who does not answer to the President').

<sup>48</sup> I discuss this provision in much more detail below. See text at notes 55-63 below.

<sup>49</sup> In the United States, '[t]here is ample evidence that the legislature was not meant to make tactical military decisions once war was initiated', according to Stephen Dycus et al., *National Security Law*, 4<sup>th</sup> ed. (New York: Aspen Publishers, 2007), p. 26. But a number of scholars have recently argued that although Congress wisely does not intervene in such decisions, constitutionally it could. See David J. Barron & Martin S. Lederman, 'The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding', (2008) 121 Harv. L. Rev. 692; Jules Lobel, 'Conflicts Between the Commander in Chief and Congress: Concurrent Power Over the Conduct of War', Ohio St. L.J. (forthcoming), available at <http://ssrn.com/abstract=1028526>; David Luban, 'On the Commander-in-Chief Power', available at <http://ssrn.com/AbstractID=1026302>.

<sup>50</sup> Section 36, to be sure, requires not just a weighing of national need and democratic reasonableness, but also the presence of 'law of general application' or authority elsewhere in the constitution to sustain a limitation on rights. If a statute such as the Defence Act did not provide the necessary legal basis, Parliamentary approval of the declaration of a state of national defence might, or the Constitution itself might indeed be seen as the foundation for orders to fight under such a declaration.

<sup>51</sup> Cf. *Ex parte Milligan*, 71 U.S. 2, 78-82 (1866) (on the circumstances in which martial law may and may not be declared).

<sup>52</sup> No constitutional question would arise, of course, if the Constitution does not apply to actions taken by the South African government outside its own borders and directed at noncitizens whose only



connection with South Africa is their intent to attack it. *See generally Kaunda*, paras 41-44 (judgment of Chaskalson CJ); *id.* para 228 (judgment of O'Regan J).

<sup>55</sup> These questions of course recapitulate the argument in the United States over whether our President has authority, under the post-9/11 Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001), to order warrantless electronic surveillance of people suspected of links with Al Qaeda. South Africa has prohibited surveillance inside the country even in national security matters absent a judicial order, *see* Regulation of Interception of Communications and Provision of Communication-Related Information Act, Act No. 70 of 2002, §§ 2-3. This statute does, however, permit emergency 'interception' of communications without such an order, in order to locate their sender, when a law enforcement officer, including a member of the Defence Force, 'has reasonable grounds to believe that an emergency exists' because another person is in danger of dying or being seriously injured. *Id.*, §§ 1, 8(1)(b); *see also id.* § 7 ('[i]nterception of communication to prevent serious bodily harm'). Moreover, it seems arguable that Parliament did not craft this Act's limits with the needs of a state of national defence in mind, and that the President might exercise the authority granted in the Defence Act (discussed *infra* in the text) to establish different rules to govern surveillance in that context.

<sup>56</sup> As noted earlier, *see* text at notes 41-42 above, the constitutional text does not make clear who a declaration of a state of national defence can be made against. But it is certainly possible to imagine domestic threats that are as grave as foreign ones, and so it is quite possible that a declaration could target a domestic group.

<sup>57</sup> But are there actually any interventions that are mandated by 'international obligation'? It may be that no international agreements to which South Africa is a party actually *demand* the commitment of South African troops, but it is also true that South Africa, as a member of the United Nations, the African Union, and the Southern African Development Community, has obligations to preserve human rights in other parts of the world. Section 201(2) can easily be read to refer to this broader, less insistent form of 'obligation', and to authorize the deployment of troops in its service. The White Paper on South African Participation in International Peace Missions also can be read to reflect such a view, *see* 'White Paper on Peace Missions', 34. In any event, it would seem from § 201(2)(c) itself that South Africa must have the power to enter into international obligations whose fulfillment will entail the employment of troops.

<sup>58</sup> So, too, it appears that 'employment of the defence force ... in cooperation with the police service' does not require any declaration. (It is also noteworthy that the list in § 201(2) is not explicitly exclusive, Motala & Ramaphosa, *Constitutional Law*, p. 218, and in fact the Defence Act, § 18(1), provides for *other* uses of the defence forces as well, *see* note 45 above.) The question of how deeply the South African military is, or should be, involved in domestic law enforcement has important potential implications for the long-run strength of civilian democracy. The Defence Act as it now stands appears to empower the defence forces to exercise a considerable range of domestic law enforcement authorities, *see* Defence Act, §§ 20(1) & 22. For an American response to this problem, *see* the longstanding, though ambiguous, Posse Comitatus Act, 18 USC § 1385 (2000). But these issues are beyond the scope of the present paper.

<sup>59</sup> There would be risks entailed in a variety of actions the President might take as part of routine military protection of the nation, especially if South Africa were actually to face any external threats. Today, fortunately, South Africa 'faces no known immediate threat', according to Major-General Roy Andersen, head of the SANDF Reserve Force. Jonathan Katzenellenbogen, 'Overlooked Reservists Bolster Ranks of Cash-Strapped SANDF', *Business Day*, Oct. 13, 2004 (available on Westlaw - ALLNEWS database).

<sup>60</sup> *See* text at notes 43-49 above.

<sup>61</sup> Parliament, however, has not asserted this power in the Defence Act. *See* note 45 above. Vanessa Kent and Mark Malan have pointed out that the 'White Paper on Peace Missions' (which they report was adopted by Parliament in October 1999) envisioned greater responsibility for Parliament than the Defence Act Mandates. The White Paper appeared to see Parliamentary approval as a prerequisite to the President's authorizing the deployment of troops where 'military enforcement measures' might be required, and seemed to contemplate, as a standard procedure, the President's 'tabling a proposal for ratifying the participation of a South African military contingent in a particular peace support operation'. 'White Paper on Peace Missions', 32; *see* Vanessa Kent & Mark Malan, 'Decisions, Decisions - South Africa's foray into regional peace operations' (Pretoria: Institute for Security Studies, Occasional Paper 72, April 2003), available at [http://www.iss.co.za/index.php?link\\_id=14&slink\\_id=576&link\\_type=12&slink\\_type=12&tmpl\\_id=3](http://www.iss.co.za/index.php?link_id=14&slink_id=576&link_type=12&slink_type=12&tmpl_id=3).

I have found no instance of such a proposal being presented to Parliament or voted on by it, and Kent and Malan in 2003 argued that troop deployment decisions were being taken 'at the level of the Presidency' with little input from Parliament (or other actors). In one instance, however, Parliamentary



committees decided to draft and support a resolution approving the already-underway employment of South African troops in Burundi. Parliamentary Monitoring Group, 'Joint Standing Committee on Defence; Select Committee on Security and Constitutional Affairs: Joint Meeting, 14 November 2001, Deployment of the SANDF in Burundi', available at <http://www.pmg.org.za/viewminute.php?id=1240>. It is conceivable that this resolution was voted on by Parliament, but perhaps more likely that the committee itself voted on the resolution and reported its vote to Parliament, which then took no further action. For examples of the Joint Committee on Defense apparently proceeding in this way -- reviewing troop deployments and then reporting the conclusion of its deliberations to Parliament (and on one occasion raising some concerns in the course of its deliberations) -- see Parliamentary Monitoring Group, 'SANDF Deployment to DARFUR, Sudan & within South Africa, Committee Annual Report', Feb. 21, 2008, available at <http://www.pmg.org.za/node/10543> (last visited Apr. 20, 2008); Joint Standing Committee on Defence, 'Annual Report: January – November 2007', available at <http://www.pmg.org.za/docs/2008/comreports/080304jcddefencereport.htm> (last visited Apr. 20, 2008).

<sup>60</sup> A similar argument has been made by John Yoo to support the inference that the President does not need a declaration of war by Congress. Yoo notes that the United States constitutional text *does* explicitly prohibit the states from making war without Congress' consent, and contrasts that to the absence of any explicit textual requirement that the President obtain consent. John C. Yoo, 'Exchange: War Powers – War and the Constitutional Text', (2002) 69 U. Chi. L. Rev. 1639, 1666-67, citing U.S. Const., art. I, § 10. I would not take this argument so far, either for South Africa or for the United States, but the absence in the South African Constitution of any textual requirement of Parliamentary assent to fighting does have to be reckoned with.

<sup>61</sup> Cf. *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir.), cert. denied, 404 US 869 (1971) (noting that a declaration of war might be seen by Congress and the President as 'plac[ing] the nation in a posture in its international relations which would be against its best interests'). The Constitutional Court has recognized 'the government's special responsibility for and particular expertise in' foreign affairs'. *Kaunda*, para 144, subsection 6 (judgment of Chaskalson CJ). See also *id.*, para 172 (judgment of Ngcobo J); *accord, id.*, para 243 (judgment of O'Regan J).

<sup>62</sup> Such paradoxical votes are possible, and in fact were cast by the members of the US House of Representatives on Operation Allied Force, the NATO bombing campaign against the Federal Republic of Yugoslavia in 1999. See Stephen Dycus et al., *National Security Law*, 3d ed. (New York: Aspen Law & Business, 2002), p. 412.

<sup>63</sup> For an account of the US courts' unwillingness to second-guess the President's efforts to withdraw from Vietnam, despite the intense fighting that took place over several years in the process, see Dycus et al., *National Security Law*, 4<sup>th</sup> ed., pp. 230-39.

<sup>64</sup> § 213(1) (limiting exceptions to those 'reasonably' made by Parliament).

<sup>65</sup> Parliamentary may either enact appropriations, § 213(2)(a), or by statute authorize 'direct charge[s]' against the National Revenue Fund. § 213(2)(b). Parliamentary action is not required when a direct charge 'is provided for in the Constitution'. *Id.*

<sup>66</sup> The President cannot carry on, that is, unless the spending is a direct charge 'provided for in the Constitution'. *Id.* But § 213 itself identifies only one such direct charge, and that one – for revenue sharing with the provinces, § 213(3) – is far from the field of defence.

<sup>67</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 US 579, 643-44 (1952) (Jackson, J., concurring).

<sup>68</sup> See generally *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973); Dycus et al., *National Security Law*, pp. 285-91.

<sup>69</sup> For an extensive account of Congress' efforts to cut off funding to the Nicaraguan Contras, and the Reagan administration's efforts to circumvent this cut-off with funds received from covert sales of arms to Iran, see *id.* pp. 473-522.

<sup>70</sup> See Motala & Ramaphosa, *Constitutional Law*, pp. 216-17, discussing Executive Council, Western Cape Legislature, and Others v. President of the Republic of South Africa and Others, 1995 (4) SA 867 (CC), 1995 (10) BCLR 1289 (CC), paras 62 (judgment of Chaskalson P) & 149-50 (judgment of Ackermann & O'Regan JJ).

<sup>71</sup> See *supra* note 49 and accompanying text.

<sup>72</sup> See also § 55(1)(b), giving the National Assembly power to 'initiate or prepare legislation, except money Bills' (emphasis added).

<sup>73</sup> US Const., art. I, § 7.

<sup>74</sup> Moreover, if Parliament is really determined to block some exercise of executive war powers, it probably can do so directly, as already noted.

<sup>75</sup> US Const., art. I, § 8, cl. 12.



<sup>76</sup> The procedures specified for the National Assembly's consideration of appropriation bills also seem more likely to curtail Parliamentary resistance than to facilitate it. In the Rules of the National Assembly as of June 1999, available at <http://www.pmg.org.za/parinfo/narules> (last visited May 12, 2008), a section on 'Specific Rules applicable to money bills' lays out a 'special procedure' which must be used for 'a bill appropriating money for the ordinary annual services of the government or imposing taxes, levies or duties for this purpose'. Rule 286(2). Under this procedure, it appears that committee consideration of a 'main appropriation bill' must be completed within 'a maximum of ... seven consecutive Assembly working days'. Rule 290(3). Moreover, if a money bill is subsequently amended by the National Council of Provinces, and is returned to the National Assembly for reconsideration, '[t]he debate on the reconsideration of the bill, including the consideration of any amendment, may not continue for more than one hour'. Rule 295(3).

<sup>77</sup> As the Congress of South African Trade Unions (COSATU) has pointed out, it is also noteworthy that ss 55(1)(a) and 68(a) of the Constitution, which describe the legislative powers of the National Assembly and the National Council of Provinces, respectively, both refer to these Houses' authority to amend, or in the National Council of Provinces' case to amend or propose amendments to, 'any legislation' (emphasis added). See Congress of South African Trade Unions (COSATU), 'COSATU Submission on the Republic of South Africa Second Amendment Bill, Submitted to the Portfolio Committee on Justice and Constitutional Development, 21 September 2001', s 4.2, available at <http://www.cosatu.org.za/docs/2001/const.htm> (last visited May 12, 2008).

<sup>78</sup> A National Council of Provinces webpage, [http://www.parliament.gov.za/live/content.php?Item\\_ID=34&Revision=en/13&SearchStart=0](http://www.parliament.gov.za/live/content.php?Item_ID=34&Revision=en/13&SearchStart=0) (last visited May 11, 2008), indicates that this legislation has yet to be enacted. In early May 2008, a 'tripartite alliance summit' of the African National Congress, the South African Communist Party, and the Congress of South African Trade Unions reportedly decided 'to allow Parliament to amend money bills' – one of several decisions seen as 'suggest[ing] much greater influence of the ANC's leftist allies on economic policy ...'. Karima Brown & Amy Musgrave, 'South Africa: Leftward Leap If ANC Allies Get Their Way', *Business Day* (Johannesburg), May 12, 2008, available at <http://allafrica.com/stories/200805120351.html>. COSATU has in the past called for 'the tabling of an adequate money bills amendment procedure bill as a matter of urgency'. 'COSATU Submission', s. 4.2. As COSATU noted in that submission, *id.*, Article 21(1) of Schedule 6 of the Constitution provides that '[w]here the new Constitution requires the enactment of national or provincial legislation, that legislation must be enacted by the relevant authority within a reasonable period of the date the new Constitution takes effect'.

<sup>79</sup> The Parliamentary Monitoring Group's description of 'The Legislative Process', <http://www.pmg.org.za/parinfo/sectionb3> (last visited May 12, 2008), observes that '[a]t present Money Bills may only be debated and not amended as, according to the Constitution, Parliament must still devise legislation for a procedure to amend Money Bills'. COSATU cites an example of a bill that could not be amended because of its status as a money bill in 'COSATU Submission', s 4.2.

Parliamentary rules appear to produce a particularly odd result – that the National Assembly cannot amend money bills, but the National Council of Provinces (in general the less powerful house with respect to matters of national rather than provincial concern) can. Under the National Assembly's 'special procedure' for money bills, *see* note 76 *supra*, there is simply no provision for amendments – either by committees or by individual members of Parliament – in the Assembly's initial decision on such a bill. Oddly enough, there is also no explicit prohibition of amendments in these provisions; they simply are not mentioned.

Under ss 75 & 77(3) of the Constitution, the bill then goes to the National Council of Provinces. Draft National Council of Provinces rules adopted by its Rules Committee in 1999 do authorize amendments of 'Ordinary Bills not affecting provinces' – for which s 75 of the Constitution specifies the appropriate Parliamentary processes – while noting that '[i]t is unclear whether money Bills should have a procedure separate from the standard procedure for section 75 Bills'. Note to 'Part 4: Section 75 Bills', Draft Rules of the National Council of Provinces, available at <http://www.pmg.org.za/parinfo/ncoprules> (last visited May 12, 2008); for the rules applicable to amending section 75 bills, *see* Rules 203(i) & 205(1)(a), *id.*

If the National Council of Provinces does follow the rules for section 75 bills and amends a money bill, then the bill, as amended, returns to the National Assembly. At that point, according to National Assembly Rule 295(1), further amendments are possible, but only certain amendments: 'The Assembly must consider any amendments proposed by the Council. No further amendments may be considered unless moved by the Minister in charge of the bill, who may do so without prior notice'. As mentioned in note 76 *supra*, the debate over the amended bill, and over any amendments moved by the Minister, must be completed within an hour.

<sup>80</sup> Parliamentary Monitoring Group, 'Minutes for Defence Joint Committee, 26 March 2003, White Paper on Peacekeeping: Discussion' (available at <http://www.pmg.org.za/viewminute.php?id=2596>)



(last visited Jan. 26, 2007). For another suggestion of the degree of operational flexibility that current defence budgeting gives the Executive, see Wyndham Hartley, 'African Peace Burden Cannot Be SA's Alone, Warns Lekota', *Business Day*, Feb. 16, 2005 (available on Westlaw, ALLNEWS database).

<sup>81</sup> The statutory basis for such adjustments ultimately lies in the Public Finance Management Act, Act No. 1 of 1999, as amended, under which a government department has a number of statutory routes by which it can increase its spending on a particular function, such as peacekeeping, without prior specific Parliamentary authorization. See *id.* §§ 16, 30, 34, 43, & 92; see Kent & Malan, *Decisions, Decisions* (discussing §§ 16 & 30). For an illustrative recent funding bill, see 2006/07 Appropriation Bill, as introduced, Schedule, Vote 21 (Defence), available at <http://www.info.gov.za/gazette/bills/2006/b2-06.pdf> (last visited Mar. 5, 2007) (allocating R820 million specifically and exclusively to 'peace support operations' within a 'force employment' budget of R1.41 billion). For an example of a peacekeeping mission whose costs were expected to be covered without the need for new legislation, see Letter from President T.M. Mbeki to Speaker of the National Assembly, 'Employment of the South African National Defence Force in Sudan in Fulfilment of the International Obligations of South Africa Towards the African Union', July 2, 2004, available at <http://www.pmg.org.za/docs/2003/comreports/040729presletters.htm> (last visited Mar. 5, 2007) (noting that costs would be accommodated within the Department of Defence's 'current allocation for Peace Support Operations').

<sup>82</sup> § 89(1).

<sup>83</sup> § 102(2). I am grateful to Christina Murray for calling this section to my attention.

<sup>84</sup> § 53(1).

<sup>85</sup> §§ 77, 75.