

Chapter 23C

War Powers

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23C.1 Introduction*

It may seem strange to inquire into the nature of war powers under South Africa's Constitution¹ — for surely South Africa is not a nation that considers itself embarked on a policy of war. 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. It demands that soldiers 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 that 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.² Its spending to maintain that military strength is at the heart of a bribery scandal that threatened to derail Jacob Zuma's candidacy for President and may taint others as well.³ Its troops are already serving, or have served, in peacekeeping or election-support missions in several other African states: Burundi, the Democratic Republic of the Congo (DRC), the Comoros, Côte d'Ivoire, Eritrea, Ethiopia, Lesotho, Liberia, Mozambique, Sudan (Darfur), and Uganda; South African forces have ventured as far as Nepal.⁴ Some, fortunately a small

1 Constitution of the Republic of South Africa, 1996 ('Final Constitution' or 'FC').

2 While recognizing that South Africa is a peaceful state, we should not overlook the considerable military force it is accumulating. See, for example, Shaun Benton 'First of SA's Three New Submarines Cruises into Simonstown After 49-Day Voyage' *AllAfrica.com* (7 April 2006)(available on Westlaw WIRES database).

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number, have died in combat outside its borders (in an intervention in Lesotho in 1998 and more recently in the DRC.⁵) War is not entirely absent from South Africa's politics. South Africa's peacekeeping efforts in fact have stretched the nation's current military resources,⁶ and the goal of establishing an African Union peacekeeping force will certainly call on South African resources as well.⁷

The Final Constitution addresses the possibility of war, and the deployment of troops, but not at great length. The brevity of these provisions is entirely understandable. 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. 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

3 See, for example, Mandy Rossouw, Matuma Letsoalo & Rapule Tabane, 'Mbeki Faces Amnesty Pressure' *Mail & Guardian Online* (20 March 2008), available at http://www.mg.co.za/articlePage.aspx?articleid=335115&area=/insight/insight__national/; 'Cabinet Dismisses Arms-Deal Allegations Against Mbeki' *Mail & Guardian Online* (20 March 2008), available at http://www.mg.co.za/articlePage.aspx?articleid=335107&area=/breaking_news/breaking_news__national/; Sam Sole & Stefaans Brummer, 'Arms Broker Did Give Cash to the ANC' *Mail & Guardian Online* (14 March 2008), available at http://www.mg.co.za/articlePage.aspx?articleid=334629&area=/insight/insight__national/ (all accessed on 20 April 2008).

4 'Foreword by the Honourable MGP Lekota, Minister of Defence' Department of Defence *Annual Report FY 2006 — 2007* (2007) xiii-xiv, available at http://www.info.gov.za/annualreport/2006/defence_annual_rpt07.pdf (accessed on 20 April 2008); Parliamentary Monitoring Group 'Transformation Management Developments; SANDF Deployment to West Indies, Nepal, Mozambique', available at <http://www.pmg.org.za/node/9056> (accessed on 20 April 2008); Mosiuoa Lekota 'Address by the Minister of Defence, the Honourable Mosiuoa Lekota, at Media Breakfast at the Defence Headquarters, Pretoria' (5 September 2005), available at <http://www.info.gov.za/speeches/2005/05090712451003.htm> (accessed on 3 March 2007); Clive Ndou 'South Africa Beefs Up Peace Missions in Africa' *AllAfrica.com* (23 March 2006), available at <http://www.buanews.gov.za/view.php?ID=06032311151002&coll=buanew06> (accessed on 7 July 2009). SANDF troops have also been employed in the Central African Republic. Shaun Benton 'South Africa: Cabinet Approves SANDF Deployment in Uganda' *BuaNews* (Tshwane) (20 March 2008), available at <http://allafrica.com/stories/printable/200803200328.html> (accessed on 27 Sept 2009).

5 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* (27 September 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' <IT>SAPA <IT+> (10 June 2004); 'Five of Six Soldiers Drowned in DR Congo to Be Buried Saturday' <IT>SAPA <IT+> (16 April 2004); 'Full Military Honours for SANDF Soldier Killed in DRC' <IT>SAPA <IT+> (6 April 2004); 'South Africa: Army to Investigate Officer's Death' *UN Integrated Regional Information Networks* (31 March 2004) (all available on Westlaw ALLNEWS database).

6 These resources have also been affected by AIDS. An estimated 23 % of SANDF troops — and perhaps more — are HIV positive. Xan Rice 'South African Army Facing HIV Crisis' *The Times* (UK) (19 August 2004) (all available on Westlaw ALLNEWS database).

new South 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.

War is hell. 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 this chapter

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offers few prescriptions, it aims to provide a guide to the interpretation of those constitutional provisions governing this nation's powers of war.

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 Final Constitution. On the contrary, where ambiguity in specific clauses can be interpreted by reference to general principles of South African constitutional law, I 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 Final Constitution. The notion of war powers that are wholly beyond the reach of judicial review is implausible.⁸ Moreover, the protection of human rights is an absolutely integral part of the South African constitutional order.⁹ Second, the Final Constitution contains a specific commitment to subject military power to law. The Final Constitution declares that the security services (including military, police and intelligence services) 'must act ... in accordance with the Constitution and the law'.¹⁰ This provision is not just an abstract sentiment. The issue of the armed forces' loyalty during the constitutional transition was both critical and delicate for the

7 See Peter Honey 'Defence. Battle for Force Readiness' *Financial Mail* (16 September 2005) 46 (available on Westlaw ALLNEWS database); Shaun Benton 'Darfur Peace Mission Is Hurting AU, SA, Financially' *AllAfrica.com* (16 March 2006), available at <http://www.buanews.gov.za/view.php?ID=06031616151004&coll=buanew06> (accessed on 7 July 2009). In 1999, South Africa anticipated employing one battalion 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* ('White Paper on Peace Missions') (approved by Cabinet, 21 October 1998; tabled in Parliament, 24 February 1999), 25 available at <http://www.info.gov.za/view/DownloadFileAction?id=70438> (accessed on 27 September 2009). A battalion 'is made up of between 700 and 1200 personnel and support staff, as well as weaponry and transport'. Prakash Naidoo 'African Peacekeeping Force. SA Stretched to Its Limits' *Financial Mail* (18 June 2004) 24 (available on Westlaw ALLNEWS database). In 2004-05, South Africa had approximately three battalions, rather than one, stationed in other nations on such missions. *Ibid.* 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. See David Masango 'Southern Africa: Stand-By Brigade to Maintain Peace in SADC' *BuaNews* (Tshwane) (17 August 2007), available at <http://allafrica.com/stories/20070817075.html> (accessed on 27 September 2009).

8 See, for example, *Kaunda & Others v President of the Republic of South Africa & Others* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) at para 78 (Chaskalson CJ). However, where issues primarily for other branches are involved — as is surely the case with foreign affairs and war — the Courts' review will be relatively more deferential. *Ibid.* at para 244 (O'Regan J). I am grateful to a reader for calling this decision to my attention.

9 *Ibid.* at para 66 (Chaskalson CJ); para 159 (Ngcobo J); para 221 (O'Regan J). See FC s 7(2), '[t]he state must respect, protect, promote, and fulfill the rights in the Bill of Rights'.

negotiating parties.¹¹ Third, the Final Constitution rejects the idea that war is the province of the executive alone. FC s 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'.¹²

As important as these general principles are, however, they do not remove the need to look carefully at the specific provisions of the Final Constitution that deal with war. We will first look at the provisions governing the declaration

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of a state of national defence — the clearest route provided by the Final Constitution for South Africa to enter or to initiate a 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 seems to be 'yes'. Moreover, it appears that the President has the authority to initiate a range of potentially risky military involvements without any direct approval by Parliament — although, again Parliament may approve or disapprove this decision, if it so chooses. Finally, in light of the extent of military and Presidential authority that this analysis has identified, the chapter will consider the role of Parliament's power over the budget as a check, albeit an imperfect one, on executive military decisions.

23C.2 The Procedural Requirements for a state of national defence

The Final 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 Final Constitution's drafters carefully avoided giving the nation a power to declare war, and instead gave it a

10 FC s 199(5). See generally *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC); *South African National Defence Union v Minister of Defence & Others* 2007 (5) SA 400 (CC), 2007 (8) BCLR 863 (CC) (both examining the constitutional rights of members of the South African National Defence Force). For more on the security services, see O Ampofo-Anti, K Robinson & S Woolman 'Security Services' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 23B. (Ed.)

11 See Nico Steytler & Johann Mettler 'Federal Arrangements as a Peacemaking Device During South Africa's Transition to Democracy' *Publius* (1 October 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* (14 February 2008), available at <http://www.dailynews.co.za/index.php?fArticleId=4253049> (accessed on 7 July 2009). Indeed, an August 2009 demonstration by unionized soldiers prompted government accusations of 'mutiny'. 'Zuma: Unions can't control the army' *Mail & Guardian Online* (17 September 2009), available at <http://www.mg.co.za/article/2009-09-17-zuma-unions-cant-control-the-army> (accessed on 28 September 2009).

12 Moreover, the Final 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'. FC s 199(8).

power to declare a 'state of national defence'.¹³ Does this mean that South Africa cannot fight a war, or engage its troops in combat 'hostilities'?¹⁴ 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, then the declaration of a state of national defence must have been intended to serve as a means for

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declaring that the nation was going to fight in order to defend itself.¹⁵ It may well be that South Africa has no constitutional power to fight a war of aggression.¹⁶ But, as we will see, even 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. FC s 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 expressly prohibit Parliament from issuing such a declaration on its own, the overall content of FC s 203 (with its focus on the President's reporting to Parliament, and Parliament's approving the declaration after it has been made) makes it 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 someone elected by Parliament to play this role.¹⁷ In actual fact, South Africa's

13 FC s 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>) (accessed on 15 September 2006). The same may be said of the Namibian Constitution. See Constitution of the Republic of Namibia 1990 art 24, reprinted in Gisbert H Flanz (ed) & Patricie H. Ward (assoc ed) *Constitutions of the Countries of the World [Namibia]* (2003) 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. Constitution of the Republic of South Africa, Act 200 of 1993 ('IC' or 'Interim Constitution') s 82(4)(b)(i) (Section empowers the President 'with the approval of Parliament, [to] declare a state of national defence'). This Interim Constitution provision retained a tenuous legal existence under FC Schedule 6, Item 24(1). See Iain Currie & Johan de Waal, with Pierre de Vos, Karthy Govender & Heinz Klug, *The New Constitutional & Administrative Law* (Revised Edition, 2002) vol I, 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 110 of 1983 s 6(3)(g).

14 This chapter does not seek to precisely define the term 'war'. My focus is on the Final 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 Final Constitution itself does not make it so.

15 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.

16 Currie and de Waal point out that wars of aggression are now violations of international law as well. Currie & de Waal (*supra*) at vol I, 252.

17 See FC s 90(2). The Acting President could even be a Minister chosen from outside Parliament, and thus entirely unelected. FC ss 90(1) and 91(2)-(3).

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.¹⁸ (Mandela's choice of Buthelezi surely was related to the ANC's efforts to improve relations with this long-time opponent.¹⁹)

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

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Cabinet as a whole.²⁰) Presumably the war can then be prosecuted. However, the declaration 'lapses unless it is approved by Parliament within seven days of the declaration'.²¹ This requirement of affirmative approval by Parliament means that a formal declaration of the nation's martial intent 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 ability of the United States President to involve the United States in fighting presents Congress with something approaching a *fait accompli*.²² In any event, the more firmly the executive maintains political control of Parliament, the less likely it is that Parliament will fail to give its approval.

18 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* (26 September 1998) at 7A (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.) Ibid. I have included the dispatch of troops to Lesotho in this chapter's list of peacekeeping missions, but clearly it was initially seen by many in Lesotho as deeply partisan and aggressive. See also Gilbert A. Lewthwaite 'Lesotho military operation criticized in South Africa Newspapers, opposition say peacekeeping mission is botched and misguided' *Baltimore Sun* (24 September 1988) at 20A (available on Westlaw ALLNEWS database).

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

20 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 FC s 101(2). In addition, they explain, '[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'. Currie & de Waal (supra) at vol I, 246. See FC s 85(2). Thus the President would need the signature of the Minister of Defence for orders to the troops, FC ss 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.

21 FC s 203(3).

22 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, and by then the fighting may have advanced too far to be easily halted. War Powers Resolution, § 5(b), 50 USC § 1544(b) (2006).

Though Parliamentary approval is required for a declaration of a state of national defence, it is clear that the Final Constitution imposes much clearer and more stringent requirements for a declaration of a state of emergency than it does for the declaration of a state of national defence.²³

- First, FC s 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,²⁴ but no statute is required as a basis for declaring a state of national defence. So while the Defence Act does set out grounds for declaring a state of national defence,²⁵ these procedures 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 (the ‘first extension’) has been issued by Parliament for a state

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of emergency, this approval must be renewed at least every three months.²⁶ A state of national defence, once approved by Parliament, appears to extend indefinitely.

- Third, FC s 37(2) spells out which chamber of Parliament has the power to give or withhold approval of a state of emergency — the National Assembly. The allocation of this authority for states of national defence, however, is not made explicit. What FC s 203(3) says is that ‘Parliament’ must approve the declaration. FC s 42(1) declares that Parliament consists of the National Assembly and the National Council of Provinces (NCOP).²⁷ 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 this state of affairs is what the text on its face dictates.²⁸ 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

23 See generally N Fritz ‘States of Emergency’ in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 61. (Ed.)

24 FC s 37(1).

25 Defence Act 42 of 2002 (‘Defence Act’) s 89 (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.’)

26 FC s 37(2)(b).

27 I am grateful to a reader for pointing this out.

28 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. 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 a disagreement between the two houses of Parliament seems small.

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.²⁹ 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.³⁰ 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.³¹ 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.³² Finally, it could be maintained that the approval of a declaration of a state

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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, FC s 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. (Other sections require that Parliament's rules in general must have 'due regard' for 'transparency and public involvement'.³³) It is hard to accept the idea of a state of national defence being approved without a public debate. The sheer unlikelihood of such a step, however, perhaps makes the absence of this textual requirement less important.

29 See S Budlender 'National Legislative Authority' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) 17-1, 17-3 ('The national executive is accountable to the National Assembly and not to the NCOP'.)(Ed.) Also, compare FC s 68 (section on 'Powers of National Council' detailing only 'legislative power') with FC s 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.

30 See FC ss 75-76.

31 FC s 75(1); Budlender (supra) at 17-15.

32 FC s 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 FC ss 65, 75(2); Budlender (supra) at 17-4-17-6.

33 Budlender (supra) at 17-37, citing FC ss 57(1)(b), 70(1)(b). For more on the constitutional requirement of public involvement in the legislative process, see *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC); *Matatiele Municipality & Others v President of the Republic of South Africa & Others (2)* 2006 (5) SA 47 (CC), 2007 (1) BCLR 47 (CC); and *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* 2008 (5) SA 171 (CC), 2008 (10) BCLR 968 (CC).

- 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’.³⁴ The Final 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 Final 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.³⁵ 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.³⁶
- Sixth, the Final 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.³⁷ It is likely that some form of judicial review of a state of national defence is also available. The legality principle or the role of law doctrine

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subjects all government action to constitutional control.³⁸ But since the Final Constitution contains no explicit, specific provision for such review, that silence might well support arguments that the available judicial review must be particularly deferential.

23C.3 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 that authority?

34 FC s 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 LJ* 1029, 1055.

35 FC s 53(1).

36 See FC s 53(1). For the decision rules potentially applicable in the NCOP, see FC ss 65(1), 75(2).

37 FC s 37(3).

38 *Pharmaceutical Manufactures Association of South Africa and Another In Re: The Ex Parte Application of the President of the Republic of South Africa and others* (2000) (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 20 (Chaskalson P); see F Michelman ‘The Rule of Law, Legality and Supremacy of the Constitution’ in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11. But see Ziyad Motala & Cyril Ramaphosa *Constitutional Law: Analysis and Cases* (2002) 218-20 (The authors suggest that the President’s use of defence powers would be largely or entirely non-justiciable.)

- (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.

(a) Presidential powers in a state of national defence

The text does not explicitly answer the first 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 to 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.³⁹ But what are the powers of a Commander-in-Chief? The text does not specify the extent or the limits of this authority. But, again, the most plausible answer is that as Commander-in-Chief, the President has the authority to order any lawful military action,⁴⁰ from preparation for war to actual fighting. Suppose, for instance, that troops from one of South Africa's neighbors massed along the border. One might imagine that South Africa would move its troops to the border in

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response, and this positioning of forces would be an appropriate exercise of the Commander-in-Chief's 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 to 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 norms of 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 authorizes much less than I've just suggested. FC s 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.

39 FC s 202(1).

40 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. See FC ss 231-32. See also K Hopkins & H Strydom 'International Law and International Agreements' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 30. (Ed.) So, for example, the South African Bill of Rights, domestic 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.

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. This is a possible reading but not the most plausible one. FC s 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 Final 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

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did?⁴¹ Or who 'might' commit acts of terrorism in the future?⁴² The answers to these questions will help measure the breadth of the President's, and Parliament's, authority under a state of national defence.

(b) Parliament's authority to limit the President's powers

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 ambiguity is important and potentially troublesome. 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 constitute a new declaration, and one issued by Parliament rather than the President. 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

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

42 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* (23 December 2005)(available on Westlaw ALLNEWS database).

declarations impliedly limits Parliament's authority in this respect, a sufficiently independent Parliament might be able to compel a President to modify and to re-issue a declaration in order to win Parliamentary approval for it.

In addition, Parliament might well retain authority to approve or to 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 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.⁴³ The constitutional text does not spell out such a power to approve or to disapprove military policies. But it is, likewise, 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 Final Constitution, in addition to requiring the President to provide Parliament with certain information in connection

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with a declaration of a state of national defence, also imposes in FC s 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'.⁴⁴ 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.⁴⁵ (Parliament's funding power — though limited — is a further check, as we will see below.⁴⁶) It is important to recognize, however, that this reading affirms Parliamentary review power but does not establish any requirement of

43 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).

44 These instances of employment of the defence forces are specified in FC s 201(2), and discussed further in § 23C.4 *infra*. For uses of the military covered by FC s 201(2), s 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 adds the requirement of a report on 'expenditure incurred or expected to be incurred'. Defence Act ss 18(2)(e) and (4). 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, FC s 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.

specific Parliamentary approval as a predicate for Presidential action. As long as Parliament does not order otherwise, it seems quite likely that the approval of the declaration of a state of national defence in itself 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 potentially 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

- 45 Defence Act s 18(5) explicitly establishes Parliamentary review power over the President's uses of troops for a variety of purposes. It applies under circumstances specified in s 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 authorise 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 s 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 authorisation of employment;
- (b) order the amendment of such authorisation;
- (c) order the substitution for such authorisation 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 FC s 201(2) 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. Interestingly, a Parliamentary legal adviser has in fact expressed the view that the President's employment of the Defence Force under FC 201(2) 'is not subject to the approval of Parliament and it may not amend, substitute or terminate such employment'. Memorandum — Confidential — to Secretary of the National Assembly from Legal Services Office, 'Employment of the Defence Force' (14 July 2003) at 3, available at <http://www.pmg.org.za/files/docs/081024memo.pdf> (accessed 4 October 2009). This report was distributed and discussed at a meeting of the Joint Standing Committee on Defence, reported in Parliamentary Monitoring Group, 'Protection of Civilians during Peacekeeping Operations: ACP/EU Draft; Employment of SANDF under Section 201 of Constitution: Legal Opinion', (29 October 2008), available at <http://www.pmg.org.za/report/20081024-protection-civilians-during-peacekeeping-operations-acpeu-draft-emplo> (accessed 4 October 2009). I discuss the report further at § 23C-18 n 2 infra.

- 46 See § 23C.5 infra.

National Assembly: the President, not the Speaker, is the Commander-in-Chief.⁴⁷ 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 FC s 201(2).⁴⁸ If Parliament cannot order the 'employment' of troops, then 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.⁴⁹ Once a state of national defence has been declared and approved, some considerable authority may pass to the President in a manner that Parliament cannot restrict.

(c) Limits on human rights during a state of national defence

We can begin to answer the third question by asking another: Does the declaration of a state of national defence also result in the declaration of 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

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of national defence does not suggest a recognition that constitutional rights would be subject to extensive abridgment. The text addressing states of emergency, on the other hand, focuses elaborately on exactly this prospect. It seems reasonable to say that the only time that constitutional rights can be 'derogated' from is in a state of emergency, although the text of FC s 37 (on states of emergency) does not expressly say so.

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 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 — so far as human rights are concerned — fewer constitutional limits need to be imposed on the use of states of national defence; *realpolitik* itself will protect the nation's liberties. So, at least we may hope.

47 Cf Michael D Ramsey 'Torturing Executive Power' (2005) 93 *Georgetown LJ* 1213, 1241 (US 'Congress cannot appoint a commander who does not answer to the President.')

48 I discuss this provision in much more detail below. See § 23C.4 *infra*.

49 In the United States, it has been said that '[t]here is ample evidence that the legislature was not meant to make tactical military decisions once war was initiated'. Stephen Dycus, Arthur L Berney, William C Banks & Peter Raven-Hansen *National Security Law* (4th Edition, 2007) 26. But a number of scholars have recently argued that although such tactical choices are normally made by the President as Commander-in-Chief, Congress does have the authority to intervene in many, perhaps even all, of them if it so chooses. See David J Barron & Martin S Lederman 'The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding' (2008) 121 *Harvard L Rev* 692; Jules Lobel 'Conflicts Between the Commander in Chief and Congress: Concurrent Power Over the Conduct of War' (2008) 69/477 *Ohio State LJ* 391; David Luban 'On the Commander-in-Chief Power' (2008) 81 *Southern Cal LR* 477.

However, 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. FC s 11 protects the right to life.⁵⁰ This right cannot be derogated from even in a state of emergency.⁵¹ It must follow that orders sending troops into battle in a lawfully-undertaken war are *justified* under FC s 36 as a limitation on the soldiers' right to life, and so can be issued without effecting a derogation from that right.⁵²

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 Final Constitution, yet still waiting somewhere in the wings.⁵³

Far from the realm of martial law, the existence of a state of national defence would raise other issues regarding the 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

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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, though doing so might impair their privacy of communications under FC s 14(d).⁵⁴ 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

50 See generally M Pieterse 'Life' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 39. (Ed.)

51 FC s 37(5)(c).

52 FC s 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 Final Constitution to sustain a limitation on rights. If a statute such as the Defence Act did not provide the necessary legal basis, then Parliamentary approval of the declaration of a state of national defence might, or the Final Constitution itself might indeed be seen as the foundation for orders to fight under such a declaration. For more on the need for a 'law of general application' and its contours, when undertaking FC s 36 analysis, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34. (Ed.)

53 *Cf Ex parte Milligan* 71 US 2, 78-82 (1866)(on the circumstances in which martial law may and may not be declared).

54 No constitutional question would arise, of course, if the Final 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* (supra) at paras 41-44 (Chaskalson CJ) and para 228 (O'Regan J). For an argument in favour of broad extraterritorial application of the Bill of Rights, see S Woolman 'Application' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31 at 31-113 to 31-122. (Ed.)

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?⁵⁵ And, finally, what if the group against which the state of national defence has been declared is a domestic, South African terrorist group?⁵⁶

I don't mean to suggest 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 always be the same as those rules that apply 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 conflict, and the exact boundaries between them have not yet been worked out.

These inferences may seem feverish. In fact, the Defence Act appears to go considerably further. Section 91(1) of the Defence Act gives the President broad authority to make regulations to deal with the tasks of a state of national defence.

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Section 91(2) in turn 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. However, the existence of the statute presumably reflects at least the view of Parliament and the President that the Final Constitution does permit these provisions.

The subsections of s 91 cover a considerable range of issues affecting human rights. To begin with, ss 91(2)(a) — (f) appear to enable 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. A South African reader may be quickly reminded of pass laws and bantustans or the disease-ridden concentration camps created by the British during the South African War.

55 These questions of course recapitulate the argument in the United States over whether the President has authority, under the post-9/11 AUMF, to order warrantless electronic surveillance of people suspected of links with Al Qaeda. South Africa has prohibited surveillance inside the country in national security matters absent a judicial order. See Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 (RICA) ss 2-3. This statute does, however, permit emergency 'interception' of communications without such an order, for the purpose of locating 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. RICA ss 1 and 8(1)(b). See also RICA s 7 ('Interception 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 in the text in the remainder of this section) to establish different rules to govern surveillance in that context.

56 As noted earlier the constitutional text does not make clear against whom a declaration of a state of national defence can be issued. See § 23C.3(a) *supra*. But it is certainly possible to imagine domestic threats that are as grave as foreign ones, and so it is quite conceivable that a declaration could target a domestic group.

Finally, s 91(2)(l) addresses regulations of ‘places of custody or detention’. On this score, it is worth noting that FC s 37(8) makes clear that the many provisions of s 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.

FC s 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 Final Constitution. Thus a non-South African detained in these circumstances would have neither the rights of a normal detainee under FC s 35, nor the rights of an emergency detainee under FC s 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 the above, it is important to add that the list of topics in s 91(2) of the Defence Act may not be exclusive. Indeed, the breadth of s 91(1)’s general authorization suggests that the specific powers granted in s 91(2) might be viewed as exemplifying a range of other implicit powers that may impinge, where necessary, on constitutional liberties. Whether s 91(2)’s provisions, or broader implications that flow from them, are constitutional remains to be litigated. 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 Final Constitution. It might be argued that the differences do not matter, since South Africa can always declare and approve declarations

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of a state of national defence and of a state of emergency simultaneously. A state of emergency may be harder to start and is certainly harder to maintain, however, and so the existence of this partially overlapping, less regulated authority is troubling.

23C.4 Hostilities without a declaration of a state of national defence

Although the declaration of a state of national defence under FC s 203 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, FC s 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 FC s 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 FC s 201(2) between such defence and the use of force ‘in fulfillment of an international obligation’, however, suggests that the latter is not encompassed by a ‘state of national defence’.⁵⁷ Moreover, this reading of FC ss 201(2) and 203 accords 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. This understanding is also consistent with South African practice, under which South African 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.⁵⁸

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Peacekeeping missions do not seek combat, but combat can certainly arise. In point of fact, 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,⁵⁹ 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 FC s 201(3), which requires the President to ‘inform Parliament, promptly and in

57 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. It is also true, however, 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. FC s 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* (supra) at 34. In any event, it would seem from FC s 201(2)(c) itself that South Africa must have the power to enter into international obligations whose fulfillment will entail the employment of troops.

58 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 FC s 201(2) is not explicitly exclusive. Motala & Ramaphosa (supra) at 218. In fact the Defence Act, s 18(1), provides for *other* uses of the defence forces as well. See § 23C-12 n 1 (supra).) 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 ss 20(1) and 22. For an American response to this problem, see the longstanding, though ambiguous, Posse Comitatus Act 18 USC § 1385 (2006). But these issues are beyond the scope of this chapter.

59 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* (13 October 2004)(available on Westlaw ALLNEWS database).

appropriate detail' of a range of information about any employment of the defence force which he or she has ordered under FC s 201(2). This reporting requirement is a wise one, and has apparently been understood to require the President to provide Parliament with information even on deployments of very small numbers of soldiers. 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,⁶⁰ that the principle of joint Parliamentary-Presidential control over the military does mean that Parliament *can* vote if it so chooses.⁶¹

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, then 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 already suggested, it is also important to recognize that if the President makes decisions

60 See § 23C.3(b) supra.

61 Parliament, however, has not asserted this power in the Defence Act. See § 23C-12 n 1 supra. 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 authorising 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* (supra) at 32; Vanessa Kent & Mark Malan, 'Decisions, Decisions - South Africa's foray into regional peace operations', 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 (accessed on 3 October 2009).

I have found no instance of such a proposal being presented to Parliament or voted on by it. 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). Parliamentary committees, perhaps primarily the Joint Standing Committee on Defence, however, do review these letters. Committee practice in carrying out this review appears to have varied. In one instance, two committees decided jointly 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> (accessed on 3 October 2009). It is conceivable that this resolution was voted on by Parliament, but in context it seems more likely that the committees themselves adopted the resolution and that Parliament as a whole never voted on it. In contrast, in 2005 the Joint Standing Committee adopted a report on several notifications which took no position at all, and simply declared that the committee, 'having considered the letters from the President on the deployment of the SANDF to areas outside the borders of the country, referred to the Committee, reports that it has concluded its deliberations thereon'. Parliamentary Monitoring Group, 'Deployment of South African National Defence Force: Notification from President's Office' (16 November 2005) available at <http://www.pmg.org.za/node/6745> (accessed on 4 October 2009).

For other instances in which the Joint Standing Committee voted to 'adopt' letters from the State President, see Parliamentary Monitoring Group, 'Deployment of SA National Defence Force & Report on finalisation of Armscor employee grievance' (13 February 2009), available at <http://www.pmg.org.za/report/20090211-letters-president-deployment-south-african-national-defence-force-san> (accessed 4 October 2009); Parliamentary Monitoring Group, 'Letters requesting SANDF Deployment; Defence Committee Reports: consideration' (25 June 2008), available at <http://www.pmg.org.za/report/20080618-committee-reports-and-letters-deployment-consideration> (accessed 4 October 2009).

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, but still it would have a chance, and indeed an obligation, to endorse or not to endorse such a declaration if it was issued. And unless Parliament gave its approval, the declaration would lapse.

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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 Final Constitution to have explicitly forbidden war or fighting in the absence of a declaration, but no such prohibition has been spelled out.⁶² 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 Final Constitution empowers the President to send troops abroad for

It appears that the Joint Standing Committee has grown increasingly discontented with its role. Members of the Committee voiced sharp concerns at a meeting in August, 2008. Parliamentary Monitoring Group, 'SANDF deployment letters: Committee complaints & approval; National Conventional Arms Control Amendment Bill: deliberations' (27 August 2008), available at <http://www.pmg.org.za/report/20080827-national-conventional-arms-control-committee-amendment-bill-b-43-2008> (accessed 4 October 2009). Two months later, the Committee reviewed opinions of the Parliamentary Legal Adviser concerning its role under FC s 201, and the Chairperson 'explained that it was not the intention of himself or the Committee to be confrontational against the President. However, there were real concerns that Parliament was being required to rubber stamp decisions and actions by the Executive, and accordingly was not fully performing its constitutionally designated role and function'. According to the Parliamentary Monitoring Group summary, '[m]embers finally resolved that the matter should be referred to the Rules Committee of Parliament, as it seemed that this was a matter finally dependent upon the Rules, and that the situation in times of both war and peace needed to be considered'. Parliamentary Monitoring Group, 'Protection of Civilians during Peacekeeping Operations: ACP/EU Draft; Employment of SANDF under Section 201 of Constitution: Legal Opinion' (29 October 2008), available at <http://www.pmg.org.za/report/20081024-protection-civilians-during-peacekeeping-operations-acpeu-draft-emplo> (accessed 4 October 2009).

62 A similar argument has been made by John Yoo to support the inference that the President of the United States does not need a declaration of war by Congress. Yoo notes that the 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 Chicago LR* 1639, 1666-67, citing US Constitution 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 Final Constitution of any textual requirement of Parliamentary assent to fighting does have to be reckoned with.

peacekeeping. Peacekeeping can be violent. To authorize a peacekeeping mission, it seems to me, is necessarily to authorize some limited amount of actual fighting in the course of that mission. 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 responsibilities 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.⁶³ 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 to withhold its approval for the enterprise. Exactly what level of combat triggers the need for a declaration remains, inescapably, unclear in the text.

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Suppose, finally, that the President does declare a state of national defence, but Parliament refuses to approve it. Must the fighting then stop? Again, the text does not provide an answer, 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 exactly 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.⁶⁴ 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. It would follow that if necessary, the fighting could continue for a considerable period in order to insure the safe extrication of South African troops.⁶⁵ Whatever the correct view of this matter, it is quite clear that the text leaves it ambiguous. This ambiguity means

63 *Cf Orlando v Laird* 443 F2d 1039, 1043 (2d Cir, 1970), cert. denied, 404 US 869 (1971)(Court notes 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* (supra) at para 144(6)(Chaskalson CJ). See also *Kaunda* (supra) at para 172 (Ngcobo J) and para 243 (O'Regan J).

64 Such paradoxical votes are possible. In fact, such votes 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, Arthur L Berney, William C Banks & Peter Raven-Hansen *National Security Law* (3rd Edition, 2002) 412.

65 For an account of the US courts' unwillingness to second-guess the President's efforts to withdraw from Vietnam, despite the years of continued warfare that took place in the process, see Stephen Dycus et al (4th Edition) at 230-239.

that in a situation where this point became important, the President could claim various forms of authority to continue. Though South African courts could address such claims, it would not be easy for a court to reject a President's claim of authority while the battle actually raged.

23C.5 The power of the purse: Parliament's budgetary powers

Let us begin our examination of Parliament's power to limit war through restricting spending by considering the related 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, then both branches of government will be happy to recognize the end of the state of national defence. But can the President rescind the declaration of 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 does it go on indefinitely? Perhaps more importantly,

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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 questions are left unanswered 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 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 behind the 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 FC s 203 (as long as Parliament 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 FC s 201. But Parliament does not have to exercise these powers. In contrast, Parliament also has authority to give or to 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 Final 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.⁶⁶ Once revenue has been deposited in this Fund, the Final Constitution specifies that it normally can only be withdrawn if

66 FC s 213(1)(Section limits exceptions to those 'reasonably' made by Parliament).

Parliament enacts an appropriation or authorises a 'charge'.⁶⁷ 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 (unless Parliament reasonably provides otherwise) and then become subject to Parliamentary control rather than unilateral Presidential

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disposition. At that point, 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.⁶⁸

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. The funding power could also be brought to bear 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 the legislature provides, as Justice Robert Jackson pointed out in an important war powers case half a century ago in the United States.⁶⁹

Though it is possible to argue for an implied Presidential authority to take otherwise unauthorized action, including spending money, in a dire emergency,⁷⁰ 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 defunding 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

67 Parliamentary may either enact appropriations (FC s 213(2)(a)) or by statute authorize 'direct charge[s]' against the National Revenue Fund (FC s 213(2)(b)). Parliamentary action is not required when a direct charge 'is provided for in the Constitution'. FC s 213(2). The text of FC s 213 does not make clear whether Parliament could also provide — as an exercise of its power under FC s 213(1) to make reasonable exceptions to the general rule that all revenues go into the National Revenue Fund — that certain funds received by the government would not go into this Fund but instead would go directly to the President for spending entirely according to his or her unilateral direction for the conduct of war. But the constitutional commitment to budgetary 'transparency and expenditure control', FC 216(1), to say nothing of the broad principle of joint Parliamentary and Presidential responsibility for national security, would seem to weigh against such a reading of the text.

68 The President cannot carry on, that is, unless the spending is a direct charge 'provided for in the Constitution'. FC s 213(2)(b). But FC s 213 itself identifies only one such direct charge, and that one — for revenue sharing with the provinces (FC s 213(3)) — is far from the field of defence.

69 See *Youngstown Sheet & Tube Co v Sawyer* 343 US 579, 643-644 (1952)(Jackson J concurring). 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. See generally *Holtzman v Schlesinger* 484 F2d 1307 (2d Cir, 1973); Dycus et al (4th Edition) (supra) at 235-239. Congress' funding power has also been notoriously circumvented. For an extensive account of Congress' efforts to cut off funding to the Nicaraguan Contras, and the Reagan administration's efforts to evade this cut-off with funds received from covert sales of arms to Iran, see Dycus et al (4th Edition) (supra) at 473-522.

70 See *Motala & Ramaphosa* (supra) at 216-217, discussing *Executive Council, Western Cape Legislature & Others v President of the Republic of South Africa & Others* 1995 (4) SA 867 (CC), 1995 (10) BCLR 1289 (CC) at paras 62 (Chaskalson P) and 149-150 (Ackermann & O'Regan JJ).

President may make in an ongoing, duly authorized war,⁷¹ 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 to be drawn 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, given the degree of executive control of the legislature in South Africa.⁷² Two other

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reasons exist for more hesitation about the efficacy of this power than the text might otherwise encourage. The first is the special legislative authority that the executive commands over budgeting under the Final Constitution.⁷³ Under FC s 73(2) 'only the Cabinet member responsible for national financial matters may introduce [a money Bill] in the Assembly'.⁷⁴ (The United States Constitution, by contrast, provides that 'All Bills for raising Revenue shall originate in the House of Representatives'.⁷⁵) 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.

However, Parliament is not without power to take spending decisions. Most clearly, Parliament can reject the Executive's war when the Executive proposes legislation to fund it. The significance of this authority, however, depends on whether the President will actually need to apply to Parliament for funds in short order. 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),⁷⁶ and so, at least in theory, an extended appropriation at one point could fund a considerable length of military activity without further specific approval. Since South African appropriations are in practice enacted on an annual basis, however, the requirement of annual approval does constrain the President's power – though it also leaves the President with a year's discretion.⁷⁷

71 See § 23C.3(b) supra.

72 See C Murray and O Ampofo-Anti 'National Executive Authority' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 18. (Ed.)

73 R Kriel and M Monadjem 'Public Finance' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 27. (Ed.)

74 See also FC s 55(1)(b), giving the National Assembly power to 'initiate or prepare legislation, except money Bills' (emphasis added).

75 US Constitution art I, § 7.

76 US Constitution art I, § 8, cl. 12.

77 Annual appropriations are required under the Public Finance Management Act 1 of 1999 ('PFMA'), as amended, s 26. The President's discretion is further enhanced because under some circumstances this same statute permits spending prior to specific Parliamentary authorization. See page 23C-25 n 2 infra.

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. FC s 77(3) 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'.⁷⁸ Although more than 12 years would pass before this constitutional mandate was carried

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out,⁷⁹ the Money Bills Amendment Procedure and Related Matters Act⁸⁰ was signed by the President on 16 April 2009. The Act provides a detailed procedure for the amendment of money bills, and specifies that its provisions are to be interpreted to 'give effect to the constitutional authority of the National Assembly and the National Council of Provinces in passing legislation and maintaining oversight of the exercise of national executive authority'.⁸¹

The second reason for hesitation about the efficacy of the funding power is, perhaps, partly a reminder of the political difficulties of wielding this authority: 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 their 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.⁸²

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78 As the Congress of South African Trade Unions (COSATU) has pointed out, it is also noteworthy that FC ss 55(1)(a) and 68(a), 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). 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) at para 4.2, available at <http://www.cosatu.org.za/docs/2001/const.htm> (accessed on 12 May 2008).

79 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) (12 May 2008) available at <http://allafrica.com/stories/200805120351.html> (accessed on 7 July 2009). COSATU had earlier called for 'the tabling of an adequate money bills amendment procedure bill as a matter of urgency'. 'COSATU Submission' (supra) at 4.2. As COSATU noted in that submission, Article 21(1) of Schedule 6 of the Final 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'. *Ibid.*

80 Act 9 of 2009.

81 Money Bills Act s 2(a). A full evaluation of the procedures of the Act is beyond the scope of this chapter.

That deficit may have been unusual, but budget adjustments to cover unanticipated spending are quite permissible under South African law.⁸³

The National Assembly does, finally, have one further recourse: it can expel the President from office. First, it can 'remove the President from office' under FC s 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 to remove the President can be based: serious illegal conduct, serious misconduct or inability to perform the functions of the office.⁸⁴

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'.⁸⁵ National Assembly

82 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> (accessed on 26 January 2007). At another Parliamentary committee hearing in 2004, overspending amounts of R25.9 million and R14.3 million for 'peacekeeping support operations' were reported, though 'Mr V Mbethe (National Treasury Chief Director: Justice and Protection Services) pointed out that unauthorized expenditure due to the undertaking of unforeseen peacekeeping missions were [sic] much less likely in the future as such missions were much more regular and well provided for now'. Parliamentary Monitoring Group, 'National Government Unauthorised Expenditure 1998 - 2004: Treasury briefing' available at <http://www.pmg.org.za/minutes/20050809-national-government-unauthorised-expenditure-1998-%E2%80%93-2004-treasury-briefing> (accessed 4 October 2009). For another suggestion of the degree of operational flexibility possible within defence budgeting, see Wyndham Hartley, 'African Peace Burden Cannot Be SA's Alone, Warns Lekota', *Business Day* (16 February 2005)(available on Westlaw ALLNEWS database). As recently as October 2008, the chair of the parliamentary Joint Standing Committee on Defence observed that 'participation in peace keeping missions had cost implications for South Africa, as although the country in which the intervention had taken place was supposed to reimburse South Africa, there were long delays before this reimbursement might be received, if it was paid at all, and therefore effectively the Department of Defence (DOD) was being called upon to pay the costs, which impacted upon that Department's ability to maintain a budget approved by Parliament and consequently upon Parliament's competence to oversee the Department of Defence, if the Executive, the Department of Foreign Affairs and possibly the Department of Intelligence were making unforeseen calls upon DOD's budget.' Parliamentary Monitoring Group, 'Protection of Civilians during Peacekeeping Operations' (supra).

83 The statutory basis for such adjustments ultimately lies in the Public Finance Management Act, 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 PFMA (supra) ss 16, 30, 34, 43, & 92. See also Vanessa Kent & Mark Malan (supra) at 72 (discussing PFMA ss 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> (accessed 5 March 2007)(The bill allocates 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 TM Mbeki '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' (2 July 2004) available at <http://www.pmg.org.za/docs/2003/comreports/040729presletters.htm> (accessed on 5 March 2007)(Mbeki notes that costs would be accommodated within the Department of Defence's 'current allocation for Peace Support Operations.') South Africa is not unique in providing considerable flexibility for executive spending in the area of national defence. For a description of practice in the United States, see William C Banks & Peter Raven-Hansen, *National Security Law and the Power of the Purse* 69-85, 168-170 (1994).

84 FC s 89(1).

85 FC s 102(2). I am grateful to Christina Murray for calling this section to my attention.

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,⁸⁶ though they would also have to vote to override the National Council of Provinces, if that body opposed the legislation.⁸⁷

23C.6 War powers as constitutionally exceptional powers

The text of the Final 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

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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 to make those commitments enforceable. In these areas, South Africa has developed an impressive apparatus for the constitutional protection of individual rights. In the field of war, however, the Final Constitution has taken fewer precautions.

South Africans will need 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 text if and when these issues must be addressed. This chapter has sought both to outline a rights-protective interpretation of the Final Constitution and to point to aspects of that text – notably 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 might be desirable. I hope that this chapter 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 might actually increase rather than limit executive prerogative. Finally, I must close by saying that many centuries of human experience, hard experience, suggest that to regulate killing and chaos — war — by law is always, to some extent, impossible.

86 FC s 53(1).

87 FC ss 77, 75.