

LIMITING WAR POWERS IN AFRICA

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Introduction

This paper critiques the constitutional powers conferred on the executive branch of governments in Africa to declare war. These war powers have allowed governments to deploy troops into actual or potential conflict areas without prior consultation with parliament and without parliamentary consent.

The conferring war powers on the executive whilst the values that define constitutionalism and democracy in Africa are still largely under-developed has had serious economic and political consequences. A case in point and one which forms the main subject of this paper is the involvement of foreign troops in the conflict in the Democratic Republic of the Congo (DRC).

This paper calls for a rethinking of the current status quo. These powers should be removed from the exclusive control of the executive branch of government, to allow parliaments to exercise stronger control. This can be achieved through the enactment of constitutional amendments and legislation that clearly asserts the role of parliament to act as a check on the executive. There should be properly defined legal parameters within which the executive exercises war powers under parliamentary scrutiny.

A need for constitutional reforms

Former British colonies in Africa largely fashioned their constitutions according to the Westminster model constitution. It provided for a parliamentary form of government, the doctrine of separation of powers, the rule of law and supremacy of parliament. What was lacking was an entrenched democratic culture, a necessary pre-condition by which these institutions could flourish. In the absence of such a culture, granting war powers to the executive was especially problematic. However, even in countries such as Britain that are generally regarded as being democratic, a call for constitutional reforms in respect of war powers has found a hearing.

On 3 July 2007, British Prime Minister Gordon Brown announced to the House of Commons that 'Government will now consult on a resolution to guarantee that on the grave issue of peace and war it is ultimately this House of Commons that will make the decision'.¹ In Britain currently the House of Commons is not legally required to play a role in respect of sending armed forces into conflict. Although parliament may debate on it, the terms of the debate are largely set by government. The limited influence and powers of the British parliament in this area are also largely reflective of African parliamentary systems in relation to the deployment of national troops into foreign countries.

The British proposals are relevant to Africa for several reasons. Firstly, war powers in Africa lie essentially in the hands of the executive and more specifically with the head of government. However, the exact powers of the executive are often unclear, and are much more varied than legislative and judicial functions.² Secondly, in those rare instances where the constitution of an African country states that war powers must be exercised in consultation with cabinet or parliament or that parliamentary approval must be obtained, in practice this rarely occurs.

Thirdly, the doctrine of separation of powers, which is the cornerstone of any truly democratic country, is not protected and promoted within African constitutional frameworks, thereby permitting

¹ <http://www.publications.parliament.uk/pa/cm200607/cm070703/debtext/70703-0003.htm> House of Commons Hansard Debates.

² E. Barendt, *An Introduction to Constitutional Law*, Oxford: Clarendon, 1998, p.107.



the executive to undermine it.³ Fourthly, limiting war powers can enhance the capacity of African governments and civil society to build on conflict prevention strategies that can be maximised and synergised through constitutional reforms throughout Africa. Fifthly, deployment of troops into foreign nations carries with it a risk of war crimes being committed therefore, the effective utilisation of parliaments legislative powers would allow parliament to put in place legal processes which will ensure accountability and deter criminal acts.

The war in the DRC

In 1996 Rwanda and Uganda invaded Zaire on the pretext of fighting rebels who had taken refuge there. As the regime of Zaire's President Mobutu collapsed, both countries took the war to the capital Kinshasa and installed a new government with Laurent Kabila as head. When relations with President Kabila soured, Rwanda, Uganda and Burundi invaded the newly renamed DRC once again in 1998. Plans to replace the Kabila regime with the newly formed Congolese Rally for Democracy were stopped only by the intervention of Angola, Zimbabwe and Namibia.⁴ By late September 1998, Chad, Libya and Sudan had also come to Kabila's aid.⁵

The interventions on the side of the DRC government were controversially approved by the Southern Africa Development Community (SADC), which actually commended the 'governments of Angola, Namibia and Zimbabwe for timeously providing troops to assist the government and the people of the DRC'.⁶

Constitutional analysis

This section of the paper closely examines the constitutions of the main state actors involved in the invasion of the DRC on the rebel side, Rwanda and Uganda, and the principal ally that intervened on the side of Kabila, Zimbabwe.⁷ It further examines and contrasts the extent to which the constitutions of these countries have allowed the executive to gain absolute control over the army and exercise war powers without any parliamentary oversight. Finally, this analysis provides an opportunity to probe into the constitutional space, if any, that parliament has to monitor, control and or limit war powers by virtue of its legislative powers and the extent to which this has been accommodated or undermined by the executive.

The 'power to declare war' is a term that is found in many constitutions, including those of Rwanda and Zimbabwe, but it has lost its basic literal meaning. The growing practice is to simply deploy troops without reference to an actual declaration of war. In fact, the decision to deploy Zimbabwean troops in the DRC was not made public for more than a month after they were on the ground.⁸ Rwanda and Uganda's early official denials that their soldiers were in the DRC also indicate that no

³ See for example Article 32 of the Zimbabwean constitution, which states that legislative authority vests in the legislature which consists of the president and parliament.

⁴ Robert Guest, *The Shackled Continent*, Chapter 2, 'Africa's Past, Present and Future', pp.52-61; see also Filip Reyntjens 'Briefing: The Second Congo War: More than a remake', (1998) 98 *African Affairs* pp.241-244.

⁵ Guy Fiti Sinclair, 'Don't mention the war (on terror): Framing the issues and ignoring the obvious in the ICJ's 2005 Armed Activities Decision', *Melbourne Journal of International Law*, Vol.8, No.1 (2007).

⁶ *Final Communiqué of the 1998 SADC Summit of Heads of States and Government*, 19 September 1998.

⁷ Zimbabwe sent an estimated 10 000 troops to the DRC; Angola 3,000 troops, and Namibia 2,000. See under 'Budgets compared to military expenditures', in *UN Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo*, 2001, p.29, available at <http://www.un.org/news/dh/latest/drcongo.htm> accessed 22 May 2008.

⁸ 'In August 1998, the President of Zimbabwe woke up and decided to deploy at least 5 000 troops to DRC. It was only in the month of October that official newspapers began acknowledging what was common to internet user, that the Zimbabwean government had deployed troops to the Congo'. Tendai Biti, 'Zimbabwe's participation in the Congo war: A contextual analysis,' *Zimbabwe Human Rights Bulletin*, Issue No. 5, September 2001, p.131.

declaration was made.⁹ The African Commission on Human and Peoples Rights (ACHPR) alluded to this in the case of *DRC v Burundi, Rwanda and Uganda*, when it referred to the ‘situation of undeclared war prevailing between the Democratic Republic of Congo and its neighbours to the East.’¹⁰

Rwanda

The Rwandan constitution specifically states that executive power vests in the President of the Republic and the Cabinet.¹¹ The president is head of state, commander-in-chief of the Rwandan Defence Forces and is vested with the power to declare war in addition to declaring a state of siege or a state of emergency (Article 110). Although the constitution states that executive power vests in both the cabinet and the president, it is only the president who has the power to declare war, and he need only inform parliament within seven days of his intention to do so. Parliament will then vote on the matter by a simple majority of the members of each chamber (Article 136). The only limitation on the exercise of this power is in the case of an outgoing incumbent president waiting for the successor to assume office (Article 105). In such an instance, the incumbent may not declare war and may not declare a state of emergency.

Article 136 describes the power to declare war not as a duty, a function or power, but rather as a right, suggesting that this is the president’s absolute personal power. Parliament is therefore expected to vote on a matter which is a constitutionally conferred presidential ‘right’ that has in all likelihood already been exercised by the president. The constitutional provision allowing for parliament to adopt a vote on the matter is therefore effectively meaningless. The constitution does not provide for the lapsing of a president’s decision to declare war in the event of parliament disagreeing with such a decision or where the president fails to inform parliament within the set time.¹²

The constitution does not require that the president give reasons and justify a decision to declare war, in direct contrast to the requirements that follow when the president declares a state of emergency or siege,¹³. Nor does the constitution require parliamentary approval to extend the duration of a declaration of war after any set period, unlike in the case of a state of emergency.

Uganda

In Uganda, the constitution places executive authority in its president, who is to exercise this in accordance with the constitution and laws of the country. Additionally, the president is head of state, head of government and commander in chief of the Uganda Peoples Defence Forces (UPDF).¹⁴

However, there are some constraints on executive power in relation to the armed forces. Article 208(1) subsection (2) states that the UPDF shall be ‘*non-partisan, national in character, patriotic, professional, disciplined, and subordinate to the civilian authority as established under the Constitution*’. Article 210 (d) states that ‘Parliament shall make laws regulating the UPDF, and in

⁹ Amnesty International, *DRC: A longstanding crisis spinning out of control*, 1998; see discussion pp.5 & 8 available at <http://www.amnesty.org/en/library/asset/AFR62/033/1998/en/dom/-AFR620331998en.html> accessed 29 May 2008

¹⁰ *DRC v Burundi, Rwanda and Uganda*, in Heyns and Killander (eds), *Compendium of Key Human Rights Documents of the African Union*, 3rd edition (2007), pp.190-197.

¹¹ Constitution of Rwanda, 2003, Article 97.

¹² Compare, for example, the South African Constitution Act 108 of 1996, Article 203 (3) ‘A declaration of a state of national defence lapses unless it is approved by Parliament within 7 days of the declaration’.

¹³ Article 137, Constitution of Rwanda. Firstly, it is declared by the president following a decision of cabinet; there must also be clear reasons given, the affected area must be specified, and the rights are to be suspended and duration of the suspension must be indicated.

¹⁴ Constitution of Uganda, 1995, Articles 98-99.

particular providing for its organs and structures, terms and conditions of service of members of the UPDF, and the deployment of troops outside Uganda.’

By conferring on parliament legislative powers to regulate the army, the constitution places clear limitations on executive control of the national army, including the deployment of troops outside of Uganda. Article 210 thus has the effect of rendering the UPDF a potentially parliamentary army, whose basic functioning and deployment outside of Uganda is subject to parliamentary regulation, depending of course on the legislative provisions put in place by parliament.

Contrary to the Rwandan constitution, the constitution of Uganda makes no specific reference to the executive’s power to declare war. However, the constitution also does not specifically require parliamentary approval in respect of the power to declare war or the consequent deployment of troops. It simply states that parliament shall make laws with regards to deployment of troops.¹⁵ Article 208 stipulates that the army be subordinate to civilian authority, yet fails to specify which civilian authority. The current president of Uganda, a retired army general, may qualify as this ‘civilian’ authority just as easily as parliament.

Though an improvement on the constitutional provisions in Rwanda, these constitutional gaps thus allow unnecessarily wide interpretations of executive war powers. In practice, the president has deployed the army beyond Uganda’s borders without parliament’s approval, as in the case of the DRC. There is need for constitutional provisions clearly subjecting the army to parliamentary authority.

Zimbabwe

The Zimbabwean constitution confers on the president executive authority, including the power to declare war and make peace (although it is not a right as in Rwanda).¹⁶ In terms of Article 31(h) (5), the president must act on the advice of the cabinet in the exercise of his executive functions. In practice, however, it is unlikely that the cabinet would advise and act contrary to the wishes of the president as he appoints its members. Article 31 (k) removes the president from the authority of the courts, by stipulating that the president may not be questioned by any court of law in respect of any decisions he makes in the exercise of his executive functions.

Under Article 32 of the constitution, legislative authority vests in *both* parliament *and* the president. This provision would make it very difficult for parliament to provide for legislation limiting executive war powers since the president is part of the legislative decision making process. This can be directly contrasted to the powers of parliament in Uganda to legislate the army’s activities; only parliament owns the legislative process according to Uganda’s constitution. Although the Zimbabwean constitution does make reference to the existence of an army for national defence purposes,¹⁷ there is no further restriction on its deployment based on this purpose. Not even parliament’s powers to monitor and control the financial resources of the country¹⁸ can impact the president’s limitless power in this regard.¹⁹

¹⁵ Consider for example parliamentary debates on the UPDF Deployment of Troops Outside Uganda Bill in 1999.

¹⁶ Constitution of Zimbabwe, Article 31 (h) (4).

¹⁷ Article 96 stipulates that, ‘For the purpose of defending Zimbabwe, there shall be a defence force consisting of an army, an air force and such other branches, if any, of the defence forces as may be provided for by or under an Act of Parliament’.

¹⁸ Constitution of Zimbabwe, Article 101.

¹⁹ See for example, a motion on the deployment of troops to the DRC which was raised by a prominent member of parliament in 2000, who argued that, ‘The prerogative of making war and declaring war is not an absolute prerogative that a head of state has. I say so for the reason that any war involves financial implications and to the extent that Parliament is the controller of financial resources in terms of Article 101 of the Constitution of Zimbabwe it means a fortiori that, before the presidential prerogative of declaring war is invoked, approval of

International and regional implications

After a series of serious allegations concerning the exploitation of natural resources by foreign countries in the DRC, a UN Panel was set up to undertake a fact finding mission investigating the allegations. With regards to Zimbabwe the panel stated that it had ‘enough elements and evidence to suggest that the Government of the Democratic Republic of the Congo under the late President Kabila, gave strong incentives in the form of access, exploitation and management of mineral resources which have in turn “convinced” the Zimbabwean authorities to remain engaged in the Democratic Republic of Congo’.²⁰ The Panel also implicated Presidents Kagame and Museveni of Rwanda and Uganda and said of them that they were ‘on the verge of becoming the godfathers of the illegal exploitation of natural resources and the continuation of the conflict in the Democratic Republic of the Congo’.²¹

In a communication to the African Commission on Human and Peoples’ Rights filed by the DRC against Burundi, Uganda and Rwanda, the Commission found that ‘the use of armed force by Respondent States contravened the well established principle of international law that states shall settle their disputes by peaceful means in such a manner that international peace, security and justice are not endangered.’²²

In 2005, the International Court of Justice (ICJ) found against Uganda and held that it was under an obligation to make reparation to the DRC for the injury caused because of its engagement in military activities against the DRC on the latter’s territory and by actively extending military, logistic, economic and financial support to irregular forces operating on DRC territory.²³

The evidence considered by the UN Panel of Experts, the African Commission and the ICJ, overwhelmingly shows that the deployment of troops by Rwanda, Uganda and Zimbabwe (and the other countries not part of this analysis) violated national laws and sovereignty that spiralled into violations of international law. Consultation with parliament was not considered by these countries and thus is indicative of a high level of executive arrogance that can only be checked by a strengthened parliament.

Parliamentary scrutiny at national level, founded on a clear distinction between what is an act of national defence and what is an act of war, could have allowed for the investigation of the legal and factual circumstances that acted as justification for the different countries’ involvement in DRC and perhaps prevented these abuses.

It is thus particularly unfortunate that the SADC heads of state chose to support the interventions on the side of the DRC government. SADC approval in essence undermined regional peace and security as well as showed contempt for national legislative processes by not even ensuring that leaders would at the very least inform their parliaments of the decision to militarily intervene in the DRC crisis.

Parliament must be sought because at the end of the day, it is Parliament which controls resources’. *Zimbabwe Parliamentary Debates*, Volume 27, No.18, p.1779; Motion by Tendai Biti 20 September, 2000 on ‘Defence Forces in DRC’.

²⁰ *UN Report of the Panel of Experts*, p.36.

²¹ *UN Report of the Panel of Experts*, p.41.

²² *DRC V Burundi, Uganda and Rwanda*, Compendium of Key Human Rights Documents of the African Union, p.190.

²³ *Armed Activities on the Territory of the Congo (DRC v Uganda)* (Judgment) (2005) International Court of Justice (ICJ) decision para 345 available at <http://www.icj-cij.org> accessed 18 April 2008. For a summary of the case see also Margaret McGuinness, ‘Case Concerning Armed Activities on the Territory of the Congo: The ICJ finds Uganda acted unlawfully and orders Reparations’, *American Society of International Law Insights* (2006).



Conclusion

The proposed British constitutional reforms to limit executive war powers have received a lot of interest and support from the British people. In response to the consultation questions presented by the British government one respondent argued that such war powers need not be limited because ‘as long as a decision is made by democratically elected governments it is difficult to see why the process should be regarded as undemocratic’.²⁴ Unfortunately, this argument cannot pertain to Africa, where the content and rules of democracy are still very much under dispute. The responses also indicate that issues of legality, transparency and access to information are reoccurring issues of great concern to the British people as they are for the African people, particularly within the context of war powers.

On this point, respondent thought that the deployment of British troops should ‘not go ahead unless it was clearly lawful according to the best international legal argument’.²⁵ This is a very valid point when one considers that the DRC interventions were completely illegal, and accompanied by major rights violations by the intervening armies. For parliament to make an informed decision there must be clear laws put in place that remove any restrictions on access to such information. As one respondent emphasised ‘unless there is more forthright willingness to put the information on which deployments are based into the public sphere and a frankness about its weight it is hard to see how the quality of decision making is likely to be much improved’.²⁶

Limiting executive war powers will contribute greatly towards achieving democracy for all on the African continent. The events that occurred in the DRC conflict stand as strong testimony that leaders will not always act in the interests of the people, but will unashamedly pursue their own self interests through abusing their own human resources (national troops) in order to exploit foreign national resources. The principles of accountability and transparency can find rooted ground in Africa if the principle of separation of powers is further entrenched through the limitation of war powers.

²⁴ *The Governance of Britain: Analysis of Consultations*, p.75 available at <http://www.justice.gov.uk/docs/governance-analysis-consultations>.

²⁵ *Ibid.*, p.84.

²⁶ *Ibid.*, p.84.