
Comments

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THE POWER TO GO TO WAR: AUSTRALIA IN IRAQ¹

Australia's participation in the conflict in Iraq as part of the "coalition of the willing" created debate about how we as a nation go to war.² Should the government be able to direct the military to use force in hostile action outside of Australia without parliamentary approval? This question can be particularly acute where, as in the Iraq conflict, a government seeks to use force in a way that is apparently at odds with popular opinion and certainly at odds with the views of the Senate.

It might be expected that the *Constitution* would set out who can declare war for Australia. After all, there are few exercises of public power more important than committing a nation to war. Unfortunately, the *Constitution* does not expressly supply the answer. Section 51 empowers the federal Parliament to pass laws with respect to "The naval and military defence of the Commonwealth and of the several States", while s 68 vests the Governor-General, as the representative of the Queen, with command of the defence forces. Section 61 describes the executive power in broad and undefined terms and says nothing directly on this topic.

The *Constitution* is otherwise silent. It says nothing about who can declare war for Australia or the circumstances in which we might go to war, including whether Australia can use military force in breach of international law as part of a unilateral or pre-emptive strike. There is certainly nothing resembling Art 9 of the Japanese *Constitution*, which states that "the Japanese people forever renounce war as a sovereign right of the nation".

It is not surprising that much is left unsaid in the Australian *Constitution*. It is a document framed in the 19th century for governments operating according to the conventions and practices of the Westminster tradition of that era. That was not a time that contemplated popular or even parliamentary involvement in decisions about war, let alone that Australia might consider itself bound by the rules of a body like the United Nations. If we were bound in any way, it was to the foreign policy of the United Kingdom.

Without a clear answer from the text of the *Constitution* (or even from the *Defence Act 1903* (Cth)), some would argue that the decision to go to war against Iraq should be made by Parliament or the people. However, the unwritten practices of the *Constitution* direct otherwise. They suggest that the decision is within the prerogative of the Prime Minister and Cabinet alone.³ Prime Minister John Howard may have Parliament debate the issue or arrange for a popular vote. However, he need not consult Parliament or the people and the decision will ultimately be made in the secrecy of the Cabinet room. The Governor-General will then be informed as the Commander in Chief and by convention must follow the decision or face dismissal.

The situation is different in the United States, where President George W Bush was not as free to take his country to war. Article 1 of the United States *Constitution* vests the power "to declare war" in Congress and not the President. On the other hand, Art 2 states that the President is the "Commander in Chief". Significantly, the President's power has been used without the approval of Congress to engage in undeclared wars in countries such as Vietnam and has given rise to an ongoing debate over which branch of government possesses the war powers of the nation.

The tension between Congress and President was resolved over whether to go to war in Iraq. In October 2002, Congress authorised the President, in its words, "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to defend the national security

¹ This comment has been developed from a paper delivered at the 2003 Public Law Weekend organised by the Faculty of Law, Australian National University. I thank Tracey Stevens for her research assistance.

² These issues have also been analysed by Lindell G, "The Constitutional Authority to Deploy Australian Military Forces in the Coalition War Against Iraq" (2003) 5 *Constitutional Law and Policy Review* 46.

³ Lindell, n 2 at 46.

of the United States against the continuing threat posed by Iraq".⁴ The resolution enabled the United States to go to war with or without the backing of the United Nations Security Council.

Comparison with constitutional systems like the United States raises the question of whether Parliament or the people should play a role in Australia. I believe that such a decision is generally not one for the people. A plebiscite is too unwieldy an exercise on such an issue, and for the same reasons that citizen-initiated referenda are not consistent with Australia's system of representative government,⁵ a popular vote on whether to go to war should be rejected.

Parliament, on the other hand, should have a formalised role in Australia's decision to go to war. One reason for this is the obligations that Australia has assumed under international law. While Australia in 1901 had not submitted to an international jurisdiction that made illegal its use of force, this is not true today. Australia has been a party to the Charter of the United Nations since 1945. That Charter has the status of a higher law in the international legal order, with Art 103 of the Charter providing that Member States' obligations under the Charter shall prevail over other international obligations.

Australia's obligations under the Charter must be considered in light of the object and purpose of the Charter. The Preamble sets out the object of the establishment of the United Nations as being "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind", with an overriding aim of ensuring "that armed force shall not be used, save in the common interest". After the experience of two world wars, the drafters of the Charter established a world order based on two interrelated underlying principles: first, to bring about the resolution of international disputes by peaceful means and, second, recognition that the use of force would only be justified as a last resort in the interests of the international community, and not individual States.

Under this legal framework, the use of force is prohibited by Art 2(4), which states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations". This cardinal principle of international law is subject to two exceptions, relating to Security Council authorisation under Ch VII and self-defence under Art 51 of the Charter, and possibly a third relating to humanitarian intervention.

The effect of this regime is that the use of force by Australia can raise different issues than were imagined at the time the *Constitution* was drafted. A key question has been whether Australia should breach its international obligations, as I believe it did,⁶ in using force in Iraq. This question can have ramifications for the nation and its long term security and economic prosperity beyond the decision to use force in a particular case. Accordingly, international law is one legal reason why it is no longer appropriate for the decision to use force by the military to be left solely in the hands of the executive. This may especially be the case where there are serious doubts about the justification for the use of force as part of a unilateral pre-emptive strike.

The argument in favour of parliamentary involvement has been reflected in recent times in two ways. First, Australia did not use force in Iraq without parliamentary debate (albeit after troops had been pre-deployed in the region). The matter was brought before the House of Representatives on a motion by the Prime Minister and a vote held on 20 March 2003 that authorised the use of force. While Prime Minister Howard recognised that the "decision lies with the executive of government: the cabinet", he "nevertheless [thought it] appropriate that the parliament, at the first opportunity, have the chance to debate this motion. It is essential that the reasons for that decision be made plain to the representatives of the people and that they have a full opportunity to debate them and to have their

⁴ Congress of the United States, *Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq*, Section 3, Media Release (2 October 2002), <http://www.whitehouse.gov/news/releases/2002/10/20021002-2.html> viewed 20 January 2004.

⁵ Williams G, "Distrust of Representative Government: Australian Experiments with Direct Democracy" in Sawyer M and Zappalà G (eds), *Speaking for the People: Representation in Australian Politics* (2001) p 80.

⁶ Hovell D and Williams G, "Advice to Hon Simon Crean MP on the Use of Force Against Iraq" (2003) 4 *Melbourne Journal of International Law* 183.

views recorded.”⁷ That motion “endorse[d] the Government’s decision to commit Australian Defence Force elements in the region to the international coalition of military forces prepared to enforce Iraq’s compliance with its international obligations under successive resolutions of the United Nations Security Council, with a view to restoring international peace and security in the Middle East region”.⁸ A separate motion in the Senate “call[ed] for the Australian troops to be withdrawn and returned home”.⁹ The text of both motions is set out at the end of this comment.

Second, there have been proposals for legislative reform to remove the exclusive power of the executive to authorise the use of force outside of Australia. On this I share the view of Geoffrey Lindell, who found that it is possible by legislation to “strengthen parliamentary control over the executive branch of government in the exercise of its prerogative powers”.¹⁰ On 27 March 2003 the *Defence Amendment (Parliamentary Approval for Australian Involvement in Overseas Conflicts) Bill 2003* was introduced by Senators Bartlett and Stott Despoja as a private members Bill. Not surprisingly, it has not passed the Senate. The Bill would amend the *Defence Act 1903* (Cth) by repealing s 50C, which currently states: “Members of the Army may be required to serve either within or beyond the territorial limits of Australia”. According to the second reading speech, the Bill would “place the responsibility for the decision to send Australian troops overseas with both Houses of Federal Parliament subject to exceptions covering the movement of personnel in the normal course of their peacetime activities and the need to take swift action in an emergency”.¹¹ Section 50C as amended would state:

Parliamentary approval of territorial limits of service of members of defence force

50C. (1) Members of the Defence Force may be required to serve within the territorial limits of Australia.

(2) Subject to subsection (3), members of the Defence Force may not be required to serve beyond the territorial limits of Australia except in accordance with a resolution agreed to by each House of the Parliament authorising the service.

(3) The Governor-General may by proclamation declare that an emergency exists requiring the service beyond the territorial limits of Australia of members of the Defence Force, and such service may be required in accordance with such proclamation.

(4) If the Parliament is not in session when a proclamation under subsection (3) is made, it shall be summoned to meet within 2 days after the making of the proclamation.

...

(7) For the purpose of this section, service beyond the territorial limits of Australia does not include service by members of the Defence Force:

- (a) pursuant to their temporary attachment as provided by section 116B; or
- (b) as part of an Australian diplomatic or consular mission; or
- (c) on an Australian vessel or aircraft not engaged in hostilities or in operations during which hostilities are likely to occur; or
- (d) for the purpose of their education or training; or
- (e) for purposes related to the procurement of equipment or stores.

I believe that a formalised role should be established for Parliament in regard to decisions to use force outside of Australian territory. However, I do not think that the proposed s 50C would achieve the right balance. It is not appropriate to require the support of the Senate for such a decision given the difficulties of doing so and the nature of the decision. On the other hand, a vote only by the House of Representatives is too likely to be controlled by the government of the day, may lead to little real debate and would not involve the members of the Senate.

⁷ Australia, House of Representatives, *Debates* (18 March 2003) Vol 252, p 12,506.

⁸ Australia, House of Representatives, *Debates* (18 March 2003) Vol 252, p 12,505.

⁹ Australia, Senate, *Debates* (19 March 2003) Vol 219, p 9,642.

¹⁰ Lindell, n 2 at 49.

¹¹ Australia, Senate, *Debates* (27 March 2003) Vol 219, p 10,321 (Senator Bartlett).

I favour a compromise whereby the decision would be made by a joint sitting of both houses. This would emphasise the importance of the decision and would involve all members. However, it would also generally allow the government, with its greater majority in the lower house offsetting its deficit in the Senate, to gain the outcome it wishes so long as it can maintain party discipline. This would involve an appropriate measure of symbolism and deliberation. It would not, however, remove the capacity of the executive in most cases to determine the course for which it will ultimately have to answer at the ballot box.

Appendix: The federal Parliament on the Iraq war

Motion passed by the House of Representatives on 20 March 2003¹²

That this House:

1. condemns Iraq's refusal, over more than 12 years, to abide by 17 resolutions of the United Nations Security Council regarding the threat it poses to international peace and security;
2. recognises:
 - (a) that Iraq's continued possession and pursuit of weapons of mass destruction, in defiance of its mandatory obligations under numerous resolutions of the United Nations Security Council, represents a real and unacceptable threat to international peace and security;
 - (b) that Iraq's behaviour weakens the global prohibitions on the spread of weapons of mass destruction, with the potential to damage Australia's security; and
 - (c) that, as more rogue states acquire them, the risk of weapons of mass destruction falling into the hands of terrorists multiplies, thereby presenting a real and direct threat to the security of Australia and the entire international community;
3. abhors:
 - (a) Iraq's continued support for international terrorism; and
 - (b) the institutionalised widespread and grave abuse of the human rights of the Iraqi people over many years;
4. notes that United Nations Security Council resolutions adopted under Chapter VII of the United Nations Charter, in particular resolutions 678, 687 and 1441, provide clear authority for the use of force against Iraq for the purposes of disarming Iraq of weapons of mass destruction and restoring international peace and security to the region;
5. endorses the Government's decision to commit Australian Defence Force elements in the region to the international coalition of military forces prepared to enforce Iraq's compliance with its international obligations under successive resolutions of the United Nations Security Council, with a view to restoring international peace and security in the Middle East region;
6. expresses its unequivocal support for the Australian service men and women, and other personnel serving with the international coalition, our full confidence in them and the hope that all will return safely to their homes;
7. extends to the innocent people of Iraq its support and sympathy during the military action to disarm Iraq of its weapons of mass destruction and the reconstruction period that will follow; and
8. notes that the Government is committed to helping the Iraqi people, including through humanitarian assistance, to build a new Iraq at peace with itself and its neighbours.

Motion passed by the Senate on 20 March 2003¹³

That the Senate:

- (a) insists that Iraq must disarm under the authority of the United Nations (UN);

¹² Australia, House of Representatives, *Debates* (20 March 2003) Vol 252, p 13,170 (motion put and agreed to).

¹³ Australia, Senate, *Debates* (20 March 2003) Vol 219, p 9,888 (motion put and agreed to).

- (b) believes that in the absence of an agreed UN Security Council resolution authorising military action against Iraq, there is no basis for military action to disarm Iraq, including action involving the Australian Defence Force;
- (c) insists that there should be no commitment of Australian troops to a war in Iraq outside the authority of the UN;
- (d) concludes that Australian involvement in a war in Iraq without UN authorisation is not in Australia's national interests nor in the interests of maintaining international peace and security; and
- (e) expresses its confidence in our service men and women and its full support for them and their families.
- (f) is of the view that the decision of the Australian Government to commit Australian troops to an invasion of Iraq is clearly being done without the authorisation or support of the UN Security Council;
- (g) opposes the decision of the Australian Cabinet and the President of the United States of America (Mr Bush) to commit troops to an attack on Iraq;
- (h) calls for the Australian troops to be withdrawn and returned home; and
- (i) calls on the Australian and the United States governments to continue the policy of containment and disarmament through weapons inspections under the existing UN Security Council authority, as proposed by the governments of France, Germany and Russia.
- (j) calls on the Government to immediately return Australia's 2000 Defence Force personnel home.

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¹ *Migration Amendment Regulations 2003* (No 8) (Cth). These regulations were disallowed by the Senate on 24 November 2003.