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Select Committee on the Constitution

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15th Report of Session 2005–06

# **Waging war: Parliament's role and responsibility**

Volume I: Report

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**NOTE:**

The Report of the Committee is published in Volume I, HL Paper 236-I.  
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References in the text of the Report are as follows:

(Q) refers to a question in oral evidence

# Waging war: Parliament's role and responsibility

## CHAPTER 1: INTRODUCTION AND BACKGROUND

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### INTRODUCTION

1. Under the Royal prerogative powers, the Government can declare war and deploy armed forces to conflicts abroad without the backing or consent of Parliament. However, the Government agreed to a parliamentary vote before the Iraq war in 2003. Subsequently, there have been calls for a requirement that Government should always seek Parliament's approval when taking action in future conflicts.
2. In 2004, the House of Commons' Public Administration Select Committee published a report on Ministers' prerogative powers, recommending that "any decision to engage in armed conflict should be approved by Parliament, if not before military action then as soon as possible afterwards".<sup>1</sup> The Government responded that they were "not persuaded" that replacing prerogative powers within a statutory framework would improve the present position.<sup>2</sup> Since then, three Private Members Bills have been brought forward in Parliament, seeking to give Parliament a greater role in the exercise of these royal prerogative powers, and several leading parliamentarians from across the political spectrum have spoken to similar effect. The primary motive has been to reinforce both the legality and the legitimacy of such action by giving Parliament a role in the decision-making process.
3. The purpose of our inquiry has been to consider what alternatives there are to the use of the Royal prerogative power in the deployment of armed force, whether there should be a more direct role for Parliament and in particular whether Parliamentary approval should be required for any deployment of British forces outside the United Kingdom (whether or not into areas of conflict), or if there is a need for different approaches in different situations, for example in honouring commitments under international treaties or in pursuance of UN Security Council resolutions. Other important issues for consideration have been whether the Government should be required, or expected, to explain the legal justification for any decision to use force outside the United Kingdom, and whether the courts have jurisdiction to rule upon the decision to use force.

### BACKGROUND

#### *The origins and nature of the prerogative*

4. The Royal prerogative derives from the constitutional settlement enshrined in the Bill of Rights 1688, which in effect transferred to Ministers certain rights which were previously the exclusive preserve of the Monarch. It did not abolish the prerogative, but allowed Parliament to take specific steps to

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<sup>1</sup> Taming the Prerogative: Strengthening Ministerial Accountability to Parliament, Fourth Report, Session 2003–04, 16 March 2004, HC 422

<sup>2</sup> Government Response to the Public Administration Select Committee's Fourth Report, July 2004, HC 1262

modify, abolish or put any particular prerogative power on a statutory footing. Thus it would no longer be sufficient for the Crown (or its Ministers) to invoke the prerogative to justify its actions. It would have to show that at common law there was such a power and that it had not been affected by legislation. The prerogative could be “affected” in two ways: a power could be abolished, or statute could give the Crown an alternative basis for acting, on which it must then rely so long as the statutory power remained extant.<sup>3</sup> Today, it is for the courts to decide whether or not and to what extent a prerogative power has been superseded by statute.<sup>4</sup> It should perhaps be noted, for completeness, that prerogative powers can atrophy—the power of impressment into the navy is the usual example—and that the courts can subject the exercise of some prerogative powers to judicial supervision.

5. The nature of the prerogative can be summarised here as
  - Personal discretionary powers, including the rights to advise, encourage and warn Ministers in private; to appoint the Prime Minister and other Ministers; to assent to legislation; to prorogue or to dissolve Parliament; and (in grave constitutional crisis) to act contrary to or without Ministerial advice;
  - The legal prerogative, including the principle that the Crown (or the state) can do no wrong, and that the Crown is not bound by statute save by express words or necessary implication;
  - Certain executive powers, evolving historically from the constitutional convention that the Monarch acted on Ministerial advice, so that prerogative powers came to be used by Ministers on the Sovereign's behalf. Parliament was not directly involved in that transfer of power. Without these powers governments would have to take equivalent authority through primary legislation.
6. The principal executive powers include the making and ratification of treaties; the conduct of diplomacy; the governance of British overseas territories; the deployment and use of the armed forces overseas, including involvement in armed conflict or the declaration of war; the use of the armed forces within the United Kingdom to maintain the peace in support of the police; the Prime Minister's ability to appoint and remove Ministers, recommend dissolutions, peerages, and honours (save for the four Orders within The Queen's own gift); and the issue and revocation of passports.

### *Evolution of the prerogative*

7. In relation to the prerogative, the principal elements of the Bill of Rights 1688 were the abolition of some powers (such as the suspending and dispensing powers) and the modification of others (such as requiring parliamentary authorisation to raise money by taxation or to maintain a standing army). Modern examples of erosion of the prerogative include the War Damages Act 1965 which amended the power to take property in wartime by removing any obligation on the Crown to pay compensation. The immunities from legal proceedings enjoyed by the Crown under the prerogative were abolished and amended by the Crown Proceedings Act

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<sup>3</sup> *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508

<sup>4</sup> *R v Secretary of State for the Home Department ex p Northumbrian Police Authority* [1989] QB 26

1947. The European Assembly Elections Act 1978 imposed a requirement of parliamentary authorisation for certain European treaties before they could be ratified under the treaty-making prerogative.

8. The courts have held that new prerogatives may no longer be created (though a definitive list of what the remaining powers are is lacking). It is sometimes the case that the courts will hold that a prerogative power has survived even though there is legislation in the same field (*Northumbrian Police*, paragraph 4 above and footnote 4). The courts have not challenged the right of Parliament to intervene to alter or remove the prerogative, and there is no constitutional obstacle to Parliament doing so with respect to the deployment power.

## TERMINOLOGY

### *“War” and “armed conflict”*

9. “War” is a term that has both popular and legal connotations. Colloquially, “war” embraces conflicts between the armed forces of states and, occasionally, major internal conflicts such as the British or American Civil wars. “War” as a legal institution is a feature of both international and national law. In international law, the distinguishing characteristic of “war” is the legal equality of the belligerents and the special status of those states not taking part in the conflict (“neutral” states). The condition of “war” could be brought about by a declaration of war but one was not necessary (nor, where there was a declaration of war, were hostilities inevitable). Additionally, states could choose to regard a conflict between them as “war” and apply the legal rules accordingly, or neutrals could insist on respect for their rights. “War” as an institution of domestic law did require a declaration, made in the Monarch’s name but by the Prime Minister, acting under the prerogative. This action triggered domestic consequences—nationals of the opponent state became “enemy aliens”, liable to measures of restraint including detention. Property of enemy aliens was liable to seizure. Statute provided for emergency measures—for the call up of troops, the sequestration of property and so on.
10. The United Kingdom has made no declaration of war since that against Siam (modern Thailand) in 1942, and it is unlikely that there will ever be another. Developments in international law since 1945, notably the United Nations (UN) Charter, including its prohibition on the threat or use of force in international relations, may well have made the declaration of war redundant as a formal international legal instrument (unlawful recourse to force does not sit happily with an idea of legal equality). The courts have recently decided that, as a matter of our constitutional law, the United Kingdom is not at war with Iraq because there has not been a declaration of war. In this report, when we use the word “war”, we use it in the popular sense, conscious of its limitations as a definition suitable to our purposes in the modern world. Otherwise, we shall refer to “armed conflicts”, both international and internal, to cover those situations not falling within the popular idea of “war” but where British forces are sent in anticipation that they will or may be involved in lethal exchanges of force or where British air or naval force is used against targets in another state or in international waters. While “international” and “internal armed conflicts” have become terms of art in international law, we do not use them here in their strict legal

sense but by reference to an assessment of the risk of military action by British forces.

### *The deployment of forces*

11. This report is concerned with military activities outside the United Kingdom. It does not deal with use of the armed forces in aid of the civil power in the United Kingdom. When, today, states use their armed forces to promote their own or common interests internationally, such activities would not always fall within even the most elastic popular conception of “war”; but they may nonetheless involve risks to the lives of British troops and those against whom they are authorised to act. We describe some of these operations in paragraph 27. The categories of “armed conflicts” are so various and the risks so different that generalisation may be difficult, but the thread which holds them together is that the State contemplates that its armed forces will be sent into action abroad in the course of which they may have to kill and to risk being killed. Sometimes forces will be sent to “conflict” locations where a state of war exists or is anticipated. But there are circumstances when deployment is not expected to involve the use of force (for example peacekeeping) but where the possibility—and the risk of casualties—exists. A third category is when forces are deployed to locations where there is no real risk of armed conflict, for example to assist with humanitarian relief. Finally, forces may be deployed abroad for training, representational or other similar non-combatant purposes. In all cases, however, the decision to deploy is exercised under the prerogative. The power to commit those forces abroad will be referred to in this report as the “deployment power”.

### *The exercise of the prerogative*

12. It is commonly accepted that the prerogative’s deployment power is actually vested in the Prime Minister, who has personal discretion in its exercise and is not statutorily bound to consult others, although it is inconceivable that he would not do so in practice. In this report we and witnesses have variously used such terms as “the executive” or “the government” in referring to the exercise of the power. Except where the context plainly indicates otherwise, these two phrases, and “the Prime Minister” should be regarded as mutually interchangeable.

### *Operational control*

13. In addition to these definitions, we identify an important exclusion. Constitutionally, the armed forces of the United Kingdom are the forces of the Crown and the Monarch is the Commander in Chief. Thus, the prerogative over their disposition not only includes the ultimate power to send forces to war but operational questions regarding, for instance, their formation and armaments. The majority of witnesses who advocated change to the exercise of war-making powers by transferring them to Parliament sought to create limitations to the exercise of the deployment power itself, but not to the way in which operational matters are decided. Asked to comment on the proposition, witnesses in general, including all those with a military background, were of one mind in declaring that operational control had to remain with the professionals<sup>5</sup>. We acknowledge and endorse this

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<sup>5</sup> For example, Field Marshal Lord Bramall (Q117): “... under no circumstances must parliamentary approval be allowed to go into the tactical field or ... the way you carry out the operation”

position and do not, in this report, question the principle that the conduct of military operations—as opposed to the decision to mount them—should remain the exclusive responsibility of military commanders. At the same time we should add that, clearly, the greater the clarity on the part of Government of their objectives in determining the mission objective, the more this assists military commanders in executing that responsibility.

### CONSTRAINTS ON THE DEPLOYMENT POWER

14. The power to deploy the armed forces is not absolute. The Government are of course subject to certain constitutional constraints, including the general principle of their accountability to Parliament for the exercise of their powers. Government may also require the agreement of Parliament for financial provision for military deployment, although this was a more significant check on the Monarch's exercise of the prerogative in the past than it is for any Government which commands a majority in the House of Commons. Supply for deployments may be obtained from within the ordinary defence appropriation or from the contingency fund in an emergency. Otherwise, it is an item in the Budget, sometimes subject to special funding arrangements. The additional costs of spending in Iraq have been met from a special reserve set aside by the Treasury in 2003 and topped up from Budgets since. For instance, the Budget in 2006 contained provision for £800m for Iraq and Afghanistan and other international commitments and £200m for peacekeeping. In answer to a question about Afghanistan, the then Secretary of State for Defence said:
 

“When we have embarked on unexpected deployments—and over a period of years until 9/11, Afghanistan was unexpected—the Chancellor has been prepared, sometimes under very difficult circumstances, and in addition to the money spent on maintaining the defence posture, to support Her Majesty's armed forces in the tasks that this House asks them to carry out.”<sup>6</sup>
15. Judicial rulings from 1985 removed the complete insulation of the exercise of prerogative powers from review by the courts, although there is a lack of clarity over which of them might be subject to judicial control, and to what extent. Some powers however remain beyond judicial review because there are no legal standards by which to assess their exercise. Among these are the powers to make treaties and defend the realm.<sup>7</sup> In chapter 2 we look in more detail at the legal constraints on the deployment power, but note here that while the occasions have been few, the domestic courts have consistently held that the exercise of the umbrella power of deployment and its various subsidiaries are beyond their supervision.<sup>8</sup>
16. In summary, the deployment power's status as a prerogative power means that there are few restrictions to its use, other than those that have arisen from precedent or convention. Parliament has no formal role in approving deployments, although governments have usually kept Parliament informed about the decision to use force and the progress of military campaigns<sup>9</sup>. The

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<sup>6</sup> HC Hansard 26 January 2006 col 1546.

<sup>7</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374

<sup>8</sup> See, for example, *Chandler v DPP* [1964] AC 763; *Campaign for Nuclear Disarmament v Prime Minister (CND)* [2002] EWHC 2759 (QB).

<sup>9</sup> A useful, but selective, summary of parliamentary debates on military deployments since 1939 can be found in the House of Commons Library research paper 05/56 of 8 August 2005

decision to invade Iraq in 2003 was the first time Parliament had voted on a substantive motion to deploy forces into conflict before fighting had begun since the Korean War in 1950. While the armed forces are technically subject to statutory control because legislative authority is needed for the Crown to maintain a standing army in time of peace, their use is for the Government alone to decide. Generally speaking, however, the deployment power is one to which no statutory or legal standards can be applied, and the courts have been reluctant to use arguments based on international law as a standard for assessing the legality of government decisions.<sup>10</sup> It is difficult to envisage how legal standards could be established, since precise lines cannot easily be drawn between the various tactical operational decisions that might be taken—for example to send troops into that town today, or to use air power rather than artillery. Even a decision to commit armed force at all may be qualitatively less significant in a legal sense than major in-theatre operational decisions, for example to escalate an existing conflict or to extend an area of operations. One only needs to recall the “Belgrano” incident during the Falklands campaign to see how controversy may develop.

17. British forces are nowadays rarely deployed overseas by unilateral British governmental decision. There have been instances of deployments of wholly British forces following a solely British decision, for example the Falklands in 1982 and Sierra Leone in 2000, but more often deployment is part of coordinated action in partnership with allies (whether or not through an international organisation like NATO). In some cases, such deployments have lacked formal authorisation—in international law terms—like UN Security Council (UNSC) resolutions. In other cases, the UNSC may establish a UN force to which states might contribute their armed forces for peace-keeping or peace-building (such as the UN Protection Force in Bosnia-Herzegovina between 1992–95), or it may authorise one or several states to use force with a mandate and on conditions set out by itself (for example the authorisation to states to use force in support of Kuwait in 1991).<sup>11</sup> Such “multilateral” operations might involve many thousands of personnel, from all the armed services, down to a handful from a single service. In evidence, the Geneva Centre for the Democratic Control of Armed Forces drew attention to what it called the “double democratic deficit” of the use of force under such international auspices, arguing that there was inadequate accountability at the domestic level in some states, not compensated for at the international level of decision-making<sup>12</sup>.
18. Although some witnesses have suggested that the entire class of prerogative powers requires re-assessment, and this was also the view of the House of Commons Public Administration Select Committee in its report two years ago,<sup>13</sup> in this report we focus solely on the power to deploy armed forces overseas. This is arguably the most serious decision that can be taken by a government, and we hold the view, shared by several witnesses<sup>14</sup>, that its

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<sup>10</sup> For a recent example, see *R v Jones et al* [2006] UKHL 16, where the criminality under international law of the attack on Iraq was not pursued by the court.

<sup>11</sup> UNSC resolution 678.

<sup>12</sup> Volume II: Evidence, Page 213; H Born and H Hanggi, “The Use of Force under International Auspices: Strengthening Parliamentary Accountability”, Geneva Centre for the Democratic Control of the Armed Forces, Policy Paper No.7, 2005)

<sup>13</sup> Taming the Prerogative: Strengthening Ministerial Accountability to Parliament, Fourth report, 2003–04, HC Paper 422

<sup>14</sup> For example, Tony Benn QQ 2, 4; Clare Short Q 4; Peter Facey Q 180

consideration should be given priority, especially because of the public concern that has been expressed on the subject since the decision to join the coalition which invaded Iraq in 2003. Our focus on one prerogative power, rather than the entire class, also reflects the reality that the historical process of transforming the status of prerogative powers has, for the most part, been an incremental and evolutionary one. It has also attracted the most interest from parliamentarians—private members bills on or including proposed measures on the matter have been sponsored by Neil Gerrard MP, the Rt Hon Tony Benn, Lord Lester of Herne Hill and, in the current parliamentary session, the Rt Hon Clare Short MP (see paragraph 80).

19. The United Kingdom's constitution is a combination of statute, common law and unwritten convention, with the result that it is flexible and constantly evolving. There are therefore dangers in seeking to compare our constitutional practice with that of other nations, most of which have written constitutions with complex procedures for their amendment, and there is perhaps only limited advantage in trying to draw lessons from them. Nevertheless, there is a greater degree of parliamentary involvement in deployment decisions in some other countries, and information about their practice can be instructive. We therefore attach at Appendix 4 a summary of the processes followed by other states in reaching decisions on the deployment of military force overseas.

## CHAPTER 2: POLITICAL AND LEGAL FACTORS INFLUENCING THE DEPLOYMENT POWER

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### *Wars of necessity and wars of choice*

20. Historically, the British constitutional arrangements for deploying armed force have been an unconstrained instrument of foreign policy, to protect, promote—or even, in the nineteenth century, expand—British overseas interests; to play a part in maintaining the balance of power in Europe; and to punish those who sought to thwart those purposes. Today, certainly since the Second World War, and perhaps since the Kellogg-Briand Pact (Paris 1928) by which states agreed to renounce war as an instrument of policy, there are treaty restrictions on this freedom.
21. Nevertheless, although the nature of war may have changed, resort to military force remains an instrument of policy. Some wars, for example of self-defence (like the restoration of sovereignty in the Falklands), serve precisely the same purposes as they ever did and have been described as “wars of necessity”. But the phenomenon of military intervention for reasons other than to preserve the state’s own vital territorial interests, sometimes called “wars of choice”, could only be categorised as being waged in the national interest if that “interest” is given a very broad definition. In evidence, Professor Freedman described this “discretionary” approach to intervention in civil conflicts in third countries as “a very difficult choice that faces government so that sometimes you get involved, belatedly in Bosnia, more quickly on Kosovo,” and contrasted the American use of force in Somalia, where “they got burnt,” and the consequent lack of it in Rwanda.<sup>15</sup>
22. Professor Freedman also told us that unlike wars of necessity, which arise from attack or an imminent threat of one and often require instant use of the deployment power, the decision to engage in wars of choice frequently evolves more slowly, allowing governments to weigh up the factors involved before deciding whether and how to intervene.<sup>16</sup> The justification for such interventions varies—to relieve an occupied state, peacekeeping or peace enforcement, to mitigate or prevent a humanitarian disaster, or rescue nationals. On the other hand, Sir Lawrence categorised the “pre-emption” in Iraq in 2003 as “quite unique ... a decision on the basis not that there was an immediate threat but that if they did not act a threat could develop.”<sup>17</sup>
23. We conclude that there are two broad considerations which might influence the decision to use the deployment power in a “war of choice.” One is a sense of political, even moral, obligation to take action (for example over Kuwait in 1991, Sierra Leone in 2000). The other is a judgment that circumstances at the time created a pressing security need to act (destroying the Taliban in Afghanistan after 9/11; it was also at least part of the Government’s case for action against Iraq in March 2003).

### *Treaty and other international obligations*

24. We were assured that “wars of obligation really do not exist.” Ms Elizabeth Wilmshurst added that Article V of the NATO Treaty was so broadly drawn

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<sup>15</sup> Volume II: Evidence, Q 131

<sup>16</sup> Volume II: Evidence, Q 124

<sup>17</sup> Ibid

that “no country would consider that it had to produce its military if its Parliament did not want to.”<sup>18</sup> Professor Greenwood agreed. We note that Article V of the NATO Treaty, which is the core of the alliance’s commitment to collective self-defence, only commits an individual signatory to take “such action as it deems necessary” in the event of an attack on another. Similarly, Ms Wilmshurst told us, “it is not conceivable that the Security Council would impose an obligation on the United Kingdom.” We believe this means that while the UNSC can authorise willing states to use force for the purposes and on the conditions established by the Council, it cannot compel them to do so.

25. We include in Volume II a summary, compiled for us by the Foreign and Commonwealth Office, of formal commitments to consider military assistance to other states which might request it. In a written submission<sup>19</sup> the Foreign and Commonwealth Office provided us with details of formal commitments of a defence related nature with other states. Not all of the texts of the treaties are readily available, but Dr Howells<sup>20</sup> covering letter says none of them creates a legal requirement automatically to provide military support to other countries since every deployment ultimately requires a separate and independent decision by the United Kingdom government. Dr Howells also emphasised that “there is, of course, a difference between a legal requirement to deploy military forces created by international treaties, and a political expectation of military deployment”. He considers that there are four treaties which probably create the strongest sense of general political expectation, namely the North Atlantic Treaty, the Treaty of the European Union, the UN Charter and the Brussels Treaty establishing the WEU, but all four “preserve the fundamental principle that the United Kingdom armed forces cannot be deployed without a sovereign decision by the United Kingdom government.” Many other agreements which might be regarded as creating a political expectation of deployment are with former colonies and concern their security within their own region, for example with Belize, from its independence in 1981 until 1994; although there is no longer a treaty basis for consultations, British governments have made it clear that they would take very seriously any threat to Belize.
26. British forces have in the past been deployed in answer to requests from treaty partners, such as the support given to Malaysia in the “Confrontation” with Indonesia from 1963. Professor Freedman drew our attention<sup>21</sup> to a report published by the Human Security Centre<sup>22</sup> demonstrating that since the end of the Second World War Britain has been involved in more military operations than any other country, including the United States. The report notes that “only a minority of the wars that [former colonial powers] waged were against anti-colonial independence movements—most were either interstate conflicts or interventions in intrastate wars.”<sup>23</sup>
27. The Ministry of Defence (MOD) helpfully supplied us in confidence with details of more than sixty British deployments since 1990. Most were actions

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<sup>18</sup> Volume II: Evidence, Q 87

<sup>19</sup> Volume II: Evidence, Page 131.

<sup>20</sup> Dr Kim Howells, MP, Minister of State, Foreign and Commonwealth Office.

<sup>21</sup> Volume II: Evidence, Q 131

<sup>22</sup> Human Security Report 2005: War and Peace in the 21st Century, University of British Columbia, Canada

<sup>23</sup> Ibid, page 26 and Figure 1.3

in cooperation with other states and/or under UN authorisation (although deployments in Iraq and in the former Yugoslavia were made without UN authorisation). The majority were operational deployments subsequent upon initial major decisions to deploy in response to particular international situations which included:

- In the Arabian Gulf and Iraq: in response to the Iraq invasion of Kuwait in 1991; the enforcement of the no-fly zones in Iraq; and the coalition operations in Iraq since March 2003.
- In the Balkans, contributions to the UN Protection Force (UNPROFOR); the NATO-led implementation force (IFOR) and the subsequent stabilisation force (SFOR); and to NATO operations in former Yugoslavia, Kosovo (KFOR).
- The Sierra Leone evacuation of British nationals following internal rebellion, and subsequent support for the UN and Sierra Leone army.
- In Afghanistan, operations against al-Qa'eda and the Taliban in support of the USA, following terrorist attacks on 11 September 2001, and the recent deployment to southern Afghanistan as part of the UNSC authorised operation, the International Security Force in Afghanistan (ISAF).

There were numerous other minor deployments including very small numbers of personnel deployed, for example as a part of the cease-fire monitoring force sent under UN auspices to Western Sahara. In the period from 1991 to 2005, there was no action in self-defence against an attack against United Kingdom territory. Where action was taken by British decision and British forces alone, it was almost always for the protection of British nationals. The operations involved all three services, sometimes acting together. Forces were sometimes sent out, especially naval vessels, in anticipation of a need for action (usually evacuation) which did not materialise. The information provided by the MOD did not include information about Special Forces operations, the strategic deterrent and routine maritime policing, or about training missions and humanitarian (disaster relief) operations. The MOD was unable to identify what procedures had been followed to inform Parliament of the deployments summarised in its list, but it seems to us that nearly all could have been subject to prior parliamentary notification without jeopardizing the security of the deployments.

#### *Deployment and domestic law*

28. As noted in paragraph 15 above, the United Kingdom's courts have taken the view that the exercise of the deployment power is neither justiciable nor subject to review in domestic courts. In consequence, not only is the exercise of the power immune from judicial review, but such actions are legal as a matter of domestic law. This in turn means that acts by individual members of the armed forces, of whatever rank, in the execution of a deployment order are themselves lawful. A serviceman is protected from legal liability for the discharge of his orders: a killing in action in the course of the conflict will be justifiable homicide not murder; certain detentions will be lawful and not amount to false imprisonment. This also means, however, that it is not open to a member of the armed forces to rely on domestic law to refuse to obey an

order consequent upon a deployment, because such orders are lawful.<sup>24</sup> The present position holds out certainty for troops about their individual liability in conflict situations.

29. In chapter 4 we consider the legal implications of putting the deployment power on a statutory footing. It is worth noting here, however, that some witnesses were concerned that the introduction of legal standards by which to judge the lawfulness of a deployment could undermine the legal certainty mentioned above. Professor Rowe, for example, said that “if the law is changed or the constitutional arrangements are changed so as to make the situation less clear to the soldier, I think that is a retrograde step.”<sup>25</sup>

### *International law*

30. Given the absence of legal restraint on the deployment power under domestic law, the rules of international law on the use of force take on an enhanced significance as the only apparent limitation on the prerogative. Domestic legality does not pre-empt international law. In other words action, which may not be unlawful under domestic law, could be in violation of international law. In this context, it is necessary to make a distinction between those rules which regulate the right of states to use military force and those—the laws of war or International Humanitarian Law (IHL)—which govern the conduct of hostilities and certain other matters, such as the occupation of foreign territory. As regards deployment powers, the centrepiece of international law is the United Nations Charter, which states that “all Members shall settle their international disputes by peaceful means” (Article 2(3)), and that “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” (Article 2(4)). Article 51 allows for “the inherent right of individual or collective self-defence”.
31. There is no international court with automatic jurisdiction over states and it would be unusual for action against a state about the lawfulness of a use of force to reach the International Court of Justice—though not impossible: at one stage, the United Kingdom was a defendant in an action brought by Serbia, which argued that the bombing of its territory in 1999 (in connection with events in Kosovo) was contrary to international law. The International Criminal Court (ICC), which has jurisdiction over individuals rather than states, does not presently have jurisdiction over “aggression” (though work is going on to set that up). The UN Security Council is a political body which does not reach authoritative conclusions on the law, though it may, for its own purposes, determine that an “act of aggression” has occurred. The powers of the Security Council under Chapter VII extend to imposing mandatory non-forcible measures against a state (such as a trade embargo) and to authorising States to use force against or on the territory of another state under a mandate established by the Council. Decisions of the Security Council under Chapter VII are subject to the veto of the permanent members, so that authorisation to use force depends on no permanent member being opposed to a proposal to authorise its use.

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<sup>24</sup> On 13 April 2006, Flt Lt Malcolm Kendall-Smith was jailed by a court martial for refusing to obey orders relating to his return to Iraq. Kendall-Smith’s defence that the attack on Iraq was unlawful under international law was dismissed as irrelevant to the reasons for the present deployment of British forces in Iraq. There was no argument based on illegality in UK law which he could have raised ([www.bbc.co.uk/1/hi/scotland/4832282.stm](http://www.bbc.co.uk/1/hi/scotland/4832282.stm)).

<sup>25</sup> Volume II: Evidence, Q 75

32. The situation is different, however, in the case of breaches of IHL. The Minister of State for the armed forces told us that “once a conflict actually begins, whatever the legal basis for this participation, it is conduct by all participants as required by the body of law in rules known as the International Humanitarian Law. The four Geneva Conventions of 1949 are a part of that IHL. The United Kingdom is also bound by a number of other conventions and protocols, such as the first additional protocol to the Geneva Conventions ... Those are not our laws. We apply them. Those have been defined elsewhere and we simply live within them, so to speak”. Mr Ingram added that “all of our personnel are so trained in understanding the basis upon which they are having to conduct themselves in a conflict situation and it is very much part of the whole training process”<sup>26</sup>. Individuals (and in some cases their commanders) suspected of violations of IHL such as killing prisoners of war, the ill-treatment of detainees in occupied territory or the use of prohibited weapons must be considered for prosecution in national courts. The Government has said, in the context of the ICC, that all allegations of this kind would be stringently investigated and, where appropriate, criminal proceedings instigated. This duty, which mainly derives from the Geneva Conventions, has gained in importance following the United Kingdom’s acceptance of the Statute of the ICC. The prosecution of those alleged to be responsible for serious violations of IHL is within the jurisdiction of the ICC, but only where the proceedings in national law have been unsatisfactory or non-existent. The Government’s position has been that there will never be prosecutions against British servicemen before the ICC because there always will be adequate national investigations, followed, where required, by prosecutions.
33. It is clear from paragraph 32 above that it is difficult if not impossible to adjudicate on the lawfulness of a state’s decision to deploy forces into conflict. In reality, judgements are usually political ones taken at the United Nations. General Assembly resolutions have no legal status, but a Security Council decision—whether ordering an aggressor to desist or authorising deployment of force to repel him—has the force of international law. If a government, in the absence of a specific resolution or in doubt about the applicability of an existing one, wished to verify whether contemplated action was consistent with the provisions of international law, it would need to take expert advice. In the case of the United Kingdom, this advice would be provided, confidentially, by the Attorney-General.
34. We consider the provision of legal advice in more detail in chapter 4, in particular the Attorney-General’s duty to Parliament, but it is relevant here to note that the Attorney-General’s duty to the Government is to offer advice on the facts, not the tactics: Lord Goldsmith emphasised that “it is not the Attorney-General’s job to construct a legal case for a policy which in fact does not have a proper legal base ... It is the job of the Attorney-General to give his best and honest independent opinion of whether or not the course of action which he is being asked to advise on is lawful or not.”<sup>27</sup>

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<sup>26</sup> Volume II: Evidence, Q 302

<sup>27</sup> Volume II: Evidence, Q 239

### CHAPTER 3: PARLIAMENTARY INVOLVEMENT: THE BALANCE OF ARGUMENT

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35. We have heard a range of arguments both in favour and against increasing parliamentary involvement in decisions about the deployment of armed forces. The exact impact of any change would, of course, depend upon the way in which that “involvement” was implemented, which we consider in chapter 4. In referring to Parliament, we mean both Houses, but it will be seen from the context that some witnesses tended to focus their thoughts on the House of Commons alone.

### THE BENEFITS OF INCREASING PARLIAMENTARY INVOLVEMENT

36. Witnesses have suggested that the need for greater parliamentary involvement in the decision to deploy armed forces overseas stems from two main concerns with the current process: legitimacy and accountability. The questions over legitimacy focus on the source of authority and exercise of the power. Concerns over accountability include suggestions that historical checks and balances have been undermined, and that there are weaknesses in current arrangements for scrutiny, and poor processes for decision-making.

#### *Legitimacy: Source and Exercise of the Deployment Power*

37. A key concern over the current deployment power is one of constitutional principle: that Parliament should be the source of the Government’s power and not the Crown. Lord Lester regarded the key question about the deployment power to be: “should it be Parliament that is Sovereign, to whom the executive is constitutionally accountable, or should it be the Monarch?” He considered it anomalous for the Crown to be able to exercise public powers without parliamentary authority, on the basis of mediaeval notions of kingship and through Crown Ministers.<sup>28</sup> Mr Sebastian Payne agreed: “Parliament should be the source of Government’s power,” a position also taken by Professor McEldowney.<sup>29</sup> In oral evidence, Professor Bell noted that the principle of the rule of law, on which governments exercise power in most constitutions in Europe, means that there has to be a specific authorisation to exercise powers. Therefore, “having a rule about authorising the exercise of powers is just a natural consequence of that principle”.<sup>30</sup>
38. A number of witnesses considered that the extremely serious nature of the decision to deploy armed forces—involving possible loss of life and national consequences—meant that it should necessarily be undertaken, or approved, by Parliament:
- “the use of military force is so important, it is a unique capability where the state authorises the use of lethal force ... that Parliament must necessarily take a view on when and where it is used, if it is to be used.”<sup>31</sup>

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<sup>28</sup> Volume II: Evidence, Q 3; see also Tony Benn, Volume II: Evidence, Page 1.

<sup>29</sup> Volume II: Evidence, Q 79 and Professor McEldowney, Volume II: Evidence, Page 228.

<sup>30</sup> Volume II: Evidence, Q 82

<sup>31</sup> Lord Garden, Volume II: Evidence, Q 110

- “the authorisation to send men and women into situations which are dangerous ... and which might have enormous national consequences should be taken by a sovereign democratic body. In the United Kingdom this is the Houses of Parliament.”<sup>32</sup>
  - “If you tell young men in the Services that they have got to go under orders and kill, and may be killed, you are talking about the most important decision literally in their lives and that should not be taken other than by a democratic vote in the House of Commons, in Parliament.”<sup>33</sup>
39. The former Attorney-General Lord Mayhew of Twysden considered the exercise of the power to be out-of-date in the modern world: “I do not think today that it is practicable to suppose that the public will be satisfied in terms of confidence in the commitment of our Armed Forces to what we might call an ‘armed conflict’ situation solely on the exercise of the prerogative by the Prime Minister”.<sup>34</sup> We also heard evidence to suggest that procedural legitimacy and credibility is necessary if civil society is to accept the sacrifices asked for in a conflict.<sup>35</sup>

#### *Increased Accountability of Decision-making*

40. Several witnesses advocated greater parliamentary involvement on the grounds that the current deployment power lacks sufficient accountability or restraint. As we noted in paragraph 14, it could be said that the ability of United Kingdom governments to use the royal prerogative power to engage in conflict is paradoxically less democratic than when the Monarch exercised the power personally. In the past, the Monarch’s power to make war and deploy armed forces was checked by Parliament’s control of the resources necessary for the exercise of the power. Now, the Government of the day not only exercises the royal prerogative but also generally controls the House of Commons and therefore its power over finance—through parliamentary majorities, use of the Whips and control over the parliamentary timetable—thereby undermining this historical brake on executive power.<sup>36</sup>
41. By contrast, the Government insists, as it did when responding to the PASC inquiry, that the current process is sufficient: “In the United Kingdom, ministers are accountable to Parliament for all their actions. Therefore Parliament is always in a position to hold the executive to account in any way it sees fit”.<sup>37</sup> Others agreed that the current system provides adequate opportunities for Parliament to hold Ministers to account for their actions: “The existing system of ministerial accountability permits immediacy of response by Parliament to situations which are complex, unpredictable and highly varied in their nature”.<sup>38</sup>

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<sup>32</sup> David Berry, Volume II: Evidence, Page 209

<sup>33</sup> Tony Benn, Volume II: Evidence, Q 2

<sup>34</sup> Volume II: Evidence, Q 214

<sup>35</sup> Dr Ziegler, Volume II: Evidence, Q 84

<sup>36</sup> Anthony Tuffin, Volume II: Evidence, Page 243; also see New Politics Network, Volume II: Evidence, Page 92.

<sup>37</sup> Volume II: Evidence, Page 120.

<sup>38</sup> Professor Eileen Denza, Volume II: Evidence, Page 214.

42. However, some witnesses questioned the effectiveness of these accountability measures in practice. The Rt Hon Kenneth Clarke MP considered that parliamentary discussion preceding both the Falklands and Kosovo engagements curtailed real accountability:

“I think on both occasions the Government, when it had parliamentary debates, put down motions on the adjournment precisely to make sure that there was no substantive vote taking place at any stage. The whole thing was used more as a process of explanation and persuasion than it was of giving Parliament a real way to challenge the decision and to be accountable fully, which I think means throwing down before Parliament the opportunity to reject this policy if it wants to before any military action takes place.”<sup>39</sup>

Air Marshal Lord Garden pointed out that “When we keep on saying Parliament is informed, we all know how Parliament is informed: we get a statement, if we are lucky we get it ten minutes before it is given and we debate it for under an hour. That does not seem to me to be a democratic process”.<sup>40</sup>

43. This view was echoed in other evidence. Professor John McEldowney, for example, told us that Parliament relies on the Government to provide sufficient information and allow debate. He thought the lessons of the Iraq war were that the Government could set the agenda, identify the issues and provide its own publicity on the need for military action and its subsequent outcome, leaving Parliament relatively weakened.<sup>41</sup> Democratic Audit considered the current system of Ministerial accountability to Parliament to be too broad, retrospective and vulnerable to executive power to be an effective check on the Prime Minister’s use of the prerogative.<sup>42</sup> Accountability was also described as problematic because, in line with all prerogative power, it is “dependent on the goodwill of the executive or the existence of a convention that Parliament should be informed”.<sup>43</sup> Dr Ziegler told us that parliaments could be marginalised by lack of information (at any rate in time to influence their decisions) or by being confronted by *faits accomplis*: “this is known as the de-parliamentarisation of decision-making”.<sup>44</sup>

### *“Better” decision-making*

44. Other witnesses proposed that a change to the current deployment power was necessary because the highly personalised nature of the royal prerogative power leads to poor processes of decision-making. Clare Short told us that because the royal prerogative power is exercised by the Prime Minister alone—without any formal requirement for scrutiny or discussion—this can lead to decisions being taken in a “vacuum”. A requirement for scrutiny by Parliament, she argued, might lead to better considered and prepared decisions: “If any Prime Minister knew that he had to bring before the House of Commons—and maybe both Houses ... a full statement of why and the analysis, I think that means the whole issue would have to be better scrutinised, better thought through, better prepared and the decision would

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<sup>39</sup> Volume II: Evidence, Q 309

<sup>40</sup> Volume II: Evidence, Q 121

<sup>41</sup> Volume II: Evidence, Page 228

<sup>42</sup> Volume II: Evidence, Page 88; also Sebastian Payne, Volume II: Evidence, Page 17

<sup>43</sup> Sebastian Payne, Volume II: Evidence, Page 17

<sup>44</sup> Volume II: Evidence, Page 56 (section III)

be better made”.<sup>45</sup> Lord King of Bridgwater also considered that there was a need for post-deployment scrutiny of ministerial decisions to ensure people “understand they have to answer for their account”. He described the current instinctive reaction of the Armed Forces as, “to stand to attention, to salute and say, ‘If that’s what you want, Secretary of State, of course we’ll do it,’ and only afterwards that you find that they actually suggested something absolutely ludicrous”.<sup>46</sup>

*The impact on military morale*

45. Several witnesses suggested that more legitimate decision-making would result in greater support for deployment decisions among the public, senior military figures and serving troops. This opinion was evinced by a number of retired leaders of the Armed Forces. General Sir Michael Rose told us:
- “It would be enormously advantageous to members of the armed forces for such a formal and legal justification to be made by the government before entering into armed conflict. There can be no more debilitating effect on the morale of members of the armed forces for them to know that their country does not support the mission or that the case for war is based on doubtful moral or legal arguments. A proper justification should always be a *sine qua non* for engaging in conflict. A formal requirement for prior parliamentary authorisation for entering into conflict situations can therefore only be of benefit to members of the armed forces.”<sup>47</sup>
46. Lord King also believed “very strongly indeed” that it was important to the morale of the Armed Forces to know that the country is really behind them.<sup>48</sup> Field Marshal Lord Bramall considered that the Armed Forces would like to know three things before being committed to a large scale military operation; that they had the support of the country; that they had the support of Parliament and that what they had been asked to do was legal.<sup>49</sup> He placed slightly less emphasis on the importance of this later in his evidence: “it is obviously better if [a soldier is] thinking that you have got the cause and the people are behind you” but, “I do not want to put too much stress on it because even if it was not I think most of them would still do their duty but yes, it would be better”.<sup>50</sup> Air Marshal Lord Garden considered that approval by Parliament before the use of military force should be the “default position”, because “people should, through their elected representatives, have a say when such an important authorisation is given” and “the military need to know that what they are doing is legal”.<sup>51</sup> He thought Parliament’s “stamp of approval” would help that process.
47. The Armed Forces Minister, The Rt Hon Adam Ingram, MP, told us that in his opinion morale is affected by operational considerations, such as equipment, good leadership and a clear mandate coming down through the chain of command, rather than, for instance, the public debate about the

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<sup>45</sup> Volume II: Evidence, Q 2

<sup>46</sup> Volume II: Evidence, Q 170

<sup>47</sup> Volume II: Evidence, Page 241.

<sup>48</sup> Volume II: Evidence, Q 151

<sup>49</sup> Volume II: Evidence, Q 109

<sup>50</sup> Volume II: Evidence, Q 112

<sup>51</sup> Volume II: Evidence, Q 110

second Iraq war.<sup>52</sup> Indeed, we heard mixed evidence about what might be the impact on the morale of the troops of changing the deployment-power. The contrasting view on the effect on morale of greater parliamentary involvement is discussed below in paragraph 59.

### **ARGUMENTS AGAINST INCREASING PARLIAMENTARY INVOLVEMENT**

48. A range of arguments against increasing parliamentary involvement in the decision to deploy armed forces was outlined to us. In summary, they related to concerns about the possible detrimental effect on operational effectiveness and coalition-working; the importance of maintaining executive authority over the decision; the difficulties Parliament might have in reaching an informed decision; the legal impact if legislation were put in place and the detrimental effect this may have on Armed Forces morale.

#### *Undermining effectiveness of operations*

49. Several witnesses regarded operational efficiency to be the key benefit of the present deployment arrangements, and one which could be undermined by greater parliamentary involvement in the process. Field Marshal Lord Vincent of Coleshill said that the success of many military operations relies on the need to maintain “secrecy, security and surprise”.<sup>53</sup> Admiral Lord Boyce summarised his concern:

“... all my experience over conducting or being involved with the conduct of several wars over the last five or six years or so is that those allies who go through the parliamentary process are frankly in my view not as operationally effective as those who do not ... I cannot see any advantage whatsoever in shedding the current practice of going to war from an operator’s point of view. I believe it would make us operationally far less effective and we would probably start to lose.”<sup>54</sup>

50. General Sir Rupert Smith also considered that an open debate about whether or not to deploy Armed Forces could risk compromising their effectiveness, which he considered to be greatly enhanced by the opponent’s current expectation that “we will fight to win and that the popular will at home is more or less disaster-proof”.<sup>55</sup> Lord Boyce told us that an open debate in Parliament on deployments could undermine six key aspects of Armed Forces operations:

- escalating the conflict through rhetoric;
- skewing decisions through access to only limited information (since a great deal of intelligence cannot be revealed in public);
- compromising operational security by publicly discussing too much detail prior to action;
- impairing flexibility of operational response if parliamentary approval is required for every change of the situation on the ground;

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<sup>52</sup> Volume II: Evidence, Q 269

<sup>53</sup> Volume II: Evidence, Q 107

<sup>54</sup> Volume II: Evidence, Q 107

<sup>55</sup> Volume II: Evidence, Q 106

- undermining clarity about the timetable for preparation, if it is contingent on a parliamentary debate or vote;
- removing the ability of United Kingdom Forces to have “strategic poise” by giving the opponent early notice of intent.<sup>56</sup>

### *Coalition-working*

51. Mr Ingram told us that in his experience coalition partners liked to work with British units because the current process gave the Government the capacity to make quick decisions about deployments and to provide wide mandates for British forces.<sup>57</sup> He gave as an example the intervention by Kosovo-based British troops in civil unrest in the area in 2005, when a United Kingdom force was assembled and deployed in circumstances in which other countries’ forces could not respond because of the limited terms on which they had been committed. Indeed, the British government had actively sought to encourage new NATO members to establish fast parliamentary decision-making processes about deployments, because:

“it facilitates the bringing together of coalitions as early as possible. It does not mean to say that you don’t plan properly, it just means you have got quick processes to deal with the threat, because the military chain of command requires that of the political masters. They need clarity. They need to know what the mandate is and anything which puts delay, confusion or uncertainty into it detracts the military planners from their prime role, which is looking after our interests.”<sup>58</sup>

Witnesses referred to the deployment of troops in Afghanistan, contrasting the procedure in the United Kingdom with that in the Netherlands. Lord Boyce deprecated the delay and uncertainty caused by the negotiations between government and parliament in the Netherlands,<sup>59</sup> whereas Professor Weir held it out as an example of proper decision making.<sup>60</sup>

### *Maintaining executive responsibility for action*

52. We have heard evidence to suggest that the responsibility for taking the decision to deploy armed forces should very clearly rest with the executive and not be dictated by the immediate views and reactions of Parliament or of the people. The Government has clearly stated that “the power to deploy troops is an executive power. Such decisions are by their nature most suitable for the executive to take”.<sup>61</sup> Professor Denza also considered the decision to be essentially an executive one: “While the government which has taken it should be required to explain and justify its decision to Parliament and to the people, the decision itself should not be dictated by the immediate views and reactions of Parliament or of the people”.<sup>62</sup>

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<sup>56</sup> Volume II: Evidence, Q 107; also see Professor Freedman, Volume II: Evidence, Q 122

<sup>57</sup> Volume II: Evidence, Q 304

<sup>58</sup> Volume II: Evidence, Q 304

<sup>59</sup> Volume II: Evidence, Q 119

<sup>60</sup> Volume II: Evidence, Q 209

<sup>61</sup> Lord Falconer, Volume II: Evidence, Q 270

<sup>62</sup> Volume II: Evidence, Page 214; also see Sebastian Payne, Volume II: Evidence, Page 117

53. There was also concern that any increase in the involvement of Parliament might lead to attempts to pre-empt operational decisions. Although we also heard some evidence to suggest that parliamentary involvement in detailed considerations was desirable,<sup>63</sup> the majority of views did not favour this approach:

“the tactical deployment of troops is very much a matter ... for the officer commanding ... The idea that Parliament will then second-guess that as well is I think quite difficult ... [Parliament] must not take away from where executive authority and responsibility has to lie and hold people accountable”.<sup>64</sup>

“If anybody was so foolish as to table a motion that was talking about the tactics of military deployment, the strategy, the timing or anything of that kind, I would regard that as ridiculous and I do not think there is much chance the House of Commons would pass any such thing.”<sup>65</sup>

54. Notably, although both Lord Garden and Lord Bramall were in favour of greater parliamentary involvement in the deployment power, they strongly opposed parliamentary involvement in operational decision-making:

“What you cannot do is end up with Parliament micro-managing the forces, taking tactical decisions, and you have to set thresholds at a level where this will not happen. On any *roulement* you get a sudden bulge of numbers and then a decrease in numbers. You do not want Parliament involved in that”;<sup>66</sup>

“Under no circumstances must parliamentary approval be allowed into the tactical field or the minute field of the way you carry out the operation”.<sup>67</sup>

#### *Difficulties of informed decision-making*

55. There was broad agreement that it is necessary to restrict some information in a potential deployment situation and an acknowledgement that this could compromise the ability of Parliament to make informed decisions about a given situation. Clare Short considered that a demand to put security information in the public domain could not be agreed to, because it might put people’s lives in danger, but this could also be “used as a smokescreen”.<sup>68</sup> The Government told us that:

“The provision of information to Parliament on any deployment will always be constrained by the need not to reveal sensitive information on the way the armed forces propose to act or the extent or nature of intelligence on the forces they will act against.”<sup>69</sup>

56. General Sir Rupert Smith also supposed that a parliamentary debate might lead to confusion about the purpose and intention of the debate “between the legality of the action we are intending to take and its utility, its usefulness, in the set of circumstances at the time. We will also, I suspect, get confused as to the decision to deploy the Forces and whether to employ

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<sup>63</sup> David Berry, Volume II: Evidence, Page 209

<sup>64</sup> Lord King, Volume II: Evidence, Q 164

<sup>65</sup> Kenneth Clarke, Volume II: Evidence, Q 312

<sup>66</sup> Lord Garden, Volume II: Evidence, Q 110

<sup>67</sup> Lord Bramall, Volume II: Evidence, Q 117

<sup>68</sup> Volume II: Evidence, Q 32

<sup>69</sup> Volume II: Evidence, Page 120; see also Lord Boyce, Volume II: Evidence, Q 113

force”. All of this might “risk weakening our capacity to act in the field at the time necessary”.<sup>70</sup>

### *Legal impact of legislation*

57. We have heard that if parliamentary involvement in the deployment decision was enshrined in legislation that required, for instance, prior parliamentary approval, this would require language tantamount to definitions of what is lawful and might lead to the legality of any deployment being challenged in the United Kingdom courts. Some witnesses raised concerns that this could lead to individual servicemen facing criminal prosecution for actions in an “unlawful” deployment. In written evidence, Professor Rowe raised the issue of whether such legislation would have legal implications for members of the armed forces (the possibility of involving the courts in action against a particular soldier) and whether national obligations might differ from those they already have under international law.<sup>71</sup> Ms Wilmshurst also questioned whether it would be desirable for legislation to provide that prior parliamentary approval was required to make a deployment lawful, since “troops themselves are acting unlawfully if the government fails to obtain Parliamentary approval”.<sup>72</sup> She considered that if a legislative requirement for prior parliamentary approval were put in place, the consequences of failure by the Government to obtain parliamentary approval would need to be looked at very carefully.<sup>73</sup>
58. Others wondered whether a requirement for parliamentary approval might lead to troops refusing to obey orders to implement a deployment that they perceived to be unlawful. Professor Rowe told us that a soldier might refuse to obey an order because it was unlawful or because he believed it to be unlawful because no parliamentary authorisation had been given.<sup>74</sup> General Sir Michael Rose considered that it would “certainly put soldiers in a difficult position both legally and morally if they were ordered to undertake a mission when Parliamentary approval had expressly not been given”.<sup>75</sup>

### *Undermining morale*

59. While we have heard evidence to suggest that greater parliamentary involvement in the deployment power would improve morale (paragraphs 45–47), we also heard contrasting evidence to suggest that it might actually undermine it. The Lord Chancellor and Secretary of State for Constitutional Affairs told us that any restriction on deployment might introduce an “unpredictable and damaging level of uncertainty” as to the legality of the actions of Armed Forces on the ground.<sup>76</sup> Lord Boyce told us that the uncertainty that resulted from relying on Parliament’s approval would be bad for morale.<sup>77</sup> Other concerns hinge on whether Parliament is shown to be

<sup>70</sup> Volume II: Evidence, Q 106

<sup>71</sup> Volume II: Evidence, Page 18.

<sup>72</sup> Volume II: Evidence, Page 54.

<sup>73</sup> Volume II: Evidence, Q 81

<sup>74</sup> Volume II: Evidence, Page 18.

<sup>75</sup> Volume II: Evidence, Page 241.

<sup>76</sup> Volume II: Evidence, Page 120.

<sup>77</sup> Volume II: Evidence, Q 107

unanimously in favour of action, or whether divisions are exposed, as outlined by Sebastian Payne:

“The advantages could be, of course, that there is public support for the action, that is manifested also in parliamentary support ... that the Chiefs of Staff enacting know that they have widespread political backing for the action and ... that the Government would be more cohesive in its pursuit of a war or military action. On the other hand, those are double-edged, because it all depends what happens in Parliament, so that, for instance, the parliamentary support might be wafer-thin and that in itself might weaken the resolve of the Government. There are clear advantages but I believe they come with a corresponding risk as well.”<sup>78</sup>

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<sup>78</sup> Volume II: Evidence, Q 50

## CHAPTER 4: OPTIONS FOR ENHANCING PARLIAMENTARY INVOLVEMENT

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60. In this chapter we summarise the evidence we have received on different options for greater parliamentary participation in deployment decisions, in order to improve accountability and legitimacy. Some general points which apply to the majority of the options put forward are outlined in paragraph 61 below. The means by which Parliament might obtain a greater role in deployment decisions can be broadly summarised on a sliding scale of involvement:
- The Prime Minister's power to deploy troops should derive from Parliament, rather than the Crown;
  - Government should be required to provide to Parliament a formal justification of their decision;
  - Parliament should be empowered to undertake scrutiny of the Government's proposal/decision on the basis of a range of evidence and information provided by Government;
  - Subject to specified exceptions, prior parliamentary approval would be required to authorise deployment; in exceptional cases subsequent ratification should be required; this could be provided for through legislation or parliamentary convention.

### General points

61. We have noted earlier (paragraphs 40–43) that Parliament's scrutiny of a government's deployment decision can currently include initiating parliamentary debate, calling for statements, written and oral questions and select committee scrutiny. We also heard evidence that these mechanisms can be hindered or undermined by government's control of the parliamentary timetable, parliamentary majorities, use of the Whips and a monopoly over certain classes of information. Nevertheless, any proposal to increase parliamentary involvement in deployment decisions, whether by providing for an element of prior authorisation from Parliament for some decisions or by strengthening existing means of accountability—for instance by requiring the provision of information to Parliament—would not be at the expense of the existing means by which Parliament may already hold the Government to account.
62. There was significant agreement that any measure for greater parliamentary involvement should include an exemption for emergency situations where the executive must act quickly and in secrecy, or where events changed rapidly on the ground.<sup>79</sup> Such power might be accompanied by an obligation to bring the matter to Parliament shortly thereafter. Additionally, it is not contemplated that every overseas deployment should require some element of parliamentary participation. Lord Vincent told us that the options for the national authorisation of military operations would need to be appropriate to

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<sup>79</sup> Lord Garden, Volume II: Evidence, Q 110; Professor Greenwood, Volume II: Evidence, Q 95; Lord Lester, Volume II: Evidence, Q 6; Professor McEldowney, Volume II: Evidence, Page 228; New Politics Network, Volume II: Evidence, Page 92.

the nature of the operations themselves.<sup>80</sup> Based on the evidence received, actions such as ceremonial or training postings, routine operations such as the sending of naval ships to distant waters (however “poised” for action such vessels may be), and “policing” operations are not intended to fall within any of the schemes of accountability considered.<sup>81</sup>

63. There were several witnesses who, while in favour of some Parliamentary participation in deployment decisions, were concerned that too strict a template for action should not be imposed on government. The diverse nature of military operations (see chapter 2), the different operational requirements and the amount of political controversy surrounding particular decisions could all affect the timing and intensity of the involvement of Parliament. Professor Freedman told us that it would be unwise to create a very strict framework, although he recognised that any government which did not take Parliament into its confidence as much as possible could well pay for it.<sup>82</sup> Lord King also argued that the political context affected what should be done, although he accepted that Parliament should be “fully involved”. He gave the example of Iraq’s invasion of Kuwait, which coincided with the parliamentary recess; there was no great pressure for the recall of Parliament because wide consensus existed about what the response should be.<sup>83</sup>

### Legislation to transfer prerogative power

64. It has been proposed that “the simplest way” to establish a “legitimate” source of authority for the deployment power would be “for Parliament to pass a law saying that all the prerogative powers of war-making are transferred to the Prime Minister”.<sup>84</sup> Although for all practical purposes the exercise of the power would be unchanged (since the Prime Minister already possesses the authority under the royal prerogative), the act of passing legislation would make Parliament the locus of authority for it. While Tony Benn did not regard this proposal to be his favoured option, he nevertheless considered that it might provide a firm foundation for making further future changes: “if that were done, all the practical problems of how it would work could be sorted out by Parliament amending its own legislation, if it wished to do so”.
65. Taken alone, legislation of this kind would not increase Parliament’s active involvement in the exercise of the deployment power. However, it would significantly change the constitutional basis upon which deployments were decided, and introduce the possibility of future change if Parliament should so decide. It might also complement additional measures outlined below and address concerns about the legitimacy of the authority for the deployment power.

### Provision of information to Parliament

66. The nature and the timing of information supplied to Parliament are integral to the question of whether Government should formally provide Parliament

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<sup>80</sup> Lord Vincent, Volume II: Evidence, Page 60.

<sup>81</sup> see Mr Blick, Volume II: Evidence, Q 190; also see Professor Rowe, Volume II: Evidence, Page 18.

<sup>82</sup> Volume II: Evidence, Q 122

<sup>83</sup> Volume II: Evidence, Q 152

<sup>84</sup> Tony Benn, Volume II: Evidence, Q 4

with the reasons for and nature of a deployment. In addition to general information justifying the decision, questions of its legitimacy and legality also need to be addressed.

67. In considering the type of information provided, the Government and other witnesses argued that the executive should use its discretion to balance its obligation to provide information to Parliament with the operational security and effectiveness of any deployment: “The provision of information to Parliament on any deployment will always be constrained by the need not to reveal sensitive information on the way the armed forces propose to act or the extent and nature of intelligence on the forces they will act against”.<sup>85</sup> Several witnesses recognised that information should not be made public that would endanger the lives of service personnel,<sup>86</sup> but it was put to us that this “does not mean that only the executive can ever be involved in making these decisions”.<sup>87</sup> Given this concern about endangering the safety of the Armed Forces, it was proposed that only information about the nature of the deployment and the reasons for it, rather than specific operational details, should be made public.<sup>88</sup>

### *Legal advice*

68. It was suggested to us that, while there might be cogent objections to the imposition of a requirement for parliamentary authorisation of the overseas deployment of British forces, a more persuasive case could be made for requiring the Government formally to explain the legal justification for such a deployment, and that “a framework could be provided by statute, under which the Government would outline the factual and diplomatic background, its objective in authorising force and the grounds on which it is satisfied that its actions are justified under international law. Such a document would be laid formally before Parliament and would necessarily have been approved by the Law Officers”—but would not need to contain the totality of the advice tendered by the Law Officers, which should remain confidential.<sup>89</sup>
69. Governments have usually responded to parliamentary enquiries about deployment decisions, and witnesses drew attention to the powers of Parliament to keep itself informed about the progress of the operations concerned,<sup>90</sup> but this suggestion would take matters a step further by formalising the process. While significant, it would not represent a drastic constitutional change, since the Government already supplies under short time constraints memoranda to Parliament on European Union documents and on treaties subject to United Kingdom ratification (see paragraph 93 below). It also supplies oral and written statements involving questions of international law. Such a proposal might meet some of the concerns about the present deployment powers in terms of legitimacy, accountability and the

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<sup>85</sup> Lord Falconer, Volume II: Evidence, Page 120. One might add that the security of intelligence sources is another factor.

<sup>86</sup> Lord Boyce, Volume II: Evidence, Q 107; Lord Goldsmith, Volume II: Evidence, Q 252; Professor Denza, Volume II: Evidence, Page 214.

<sup>87</sup> New Politics Network, Volume II: Evidence, Page 92.

<sup>88</sup> New Politics Network, Volume II: Evidence, Page 102.

<sup>89</sup> Professor Denza, Volume II: Evidence, Page 214.

<sup>90</sup> Lord King, Volume II: Evidence, Q 163; Lord Falconer, QQ 270, 278; Adam Ingram, Volume II: Evidence, Q 276.

decision-making process. It was argued that provision of a formal legal justification for any decision to authorise the use of military force abroad would offer a number of advantages, including: clarity within Government about the legal basis for the decision; consistency in the deployment of legal doctrines of international law; facilitating the process of persuading public opinion that the decision was transparent, necessary and proportionate; increase confidence, which would in turn assist the actual conduct of any operation; and would, in the longer term, be advantageous in terms of the spread of fundamental British values and the promotion of a more stable world order.<sup>91</sup>

70. The Attorney-General, Lord Goldsmith, thought that there was a very strong case for Government having to provide legal justification for military action, which he believed had already been done where the issue had arisen. Whether the information was presented before action had begun should depend on the circumstances, but “I think if there is no reason not to do it, then it would seem to me appropriate to do it before”. He considered that this would sometimes depend upon “an analysis of information which it is difficult, if not impossible, to share at that moment in time and that may make it difficult, or operational reasons may make it difficult to do in advance”.<sup>92</sup>

#### *Publication of Attorney-General's Advice*

71. Some witnesses suggested to us that the Attorney-General's legal advice on any potential conflict should be published in full and made available to the public and Parliament.<sup>93</sup> In general, however, there was little enthusiasm for the idea. The role of the Attorney-General was likened by the former Attorney-General, Lord Morris of Aberavon<sup>94</sup>, to that of a family solicitor, with the Government as his client, and “none of us would like the advice given to us by our family solicitors to be broadcast in the market place”.<sup>95</sup> He considered that the advice should remain confidential, since the Attorney-General “might not give as perhaps elaborate advice as he might otherwise do so if he knew that every facet of it was to be in the public domain”.<sup>96</sup> Another former Attorney-General, Lord Mayhew, thought that “the value of future opinions would be greatly diminished and diluted because it would open up the terms of the opinion to being cherry-picked by the Government's political opponents in a way which it ought not to be made to suffer, so it seems to me, and I think that the advices in future would be less comprehensive and less valuable.”<sup>97</sup> This view was echoed by Kenneth Clarke in his evidence.<sup>98</sup> In response to the question of whether his advice should be published, the present Attorney-General (Lord Goldsmith) quoted the opinion of the then Chairman of the Bar, Sir Stephen Irwin, QC at the time of the debate over publication of his advice on the second Iraq War:

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<sup>91</sup> Professor Denza, Volume II: Evidence, Page 214.

<sup>92</sup> Volume II: Evidence, Q 248

<sup>93</sup> Democratic Audit, Volume II: Evidence, Page 88.

<sup>94</sup> Lord Morris was not a member of the Committee when he gave evidence to our inquiry and took no part in the preparation of this report.

<sup>95</sup> Volume II: Evidence, Q 210; also see Lord Goldsmith, Volume II: Evidence, Q 238

<sup>96</sup> Volume II: Evidence, Q 210

<sup>97</sup> Volume II: Evidence, Q 208

<sup>98</sup> Volume II: Evidence, Q 327

“Were this advice to be published, it would leave future governments of whatever hue in difficulty when it comes to obtaining legal advice on major matters of public or international law. That would be clearly against the public interest. It means the Government might not ask for advice when they should or might not reveal all the facts when they do”.

72. In common with other witnesses, Lord Goldsmith considered that this could lead to a risk that Government would not be told all the risks, dangers or questions that they ought to know before taking their decision.<sup>99</sup> For his part, Lord Mayhew drew a distinction between the “character” of the advice given by the Attorney-General and the actual terms of the opinion. He considered that the Attorney-General was obliged to answer to Parliament if he was asked for the character of the advice which the Government was acting upon. However, the actual terms of the opinion should remain confidential to the Government as the Attorney-General’s client: “a privilege which it is entitled to retain, and in my view for good practical reasons should retain it”.<sup>100</sup>

### *Independent source of legal advice for Parliament*

73. We heard proposals that Parliament should be able to supplement the Attorney-General’s advice by establishing its own legal officer or by commissioning an independent legal opinion.<sup>101</sup> Witnesses generally agreed that this was a matter for Parliament to decide itself: “There is no reason why it should not seek its legal advice elsewhere or supplement its advice elsewhere, in my view. That is entirely a matter for Parliament, and then it would have to choose”.<sup>102</sup> Lord Goldsmith recognised that each House had the right to do as it wished, but cautioned, first, that legal counsel to Parliament would be unlikely to have access to all the sensitive information available to the Government’s legal advisers or the Attorney-General and, secondly, that if the advisers to the executive and Parliament put forward conflicting opinions this might be detrimental to those carrying out the operations—the Armed Forces and Civil Service—who need clear and definitive legal advice.<sup>103</sup>
74. Parliament might well take the view that the less comprehensive the Government’s description of the “character” of the Attorney-General’s advice, the more likely it would be for Parliament to seek counsel for itself, with all the consequent disadvantages identified by Lord Goldsmith.

### **Parliamentary Joint Select Committee on Armed Forces**

75. Some witnesses have proposed the introduction of a new parliamentary joint committee, to assume strategic oversight of the United Kingdom’s international and defence interests and policies. Its remit might include considering policies on the resolution of “hot” defence issues and to maintain a watch over British military activity abroad. The Committee could also conduct inquiries into long-term issues such as international security, geo-political change and intervention in failed states.<sup>104</sup>

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<sup>99</sup> Volume II: Evidence, Q 242

<sup>100</sup> Lord Mayhew, Volume II: Evidence, Q 207; also see Volume II: Evidence, Q 209

<sup>101</sup> Democratic Audit, Volume II: Evidence, Page 88; see also Lord Lester, Volume II: Evidence, Q 22

<sup>102</sup> Lord Mayhew, Volume II: Evidence, Q 225

<sup>103</sup> Volume II: Evidence, Q 252

<sup>104</sup> Democratic Audit, Volume II: Evidence, Pages 88 and 104; also see Volume II: Evidence, QQ 183–204

76. The promoters of this idea suggested that such a Committee could follow the model of Parliament's existing Joint Committee on Human Rights, which has an analogous strategic role. Its status as a joint committee would allow it to make use of the "dispassionate expertise that the House of Lords can contribute".<sup>105</sup> Another suggestion is that the Committee be similar to the German Standing Committee of Defence, a departmental select committee which scrutinises bills and defence-related matters and has the power to act as an investigative committee and consider any defence matter of its choosing. The German Defence Committee works in co-operation with the Foreign Affairs Committee and has access to relevant security information.<sup>106</sup>
77. One issue to consider is whether the establishment of such a joint committee would duplicate the work of existing House of Commons Select Committees, such as those for Foreign Affairs and Defence. Both are "departmental" committees, but also consider policy issues.<sup>107</sup> In evidence, the Democratic Audit suggested that the joint committee should supplement, not supplant, existing committees and that questions of demarcation could be amicably resolved. They consider a new joint committee to be more suited to a wide-ranging strategic role, rather than the already busy departmental select committees.<sup>108</sup> The New Politics Network has suggested key differences between the Commons' Defence Committee and a new joint committee to be that the latter should include members from both Houses; its chairman should sit on the Intelligence and Security Committee; it should have the power to require the presence of people and papers; its specific role should include monitoring the armed forces and any plans for deployment; it should act as a guardian for the rights of service personnel; it should have permanent legal advice; and it should be able to meet *in camera* if deemed necessary for national security purposes.<sup>109</sup>
78. The proposal of a joint committee was generally well received by witnesses in oral evidence. Tony Benn regarded a joint committee to be "a perfectly sensible thing to do and it could be done without infringing in any way on the prerogative", but said that "it would be purely advisory".<sup>110</sup> Lord Lester and Clare Short regarded a joint committee as a useful complement to legislation requiring prior parliamentary approval. Clare Short also considered that getting the two Houses working together on such an issue would be a desirable thing.<sup>111</sup> Professor Loveland considered that "there is great deal to be said for a statutory regime which imposes *ex post facto* or continuing scrutiny".<sup>112</sup> Kenneth Clarke considered "very attractive" the proposal that a joint committee could receive privileged and secret information on a scale not available to the rest of the House, because much information was kept secret unnecessarily and "the reason most of it is kept

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<sup>105</sup> Democratic Audit, Volume II: Evidence, Page 104.

<sup>106</sup> New Politics Network, Volume II: Evidence, Page 92; also see Dr Ziegler, Volume II: Evidence, Page 31.

<sup>107</sup> The House of Commons' Foreign Affairs Committee's remit is: "to examine the expenditure, administration and policy of the Foreign and Commonwealth Office (FCO) which includes the diplomatic service"; while the House of Commons Defence Committee's remit is to: "examine the expenditure, administration and policy of the Ministry of Defence and its associated bodies"

<sup>108</sup> Democratic Audit, Volume II: Evidence, Page 104.

<sup>109</sup> New Politics Network, Volume II: Evidence, Page 104.

<sup>110</sup> Volume II: Evidence, Q 27

<sup>111</sup> Volume II: Evidence, Q 27

<sup>112</sup> Volume II: Evidence, Q 53

secret is because it is embarrassing and not helpful for the government trying to make its case".<sup>113</sup> He did not agree with the idea that a select committee should recommend the initiation of military action. In evidence the Lord Chancellor told us that he considered the issue to be a matter for Parliament.<sup>114</sup>

### Statutory provision

79. We heard a great deal of evidence about the proposal to introduce legislation to give Parliament the right of prior approval of deployments of armed forces overseas. Many witnesses were in favour, on the basis that it would allow Parliament a more direct and ongoing role in the decision over whether to commit armed forces to action.<sup>115</sup> Those who supported the proposal recognised that the task of drafting legislation would not be without complexity but considered that the benefits would outweigh such problems. However, even the most enthusiastic supporters for scrapping the entire class of royal prerogative powers also recognised that the power to deploy armed forces is necessarily a "power of high discretion" and that an exemption was necessary for certain high-risk situations.<sup>116</sup> Those against the proposal pointed to inherent difficulties in determining the limits and application of a parliamentary power to authorise deployments and regarded a statute as, at best, unnecessary and, at worst, detrimental to national security.
80. Several efforts have been made by Members of both Houses to bring forward legislation that would give Parliament a greater and more formal role in the exercise of royal prerogative powers. There have been five private members bills on this issue in recent years. Those sponsored by Clare Short and Neil Gerrard sought to establish a requirement for the Government to obtain Parliamentary approval for deployment of Armed Forces. Those sponsored by Lord Lester and Tony Benn focused on royal prerogative powers in general. Most recently, Lord Lester introduced his *Constitutional Reform (Prerogative Powers and Civil Service etc) Bill* into the House of Lords in January 2006. It proposes putting all royal prerogative powers exercised by Ministers on a statutory footing. This follows his *Executive Powers and Civil Service Bill* in December 2003. Clare Short introduced her *Armed Forces (Parliamentary Approval for Participation in Armed Conflict) Bill* into the House of Commons in June 2005, where it had its second reading in October 2005 and was subsequently withdrawn. Neil Gerrard had introduced an identically titled Bill in January 2005. Tony Benn had introduced the *Crown Prerogatives (Parliamentary Control) Bill* in March 1999.

### Summaries of benefits and disadvantage of statutory provision

81. In summary, the key benefits of legislation to provide the right of prior parliamentary authorisation have been argued to be:

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<sup>113</sup> Volume II: Evidence, Q 324

<sup>114</sup> Lord Falconer, Volume II: Evidence, Q 292

<sup>115</sup> See, for example, Tony Benn, Volume II: Evidence, Q 2; Clare Short, Volume II: Evidence, Q 2; Lord Lester, Volume II: Evidence, Q 3; Mr Payne, Volume II: Evidence, Q 50; Professor Loveland, Volume II: Evidence, Q 63; Dr Ziegler, Volume II: Evidence, Q 84; Ms Wilmschurst, Volume II: Evidence, QQ 92–93; Kenneth Clarke, Volume II: Evidence, Q 311; Democratic Audit, Volume II: Evidence, Page 88; Professor McEldowney, Volume II: Evidence, Page 228; New Politics Network, Volume II: Evidence, Page 92.

<sup>116</sup> Mr Payne, Volume II: Evidence, Q 77

- democratic legitimacy;<sup>117</sup> democratic accountability;<sup>118</sup> and confirmation of widespread political backing, leading to greater confidence on the part of the Chiefs of Staff in the legitimacy of the deployment and higher morale of the Armed Forces;<sup>119</sup>
- the creation of “safer” arrangements for decision-making and facilitation of a more cohesive Government strategy on military action;<sup>120</sup>
- following an international trend towards increasing standards of democratic governance<sup>121</sup> and bring the United Kingdom into line with other countries’ arrangements.<sup>122</sup>

82. By contrast, the main disadvantages have been argued to be:

- the decision to authorise deployments would be dictated by the immediate views and reactions of public opinion, while they should be taken by the executive;<sup>123</sup>
- a curtailment of the necessary flexibility of action in order to defend national security;<sup>124</sup> procedures leading to delayed decision making would allow more media influence and intervention;<sup>125</sup> and there could be possible confusion about authorisation if events changed quickly on the ground;<sup>126</sup>
- a lack of clarity in identifying those deployments to which legislation would apply;<sup>127</sup> the legislation could open the door to judicial review, appeal and challenge in a way that might have adverse operational consequences;<sup>128</sup>
- the outcome of a parliamentary vote might lead to damaging levels of uncertainty as to the legality of the actions of the armed forces and might weaken the resolve of the Government;<sup>129</sup> this would be particularly acute if the two Houses failed to agree;
- formal requirements for prior approval have often been circumvented elsewhere.<sup>130</sup>

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<sup>117</sup> Lord Garden, Volume II: Evidence, Q 110; Ms Wilmshurst, Volume II: Evidence, Q 81; Dr Ziegler, Volume II: Evidence, Q 84

<sup>118</sup> Ms Wilmshurst, Volume II: Evidence, Q 81; Lord Lester, Volume II: Evidence, QQ 6, 14

<sup>119</sup> Lord Garden, Volume II: Evidence, Q 110

<sup>120</sup> Mr Payne, Volume II: Evidence, Q 50; Clare Short, Volume II: Evidence, Q 2

<sup>121</sup> Dr Zielger, Volume II: Evidence, Page 31.

<sup>122</sup> see Professor Bell, Volume II: Evidence, Page 52; Lord Lester, Volume II: Evidence, Q 14

<sup>123</sup> Professor Denza, Volume II: Evidence, Page 214; Lord Falconer, Volume II: Evidence, Page 120.

<sup>124</sup> Christian Brethren, Volume II: Evidence, Page 211; Lord Falconer, Volume II: Evidence, Page 120; Humphry Crum Ewing, Volume II: Evidence, Page 223.

<sup>125</sup> Christian Brethren, Volume II: Evidence, Page 211.

<sup>126</sup> Professor Greenwood, Volume II: Evidence, QQ 95–96

<sup>127</sup> Lord Goldsmith, Volume II: Evidence, Q 254; also Professor Rowe, Volume II: Evidence, Q 48

<sup>128</sup> Lord Mayhew, Volume II: Evidence, Q 214

<sup>129</sup> Lord Falconer, Volume II: Evidence, Page 120; Mr Payne, Volume II: Evidence, Q 50; Professor Rowe, Volume II: Evidence, Q 59; Lord Goldsmith, QQ 240, 257

<sup>130</sup> Lord Falconer, Volume II: Evidence, Page 120; also see Democratic Audit, Volume II: Evidence, Pages 88 and 104; New Politics Network, Volume II: Evidence, Page 92.

83. The evidence has demonstrated that even if the theoretical arguments favoured a statutory requirement for parliamentary approval of deployments, there are several difficulties which need to be overcome. These include:
- the definition of problematic terms, such as “deployment” and “armed conflict” (which is not defined in the Geneva Convention 1949 or Additional Protocols 1977);<sup>131</sup>
  - which deployments should require prior parliamentary approval;<sup>132</sup> what provisions would ensure necessary flexibility in emergency situations (threshold for retrospective approval etc);<sup>133</sup> and what mechanisms could address the prospect of “mission creep” and whether the Government should be required to seek new mandates as circumstances change;<sup>134</sup>
  - what type of information should be provided to Parliament to enable it to come to an informed decision;<sup>135</sup> deciding whether there should be a free vote in Parliament;<sup>136</sup> and whether the agreement of both Houses should be required.<sup>137</sup>
84. The drafting of legislation to regulate the deployment of troops undoubtedly has its difficulties, not least with the definition of key terms and its application. On the other hand, the experience of other democratic states shows that this is not insurmountable, albeit with some possible repercussions on executive discretion. While we were taking evidence, there was a notable contrast between the announcement of the decision to deploy British troops to Afghanistan by a ministerial statement on 26 January 2006 and the prolonged process of achieving parliamentary support in the Netherlands in order to allow the participation of Dutch troops in the same operations, which was only completed in February 2006 after 6 months of negotiation. It could also be the case that legislation might lead to the involvement of the courts, but this could be regarded as entirely right and proper from the point of view of securing accountability and the rule of law.

### Parliamentary convention

85. As an alternative to legislation, it has been suggested that a convention should be developed, the central theme of which would be a requirement for Parliament to be informed by Government of deployment proposals or developments, and asked to give its approval to them. This was considered a more flexible arrangement than a statutory scheme and one which avoided the legal consequences of a statutory provision.<sup>138</sup>

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<sup>131</sup> Professor Rowe, QQ 48–49 & Volume II: Evidence, Page 18; Ms Wilmshurst, Volume II: Evidence, QQ 81, 93; Lord Morris, Volume II: Evidence, Q 217; Lord Mayhew, Volume II: Evidence, Q 218

<sup>132</sup> Professor Rowe, Volume II: Evidence, Q 56

<sup>133</sup> Elizabeth Wilmshurst, Volume II: Evidence, Q 81; David Berry, Volume II: Evidence, Page 209; Democratic Audit, Volume II: Evidence, Page 88.

<sup>134</sup> Lord Falconer, Volume II: Evidence, Page 120.

<sup>135</sup> Democratic Audit, Volume II: Evidence, Page 88 (section 4); Lord Falconer, Volume II: Evidence, Page 120; Lord Lester, Volume II: Evidence, Q 32

<sup>136</sup> Eileen Denza, Volume II: Evidence, Page 214

<sup>137</sup> There were differing opinions about whether the House of Lords should have a role. This is summarised in paragraphs 94–95.

<sup>138</sup> Lord Morris, Volume II: Evidence, Q 234; also see Lord Mayhew, Volume II: Evidence, Q 214

86. Many witnesses considered that a parliamentary convention already exists on this issue, by which Government considers itself bound to inform Parliament about deployments of the Armed Forces, although it does not go far enough in the eyes of many because the Government is at liberty to pick the timing and procedure followed for the discharge of its obligation. Other evidence noted that there had been an “apparent establishment of a constitutional convention” since the vote by Parliament prior to engaging in hostilities in the second Iraq war.<sup>139</sup> This view appeared to be substantiated by comments by the Prime Minister to the House of Commons Liaison Committee in January 2003, when he said “no government could engage in a conflict if Parliament was against it ... That is why of course there will be ample opportunity for the House to make its view clear”. He also said that he “cannot think of any circumstances in which a Government can go to war without the support of Parliament”<sup>140</sup>. But in February 2005 the Prime Minister said that he did not think the vote set a constitutional precedent although that it would, “for political rather than constitutional reasons ... be more like the norm in the future, provided it can be done.”<sup>141</sup> In his evidence to us, the Lord Chancellor emphasised that the Prime Minister did not recognise that there was, or should be, a new way of involving Parliament:

“You could not possibly go to war with Parliament against you because it is the embodiment of the people, but that is not the same as saying, as you are trying to say, that therefore gives rise to a convention that subject to emergencies or secrecy you have got to go to Parliament and have a vote on the substantive motion as to whether or not Parliament supports it.”<sup>142</sup>

87. It is however noteworthy that in April 2005 the Rt Hon Gordon Brown MP, Chancellor of the Exchequer, in a newspaper interview shortly before the General Election, said that the precedent set in allowing MPs to vote before the Iraq war should become a permanent feature of government life:

“Now that there has been a vote on these issues so clearly and in such controversial circumstances, I think it is unlikely that except in the most exceptional circumstances a government would choose not to have a vote in Parliament. I think Tony Blair would join me in saying that, having put this decision to Parliament, people would expect these kinds of decisions to go before Parliament.”<sup>143</sup>

Gordon Brown reverted to this theme nine months later when, in a speech on 14 January 2006, he declared:

“Just as on the first day I was Chancellor I limited the power of the executive by giving up government power over interest rates to the Bank of England, I suggested during the General Election there was a case for a further restriction of executive power and a detailed consideration of the role of parliament in the declaration of peace and war.”<sup>144</sup>

This conclusion was echoed by Kenneth Clarke, in evidence before us on 29 March this year, when he said that “there should be some constitutionally

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<sup>139</sup> Richard Ramsey, Volume II: Evidence, Page 239.

<sup>140</sup> House of Commons Liaison Committee, Minutes of Evidence, Session 2002–03, HC 334-I, QQ 122, 125

<sup>141</sup> House of Commons Liaison Committee, Minutes of Evidence, Session 2004–05, HC 318-I, QQ 31, 32

<sup>142</sup> Volume II: Evidence, Q 273

<sup>143</sup> Daily Telegraph, 30 April 2005

<sup>144</sup> Fabian New Year Conference

explicit role for Parliament in approving, in all possible circumstances, the deployment of troops in combat areas.”<sup>145</sup>

88. The views of both Gordon Brown and Kenneth Clarke recognise that the nature of contemporary politics in the United Kingdom has changed, as has the nature of contemporary armed conflict; and that the two need to be brought into a better alignment with each other. We note however that the Ministers who gave oral evidence to us chose to regard the Prime Minister’s and Gordon Brown’s statements as doing little more than restate the Government’s current position. Dr Howells interpreted Gordon Brown to be stating “that the way the House works at the moment (if you like, convention with a small ‘c’) is the way it ought to proceed”<sup>146</sup>—an interpretation rather at odds with the words actually used by Gordon Brown—notably “these kinds of decisions” in 2004 and “a further restriction of executive power” in 2005.

89. Some witnesses argued that a parliamentary convention was a less desirable alternative to a statute. The Democratic Audit and Professor Weir, for example, contended that conventions were notoriously elastic and the rules on going to war in a democratic state required clarity. They did not think the executive would accept that a convention should require a vote on a substantive motion approving military action abroad; and if it was all left up to a convention, the Prime Minister could prepare for deployment without any parliamentary input and put the proposal to Parliament at the best possible time to gain approval.<sup>147</sup> Kenneth Clarke told us that he preferred the statutory route because:

“I have an increasing feeling that many of the conventions of government, the constitution and political life in this country are now very much weakened. There is an increasing tendency on the part of the modern executive, when taking advice on constraints on its power, to say, when they discover that conventions are conventions but are not legally binding within the sanction of Parliament, that when those conventions are out of date they should be changed. We have seen quite a lot of less important conventions swept away quite inexorably in recent years, not just under the present government. I think the process is accelerating.”<sup>148</sup>

90. The Lord Chancellor and Ministers of State for Defence and Foreign and Commonwealth affairs told us that a convention would be as unattractive as a statute:

“To prescribe (as a proposal for statute does or the proposal for convention does) how [the Government] obtains initial support would, we believe, both blur the essential distribution of responsibility and unwisely hamper the proper prosecution of intervention and the process of accountability. The key point, we believe, is that it must be for the executive to make the decisions on deployment. How consultation or support from Parliament is sought and obtained is a matter for the executive and Parliament ... Formal constraints, either in statute or in the convention, do not work when faced with the reality of planning and deployment. They would need emergency provisions.”<sup>149</sup>

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<sup>145</sup> Volume II: Evidence, Q 307

<sup>146</sup> Volume II: Evidence, Q 287

<sup>147</sup> Democratic Audit, Volume II: Evidence, Page 88; Professor Weir, Volume II: Evidence, Q 190

<sup>148</sup> Volume II: Evidence, Q 311

<sup>149</sup> Lord Falconer, Volume II: Evidence, Q 270

91. The Attorney-General took a rather different view. Although he considered that there were questions about how a convention could be created, he agreed that if there was going to be any form of change and the choice was between a statute and a convention, then he would prefer a “convention (which does not have binding legal force) [and] at least avoids some of the difficulties which I think you have rightly identified”.<sup>150</sup>
92. Lord Falconer told us that his opposition to the idea of convention was based on his understanding that it would be a procedure that would have to be followed, requiring “that if you use armed conflict involving United Kingdom troops you have got to come, save in exceptional circumstances, to get prior approval by a motion on the issue of should you use troops”.<sup>151</sup> However, Lord Mayhew proposed to us a convention that would not automatically require prior parliamentary approval, but stipulated that Parliament itself would identify those important deployments where it deemed its prior approval was necessary. This formula sought to avoid objections about definitions and inflexibility, by incorporating a more flexible and Parliament-led approach:
- “The drafting, of course, is going to be all-important, but you have got to avoid in whatever legislation of a domestic character (that is to say within Parliament or otherwise) the same difficulties of definition which will bedevil a statutory requirement. That is why it occurred to me that the way you might do it would be to establish a convention which would make it the duty of Government to seek the prior approval of the House of Commons in respect of any deployment of United Kingdom Armed Forces overseas which may be identified for the purposes of that convention by the House of Commons. So you would have a general rule that the House of Commons could tap into in respect of a deployment which caught their interest, for whatever reason, and that would avoid a difficulty of definition, which seems to me to be rather desirable.”<sup>152</sup>
93. A convention of this kind may provide a compromise between those who would like to see Parliament having a more consistent role in decisions to deploy armed forces, and those who consider that formal parliamentary involvement would hamper effective executive action and create a legal minefield. The Ponsonby Rule<sup>153</sup> is a relevant example of a convention that gives Parliament a formal but flexible role in the government’s exercise of a royal prerogative power. Since 1924, this convention has required that all treaties subject to ratification (with limited exceptions) be laid before Parliament for 21 sitting days. The laying is done by means of a Command Paper and, since 1997, the treaties have been accompanied by an explanatory memorandum. Under the Ponsonby rule Parliament, rather than Government, decides which treaties it would like to debate; if no indication of disapproval is received, it is considered that Parliament has sanctioned a treaty’s ratification. On 3 March 2006, Lord Bassam of Brighton told the House of Lords that the Government was considering putting the Ponsonby rule procedure on a statutory footing, “to increase the clarity and

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<sup>150</sup> Volume II: Evidence, Q 258

<sup>151</sup> Volume II: Evidence, Q 282

<sup>152</sup> Volume II: Evidence, Q 218

<sup>153</sup> For more detail, see appendix 5.

enforceability of the rule that government bring such matters before and to the attention of Parliament".<sup>154</sup>

### Resolution of differences between the two Houses

94. There was some discussion of whether both Houses of Parliament should be allowed to vote on prior approval, or whether it should just involve the House of Commons. The right of the House of Lords to have a debate on the issue and express its view was not called into question. The House contains members whose experience enables them to provide advice of value in such situations. Lord Lester told us that in principle he could not see why the Lords should not have the same power to withhold consent as it has on legislation generally.<sup>155</sup> Others considered that a vote of prior approval should involve just the House of Commons until the House of Lords underwent reform. Although Clare Short's *Armed Forces (Parliamentary Approval for Participation in Armed Conflict) Bill* provided that a vote would include both Houses, the second reading debate persuaded her that it should involve just the House of Commons until the Lords was reformed and had the legitimacy of being an elected body. She noted that when this happened some thought would have to be given to how to resolve potential differences.<sup>156</sup>
95. Lord Morris told us that "of course the House of Lords may voice its view", but should not have a vote on the issue.<sup>157</sup> Lord Mayhew considered that, "if part of your purpose is to establish democratic legitimacy so as to enhance the confidence which the public and the soldiers within the public will have, then I think limiting your requirement to the House of Commons is more likely to meet that bill".<sup>158</sup> He later agreed with the proposal that each House could have a debate and a vote and, if they differed, the House of Commons would prevail.<sup>159</sup> The Lord Chancellor agreed, and when asked whether his attitude would differ if, following reform, the House of Lords was substantially elected, said:

"It would not, no, because part of the stance of the Government, with which I completely agree, is the primacy of the House of Commons. Whatever arrangements are made, the executive is to be drawn from its support in the House of Commons. The existence of the Government depends upon its ability to command a majority in the House of Commons. The constitutional basis of what I set out at the beginning was the accountability of the executive to Parliament and the fact that its existence depends on its support in the Commons. So it would not change my view".<sup>160</sup>

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<sup>154</sup> House of Lords Hansard, 3 March 2006: column 481

<sup>155</sup> Volume II: Evidence, Q 19

<sup>156</sup> Volume II: Evidence, Q 17

<sup>157</sup> Volume II: Evidence, Q 181; also see Lord Falconer, Volume II: Evidence, Q 292

<sup>158</sup> Volume II: Evidence, Q 179

<sup>159</sup> Volume II: Evidence, Q 182

<sup>160</sup> Volume II: Evidence, Q 293

## CHAPTER 5: CONCLUSIONS

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96. It has been the purpose of this inquiry to consider the nature of the executive's powers in relation to the fundamentals of peace and war, and to consider whether, and if so how, Parliament can play a fuller part as the voice of Ernest Bevin's "common man".<sup>161</sup> In doing so we have been guided by the principle that, whatever concerns there may be about decisions to put forces in the field, our inquiry should not extend to any aspect of operational decision-making once force has been deployed. Nor has it done so. Clearly, however, major instances of "mission creep" or anything that represented a significant change, qualitative or quantitative, to an existing deployment would have to be treated as a new proposal. Afghanistan is possibly an example.
97. The British constitution is made up of a combination of common law, written statute, tradition and convention, much of it unwritten. In some respects, the constitution is like the English language—it is not preserved in aspic, requiring an academy, a two-thirds majority or a referendum to authorise variation; it is a living organism, adapting to change as evolutionary circumstances require. It is almost infinitely flexible: landmark judgments or pragmatic political deals can materially amend the constitution as comprehensively as primary legislation. A recent example of the latter is the Concordat of January 2004 between the Lord Chancellor and the Lord Chief Justice about the administration of justice in England and Wales<sup>162</sup>.
98. The Royal Prerogative reflects two of the constitutional features outlined above: it is rooted in the common law and its exercise is governed by convention. As we noted in chapter 1, its extent has been reduced over time through the enactment of statute law. Furthermore, its exercise has been progressively refined by the evolution of the conventions surrounding it and by the willingness of the courts to supervise the exercise of some prerogative powers. In the nineteenth century governments could—and on occasion did—engage in military adventures with little or no reference to Parliament. Today, as the Prime Minister himself has said, there are unlikely to be any circumstances in which a government could go to war without the support of Parliament. The precise meaning of "support" is, of course, elusive: it could be implicit, as the Lord Chancellor would have it, in the sense that in the absence of disapproval, the support can be assumed; or it could be explicit, through a more formal parliamentary process. Many would agree with the inference to be drawn from Gordon Brown's 2005 remarks that the House of Commons vote on 18 March 2003 (endorsing the decision to invade Iraq<sup>163</sup>) marked a new stage in the evolution of the convention governing parliamentary oversight of the deployment power. He was, unfortunately, unable to take up our invitation to appear before us, but we note the close similarity between his conclusion in January 2006, that "a case now exists for

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<sup>161</sup> "There never has been a war yet which, if the facts had been put calmly before the ordinary folk, could not have been prevented ... The common man, I think, is the greatest protection against war" (Ernest Bevin, Foreign Affairs debate, 23 November 1945, HC Hansard col 786).

<sup>162</sup> See our reports "*Meeting with the Lord Chancellor*" and "*Meeting with the Lord Chief Justice*", respectively 6th and 14th reports of Session 2005–06, HL Papers 84 and 213.

<sup>163</sup> Among other things, the resolution "supports the decision of Her Majesty's Government that the United Kingdom should use all means necessary to ensure the disarmament of Iraq's weapons of mass destruction."

a further restriction of executive power and a detailed consideration of the role of Parliament in the declaration of peace and war”, and that of David Cameron, leader of the Opposition, that “... the time has come to look at those [prerogative] powers exercised by Ministers ... Giving Parliament a greater role in the exercise of these powers would be an important and tangible way of making government more accountable.”<sup>164</sup> Mr Cameron’s conclusions were in turn echoed by Jack Straw, the recently appointed Leader of the House of Commons, when he said that “decisions in respect of Iraq were agreed through explicit, substantive, voteable motions [which] established a precedent for the future, making it very likely that any similar decisions about military action would be taken with a Parliamentary vote”.<sup>165</sup> He subsequently said that “the parliamentary votes on military action against Iraq not only showed Parliament at its best, but also set a clear precedent for the future”.<sup>166</sup>

99. Partly because of the controversies surrounding the decision to invade Iraq in 2003, many witnesses expressed concerns about the legality of deployment decisions. There was considerable debate about whether or not the Attorney-General’s advice to the Government on the legality (in terms of International Law) of the deployment should be published in full. We note the jointly held views of two former Attorneys-General that it would be counter-productive to demand full disclosure. But what we feel is important is that what Lord Mayhew described as the “character” of that advice should be provided in as much detail as possible. As we noted in paragraph 74, the less comprehensive that disclosure the greater the likelihood that Parliament will seek independent advice—with possibly less access to all the relevant facts and with the attendant risk of conflicting opinions.
100. The majority of our witnesses agreed that it is anachronistic, in a parliamentary democracy, to deny Parliament the right to pass judgement on proposals to use military force in pursuit of policy, although there was no consensus on the best means to bring that about. Underlying this sentiment is an anxiety to ensure, so far as is possible, that the action is not only legal but legitimate and is seen to command the support of the nation as a whole. The contrary argument—for the retention of the *status quo*—had two main themes. First, that any alternative would constrain the Government of the day’s freedom of action (both in terms of timing and of the objectives) that alone made it possible vigorously to pursue the national interest; and, secondly, that change would bring with it the politicisation of military decision making. Coupled with the second concern was a fear that political controversy surrounding a proposed deployment would sap the morale of the forces deployed and jeopardise their security.
101. Although there have been exceptions, such as emergencies, recent history shows that the processes leading up to deployments are generally protracted, allowing plenty of time not only to evaluate and plan for the action but to obtain parliamentary support. The fact that it might be inconvenient for the Government to seek this support is hardly a justification for denying it. The Government’s preparations have also been conducted under full media coverage, rendering the arguments about security and secrecy more

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<sup>164</sup> The Rt Hon David Cameron, MP; speech on 6 February 2006, launching the Democracy Task Force.

<sup>165</sup> The Rt Hon Jack Straw, MP; speech to the Fabian Society, 28 June 2006.

<sup>166</sup> Speech to the Hansard Society, 11 July 2006.

theoretical than real. The Government also argues that it is in any case accountable to Parliament; but it seems to us that if substance is to be given to the glib cliché that “Parliament can decide” then significant adjustment needs to be made to the processes that are employed to enable it to do so.

102. As for the potential problem of politicisation of military decision making, we do not believe that constraints on the deployment power will affect the freedoms which military commanders have and should continue to enjoy. We fully acknowledge that controversy at home could have a deleterious effect on the morale of the troops in the field and agree the importance of guarding against it, but note that that would be so whatever process was followed. More to the point, we believe strongly that the balance of the argument falls in favour of ensuring that those troops know that Parliament is behind them rather than be left to speculate. We can do no better than repeat Lord Bramall’s view that “... the armed forces need to be reassured ... that they had the support of the country ... Parliament represents the will of the people and if Parliament supports the action ... the Armed Forces can take heart that constitutionally the country supports it”.<sup>167</sup>
103. Changes in the prosecution of policy by the use of force reflect changes in global politics more generally, but have also had consequences for domestic politics and have exacerbated what is perceived as the “democratic deficit” between citizens and Government. The immediacy of communications and the advent of “24 hours news” have also affected the process by which Parliament scrutinises Government. **Our conclusion is that the exercise of the Royal prerogative by the Government to deploy armed force overseas is outdated and should not be allowed to continue as the basis for legitimate war-making in our 21st century democracy. Parliament’s ability to challenge the executive must be protected and strengthened. There is a need to set out more precisely the extent of the Government’s deployment powers, and the role Parliament can—and should—play in their exercise.**
104. In chapter 4 we examined the various options. For us, the least persuasive argument is the one for a statutory solution on the lines of the Private Members bills that have been introduced in recent years in both Houses. We have not been persuaded that the difficulties of putting the deployment power on a statutory basis could easily be overcome, and consider that the problems of the uncertainty generated outweigh any constitutional merits. In our view, the possibility—however remote—of, for example, subjecting forces of the Crown to criminal prosecution for actions taken in good faith in protecting the national interest is unacceptable. We also see no merit in legislative architecture which creates the possibility of judicial review of Government decisions over matters of democratic executive responsibility. In addition, the need to provide for “emergency” exceptions would create loopholes that could be readily exploited by a future administration with ambitions less benign than those to which we are accustomed.
105. Nor are we persuaded by the proposal simply to transfer the prerogative from the Crown to Parliament, but otherwise leave its exercise to precisely the same discretions as currently prevail. For the constitutional purist, it has the attraction of resolving a historical anomaly and eroding the prerogative still further. But it would substitute a historical anomaly with a political one, and

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<sup>167</sup> Volume II: Evidence, Q 109

signally fail to address the fundamental constitutional issue of parliamentary oversight of the decision-making process.

106. In paragraphs 75–78 we examined proposals that there should be a joint parliamentary committee to assume strategic oversight of international defence and foreign policy interests. It had been suggested to us that such a committee could appoint its own experts and legal adviser (as does the Joint Committee on Human Rights) and have the capacity to sit in private to hear intelligence and other sensitive evidence. It was also argued that, being representative of both Houses, it could draw on a wide spread of experience. However, the creation of such a committee would not, of itself, resolve the underlying issue of parliamentary sovereignty over the deployment power. Furthermore, it would duplicate the work of the existing House of Commons Defence and Foreign Affairs Select Committees.
107. While we conclude that there is no benefit in pursuing this proposal, we do believe that if our recommendation at paragraph 108 below is accepted, and Parliament is to play a more significant role in future decision-making, these two Committees will represent the Parliamentary vanguard of the process. They will consequently need to be even more vigilant and proactive than they already are in informing Parliament of international developments with the potential to require deployment decisions, providing relevant and timely information to help ensure that Parliament is able to exercise this important new responsibility effectively. Similarly, in the case of on-going deployments, they would be expected to provide early warning of potential changes in those deployments of sufficient significance to require renewed Parliamentary authority.
108. In paragraphs 85–93 we considered proposals for the creation of a parliamentary convention. We were struck by Lord Morris's reference to the need to prepare for eventualities far in the future, when he spoke of the need for "democratic credibility, to have an embracing situation which you cannot conjure [in statute] to anticipate the needs of 20, 30 or 40 years ahead," and his suggestion of "all the party leaders agreeing on the convention that our troops would not ... be sent overseas without parliamentary approval."<sup>168</sup> Despite the official Government response from the Lord Chancellor and his Ministerial colleagues in favour of the *status quo*, it is clear from the remarks of political leaders across the spectrum that a cross-party consensus of this sort is more than possible. In that spirit, **we recommend that there should be a parliamentary convention determining the role Parliament should play in making decisions to deploy force or forces outside the United Kingdom to war, intervention in an existing conflict or to environments where there is a risk that the forces will be engaged in conflict.**
109. Whereas some witnesses conflated "Parliament" and the House of Commons, for these purposes we mean Parliament to be both Houses, although we recognise that in the event of disagreement between the two the will of the House of Commons should prevail. That is not to say that the House of Lords does not have a contribution to make. It has been suggested for instance that the vote on a substantive motion in the House of Commons should be preceded, and informed, by a debate on a take note motion in the House of Lords.

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<sup>168</sup> Volume II: Evidence, Q 217

110. While not seeking to be prescriptive, we recommend that the convention should encompass the following characteristics:

- (1) **Government should seek Parliamentary approval (for example, in the House of Commons, by the laying of a resolution) if it is proposing the deployment of British forces outside the United Kingdom into actual or potential armed conflict;**
- (2) **In seeking approval, the Government should indicate the deployment's objectives, its legal basis, likely duration and, in general terms, an estimate of its size;**
- (3) **If, for reasons of emergency and security, such prior application is impossible, the Government should provide retrospective information within 7 days<sup>169</sup> of its commencement or as soon as it is feasible, at which point the process in (1) should be followed;**
- (4) **The Government, as a matter of course, should keep Parliament informed of the progress of such deployments and, if their nature or objectives alter significantly should seek a renewal of the approval.**

111. These are matters of significant constitutional interest which we publish for the information and consideration of the House. We look forward to receiving the Government's response, and the opportunity to debate the issues, at the earliest possible date.

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<sup>169</sup> This is the time limit within which Parliament must approve emergency regulations issued under the Civil Contingencies Act 2004; otherwise they lapse (s. 27(1)(b)).

## **APPENDIX 1: SELECT COMMITTEE ON THE CONSTITUTION**

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The Members of the Committee which conducted this inquiry were:

Viscount Bledisloe  
Lord Carter  
Lord Goodlad  
Lord Elton  
Baroness Hayman (until 4 July 2006)  
Lord Holme of Cheltenham (Chairman)  
Baroness O'Cathain  
Lord Peston  
Lord Rowlands  
Earl of Sandwich  
Lord Smith of Clifton  
Lord Windlesham

## APPENDIX 2: CALL FOR EVIDENCE

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The Constitution Committee was appointed “to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution”.

The Committee has decided to conduct an inquiry on the use of the royal prerogative power by Government to deploy the United Kingdom’s armed forces. The Committee invites interested organisations and individuals to submit written evidence as part of its inquiry, reflecting the guidance given below. Written evidence should reach the Committee as soon as possible and no later than **Monday 31 October 2005**.

### Scope of the Committee’s inquiry

In particular, the Committee invites evidence on the following themes:

- (1) What alternatives are there to the use of royal prerogative powers in the deployment of armed forces?
- (2) Can models, drawn from the practice of other democratic States, provide useful comparisons?
- (3) Should Parliament have a role in the decision to deploy armed forces?
- (4) If Parliament should have a role, what form should this take?
  - (a) Should Parliamentary approval be required for any deployment of British forces abroad, whether or not into conflict situations?
  - (b) Should Parliamentary approval be required before British forces engage in actual use of force? Is retrospective approval ever sufficient?
- (5) Is there a need for different approaches regarding deployment of United Kingdom armed forces:
  - (a) required under existing international treaties;
  - (b) taken in pursuance of UN Security Council authorisation;
  - (c) as part of UN peace-keeping action;
  - (d) placed under the operational control of the UN or a third State?
- (6) Should the Government be required, or expected, to explain the legal justification for any decision to deploy United Kingdom armed forces to use force outside the United Kingdom, including providing the evidence upon which the legal justification is based?
- (7) Should the courts have jurisdiction to rule upon the decision to use force and/or the legality of the manner in which force is used. If so, should that jurisdiction be limited by considerations of justiciability of any of the issues involved?

### Background

Under the royal prerogative powers, a government can declare war and deploy armed forces without the backing or consent of Parliament. However, the Government did allow Parliament a vote before the Iraq war in 2003, leading to

calls that it should be required to seek Parliament's approval before taking action in future conflicts.

In 2004, the House of Commons' Public Administration Committee published a report on Ministers' prerogative powers, recommending that "any decision to engage in armed conflict should be approved by Parliament, if not before military action then as soon as possible afterwards".<sup>170</sup> The Government responded that they were "not persuaded" that replacing prerogative powers within a statutory framework would improve the present position.<sup>171</sup> Since then, three Private Members Bills have been brought forward in Parliament, which seek to give Parliament a greater role in the exercise of these royal prerogative powers.

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<sup>170</sup> Taming the Prerogative: Strengthening Ministerial Accountability to Parliament, Session 2003–04, 16 March 2004, HC 422

<sup>171</sup> Government Response to the Public Administration Select Committee's Fourth Report of the 2003–04 Session, July 2004

### APPENDIX 3: LIST OF WITNESSES

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The following witnesses gave evidence. Those marked with \* also gave oral evidence.

- Australian High Commission
- Mr Peter C Beauchamp
- \* Professor John Bell
- \* Rt Hon Tony Benn
- David M Berry
- \* Admiral Lord Boyce
- \* Field Marshal Lord Bramall
- Charter 88
- Christian Brethren
- \* The Rt Hon Kenneth Clarke, QC, MP
- \* Colonel Tim Collins
- Mr A Dakers
- Geneva Centre for the Democratic Control of Armed Forces (DCAF)
- \* Democratic Audit, University of Essex
- Mrs Eileen Denza
- Mr Humphry Crum Ewing
- \* Rt Hon Lord Falconer of Thoroton
- \* Professor Sir Lawrence Freedman
- \* Air Marshal Lord Garden
- \* Mr Neil Gerrard, MP
- German Embassy
- \* Rt Hon Lord Goldsmith, QC
- \* Professor Christopher Greenwood
- \* Dr Kim Howells, MP
- \* Rt Hon Adam Ingram, MP
- Japanese Embassy
- \* Lord King of Bridgwater
- \* Lord Lester of Herne Hill
- \* Professor Ian Loveland
- \* Rt Hon Lord Mayhew of Twysden
- Professor John E McEldowney
- \* Lord Morris of Aberavon
- \* New Politics Network

- One World Trust  
Mrs Anne Palmer  
★ Mr Sebastian Payne  
Mr Richard Ramsey  
General Sir Michael Rose  
★ Professor Peter Rowe  
★ The Rt Hon Clare Short, MP  
★ General Sir Rupert Smith  
Swedish Embassy  
Mr Anthony Tuffin  
★ Field Marshal Lord Vincent of Coleshill  
★ Miss Elizabeth Wilmshurst  
★ Dr Katja Ziegler

## APPENDIX 4: PARLIAMENTARY OVERSIGHT OF THE DEPLOYMENT POWER: INTERNATIONAL COMPARISONS

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### Note by Professor C J Warbrick<sup>172</sup>

1. The following are some brief notes on the constitutional positions of other states about the exercise of the war power and the deployment of the forces of the state. In each case, the note begins with a box summarising the formal constitutional arrangements (if there are any), followed by outlines of such practice and case law as I have been able to ascertain. Often, the matters with which we are concerned are of high controversy and it is undoubtedly true that a consistent theme is that executive requirements seem to chafe against formal requirements. I have been able to take advantage of some of the evidence which has been submitted to the Committee, a note produced by the House of Commons Library<sup>173</sup>, and a very useful collection of essays.<sup>174</sup> The Committee's evidence included very wide ranging documents from Dr Ziegler.<sup>175</sup>

2. It hardly needs to be said that a state's constitutional arrangements can only be fully understood when considered in their overall context and in the light of that state's general practice. It is also the case that the nature of deployments of armed forces has been undergoing significant change—UNSC authorisation, multilateral actions, peacekeeping and so on—with the result that established mechanisms have been undergoing some modification in some states.

3. Although I do not expressly mention it in the summaries, it is important to note that in all cases a state's Parliament/Legislature will have power over supply; the potential for the exercise of that power will be something of a constraint on governmental decision-making, though to what extent will depend upon the legislative/executive balance.

4. It was put to us in evidence that constitutional comparisons were of limited use, not just because of the undoubted differences in constitutional structure between the United Kingdom and most other states but because the United Kingdom is one of only a very few states (the US and France were the others mentioned) able and willing to deploy its armed forces with global reach and in the whole range of military operations which take place today. The concern was that the more formal and demanding the legislative conditions for the deployment of the armed forces, the more difficult would it be to gain the authority to send the troops; this could prove burdensome for a state like the United Kingdom but much less so for those states which were likely to deploy their forces less frequently and to less serious conflicts.

5. It hardly needs to be said that any system of political accountability will contain the possibility of fulsome endorsement by the legislature of the plans and actions of the government, as well as the possibility of constraint. In most constitutional systems, where there is such joint resolve, the prospects for judicial intervention to the contrary will be at their weakest.

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<sup>172</sup> Professor of Law, Durham University; Specialist Adviser to the Select Committee.

<sup>173</sup> House of Commons Library Standard Note, "Parliamentary approval of participation in armed conflict—some international comparisons"—SN/PC/3776, October 2005.

<sup>174</sup> C Ku and H Jacobson (eds), "Democratic Accountability and the use of Force in International Law" (Cambridge University Press (2003)).

<sup>175</sup> Volume II: Evidence, Pages 31 and 56

## AUSTRALIA

### Commonwealth of Australia Constitution Act

#### Chapter II: The Executive Government:

“61. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

68. The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen’s representative.”

6. The Australian High Commissioner told us that “the decision to commit the Australian Defence Force to an armed conflict is a decision of the executive government. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General. However, by convention, the Governor-General acts on the advice of government. As a matter of practice, Parliament is informed of such decisions and a Parliamentary debate may well ensue.”<sup>176</sup>

7. The Executive Power includes such Prerogative Powers of the Crown as existed in 1900—which included the War Power and the Power to Deploy the Crown’s Forces—which have not been superseded by legislation. Australia’s constitutional arrangements are, thus, much like those in the United Kingdom for, although they have a constitutional base, that base assumes the continued existence of prerogative powers in the same terms as those for the United Kingdom. They may be taken as an example of what would be the case in the United Kingdom if the deployment power were put on a statutory footing, without further provision about how the statutory powers were to be exercised.

#### *Recent practice*

8. As noted above, Australian governments have in practice put motions to the House of Representatives about the deployment of troops abroad, but not necessarily prior to the deployment. In 2003, for example, the government had committed forces to Iraq before any decision of the House. In September 1999, Australia’s decision to agree to lead the UN authorised force in East Timor was taken without any Parliamentary approval; troops were committed to INTERFET on 20 September 1999; parliamentary consideration followed the day after the troops were sent, when the government motion to support the decision was approved without objection. Australia has contributed troops to the coalition carrying out counter-terrorism operations in Afghanistan since October 2001; the practice has been for the Prime Minister to announce deployment details from time to time, most recently on 9 May 2006 of a contribution to a Netherlands-led Provincial Reconstruction team (although the troops will not be deployed until later this year).

## CANADA

### National Defence Act 1985

“Forces to continue to be vested in the Queen

The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen.

Active Service: Placing forces on active service

31. (1) The Governor in Council may place the Canadian Forces or any component, unit or other element thereof or any officer or non-commissioned member thereof on active service anywhere in or beyond Canada at any time when it appears advisable to do so

(a) by reason of an emergency, for the defence of Canada;

(b) in consequence of any action undertaken by Canada under the United Nations Charter; or

(c) in consequence of any action undertaken by Canada under the North Atlantic Treaty, the North American Aerospace Defence Command Agreement or any other similar instrument to which Canada is a party.”

9. The source of the Federal Government's power to deploy its armed forces overseas is the National Defence Act and, perhaps, beyond that, the royal prerogative. The legislation quoted above highlights the difficulty of finding satisfactory language to describe the military activities to which legislation is intended to apply (here, “active service”), an issue made more pressing by the escalation of the mandates of certain UN operations in which Canada has participated, notably in Yugoslavia. The existence of a UN mandate has been an important feature of Canadian participation in action abroad. While Parliamentary debates have taken place, they have not been on motions presented by the government seeking authorisation for the action proposed. Even for the bombing of Yugoslavia in 1999, for which there was no UN authority but which Canada justified as humanitarian intervention, there was a debate in the House of Commons but no approval was sought. The courts have been reluctant to involve themselves in review of deployment decisions. The Aleksic case<sup>177</sup> shows that there remains doubt in Canada about whether the National Defence Act has completely displaced the prerogative, but the court said that it would make no difference to any power of judicial review.

10. For Canada, the principal concern has been the deployment of Canadian forces to UN peacekeeping operations. While Canada had been one of the principal contributing States to UN peace-keeping operations, one commentator has noted that the growing range and complexity of UN operations was causing disquiet in Canada—“growing crisis of legitimacy, accountability, resources, and systems of governance within institutions themselves.”<sup>178</sup> The result has been debates in Parliament on general matters about peace-keeping and ex post facto inquiries about the conduct of Canadian units acting under UN authorisation, notably in Somalia.

<sup>177</sup> Aleksic v Canada (Attorney-General) (2002) 215 DLR (4th) 720 (Ont Div Ct).

<sup>178</sup> Osler Hampson in Ku and Jacobson, Op cit. p.153.

11. The events surrounding Canada's participation in the Gulf conflict in 1990–1991 are of some interest. The House of Commons approved government motions on the sending of ships and troops to the region but a motion of October 1990 was amended to provide that a further resolution would be put in the event of the outbreak of hostilities involving Canadian forces. One was put and passed in January 1991.<sup>179</sup> It is a device not without interest, given “threat” deployments in support of diplomatic measures, as providing a further role for Parliament before the final commitment of the forces to action.

12. More recently, the Canadian House of Commons voted on 17 May 2006, by 149–145, in favour of a two-year extension to February 2009 of missions in Afghanistan. The Conservative party came to power as a minority government in January 2006. During the election campaign it had promised to put “international treaties and military engagements” to a vote. Before the vote, the Prime Minister had said that if the Government lost the vote, Canadian forces would remain in Afghanistan under their existing mandate for another year, during which time the Government would seek to broaden support for its policy. If it could not do so, it would dissolve Parliament and seek a popular mandate for its policy. The outcome of the vote perhaps undermined one of the Government's objectives, which was to demonstrate to the troops that they enjoyed the full support of Parliament.

## GERMANY<sup>180</sup>

### Constitution

The Constitutional provisions concerning the Armed Forces are in Article 87a of the Basic Law. Article 87(1) gives the Federation the power to establish armed forces for “the purposes of defence” and only for defence except where expressly permitted by the Basic Law (none relevant to present purposes). However, Article 24(2), which gives the Federation the power to make agreements for collective security, has been interpreted as covering Germany's participation in, inter alia, UN arrangements and NATO but also that the deployment of armed forces under these arrangements requires the prior consent of the *Bundestag*. The German Basic Law does not have a specific provision on the deployment of armed force, but the Constitutional Court has described the armed forces as a “parliamentary army”.

13. There have been conflicting interpretations of the case law of the Constitutional Court, but it has been said that “the consent of the *Bundestag* is required for all those deployments where the armed forces are directly and actively involved in hostile confrontations or armed conflicts”.<sup>181</sup> The same report goes on to suggest that a range of actions which might include some force by German troops, but of a limited kind (personal self-defence), do not require prior parliamentary authorisation.

14. Where prior authorisation is required, it is restricted to the question of participation only—the operational management of approved participation is in the hands of the government. The matter is now regulated by the “*Bundestag* Participation Act 2005”, which applies to the “deployment of armed German military forces outside [Germany]”. This requires the consent of the *Bundestag*. “Deployment” is defined positively—when the forces are engaged or their

<sup>179</sup> Rossignol, (Canadian) Library of Parliament, BP-303E (1992)

<sup>180</sup> See also Volume II: Evidence, Pages 56 and 214

<sup>181</sup> Volume II: Evidence, Page 214 (Appendix, para 9)

involvement is anticipated in “armed engagements”—and negatively—deployment does not include humanitarian assistance involving only the risk of action in personal self-defence. The Government must seek the consent of the *Bundestag* “in a timely manner before the start of the deployment”, with certain specific questions dealt with.<sup>182</sup> The *Bundestag* may only approve or reject a request. Where events did not admit of delay to obtain approval in advance of deployment, a retrospective procedure was laid down for the *Bundestag* to be informed after action had been taken. An informal mechanism is provided for what are called deployments of “limited intensity”, which can also apply to the extension of existing consents. The *Bundestag* may withdraw its consent during the currency of a deployment.

15. German deployment decisions may be subject to judicial review. The “Awacs” case about the deployment of German surveillance aircraft to Turkey in early 2003 shows how legal questions will arise about the limits of exceptional powers, and also how difficult they can be to resolve when all the evidence is not in the public domain.

## JAPAN<sup>183</sup>

### Constitution

#### “Chapter II Renunciation of War

#### Article 9

(1) Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

(2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of aggression of the state will not be recognized.”

16. The Japanese Armed Forces are called the “Self-defence Force” (SDF). Article 9(1) has not been interpreted as committing the state to pacifism but as allowing the deployment of its forces in self-defence of Japan. Attempts to expand the operational competence of the Japanese forces have been made by considering the reach of the idea of “self-defence” and in accordance with the War Contingency Act 2003.

17. The original position taken by the government was that Japanese forces could take part in UN operations only if they did not involve the use of force. “Peace-keeping operations” were considered to involve force, so Japan could not constitutionally contribute forces to them. Even then, Japanese forces could participate only in UN operations and not in uses of force authorised by the Security Council. Japan said that it was constitutionally unable to contribute to INTERFET (UN peacekeeping in East Timor) in 1999.

18. The conditions of the Peacekeeping Act 1992 were designed as safeguards against the unconstitutional deployment of Japan’s forces. Article 98(1) makes the Constitution the supreme law and Article 98(2) requires that Japan comply with treaties and customary international law. So, any use of force must be legal in

<sup>182</sup> Volume II: Evidence, Page 214 (Appendix, Article 3(2))

<sup>183</sup> Volume II: Evidence, Page 227.

international law but, even if it is, it must also fall within the constitutional competence of the armed forces. Article 100–8 of the Self-defence Forces Law allows armed forces to be used abroad to rescue Japanese nationals and foreign nationals.<sup>184</sup>

19. There is no explicit “war power” or “deployment power” in the Japanese Constitution. Control of the SDF is with the Prime Minister. In some cases, the participation of the National Legislature is required for the deployment of the SDF—a Bill must be presented to authorise participation in UN operations and such deployments involve only a limited capacity for Japanese troops to use force. To take part in SC-authorized operations which envisage the use of force under national command, direct legislative authorisation is required. There are now specific laws for anti-terrorism operations and for Japanese participation in the reconstruction of Iraq.

## NETHERLANDS

### **Constitution**

#### **Article 96**

(1) A declaration that the kingdom is in a state of war shall not be made without the prior approval of the Parliament.

(2) Such approval shall not be required in cases where consultation with Parliament proves impossible as a consequence of the actual existence of a state of war.

(3) The two Chambers of the Parliament shall consider and decide upon the matter in joint session.

(4) The provisions of the first and third paragraphs shall apply by analogy to a declaration that a state of war has ceased.

#### **Article 97**

(1) There shall be armed forces for the defence and protection of the interests of the Kingdom, and in order to maintain and promote the international legal order.

(2) The Government shall have supreme authority over the armed forces.

#### **Article 100**

(1) The Government shall inform the States General in advance if the armed forces are to be deployed or made available to maintain or promote the international legal order. This shall include the provision of humanitarian aid in the event of armed conflict.

(2) The provisions of paragraph 1 shall not apply if compelling reasons exist to prevent the provision of information in advance. In this event, information shall be supplied as soon as possible.

20. These provisions require that the government inform Parliament about deployments. The general prescriptions of the constitution are supplemented by a detailed “Review Protocol 2001” setting out the information which the Government will supply to Parliament. Although there is no formal obligation to

<sup>184</sup> Shibata in Ku and Jacobson, Op cit, p.217

obtain parliamentary consent to deployment, in practice government would not commit troops without support, as the negotiations and debates before the deployment of Dutch troops to Afghanistan in 2006 showed. The background to this is that, in December 2005, NATO agreed to extend its operation in Afghanistan by expanding the NATO-led ISAF operation (under UNSC authority). Dutch participation was proposed by the government in December 2005, but there were objections of various kinds in the Dutch Parliament, including concerns about the safety of the troops and the fate of detainees handed over by Dutch forces to the Afghan authorities. The government did not gain the support of Parliament for the deployment until February 2006, following parliamentary debates about its concerns. The separate mandates of ISAF and the US-led Operation Enduring Freedom were emphasised before the authorisations were given. The delays caused by the need to gain parliamentary approval were cited by witnesses as operationally disadvantageous when deployment was being considered.

## UNITED STATES

### **The Constitution of the United States**

#### **Article I,**

Section 1: All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 8: The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States ... To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; --And To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

#### **Article 2**

Section 2: The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."

21. While the Congress has the specific authority to declare war according to Article 1 s.8, we have seen that this is an obsolescent power. Presidents have not felt constrained from deploying troops abroad in the absence of Congressional authorisation, nor from interpreting express Congressional mandates in a broad way. The President has claimed wide powers under his Commander-in-Chief authority. If the decision to deploy troops is constitutional, there is little argument that the President has broad powers to conduct hostilities, subject only to the effect of other restraints in the Constitution (though, as the present controversies about unlawful combatants show, perhaps not even to these). The combination of generous interpretation of Congressional resolutions and wide powers of implementation caused severe political controversy during the Vietnam War. As

part of the reaction to that, Congress passed the War Powers Act 1973 over President Nixon's veto.

*The War Powers Act (or War Powers Resolution)*

22. The War Powers Act was passed after the end of the Vietnam War when Congress sought to ensure that, in accordance with the Constitution, the "collective judgment of both Congress and the President would apply to future exercises of the war-making power". The legislation was enacted over the veto of President Nixon and subsequent Presidents have questioned its constitutionality. The Act does not confer any power on the President to deploy forces that he does not otherwise have. It says that the power of the President to introduce US forces into "hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances" arises only under a declaration of war, under specific statutory authority or in self-defence. The Act imposes on the President "in every possible instance" an obligation to consult with Congress before introducing US Forces in category 2 of Sec.2(c) and thereafter until the forces are no longer engaged in hostilities. The President is required to submit a Report to Congress setting out the reasons for the deployment, the legal authority for it and the estimated scope and duration of the "hostilities or involvement" where, in the absence of a declaration of war, US Forces are introduced

- a. into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
- b. into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or
- c. in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation.

23. The sanction on the President is supplied in Sec.5(b), which requires the termination of any deployment of US forces within sixty days of (or for) the submission of a report under Sec.4 unless the Congress has declared war, enacted a specific authorisation for the deployment, legislated to extend the sixty day period or is unable to meet because of an attack against the United States. The obligation is subject to certain exigency exceptions. Furthermore, by Sec.5(c) the President must withdraw US forces engaged in hostilities abroad without a declaration of war or a statutory authorisation if the Congress so resolves. The War Powers Act sets out the procedures for its implementation which are specific to the constitutional arrangements of the US. The requirements on the President are mandatory and he cannot avoid its provisions by simply taking no action.

24. When the President and the Congress are of one mind to deploy force, the legislative procedures are not an encumbrance. Indeed, recent US practice has featured Congressional endorsement of exceptional powers to the President to use force under the general pursuit of the "war against terror". Where there are differences, the Executive has been astute to avoid the constraints of the War Powers Act and the Congress reluctant to stand on its prerogatives.

25. Practice under the War Powers Act is inconclusive. Presidents have submitted well over one hundred reports to Congress, all accompanied by the language "consistent with the War Powers resolution," but there has been little consultation with Congress before the decisions have been taken to deploy troops. Troops are currently deployed under two broad Congressional authorisations, PL 107-40 following the attack of 11<sup>th</sup> September 2001 and PL 107-43 authorising the use of

force against Iraq (which may be used for the enforcement of future (i.e. after October 2002) SC resolutions about Iraq). Extracts from these authorisations are quoted in paragraph 26 below.

26. Professor Glennon warns against too high expectations of legislative control of executive decisions on deployments through the War Powers Act. He said that “The most that a statute can do ... is to facilitate the efforts of individual members of Congress to carry out their responsibilities under the Constitution. To do that requires understanding, and it also requires courage ... For a Congress composed of such members, no War Powers resolution would be necessary; for a Congress without them no War Powers resolution would be sufficient.”<sup>185</sup>

27. It is not just that Congress has been reluctant to use the powers it claimed for itself and to enforce the duties it supposed of the President, but Congress has granted broad powers in specific circumstances which make redundant the procedural steps in the War Powers Act. The most recent examples are the Joint Resolution of Congress after 11 September 2001, which authorises the President

“to use all necessary and appropriate force against those nations, organisations or persons he determines planned, authorised, committed or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organisations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organisations or persons.”

and the resolution about Iraq, which authorises the President to use force

“as he determines to be necessary and appropriate in order to (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.”

28. The War Powers Act is special (even if not unique) in requiring the participation of both Houses of the Legislature and providing arrangements for dealing with disagreement between them. This is an established feature of US constitutional practice and may not be easily replicable elsewhere.

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<sup>185</sup> Michael J Glennon, “Constitutional Diplomacy” (Princeton University Press 1991), p 122

## APPENDIX 5: THE PONSONBY RULE

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### THE PONSONBY RULE<sup>186</sup>

#### Introduction

The power to make treaties is a Prerogative power vested in the Crown. It is exercised on the advice of the Secretary of State for Foreign and Commonwealth Affairs, who, in turn, consults with other Departments of Government whose responsibilities would be engaged in executing the provisions of particular treaties. There is no constitutional requirement for Parliament to approve a treaty, although sometimes legislation is needed before the Government can ratify a treaty.

Since 1924 all treaties subject to ratification (with limited exceptions) have been laid before Parliament for 21 sitting days in accordance with the Ponsonby Rule before ratification (or its equivalent) is effected. The laying is done by means of a Command Paper published in one of the following FCO series: Country, Miscellaneous or European Communities. Since 1997 treaties laid before Parliament in accordance with the Ponsonby Rule have been laid together with an Explanatory Memorandum (EM). When a treaty has entered into force for the United Kingdom (whether on signature or following ratification etc.), it is published in the Treaty Series of Command Papers.

#### The Ponsonby Rule of 1924

Since March 1892, it had been the practice to present to Parliament the texts of treaties binding the United Kingdom. This was done in a numbered series of Command Papers known as the Treaty Series. But treaties were published in that series only after they had entered into force for the United Kingdom, so that at that stage no Parliamentary approval, tacit or express, could be sought or given.

On 1 April 1924, during the Second Reading Debate on the Treaty of Peace (Turkey) Bill, Mr Arthur Ponsonby (Under-Secretary of State for Foreign Affairs in Ramsay MacDonald's first Labour Government) made the following statement: "It is the intention of His Majesty's Government to lay on the table of both Houses of Parliament every treaty, when signed, for a period of 21 days, after which the treaty will be ratified and published and circulated in the Treaty Series. In the case of important treaties, the Government will, of course, take an opportunity of submitting them to the House for discussion within this period. But, as the Government cannot take upon itself to decide what may be considered important or unimportant, if there is a formal demand for discussion forwarded through the usual channels from the Opposition or any other party, time will be found for the discussion of the Treaty in question." He warned that: "Resolutions expressing Parliamentary approval of every Treaty before ratification would be a very cumbersome form of procedure and would burden the House with a lot of unnecessary business. The absence of disapproval may be accepted as sanction, and publicity and opportunity for discussion and criticism are the really material and valuable elements which henceforth will be introduced"<sup>187</sup>.

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<sup>186</sup> Downloaded from the FCO website: <http://www.fco.gov.uk/Files/kfile/ponsonbyrule.0.pdf>

<sup>187</sup> HC Deb. (1924) 171, c. 1999–2005

The statement responded to the demands of some of the Government's supporters for a Parliamentary practice that would render impossible the "secret Treaties and secret clauses of Treaties" of the kind which were then generally supposed to have helped bring about the First World War. Since then, the practice of secret treaties has been largely abolished by changes in diplomatic practice, reinforced in turn by specific obligations in the Covenant of the League of Nations and then in the United Nations Charter requiring all treaties to be deposited with the United Nations once they have entered into force, which then publishes them in the United Nations Treaty Series (UNTS) published periodically by the UN Secretariat. Moreover, many States, including the United Kingdom, have published Treaty Series of their own. The Ponsonby Rule was withdrawn during the subsequent Baldwin Government, but was reinstated in 1929 and gradually hardened into a practice observed by all successive Governments.

### **Application of the Ponsonby Rule**

The Ponsonby Rule requires that every treaty signed by the United Kingdom subject to ratification should be laid before Parliament for 21 sitting days (although they need not be continuous). The FCO interprets the Ponsonby Rule as applying to acceptance, approval and accession as well as to ratification. "Acceptance" and "approval" have the same legal effect as ratification, and "accession" arises when the United Kingdom Government consents to be bound by a treaty of which it was not an original signatory. The Ponsonby Rule does not apply to treaties that enter into force on signature.

In its Response of July 1982 to the 6th Report of the Joint Committee on Statutory Instruments (Session 1981–82), the Government confirmed that "International agreements [i.e. treaties] (including agreements amending international agreements) that are subject to ratification are, under the Ponsonby Rule, laid before Parliament before they are ratified." However, "Sometimes an international agreement is amended, and the amendment, which may or may not be in the form of an international agreement, though it is not subject to ratification, does require the making of a statutory instrument for its implementation. In such a case, the Government accepts that the text of the agreement or amendment should be made available to Parliament, preferably when the statutory instrument is laid but in any case before it enters into force unless urgent or other important considerations make this impracticable" [Cmnd. 8600]. Therefore, in practice the Ponsonby Rule has also been applied to (a) amendments to multilateral treaties which are themselves subject to ratification and (b) amendments which, although subject to the silent procedure, require legislation.

Moreover, since January 1998 it has been the FCO's consistent practice to apply the Ponsonby Rule to treaties which are not subject to formal ratification (or acceptance or approval) but simply to the mutual notification of the completion of constitutional and other procedures by each Party. (However, the Ponsonby Rule does not apply to treaties subject to unilateral notification of completion of procedures, where there are no procedures or legislation required on the United Kingdom side and notification is only by the other side.)

### **Exceptions to the Ponsonby Rule**

On 6 May 1981 the Lord Privy Seal announced in a written answer to a parliamentary question that: "In order to effect economies in the publication of Command Papers, it has been decided that the texts of bilateral double taxation agreements should no longer be tabled in Parliament as White papers in the

Country Series of Command Papers. They will however continue to be published in the Treaty Series of Command Papers after entry into force. These new arrangements will necessitate a limited departure from the strict terms of what has become known as the Ponsonby Rule—namely, the practice whereby the texts of all international agreements concluded subject to ratification are laid before Parliament for a period of 21 sitting days after signature and before ratification. The purpose of the Ponsonby Rule is to afford Parliament the opportunity of considering commitments which the Government of the day are proposing to enter into. In the case of bilateral double taxation agreements, that purpose is already served by the statutory requirement that the draft of any Order in Council providing for double taxation relief shall be laid before the House of Commons for approval by affirmative resolution, it being the invariable practice that the text of any bilateral double taxation agreement falling within the scope of the Ponsonby Rule should be scheduled to the draft Order designed to implement the agreement. It will accordingly be seen that the new arrangements are wholly consistent with the spirit of the Ponsonby Rule.”<sup>188</sup>

With the growth of practice over the years, the Ponsonby Rule has been understood to allow for exceptions from its operation in special cases, when other means of consulting or informing Parliament can be used instead. Alternative procedures are:

- adopting a Motion;
- passing a Bill;
- making an announcement in a debate;
- adopting a resolution or a Motion as part of the Affirmative Resolution procedure for making an Order in Council;
- answering a Parliamentary Question;
- consulting leaders of the Opposition and other parliamentary parties.

However, in practice departures from the Ponsonby Rule are rare.

### **Explanatory Memoranda**

Following an undertaking by Ministers on 16 December 1996,<sup>189</sup> all treaties signed after 1 January 1997 and laid before Parliament under the Ponsonby Rule are now accompanied by an Explanatory Memorandum (EM). It contains a description of the subject matter of the treaty and an account of the reasons why it is proposed that the United Kingdom should become a party to the treaty. It further highlights the benefits for the United Kingdom from participation in the treaty as well as any burdens which would result. Guidelines on Explanatory Memoranda for Treaties are published on the Treaties page of the FCO web site at <http://www.fco.gov.uk/directory/treaty.asp>

The FCO sends two copies of a Command Paper with its accompanying EM to the Clerk in Charge, Votes and Proceedings Office at the House of Commons for laying. A further copy of the Command Paper and 25 copies of its accompanying EM are sent to the Vote Office at the House of Commons for distribution to Members. Arrangements for the House of Lords are as follows: Two copies of a Command Paper and its accompanying EM are sent to the Clerk of the

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<sup>188</sup> H.C. Deb. (1981) 4, WA 82

<sup>189</sup> H.C. Deb. (1996) 287, WA 94302; H.L. Deb. (1996) 576, WA 101

Parliaments at the House of Lords. One set is stamped for the attention of the 'Printed Paper Office', which also receives 2 copies of the EM direct for distribution to Members. In addition, EMs are published on the Treaties page of the FCO web site.

In its Response of 31 October 2000 to the House of Commons Procedure Committee's Second Report of Session 1999–2000, Parliamentary Scrutiny of Treaties (HC 210), the Government stated that: "The FCO will ensure that a copy of each Command Paper and accompanying Explanatory Memorandum (EM) for treaties laid before Parliament under the Ponsonby Rule is sent to what the FCO judges to be the relevant departmental select committee. It would then be for the lead committee to decide whether the Command Paper and EM might be more relevant to another committee or relevant to more than one committee and to pass it on accordingly." This practice was implemented at the start of November 2000.

### **Extension of the Ponsonby Period**

The Government Response to the Procedure Committee further stated that: "In accordance with the Ponsonby Rule time for consideration of a treaty by a select committee should normally be within 21 sitting days, but in cases where a committee wished to conduct an inquiry that was likely to take more than 21 days, it is open to a committee to ask for an extension. The Government would aim to respond positively to such requests provided circumstances permit and cases are justified."

Foreign and Commonwealth Office

January 2001