

# Minutes of Evidence

TAKEN BEFORE THE CONSTITUTION COMMITTEE

WEDNESDAY 23 NOVEMBER 2005

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Present	Bledisloe, V	O’Cathain, B
	Carter, L	Rowlands, L
	Elton, L	Smith of Clifton, L
	Hayman, B	Windlesham, L
	Holme of Cheltenham, L	
	(Chairman)	

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## Memorandum by Rt Hon Tony Benn

### The present constitutional position

The power to go to war is, under constitutional custom and practice, held to belong to the Sovereign personally and derive from the Crown Prerogative.

In practice this means that the Prerogative is exercised by the Prime Minister, who would presumably consult the Crown before taking the decision to commit the nation to an armed conflict.

When such a Prerogative power is exercised there is no constitutional requirement for Parliament to be consulted, let alone decide the matter itself by a vote.

In most cases Parliament is merely notified in a ministerial statement although it is open to a Prime Minister to put the matter to the House of Commons, as occurred before the attack upon Iraq in 2003, when the Commons voted in support of that attack.

But even if had been undertaken without the consent of the Commons it would, within our constitution, have been legal and unchallengeable in the Courts.

### Definitions of Democracy

In common parlance, Britain describes itself as a “Democracy”, but in the Palace of Westminster we usually speak of being a “Parliamentary Democracy”, which has a very different shade of meaning since it recognises that, in Britain, the citizens do not elect the Crown or Lords.

However when the Queen speaks about our system of government the phrase used is that Britain is a “Constitutional Monarchy”, under which the She governs with the “advice and consent” of both Houses of Parliament which means just that and nothing more.

For it is the Crown which summons Parliament, dissolves Parliament, gives assent to all Bills before they become law, and everyone in Parliament is required to swear an oath of allegiance to the Crown, an oath that is administered in a much more specific form to all Privy Councillors.

### What powers should the Executive have to make war?

The decision of a nation to go to war is one of the most serious that any government can take since war is costly in lives and money and could determine the survival and independence of the nation itself.

Where an attack from abroad occurs it is impracticable for to hold a democratic debate and vote before any response is made.

However where a government wishes to attack another nation, in circumstances which are less clear cut, it is reasonable for Parliament to be able to consider the arguments for such a war and to give its consent before that war is launched.

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23 November 2005

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### From where should the Executive war-making power derive?

That is the only question raised and the Committee should consider the alternative to Prerogative power which would be the enactment of legislation by Parliament which laid down the circumstances in which government might and might not commit this country to war.

Such legislation could confer all the powers now exercised by the Prerogative, or it could draft alternative provisions that restricted those powers to certain clearly defined cases when the war option would have to be specifically authorised.

The provisions of such a Bill would need careful consideration but however drafted the authority would derive from a democratically elected body and not by the use of the Prerogative, which Parliament cannot debate without the consent, in advance of the Queen and such legislation could not itself be debated without such Royal consent.

### Conclusion

The issue to be decided is therefore a simple one: from where should the Prime Minister's power be derived and what should be the extent of that power?

If the Committee were to accept the case for transferring those powers to Parliament it might wish to consider the means by which that could best be done and even set out some guide-lines to help with the drafting of the necessary legislation.

My recommendation is that the power to go to war should be transferred to Parliament and that legislation be drafted to make that possible.

31 October 2005

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### Examination of Witnesses

Witnesses: CLARE SHORT, a Member of the House of Commons, MR NEIL GERRARD, a Member of the House of Commons, RT HON TONY BENN and LORD LESTER OF HERNE HILL, a Member of the House, examined.

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**Q1 Chairman:** May I say welcome to our distinguished witnesses on behalf of the Committee. Thank you very much for coming. I just have to ask formally for your indulgence for a moment on whether any Member of the Committee has an interest to declare, although it would be quite difficult to imagine what it might be in respect of this inquiry. Does any Member of the Committee have such an interest? Thank you very much. Could I say that these proceedings are being televised and I think will be shown on Saturday. I am very glad you could all come and I wonder if, for the sake of the record, starting with Lord Lester, you would be kind enough to identify yourselves?

*Lord Lester of Herne Hill:* I am Anthony Lester, alias Lord Lester of Herne Hill.

*Clare Short:* I am Clare Short, the MP for Birmingham, Ladywood.

*Mr Benn:* Tony Benn, former Member.

*Mr Gerrard:* Neil Gerrard, MP for Walthamstow.

*Mr Gerrard:* I started to think about this a great deal about a year ago when I was drawn in the private Members' ballot of the House of Commons and I was looking at what issue I might bring in, in a private Member's bill. It was then that I read the report which had been done by the Public Administration Committee, which was about the royal prerogative in general, not specifically about war powers, but the more I thought about it the more it seemed to me that we had the vote on Iraq but that in itself did not create any precedents at all for the future. The Prime Minister had said that he could not envisage a situation where there would not be a vote again in the future, but it seemed to me that that left the position open for a future Prime Minister to take a different view. In the aftermath of Iraq we had that vote, but it seemed to me a great many people were dissatisfied with the process which had happened and the way in which decisions had been taken, and the fact that there was no guarantee that Parliament would in the future have any say on perhaps the most important decision which could possibly be taken of committing British troops to military action.

*Mr Benn:* I have a double interest in it. First of all, on the question of the royal prerogative, the last time I appeared before a Lords Committee was 50 years ago, on 18 February, 1955, when the Lords decided that because my father had been made a peer when he

**Q2 Chairman:** Thank you very much. I would like to start with a general question, giving you each a chance to tell us why you think this issue is important both in general and why it should be addressed by Parliament. Perhaps we could start with you, Mr Gerrard.

23 November 2005

Clare Short MP, Mr Neil Gerrard MP, Rt Hon Tony Benn  
and Lord Lester of Herne Hill

died it was inevitable that I would be ineligible to sit in the House of Commons. I was later thrown out of the House of Commons on the grounds that the royal prerogative took precedence over the votes of my constituents. It took eight years for that royal prerogative to be changed by the Peerage Act. My other interest is about war itself. I served during the war in the RAF and thought a lot about it, and it seems to me that this at heart is a moral question. If you tell young men in the Services that they have got to go under orders and kill, and may be killed, you are taking 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. I had a letter during the Suez Crisis from a young pilot in Cyprus, who wrote to me and said, "I believe this war is wrong and I intend to disobey orders. What shall I do?" I wrote back and said, "You must decide in your own conscience." So for me it is a moral and democratic issue, and I introduced a Crown Prerogative (Parliamentary Control) Bill, which dealt with all the prerogatives so that they should all be transferred to the House of Commons or to Parliament, but that never came up. One of them was the war powers, and I think the war powers one is important because war, as Neil has said, is the most important decision a government can take. It affects the lives not only of those in conflict but at home and it may affect the future of the country, and for that to be taken on the notion that it is a Crown decision when actually it is a power of the Prime Minister of the day seems to me to be wrong.

*Clare Short:* I am persuaded that this is outdated, undemocratic and should be updated, but that would not have moved me to take action if I did not remain stunned and worried by the way in which we saw our constitutional arrangements malfunction on the route to war in Iraq and a trail of deceit, which I think helps to explain the failure to prepare for afterwards and the dreadful situation and the terrible loss of life. So this is not, for me, a political point-scoring thing. We must learn the lessons of how such terrible errors were made and I think now that if the Prime Minister was briefed beforehand that this was a personal prerogative power, you can see why and how he would feel entitled to make his own judgment of what was in Britain's interests, that it is in Britain's overwhelming interest to stick close to America and not need to have any collective Cabinet discussion, and then that very, very personalised and slightly hidden method of decision-making, which means the Defence and Overseas Policy Committee never met, so all the options were not properly scrutinised and the legal authorisation was concocted in a very disreputable way, which is now a matter of record. You can see how it would happen that any one of us,

told that we personally had the duty and the right to make this decision, might do it in an extremely personalised way and in a way which I think leads to very bad decisions and which has created a very dangerous quagmire. So I think we have a duty to scrutinise our constitutional arrangements and to set in place safer arrangements so that decisions as big as this are better made. I find the argument that there was a vote in the Commons on this occasion and there has not been on other occasions completely unpersuasive given that the troops were on the ground, it was last-minute, the Prime Minister was threatening to some people to resign if half his own party did not vote for it, and people had been deceived. So I think the argument that we are only trying to secure what happened last time is not good enough. If any Prime Minister knew that he had to bring before the House of Commons—and maybe both Houses, we are coming on to that—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 be better made.

**Q3 Chairman:** Could I just ask you a supplementary because, of course, you were a Member of the Cabinet in the run-up to the Iraq war. Would your feelings and your analysis be different if there were, in your opinion, more fully fledged conventional Cabinet government and less of what I think is called "sofa government"? Are your views affected, because you have talked a lot about the personal issue of the Prime Minister?

*Clare Short:* I have a two-part answer to that. I think all decisions would be better made if a number of independent-minded people had access to information and scrutinised and discussed the idea. I think that improves the quality of decision-making in any family, local authority, the health board, government, whatever. So part of the problem was that there was not proper Cabinet government and there is not proper Cabinet government in this country. When you look at the royal prerogative, it is not the prerogative of the Cabinet, it is a prerogative of the Prime Minister, so that helps to encourage a lack of accountability to the Cabinet. I think even worse, the Cabinet Committee, Defence and Overseas Policy, to which come the heads of all the intelligence agencies, the heads of the Armed Forces, the Permanent Secretaries and Secretaries of State of all the departments which have any foreign policy intervention, normally would meet and scrutinise all the diplomatic, political and military options in a crisis situation like this. It did not meet. So my worry is that terrible errors were made and they flow from this concentrated personalised power, and we have a duty to our country's constitutional arrangements

23 November 2005

Clare Short MP, Mr Neil Gerrard MP, Rt Hon Tony Benn  
and Lord Lester of Herne Hill

and the avoidance of error in the future to correct this.

*Lord Lester of Herne Hill:* Thank you very much for asking me to come. It had not occurred to me until I heard Tony Benn that I should bring my own military experience into play, but I would like very briefly to mention that and then talk very briefly about the constitutional framework, which is wider than war powers. So far as my military experience is concerned, I was an officer serving during the Suez invasion. We never got to Suez, but I was attached to the First Brigade Guards as a gunner officer and I spent some of my time making sure we deceived the readers of *The Guardian* as to what we were up to in the run-up to the invasion. Looking back on it, it might have been better if what we were up to had been scrutinised by both Houses of Parliament. But coming from war, which I regard simply as a subset of the problems about the prerogative, since you are a Constitution Committee could I briefly say how I see the position, because it would be a mistake to see this solely in terms of war powers. We were all brought up, were we not, to believe that there are two fundamental principles protected by our unwritten Constitution? One was Parliamentary supremacy, the idea that the Executive is accountable to Parliament rather than to the Sovereign. Secondly, the principle of the rule of law, that public powers should be exercised according to the law of the land. The difficulty with our elastic and flexible unwritten Constitution, with all its benefits, is to make sure that those two principles are applied in practice. The question really which this Committee is asking itself when it looks at war powers is, should it be Parliament that is Sovereign, to whom the Executive is constitutionally accountable, or should it be the monarch? The view upon which my Bill was based—as you probably know I had an Executive Powers and Civil Service Bill in the wake of the House of Commons Public Administration Committee's excellent report—was that in a modern democratic society it should be Parliament, whilst preserving intact the personal prerogatives and immunities of the Sovereign like any other constitutional head of state. I believe that prerogative powers are necessary but that it is anomalous that the Crown is able, on the basis of mediaeval notions of kingship, through the Queen's Ministers, to exercise public powers without Parliamentary authority, and I think it is time (as, I think, do Tony Benn and Clare Short, indeed all the witnesses) that we should place the prerogative under Parliamentary authority. Later I can explain simple ways of doing it with regard to the war powers, but I think that is the broad constitutional question within which this inquiry comes.

**Q4 Chairman:** Thank you. All those statements are extremely helpful to the Committee. We have got representatives of two tendencies here, those who

start with the broad gauge of the royal prerogative (and of course it is the history of the British Constitution that that has incrementally been shrunk by Parliament eroding it, confining it and limiting it), those who see the approach as a transfer of the prerogative powers to a democratic parliament and those who have isolated this particular issue of war-making powers. It is a problem which is going to vex this Committee to ask the question: do you, in considering war-making powers, have to address yourself to the larger question of the prerogative? Is it possible, as Ms Short's and Mr Gerrard's Bill did, to address war-making powers in isolation or do you have to take the more synoptic view, which Lord Lester and Mr Benn have taken, of addressing the prerogative powers as a whole? Can one do the narrow gauge issue without addressing the larger issue of prerogative powers? I would be interested in any views.

*Clare Short:* I think you can, and there is a legislative framework which proposes so doing, and I think the war-making powers are the most urgent, but then I would support going on to look at it more broadly. I think doing something about war-making powers is absolutely urgent and we owe it to the young people whom we are willing to contemplate sending to war and to the taking of other people's lives to improve our arrangements.

*Lord Lester of Herne Hill:* I agree with that. You could do it either way. You could have a War Powers Act or you could have a Prerogative Powers Act. I would say that war-making powers rarely, happily, come up. I think treaty scrutiny powers are of more day to day practical importance and I would be sorry if one were to look at it only in terms of war. But you could, as Clare Short has said, have a statute dealing only with war powers.

*Mr Benn:* I think the war one is the most important immediately. I think the general one needs to be discussed, and it would be discussed, but if you look at the history of how changes have occurred in Britain it has always been done incrementally. You could not have a more vivid example than your Lordships' Committee. Fifty years ago every one of you would have been here by the royal prerogative; now every one of you is here by statute. Even the elected hereditaries were created by the 1999 Act, which created this marvellous innovation, the hereditary elector. It never existed before in our Constitution. So I think it would be perfectly in order to say that this is the key question, but if it were done it would raise other questions. The establishment of the Church of England is a very good example, though funnily enough that is a prerogative given to the Crown by Parliament. I looked it up. It was the Act of Supremacy of 1534 which gave the King the right to control the Church; taking it away from

23 November 2005

Clare Short MP, Mr Neil Gerrard MP, Rt Hon Tony Benn  
and Lord Lester of Herne Hill

the Pope. So this erosion of prerogative powers has occurred progressively, but this is a very important one. I think if in your conclusion you said that maybe the case for this would point to a further examination of other prerogatives, that would be sensible. One last point, which people do not always understand, is that Parliament cannot discuss a bill touching on the prerogatives without the Royal Assent being given, because I have introduced many bills which did and I got a letter from Buckingham Palace always saying the Queen put her prerogatives at the disposal of the House for the purpose of discussing the bill. So that is one safeguard of the prerogative. Secondly, even though the Royal Assent is never refused, the Royal Assent would have to be given to my law which altered the prerogative powers. So however you look at it, whether you look at it constitutionally or whether you look at it historically, it seems to me it would be perfectly easy to do this. The simplest way to do it, although it would not meet all my requirements, would be for Parliament to pass a law saying that all the prerogative powers of war-making are transferred to the Prime Minister. That would leave the position exactly as it is, but the authority would come from Parliament, not from the Crown. I would not favour that, obviously, but I think you could say that 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 so to do.

*Clare Short:* I do not think that would solve the problem.

*Mr Benn:* Parliament would decide it, that is the point.

**Q5 Chairman:** Did you want to add anything?

*Mr Gerrard:* It is obviously possible to legislate on a single aspect, the private Members' bills, and some which Clare introduced do that, but I do not think I would in any way see that as the end of the road. Even in discussing the War Powers Bill which we brought in, it immediately starts to raise other questions, for instance the question of treaties. What happens in relation to these powers if there is a treaty which demands that we commit to military force, let us say, in support of another country which has been attacked? So there are immediately relationships with some of these other powers where prerogatives are used. I suspect it will be inevitable that if progress was made on this single piece of legislation, on war powers, that would lead to further discussion of other uses of the prerogative. I think it would be practically impossible for that not to happen in due course.

*Clare Short:* Could I make one small point? In many countries they have in their constitutional arrangements about war that no one declares war any more and war has transformed itself, these short

military actions compared with the First World War and the Second World War, prolonged war. So I just want to leave in your minds that if we use the word "war" we would not catch any of the military activity which we have been concerned about over the last five years. You have to go for military action. War is transforming itself in front of our eyes and many countries have lost their constitutional control because no one declares war any more.

*Mr Benn:* At Suez that was the issue, because I remember asking the Prime Minister a question, "Are we at war and what is the legal position of British soldiers captured by the Egyptians?" There was no answer, but it was, as Clare quite properly says, armed conflict which we launched.

**Q6 Chairman:** I wonder if I could address the question you have raised, which is the variety and complexity of situations in which British Armed Services might be used, varying from acting under a UN Resolution as part of a collective force to acting under the NATO alliance, under a treaty obligation, responding pre-emptively to a possible danger (as in, perhaps, Sierra Leone) to the two varieties in Mr Benn's very interesting paper of responding to an attack defensively and going to war. One begins to think that the simple model of Neville Chamberlain saying, "This country is now at war with Germany," is one which hardly meets the complexity of situations in the modern world in which British Armed Services might be required to act in some theatre, pre-emptively, in aid of a civil power. One can envisage a whole range of possibilities. I would be interested to have a legal perspective on this from Lord Lester as to how we should think about that.

*Lord Lester of Herne Hill:* The way I have tackled it, in my view, is very simple, so simple that I can sum it up in a couple of sentences. What I have suggested is that before Executive powers are exercised for the purpose of committing the United Kingdom to direct participation in any war, any international armed conflict or any international peace-keeping activities, the prior approval of Parliament for such participation must be given by a resolution of each House. That is the first thing. So it covers war, international armed conflict or international peace-keeping activities for the reason you have indicated, my Lord Chairman. Secondly, I was realistic enough to provide also a let-out clause for dealing with dire emergencies, indicating that it would not apply if the Prime Minister considered that exceptional considerations required immediate action to be taken, notified each House of Parliament of that fact and as soon as reasonably practicable provided each House with a statement of the reasons for taking the emergency view. That encompasses, I think, what is really needed in terms of the outbreak of hostilities or

23 November 2005

Clare Short MP, Mr Neil Gerrard MP, Rt Hon Tony Benn  
and Lord Lester of Herne Hill

direct participation in any of those activities. It does not deal with the ongoing situation, which is another matter, but I think in terms of the trigger for direct intervention it should cover all those situations and I cannot see why it should make a ha'p'orth of difference whether it is done under the auspices of the United Nations, NATO, or any other international organisation or by the UK alone. In each case if there is direct participation by the Armed Forces of the United Kingdom, Parliament should be informed in advance, except in a dire emergency, and should authorise the action.

*Clare Short:* In my Bill, and I think in Neil's draft, we used the Geneva Convention applicability and the library briefing goes into the detail of this, which therefore excludes UN peace-keeping. I personally think there is quite a strong argument for treating UN peace-keeping operations differently. I think there is a good case for bringing them before Parliament. I think hardly anyone in this Parliament understands what we did and did not do in Sierra Leone, for example, and I think it would be a good idea if people knew more about what we actually did. So if we had the same framework, that you should seek Parliament's permission but there is a right for emergency action when necessary and you bring the explanation in later, but that we were using a different definition, which was that it was military conflict, not war, and therefore it did not apply to UN peace-keeping. I just want to make the point that you need to look at the different options. This is very much a committee stage point, I think, but it is something which needs to be raised.

*Mr Benn:* All the complexities which you mention, and I have listed them too, are ones which must go through any Prime Minister's mind when the question arises. Have we been attacked? That would settle it immediately, if somebody bombs you. Are we under threat? That was the Prime Minister's argument in 2003, that Saddam Hussein had weapons he could use in 45 minutes. What is the legal position? What is our international obligation? What are the likely consequences? So if these thoughts of the complexity, the different obligations and risks are in the Prime Minister's mind, then they must be capable of being clarified by a bill and put into statute. So I think you are absolutely right to say this is not as simple as war or not war. That has all changed. The rules of the game have changed, if I can coin a phrase, but actually you could address these in a way which fitted into an Act of Parliament which did give the Prime Minister of the day, or the Cabinet (I agree it should be collective) the right to respond immediately if we are attacked. You could not possibly avoid that. Then you would look at the other possibilities in the light of all the factors which Parliament thought should be taken into account.

**Q7 *Chairman:*** I think this is an issue which concerns all democrats thinking about this issue, that there may be emergencies and that the primary duty of the state is to protect its citizens and how does the state, in the shape of the Government, respond to such emergencies?

*Clare Short:* That is explicitly provided for in our Bills. Obviously any government must be able to act if it sees it as an emergency and then come to Parliament thereafter and explain why it was an emergency and why it acted.

**Chairman:** I think that is well-heard.

**Q8 *Lord Rowlands:*** How do the procedures in your Bill, Ms Short, handle this issue of "mission creep" where you could start out on a peace-keeping operation, Somali-style, and it turns horribly wrong and the whole situation changes and develops? How would the procedures which you are outlining in this Bill do that, given presumably that Parliament has authorised the initial deployment of Forces in that type of situation, but in fact the situation then changes dramatically on the ground?

*Clare Short:* Could I just say that we have not had problems with "mission creep" in recent military actions. If you go back to Vietnam, then we most certainly did.

**Q9 *Lord Rowlands:*** Somalia was "mission creep", was it?

*Clare Short:* I do not think it was. It was meant to be a humanitarian action and we now know that Bin Laden was organising there. There was the shooting down of a helicopter, the dragging of the soldier around the streets, and they pulled out.

**Q10 *Lord Rowlands:*** All right, there was a dramatic change in the context of the deployment.

*Clare Short:* This led to Bin Laden was claiming that America was defeatable, by the way. I think the short answer is that when the Government brings to Parliament, either after an emergency deployment or beforehand, the outline of the reasons for the action and such details as it thinks appropriate of the geographical location, and so on, that is the framework and there would be the debate, and if you get into an enlarged war and go into other neighbouring countries or it becomes much more prolonged then you would have to come back to Parliament because the terms on which the approval had been given are being transformed by facts on the ground.

*Lord Lester of Herne Hill:* It is the same point really, but it would all depend upon whether Parliament gave a blank cheque or wrote something in the cheque. If Parliament authorised the invasion of Iraq but not the invasion of Iran and it was decided to

23 November 2005

Clare Short MP, Mr Neil Gerrard MP, Rt Hon Tony Benn  
and Lord Lester of Herne Hill

creep into Iran, to conduct a mission, that would be outside the authority given by Parliament. If Parliament was mad enough to say, “Do whatever you like in the Middle East,” then it would be a more difficult problem, but I think the real answer is that having given the mandate it is up to Parliament then to monitor the mandate to make sure that it is not exceeded, and if it is to call Ministers to account because we are still a Parliamentary democracy.

**Q11 Lord Rowlands:** While I can understand the principle you are enunciating, when I look at the practicalities of the Bill and in particular look at the nature of the report you are expecting to be delivered by the Prime Minister to Parliament, that he or she has to explain the geographic extent of the participation, the expected duration of that participation, the particular bodies of Her Majesty’s Armed Forces participating or expected to participate, I think it is over-prescriptive and almost impossible at times for Prime Ministers to say at any one moment in time.

*Clare Short:* I think if you read it—I am sorry, I have not got a copy of the Bill with me—it says “and such details as he sees fit on these questions.”

**Q12 Lord Rowlands:** Yes, but you specify?

*Clare Short:* Yes, and then on those questions. So you read them out as though it did not have that qualification, “such details as he sees fit”. Therefore, if the Prime Minister put before Parliament a requirement that we were going to go to war in the Middle East and Parliament was willing to approve that, then the prospects for “mission creep” would be enormous. But you know as well as I do, that if Parliament was concerned about a war it would be unlikely. The Government would be more specific in order to get the support of Parliament and then if it started to go beyond the specifics of some of the undertakings it had given in statements (because we always have lots of statements in the course of military action) then you would have to come back to Parliament for a new approval.

**Q13 Lord Rowlands:** I think it is trying to create an inflexibility when you know that in many cases situations develop. You could be doing it in concert with other coalition partners, etc. I would have thought that endeavouring to put a Bill through with this type of over-prescriptive solution, as opposed to some of the substantive motions—and there have been substantive motions on war issues, Korea and indeed Iraq—

*Clare Short:* After the event.

**Q14 Lord Rowlands:** Yes, okay, but if it was before, I would have thought a simpler motion would be to bring it to the House. “This is the reason why we want to deploy the Forces and for this particular purpose and in this authority,” is a simpler version and easier to understand than this, I think, inflexible and very complicated way.

*Clare Short:* I strongly disagree with you. It outlines what any decent government ought to say to any decent parliament about the kinds of reasons it is finding for military action but it leaves the discretion with the Prime Minister about how much detail to provide but, I think, considering giving detail on those questions.

*Mr Benn:* Could I make a special point? I think the point you make is already dealt with, because what we are really talking about is the initiation of conflict, but as you know very well from your time as a Minister in the Foreign Office and on the Defence Select Committee, the House at any time can intervene once a war has begun. After all, the Suez war came to an end, did it not, as a result of Parliamentary and Cabinet action, and so on? The House can always refuse to vote the money, because that power still resides in the budget, and so on. So I am not so worried about that. I would not want, I agree with you, to prescribe it in such detail in the Act, but the House has responsibilities which it can exercise in many ways to control the Executive and at that stage the Prime Minister cannot shield behind the prerogative because he has to get his legislation and his budget through the House. So I think you are on a very, very good point, but it does not worry me because subsequent actions do not depend upon the prerogative, they depend upon a Parliamentary majority. Even a vote of confidence could bring the Government down if the war was so unpopular. In a way I know that is the ultimate weapon, but it is available to the House if it wishes to use it.

*Lord Lester of Herne Hill:* I agree with Lord Rowlands that what matters is the principle of authorisation, but one should not be over-prescriptive about the detail. That is not a necessary part at all. Of course, Members of the Houses of Parliament can raise issues of that kind when authority is being sought, that is a different matter, but I think that the principle is the principle you find in other democracies with written constitutions dealing with war powers where they are not over-prescriptive, they simply state the principle that the legislature authorises serious military action in advance because of the need for accountability. That proposition, I do not think, is a wild left-wing, republican, Cromwellian or other proposition, it is just taking Parliamentary democracy seriously.

**Chairman:** Thank you for that. I want to move on, but the issue which Lord Lester has just raised of what is the practice in other democracies is one which

23 November 2005

Clare Short MP, Mr Neil Gerrard MP, Rt Hon Tony Benn  
and Lord Lester of Herne Hill

is of great interest to this Committee and we shall be taking evidence on it because clearly other countries do it differently, as you have just said.

**Q15 Viscount Bledisloe:** Mr Benn drew a distinction between two extreme situations, one where we were being attacked and bombs were actually falling and the other where there is said to be a threat from a foreign power, as in the Iraq situation, which if it existed clearly was not imminent and going to happen tomorrow and indeed had been talked about for the last month, if not year. I think there is a very large interim gap where an attack is thought to be imminent, where in old-fashioned historical terms the enemy boats were collecting in the ports of France and it was thought desirable to have a pre-emptive strike rather than waiting for those boats to hit the coast of Dover before one did anything about them. I am thinking, for example, of Drake's action in Cadiz in "singeing" the King of Spain's beard. That action almost inevitably has got to be taken without discussion in Parliament because the King of Spain is hardly going to leave his beard hanging out when he has been warned by Parliament that people are coming to attack him. What do you do about that very large group of cases? If, as Lord Lester says, you take them to Parliament after you have your pre-emptive strike, the question for Parliament surely then is totally different, not "Was that attack justified," but, "Do we go on fighting now we have put our foot into the hornets' nest and stirred it up and probably the Spanish are, to put it rather mildly, rather cross and contemplating attacking us?" So is there not really an enormous gap which would allow any unscrupulous Prime Minister to take the pre-emptive action knowing that once he had taken it Parliament could not stop the fighting because it would not be purely a decision for our country?

*Mr Benn:* You will know much better than myself, but I felt the question of pre-emptive action had been somewhat changed by our adherence to the Charter of the UN. My understanding of the Charter is that if a country is attacked it can defend itself. The only other circumstance under which it can take action is if the Security Council, including the five permanent members, conclude there is a threat to peace. We have slipped into the habit now of legitimising pre-emptive action because what the Prime Minister did in 2003 was pre-emptive, and indeed if you take the recent statement by President Bush he said he did not rule out military action against Iran because of the non-proliferation treaty. Once you slip into that, then you must ask yourself other questions in the light of what President Bush said about Iran. Would the President of Iran be entitled to say, "There is a potential threat from the

United States. I am entitled to take pre-emptive action"? Then you go back to the law of the jungle. I know it is a very complex question, because clearly if intelligence told us that there were foreign ships in the Thames, as happened when the Dutch got in the Medway, clearly you would have to take action and the House would understand it, and the House would then have an opportunity very, very quickly of resolving on the matter. But to legitimise pre-emptive action and say, "This is so urgent it must be left in the hands of one person based on Crown powers," I think is unsatisfactory. If you want to give the Prime Minister the powers you suggest, you should put it in an Act of Parliament, and you could do.

*Clare Short:* Could I add that we provided in the Bill that where the Prime Minister considered urgent action was necessary—and of course international law would apply, he is bound by that anyway—then he could act, and then he has to bring the account and explanation to Parliament. I agree with you that once the facts are on the ground, the troops are deployed, what Parliament is approving has changed, but nonetheless if it is outrageous Parliament would have the ability to say, "You will have to arrange a withdrawal. This is completely out of order." But in the nature of events, once the troops are on the ground the situation has changed and Parliament is considering a different proposition, you are right.

*Mr Gerrard:* Yes. I think it would be an extremely dangerous position for a Prime Minister to put himself in, to take that sort of action if he had no real hope of getting support in Parliament for it. I think Prime Ministers would think twice about putting themselves in that position.

**Q16 Chairman:** How can we deal with the problem of nuclear deterrents? Mostly with the end of the Cold War this is not the only or indeed the prime factor of British defence theory, but there still is the reality of a nuclear system based on a response in minutes, and indeed the whole theory depends on that. How do we deal with that?

*Clare Short:* Our weapons now are not targeted and we would never use them unless America authorised it, but it would be an act of war. So international law would apply, as with any initial act of war, as to whether you were entitled to take that action. If you remember Cuba, the American military were advising President Kennedy to use military force. So you can have an emergency in nuclear action or you could have one with a big build-up. It is a very dramatic example of the same question.

*Lord Lester of Herne Hill:* Could I say in answer to Viscount Bledisloe, no sensible person would think that the kind of machinery I have suggested is going

23 November 2005

Clare Short MP, Mr Neil Gerrard MP, Rt Hon Tony Benn  
and Lord Lester of Herne Hill

to fetter the exercise of war-making powers, or should do, or prerogative powers in a way which would undermine the ability of this country to defend itself, obviously not. All that we are really doing, and I think it is extremely modest when you think about it, is to say that if it is not an emergency pre-emptive situation of the kind which Viscount Bledisloe was indicating then Parliament should give the authority, and if it is then not possible at least there should be a report back to Parliament speedily to explain why Parliamentary authority was not sought and that will trigger debates in both Houses. That is all it will do, but the fact that it is resisted so passionately by the Government shows how much they care about keeping the essentially prerogative powers of their own, monarchical powers clothed in presidential or prime ministerial powers, without proper Parliamentary scrutiny. May I just give one example of what I find completely unsatisfactory, which is again a subset of this? I have been trying for about four years to get the answer to a simple question as a parliamentarian: what was the first date upon which the Government sought legal advice about the legality of invading Iraq? I have been to the Parliamentary Commissioner for administration, who upheld my complaint. The Government refused to comply. I have gone to the Information Commissioner, or rather I am still trying to get there, but you have to go through extraordinary procedures, and four years later I still do not know the answer to that question. I am not asking what was the advice but simply what was the first date? Why do I ask the question? Because it is important to know when the Government first thought of the idea that they might have to invade Iraq. That seems to me to be the question; not the content of the legal advice necessarily, but the question about when it happened, which in a Parliamentary democracy we should be able to ascertain, but we cannot, or at least we cannot unless the Information Commissioner and the Information Tribunal eventually (and if I live long enough) uphold my complaint. It is ludicrous.

*Clare Short:* That is not a prerogative problem.

*Lord Lester of Herne Hill:* It is a prerogative problem if the prerogative power of the Crown is to say, "We won't tell you the answers to those kinds of questions at all." Anything to do with either the legal advice or the war-making power is something the answer to which is, in the words of Ring Lardner "Shut up," he explained.

*Mr Benn:* Yes, but that is not a prerogative power. That is because Parliament has not passed a legislation which would entitle you to ask that question. Parliament could. It has got the Official Information Bill, and so on.

*Lord Lester of Herne Hill:* It could, yes.

*Mr Benn:* It could do it, so that is not a prerogative point. I agree with you 100 per cent, but it is a point which Parliament could deal with without raising the question of the prerogative.

**Chairman:** I am afraid I have got one or two people trying to get in. In the course of your last answer, Lord Lester, you raised the issue of both Houses and I would like to bring Lord Carter in on that point.

**Q17 Lord Carter:** We have used the term "Parliament" today and of course Members of the House of Commons do tend to say "Parliament" when they actually mean the House of Commons. If there were some form of Parliamentary approval required, would that be from both Houses? For example, I think in the Bill which Lord Lester quoted each House would have to be involved. Supposing they disagreed? Supposing one voted one way and the other voted the other way? If indeed there was a Prime Minister who was unwise enough to make it a motion of confidence, how would it then work? How would you see the role of the House of Lords in this situation?

*Clare Short:* In the Bill, I think, as in Lord Lester's, we provided for both Houses. It became an issue during the debate when my Bill was before the Commons and the case was strongly made that the two Houses could disagree and that the Lords did not have any democratic legitimacy, even though it performs to a better role of holding the Executive to account than the Commons, which is a nice interesting contradiction, if I may make that aside. I was persuaded during that debate that until the Lords is reformed the case for it just being the Commons was overwhelming, but when we decide what electoral arrangements we are going to have for the Lords then it has got the legitimacy of being elected and we have to think about how you avoid the possibility of one House saying yes and the other saying no. That is my short answer.

**Q18 Lord Carter:** How would you do it if in fact we were elected, or partially elected?

*Clare Short:* Well, you could even sit together, could you not, just as an example? But at the moment I think it is reasonable to say it should just be the Commons.

*Mr Benn:* Leaving aside the question of democratic legitimacy, which is very controversial, there is an aspect of this which to the best of our knowledge nobody has taken on board. When the Parliament Act was passed provision was made for the Lords to be overturned by the Commons, but if the Lords say no to an affirmative resolution there is no provision in statute to allow the Commons to put it

23 November 2005

Clare Short MP, Mr Neil Gerrard MP, Rt Hon Tony Benn  
and Lord Lester of Herne Hill

right. So circumstances could arise where the Commons had a majority for the war, the Lords vetoed it and the Prime Minister with a Parliamentary majority in the Commons could not pursue that policy. That, I think, is a constitutional obstacle which for me would settle the matter, but I also obviously have views on the legitimacy of a body which is not elected and therefore, in a sense, cannot speak for the people who might be involved in the war. That is a more controversial question and, I think, a constitutional one. You would have to change the law about the efficacy of affirmative resolutions allowing the Lords to veto the Commons when the Commons had a majority.

**Q19 Chairman:** Lord Lester, do you want to say something?

*Lord Lester of Herne Hill:* Yes, I would like to, as I think I am the only person representing the elitist, aristocratic, unrepresentative upper House! We are in a very strange position, are we not, because we say that Acts of Parliament can only come into force when they are approved by both Houses and the Sovereign? We say that subordinate legislation requiring affirmative resolution procedure requires the affirmative vote of both Houses. We have joint committees. For example, when I served on Human Rights, it is a Joint Committee which decides and advises both Houses whether a measure is or is not compatible with our international treaty obligations on human rights. Yet when it comes to war, my colleagues from the Commons, or colleagues formerly from the Commons, are saying, "No, in that case it should be the Commons alone which should decide." But why? The other decisions we are taking, passing primary and subordinate legislation and other grave and weighty matters, require the involvement of both Houses. The real trouble is that we still have an upper House which lacks the kind of legitimacy which those in the Commons in particular would not like it to have. It is a structural problem about the Constitution, but in principle I see no reason whatever why the Lords should not have the same power to withhold consent that they have on legislation.

**Q20 Lord Carter:** That is the power of veto in effect, is it not?

*Lord Lester of Herne Hill:* It is the power of veto, yes, but that is what we have on everything else so why should we not have it on the gravest decision of all, which is sending our boys and girls to war?

**Q21 Chairman:** With respect, the power of veto in the Parliament Act is particularly relevant to the timeliness issue, which we were discussing a few minutes ago, that some of these issues are extremely

time-sensitive and if the dissent between the two Houses is resolved under the procedures of the Parliament Act that takes time and accepting the logic of what you say, that is the problem?

*Lord Lester of Herne Hill:* The let-out is if the Prime Minister decided there was a dire emergency and he cannot go through that procedure, then I let him take that decision as long as he reports back. I am not putting forward an absolute veto, I am saying that there are circumstances where the Prime Minister can circumvent the veto.

**Chairman:** I want to bring Lord Elton in.

**Q22 Lord Elton:** I think I had probably better pick up Lord Lester's interest in legal opinion and ask him whether he thinks there is a case for the House of Commons having its own legal opinion, if it is to be the arbiter of this, as to whether or not a declaration of war or an engagement in military activity is legitimate in law?

*Lord Lester of Herne Hill:* We are in again a very strange position because the only legal advice to which Parliament is now entitled is the legal advice of the Joint Committee on Human Rights, whose legal adviser's opinions are given to both Houses. Because the Attorney-General is primarily accountable to the Government, of which he is now a member and indeed attends the Cabinet—

*Clare Short:* He does not normally.

*Lord Lester of Herne Hill:* No, they changed the rule.

*Clare Short:* He can do.

*Lord Lester of Herne Hill:* He can do, whereas he used not to be able to do it except when invited. Now he can as a right. The Attorney-General cannot provide advice to Parliament where his colleagues will not let him or where there would be a conflict of interest. He is not primarily an adviser to Parliament, though of course in the past Attorneys-General have advised Parliament (including the present one). So the problem is, what should you do about it? I think the answer is that the Joint Committee on Human Rights shows that you can have a joint or separate committee with a dedicated legal adviser who can express his opinion. For example, on the eve of the invasion of Iraq, in our House Lord Goodhart initiated a full debate, I think the day before the invasion, when we all debated the legality. But we had no benefit of any legal advice from any independent source at all, so hacks like me had to express our points of view as mere lawyers, not even noble and learned peers, just peers. What would have been much better would have been if perhaps both Houses had had the benefit of the kind of legal advice which no doubt Lord Goldsmith was giving behind the scenes. We could not get it from Lord Goldsmith, but I see no

23 November 2005

Clare Short MP, Mr Neil Gerrard MP, Rt Hon Tony Benn  
and Lord Lester of Herne Hill

reason why we could not have got it from a legal adviser to a Parliamentary committee.

**Q23 Lord Elton:** How would you deal with the conflict of advice between the Parliamentary adviser and the law officers?

*Lord Lester of Herne Hill:* Well, we do that now, because Ministers sign every bill saying they think it is compatible with human rights and our committee often says, “We don’t agree for the following reasons,” and we interrogate the Minister and we produce a result, and we leave it to the players in both Houses to decide what to make of it. The fact that there is diversity of views is not new, but it is very important that Parliament should have access to an independent source of advice, I think.

*Clare Short:* The Bill provides that the Government is required to put before Parliament the legal authority for that participation. It seems to me you can go that way and that would mean the attorney would be responsible for putting some legal advice before Parliament, or you can go the way of Parliament having its own legal adviser. It seems to me you can have either option, but I think the way in which the legal opinion was concocted is now a matter of record, if you put it together, and it is very shocking.

**Q24 Lord Elton:** Are you saying there should be one legal adviser who has the trump card, so to speak?

*Clare Short:* I personally like the option of the Government having to put before the House—or both Houses, we have come down on that—when it is seeking approval, the legal advice on the legality of action. I like that option, but the alternative is that Parliament seeks its own legal opinion.

**Q25 Viscount Bledisloe:** You can have that as an alternative. Presumably in fact there would be laid before the House the opinion of the attorney? If the House was not convinced by it, it might then say, “Right, we want our own advice,” and then surely the answer to Lord Elton’s question is that wherever a client gets two differing legal advices he has to make up his mind which he thinks is the more convincing?

*Mr Gerrard:* I think on this question about what goes before Parliament, there is obviously this option of seeing what advice the Government has been given. What we have been told, I think, again and again is that the Attorney-General’s advice to Government, whether it is on this or any other issue, is advice which is for the Government and will not be shown to Parliament. There have actually been some precedents in the past where the Attorney-General’s advice has been given. I think I have got

the right Act. A colleague told me recently about discussion on the Trade Union Reform and Employment Rights Act in 1993 where the then Attorney-General came to the committee and actually told the members of the committee the legal advice which he had given to the Government. So although we are frequently told there is no such precedent, it appears that there actually is a precedent for the Attorney-General making public his legal advice to the Government.

**Q26 Lord Rowlands:** There are also others that I can recall, the Foreign Affairs Select Committee calling evidence on the legality of Kosovo and bringing before them very distinguished international lawyers to discuss the issues.

*Mr Gerrard:* Yes. So I think you have both options, of seeing the Attorney-General’s advice—and I think if you see the Attorney-General’s advice, I do not think you can really get away with, if you like, a potted summary of it because that will inevitably raise suspicions that what you are seeing are the parts the Government wants you to see, which is what we actually saw.

*Clare Short:* Which is what we had. A summary was published.

*Lord Lester of Herne Hill:* I was going to say our Attorney-General is not in the same position as the Attorney-General of Ireland or Israel, or Cyprus. Those three countries have a law officer, who is constitutionally independent of the government. He is a constitutional officer and he advises the legislature and is quite independent of the government. I wish our Attorney-General were like that and I have actually suggested it to successive Attorneys-General, who do not like that solution because they think it will de-politicise them. So long as we do not have that model, it seems to me that we cannot demand that the Attorney-General’s advice to the Crown and to the Government automatically becomes public property, however much we may wish to. The other thing I was going to say, since some raised the issue about the two Houses, is that someone was writing the other day about how odd it now is that we always have Attorneys-General in the House of Lords, the result of which is that there is much less accountability to the democratic Chamber. So you have Dominic Grieve there, but he does not have any counterpart and therefore he cannot raise any of these issues in a proper way in the Commons. That seems to me another point which is an interesting one to reflect on.

**Chairman:** Thank you. I want just to move the discussion along. This is most thoughtful and interesting evidence, but there is a number of issues to be covered and one is that we have talked up until

23 November 2005

Clare Short MP, Mr Neil Gerrard MP, Rt Hon Tony Benn  
and Lord Lester of Herne Hill

now about Parliamentary statutory intervention, but are there measures short of statutory intervention which we ought to be considering in this context?

**Q27 Baroness Hayman:** I wondered whether you could comment on some of the suggestions which have been put to us, that because the act of getting approval is difficult in many circumstances there could be a combination of measures which ensured, in a statutorily detrimental form, greater scrutiny of Government action which involved military action. It might involve the obligation to put a legal justification before Parliament, of the sort which is included in the present bill, *ex post facto* when there had been emergency action, but that that would be translated, if you like, beforehand into the context of a debate. I know you said earlier that a debate such as that which took place before the Iraq war was not a substitute for approval, but it has also been suggested however that perhaps a special joint select committee of both Houses, to which there was an obligation to refer potential issues and to scrutinise potential areas in which military action might be taken, might give some degree of assurance but be less inflexible than the legislation which you put forward.

**Mr Benn:** That would be a perfectly sensible thing to do and it could be done without infringing in any way on the prerogative, because there is nothing in the prerogative which says you cannot tell Members of Parliament what you are doing. But it would be purely advisory in fact, rather like the legal advice. The legal advice, after all, is advice. It is different from a court judgment subsequently that the war is illegal, which would have the force of law. Advice and information come into that category. I think that would be a good idea, but if at the end all you are doing is helping Members of Parliament to say something when the final decision is personal to the Prime Minister, you have not really touched the core of the issue. I think any of this type of legislation would be very welcome, but it is different from the question of who reaches the decision in the end, and the notion that it is the Crown which reaches the decision is ludicrous. What we have done is to create an elected monarch. That is the biggest constitutional change since 1997. We have recreated the monarchy and moved it to Number Ten!

**Clare Short:** If I may add, it seems to me this is not one or the other; you could have both. To have such a committee would help my point of getting proper scrutiny of whether the decisions have been thought through and it is desirable on that, but I still think it is desirable to have both, that Parliament has approval with a provision for emergency action. But I would not be against the establishment of such a committee

and getting the two Houses working together on such an issue is a desirable thing.

**Lord Lester of Herne Hill:** I think Baroness Hayman said something about inflexibility, but I do not think that what we are putting forward is inflexible at all. I think having a statutory framework with built-in flexibility coupled with such a committee would be a much better contribution to good decision-making and accountability.

**Q28 Chairman:** You see this as complementary?

**Lord Lester of Herne Hill:** Yes.

**Mr Gerrard:** I tend to agree. I think this is another point in relation to having something like a committee, that it would start to have some input, because I think one of the key questions if we move to a system where there is going to be a vote in Parliament on a report presented by the Prime Minister which suggested that military action took place is, who decides the timing of that report? Very clearly the person who decides the timing of that report can also influence what the outcome of that vote might be. One can imagine circumstances where the point at which the vote is put to Parliament could have a significant impact on what the outcome of the vote might be. So if we are saying that we should be doing something about making that decision about going to war more than a personal decision of the Prime Minister, then I think this other question arises of when does the report happen and what triggers that report. Maybe that is the sort of area in which a joint committee could have some significance in saying, "We believe there is a point being reached here at which Parliament ought to be involved."

**Q29 Baroness O'Cathain:** I think the suggestion of a joint committee obviously has merit. On the other hand, going back to what Viscount Bledisloe talked about, the ships in Calais, or wherever, ready to take a pre-emptive strike, okay we would be able to defend, I understand that, but it has been suggested in written evidence to this Committee that Parliament should have the power to appoint its own legal counsel or commission an opinion on the legality of a potential armed conflict. Therefore, would that be one way of going about it, to have it completely independent? At the moment the point which is being made about the Attorney-General is that we do not have an Attorney-General in the House of Commons, not because the role is actually in the House of Lords but because it is said that there was not somebody with the qualifications necessary in the House of Commons as we have in the House of Lords. So that is one way of getting over it, because then this question would not be exercised. What is your view on that?

23 November 2005

Clare Short MP, Mr Neil Gerrard MP, Rt Hon Tony Benn  
and Lord Lester of Herne Hill

*Clare Short:* My view is as provided in our Bill, that the Government should bring before Parliament an account of the legality. That does not have to be the original advice given to the Government, but the law officers should put before Parliament their account of the legality of war, and I agree with the point that was made here before that it should be open to Parliament to take an alternative viewpoint. As Lord Rowlands was saying, over Kosovo the Foreign Affairs Select Committee talked to prestigious international lawyers because the legality question there was considerable. So I think we should ask the Government to account to Parliament for why it thinks the action is legal. I think Parliament is free and should be free to take another legal opinion if it so wishes.

**Q30 Chairman:** One issue which is going to perplex this Committee is the difference between the legality of the war under international law and various other obligations which this country is subject to and the legitimacy of the war in terms of the consent of the people expressed through Parliament, and we have to be careful to be conscious of both those issues but not to run them together because they are related but they are not the same thing, of course.

*Mr Benn:* There also is the question of security information. The point was put that if it had been another legal adviser advising the House of Commons would they have known what MI6 or the security services have said about the nature of the threat, and so on? The Government would always be in a position, I think, to say, "If you knew what we knew you wouldn't push that point." That, in effect, was exactly what the Prime Minister said in 2003. He indicated that he knew that there was a 45 minute threat and you could not have got a lawyer who would have said, "Even if there is a 45 minute threat, it will still be illegal," because the connection between the information, the assessment, the legality and the morality is quite complex.

**Q31 Baroness O'Cathain:** Would it not be surely the case that the independent legal person would know that and the Prime Minister would actually have to show the evidence, instead of saying, "If you knew what I knew"?

*Mr Benn:* Yes.

**Q32 Chairman:** Or that you would have disclosure?

*Clare Short:* We cannot ultimately demand public disclosure of security information and it can be used as a smokescreen. I do not think you can, because at the moment when it is being obtained people's lives might be in danger. You cannot say it has to be made public.

*Lord Lester of Herne Hill:* If you consider what we were given as the legal justification for the invasion of Iraq, it was that one page summary which turned out not to be the advice of the Attorney-General, it was essentially a politically acceptable one page summary of conclusions. It was only when one of the Attorney-General's opinions was leaked that one realised that he had given an entirely proper opinion full of all the caveats and reservations and difficulties which Viscount Bledisloe and I have frequently had to put into our opinions in order to show that we have looked at both sides of the question and reached an answer. It is only by reading the whole of the Attorney-General's opinion that you can understand what was the alleged justification. The Cabinet was not provided with that, as Clare Short has frequently pointed out. They were given an oral statement and it seems to me that when one talks about whether a legal justification for deployment would be enough rather than the consent of both Houses, the answer is you need both. You need a legal justification, but I do not mean by that a bare summary of conclusions, I mean that a proper full opinion of the kind which the Cabinet should have been shown should be given to Parliament. Whether it is given by the Attorney-General or an independent legal adviser is another matter, but we should bear in mind, I think, that out of the 17 international lawyers who considered this before the war 16 said it would be illegal and only one said that it would be lawful.

*Clare Short:* Guess who was commissioned to provide a further opinion!

*Lord Lester of Herne Hill:* The one who said it would be lawful is a very fine professor.

**Q33 Chairman:** Is there some distinction which I do not understand, as a non-lawyer, between "lawful" and "legal"?

*Lord Lester of Herne Hill:* Not in my book. I mean lawful or legal. Therefore, I think that justification means a full opinion and not conclusions and Parliament should have that opinion, plus the approval of both Houses with the benefit of that opinion. Clearly the Government thought we should get something or they would not have given us the one page, but it was ludicrous because the one page simply stated some conclusions and that was not satisfactory.

**Q34 Lord Elton:** I wonder whether some such committee might help in the difficulty which I find in the wake of the discussion of "mission creep". Warfare or military engagement has changed, is changing, and there is no guarantee it will not change back. Campaigns at the moment appear to be devastating, but they can be long and full of attrition. Therefore, a single permission just to go ahead with

23 November 2005

Clare Short MP, Mr Neil Gerrard MP, Rt Hon Tony Benn  
and Lord Lester of Herne Hill

the present campaign is bound to be something of a blank cheque. If you write limitations into it you in fact inhibit possible initiatives which might be necessary later. I wonder whether some continuing Parliamentary supervision of the conduct of military engagements ought not to be formalised? If so, would some such committee provide the answer to the difficulty which Clare Short pointed out about the danger where the Government says, "If you knew what we know, you would be happy with this"? Privy Counsellors can know it, and I wondered whether a committee made up of Privy Counsellors receiving information on Privy Council terms might not be the intermediary between Government and Parliament? They would be in a position to turn to Parliament and without releasing what they then knew say, "Things are beginning to smell bad. This needs to be looked at again."

*Mr Benn:* I have been a Privy Counsellor for 41 years and the Privy Council has never met since I was on it.

*Clare Short:* When you were in government it did.

*Mr Benn:* No, the Committee of the Privy Council met, not the whole Privy Council. I just mention that to show that actually what the Privy Council is is a sort of alliance between the front benches against the back benches. If the Prime Minister said something to me as a Privy Counsellor, I would be obliged to keep it to myself. Therefore, I would be reluctant to ask him something which I could not then disclose because a Privy Counsellor is also a Member of Parliament, or most are. So I would be nervous of that, but I agree with you 100 per cent that the ongoing scrutiny of the Government in circumstances where war either is declared or is a "mission creep" is essential. I can think of a very good example of that, the Vietnam war. It began with the American President sending advisers to help the South Vietnamese government and it ended up with, I think, 50,000 Americans killed and then they all withdrew. Now, we have never had quite such a vivid example of that since we invaded Afghanistan in 1834, captured Kabul and left 18 months later and 15,000 British troops were killed. I cannot think of a disaster on the Afghan pattern—

*Clare Short:* Iraq!

*Mr Benn:*—but if Parliament is doing its job, it should be able to watch that and stop it before it becomes fatal. I am just doubtful about Privy Counsellors, that is the only thing.

**Q35 Lord Elton:** If I could just be clear, I was speaking of a committee made up of Privy Counsellors who would have information on Privy Council terms to share with each other.

*Mr Benn:* Yes, I know. That is what worries me.

**Q36 Lord Elton:** They would not share it with the House or the public, but they would be in a position to advise the House on the basis of what they knew.

*Clare Short:* In practice, the opposition front benches are briefed on those terms about the intelligence and a lot of them have complained since that they believed they were virtually misled. So it is an interesting proposition, but it has got danger in it too. In the heightened pre-war atmosphere there is still a lot of hyping of intelligence.

**Q37 Chairman:** We may not be doing complete justice to the possibilities of committees of Privy Counsellors because the noble Baroness Hayman and I sat on the Newton Commission on the anti-terrorism legislation and I do not think anybody would say that our use of privileged information was calculated to support the Government in its conclusions. So the front bench conspiracy of which we have heard may be over-pessimistic about the possibility.

*Clare Short:* Yes, but you were not given intelligence in a live situation, or briefed on intelligence. That was done throughout the crisis leading up to Iraq. I think Iain Duncan Smith has complained since. I am simply drawing that to your attention. Could I just say another thing about "mission creep", because we are talking as though it always happens. What was Iraq, six weeks or something, then mission accomplished 1 May, and then all the disaster is under a different mandate, under a UN resolution. So that is not "mission creep", it is the failure, like Afghanistan, to prepare properly for the aftermath of the initial military action. So I just do not want us to overstate the "mission creep".

**Q38 Lord Rowlands:** But you have got to accept the possibility of "mission creep" and you have got to actually accommodate whatever processes you decide to create in your introductory report?

*Clare Short:* It seems to me that if there is the provision in the Bill which says the Prime Minister can give such detail as he sees fit about duration and geography, then if Parliament gives its approval on the basis of whatever proposition the Prime Minister puts before Parliament, if it departs from or goes beyond that then he has got to bring it back to Parliament.

**Q39 Chairman:** If you will forgive me, we are now going back to an earlier loop of the conversation and I am conscious of time. We are going to stop in about ten minutes and I am anxious to bring in Lord Bledisloe and Lord Carter.

*Lord Lester of Herne Hill:* Could I just deal with the point about Privy Councils? The Government did not trust the Cabinet sufficiently to come clean before

23 November 2005

Clare Short MP, Mr Neil Gerrard MP, Rt Hon Tony Benn  
and Lord Lester of Herne Hill

invading Iraq. Why on earth should it trust a Privy Council Committee more than the Cabinet when we are meant to be a Cabinet system of government?

**Q40 Viscount Bledisloe:** I want to go back to something which somebody mentioned a great deal earlier, namely the concept of going to war in pursuance of a treaty obligation. Where would that fit into the system? It seems to me there are three possible answers. One is that you have a treaty obligation. That can be honoured without asking Parliament. Two is that even though you have a treaty obligation you have to get Parliamentary permission, in which case it may mean us breaking the treaty. Three is that any treaty which commits one to war in certain circumstances must itself be blessed by Parliament before that treaty is ratified, in which case you are getting to the position which some of you already want to get into, that this inquiry inevitably extends to other prerogative powers, namely treaty-making powers. Which of those solutions is right, bearing in mind that some of the treaties in the past pursuant to which we have gone to war were treaties which were not even published?

**Mr Benn:** I think you have made the point yourself, if I may say so. Treaty-making is also a prerogative power and when treaties are secret and not published, that is a point which I think President Wilson made about open covenants openly arrived at, which was a very revolutionary thing for him to have said after the First World War. For example, the Treaty of Rome was in effect ratified by the referendum, but it did not have to be, and indeed Edward Heath was not prepared to do that and Parliament voted for entry but it did not actually, as far as I know, have any legal powers to ratify. So you do get back into the deeper areas of the prerogative, which encourage you to think that a wider bill of the kind which I presented ten years ago might end up being the answer.

**Q41 Viscount Bledisloe:** What would you be saying about war-making powers regardless of general treaties? Are you saying that a commitment to go to war has to be blessed by Parliament at that time, or that Parliament could say to the Government, "I'm afraid, though you entered into this promise four years ago, we're not going to allow you to go to war even though you are letting down your promise to gallant little Belgium," or whatever it may be?

**Clare Short:** Well, NATO is the one, because if any NATO country is attacked everyone is supposed to go to war, but there is no automaticity, is there? Any government, even though it is part of that treaty, will still decide whether to actually go to war in that particular instance. I would say that Parliament gives its approval, knowing of the treaty, and the logic of

that, I agree with you, is that Parliament ought to have endorsed that treaty.

**Q42 Chairman:** Of course, the United States, the leading power in NATO, at least formally (although it is not used) would reserve exactly that power which the NATO alliance gave it, although it would still formally be a decision of the Congress, but not exercised.

**Clare Short:** It took those powers because of Vietnam.

**Lord Lester of Herne Hill:** The reason why we have what has been called the Ponsonby Rule is because Arthur Ponsonby, Ramsey MacDonald's minister, blurted it out on the debate on the Treaty of Locarno when they were worried about secret treaties and the only thing they could get away with at that stage in terms of Parliamentary scrutiny was what we call the Ponsonby Rule, that you lay the treaty before ratification for X days in case anyone wants to pray against it, as it were. In answer to Viscount Bledisloe, it seems to me elementary that before we enter into a major treaty of the kind which commits us to war or armed conflict Parliament should be entitled to scrutinise and approve the treaty, not in the way the Senate does. I am dead against the coercive powers of the US Senate having to give its advice and consent, and the Bricker Amendment and all of that, but there is a very modest way of doing that which my Bill dealt with. I find it absurd that we have good Parliamentary scrutiny of the European Union legislation but no Parliamentary scrutiny of treaties which go beyond that before they are ratified. The Wakeham Committee, in looking at the powers of the House of Lords, itself said that we ought to have those scrutiny powers and that we ought to have a special committee on it. So it is part of that wider question, I think.

**Chairman:** Indeed.

**Q43 Lord Carter:** You have mentioned the role of Parliament and legal advice. What about the role of the courts in all of this? Where would the legal process come in? For example, if the power was subject to Act of Parliament presumably there would be the possibility of judicial review of the Government's actions? What would be the role of the courts as you see it in the scenario which you favour?

**Lord Lester of Herne Hill:** I think in the main the courts would regard the exercise of the war-making power as either not formally justiciable or a matter on which they would defer to the Executive, except in the grossest possible way. If we had a statute like my Bill and a Prime Minister was idiotic enough simply to disregard the statute and then go to war and not have any special reason, then there could be judicial review

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23 November 2005

Clare Short MP, Mr Neil Gerrard MP, Rt Hon Tony Benn  
and Lord Lester of Herne Hill

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and the judicial review would be that the war is unlawful. The consequence of that would be that the admirals and generals would not obey instructions to go to war because they would know that the instructions would be unlawful, but I think this is very hypothetical since I cannot believe that if Parliament spelt it out any Prime Minister would ever dare to flout the will of Parliament without very special reasons. So the answer to your question is that there is a hypothetical possibility of judicial review in those circumstances.

**Q44 Lord Carter:** If the courts wished to stay out of it, it is a sort of ouster clause, is it?

*Lord Lester of Herne Hill:* It is really a separation of powers.

*Clare Short:* What you are saying is, could we entrench in the Bill that this cannot be judicially reviewed?

*Lord Lester of Herne Hill:* No, we could not do that, but I think the courts understand perfectly well that they are not running the country and that there is a separation of powers and it is not the function of the courts to take decisions about going to war or not. Therefore, I do not think that any judges whom I know would ever dream of reviewing those decisions. It is just that if you flouted the actual words of the Act of Parliament, then it is possible to imagine it.

**Chairman:** I am afraid this is going to be the last question from Lord Rowlands.

**Q45 Lord Rowlands:** If in your Bill, Ms Short, the Prime Minister delivers this report on the geography, the extension on the timing, etc, and if what he thought was going to be six months turned out to be twelve months would it not be very tempting for people to pursue that under judicial review—that the report itself was faulty?

*Clare Short:* It could easily happen that a Prime Minister says, “I think this will be a year,” and so on, and it spreads, it is prolonged and it is more difficult. Surely any Government would then come back to Parliament and say, “We are facing difficulties. This is taking longer”—

**Q46 Lord Rowlands:** That would be the protection against any formal procedural rule.

*Clare Short:* Yes, absolutely.

*Mr Benn:* “We will have the troops home by Christmas,” is a good example!

*Mr Gerrard:* I do not think anybody envisages enormous detail when those provisions will be used, but Prime Ministers will be questioned on those points in any case. Even in motions for a substantive vote, those are the sorts of issues which would in any case be raised.

**Chairman:** Could I thank our witnesses most warmly. It has been a very useful—I am almost inclined to describe it as a seminar for this Committee. We are very grateful for having your expertise and authority brought to bear. If points occur to any of our witnesses subsequently which they wish to make in writing, we would be extremely grateful, but meanwhile thank you all very much.

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WEDNESDAY 7 DECEMBER 2005

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Present	Bledisloe, V Carter, L Goodlad, L Hayman, B Holme of Cheltenham, L (Chairman)	O’Cathain, B Peston, L Rowlands, L Sandwich, E Windlesham, L
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**Memorandum by Sebastian Payne, University of Kent**

1. The Crown’s war making powers fall under the royal prerogative. The problem with the royal prerogative as a class can be identified under three headings: (a) Legitimacy, (b) Uncertainty and (c) Scrutiny.
  - (a) The legitimacy problem arises because these are powers that have not been granted by Parliament. They are legislation outwith Parliament. It seems reasonable to suggest that in a parliamentary democracy primary legislation should flow from a parliament and not from the monarch’s historical powers. The argument that Parliament must be considered to have sanctioned the prerogatives by not removing them has some force. The conclusion to draw from this past lack of activity by Parliament, with regard to the prerogatives, could well be that Parliament is to blame for not having transferred the whole class of powers onto a statutory basis.
  - (b) Uncertainty pervades the prerogatives. Uncertainty applies to:
    - (i) the definition of the prerogative;
    - (ii) how many prerogatives fall within the whole class;
    - (iii) how often they are used;
    - (iv) the extent to which they are reviewable by the court by virtue of the justiciability question;
    - (v) the extent to which Parliament can hold the executive to account.
  - (c) Scrutiny of acts down under the royal prerogative present problems. Accountability to Parliament is dependent on the goodwill of the executive or the existence of a convention that Parliament should be informed. Scrutiny by the courts depends entirely on whether the matter is deemed to be justiciable or not.
2. There are powerful arguments for changing all prerogative powers and placing whatever powers the government needs on a statutory basis. But that would be a major constitutional exercise driven by the need to transform the legal foundation of government’s authority. Ironically, by focussing on the war prerogative in isolation, the broader reasons for change may get lost in the complexities of this particular area. In addition, the war prerogative represents a discretionary power that is likely to be largely recreated in statutory form were it to be subject to reform.
3. In considering proposals for change to the war prerogative, such as those advanced in the Armed Forces (Parliamentary Approval for Participation in Armed Conflict) Bill, the Government and the Chiefs of Staff of the Armed Forces are likely to advance some or all of the issues referred to below. These issues will have to be addressed satisfactorily before any Government even considers supporting changes that could affect the United Kingdom’s military capability. The issues are the following:
  - (a) The United Kingdom is party to international treaties that in certain circumstances imply immediate engagement of British troops. Since 1949 the United Kingdom as a member of NATO has pledged to come to the immediate defence of any NATO country that is attacked. The UN Charter, Chapter 7, mandates countries to undertake military operations should the Security Council so decide. The United Kingdom’s membership of these treaties is predicated on the Government’s ability to commit troops quickly.
  - (b) In dealing with international crises the United Kingdom Government will require maximum flexibility. A major international crisis could potentially be defused if the Government were able to threaten the use of force should recalcitrant parties refuse to comply. The Government will have to have enough flexibility to make the threat of the use of force credible.

7 December 2005

- (c) Military planners usually need a long period of preparation before a conflict. They need to be reasonably certain of what kind of conflict is envisaged and how intensive and extensive it will be. Theoretically, planners can work on different scenarios but in practice financial constraints mean that there will be a maximum of one or two scenarios for each conflict. This is likely to mean that even if the power to commit troops is vested in Parliament, the practical constraints of military planning will give little leeway to Parliament to shape the operation apart from the broader power of approving or rejecting the operation itself.
- (d) The military commanders have worked for more than two centuries on the assumption that their political masters will approve the broad guidelines and purpose of the operation but will leave the details to the Chiefs of Staff. In theory this could continue in a system in which the approval is granted by Parliament. It is likely to be argued that in practice no parliamentary debate is likely to be unanimous and that certain operational consequences will follow from parliamentary involvement from before an operation begins. For example, where Parliament makes clear to the Government that it will be in trouble should there be many casualties or that approval is granted by a tiny majority, this could undermine not only the legitimacy of the operation but also its practical application.
- (e) As parliamentary debates take place the Chiefs of Staff will be aware that the potential enemy will be making counter-preparations. Whilst the Chiefs of Staff can maintain the element of surprise, by Parliament leaving to the Government the choice of the day of attack, they will be unable to provide detailed information about what they are proposing to do.
- (f) The Chiefs of Staff are likely to be concerned that a system of parliamentary oversight will lead to pressure to debate the effect of military operations as they proceed. This may be the outcome should the Crown lose the power to decide such matters.
- (g) The current system by which the Chiefs of Staff know that if they retain the confidence of ministers they can continue to exercise their powers may be replaced by a system in which the confidence of ministers will be only one of the elements in terms of the political support given to the Armed Forces.

4. If the factors, referred to above, are taken into account, a number of elements are likely to be present in a statutory scheme relating to war. Parliamentary involvement is likely to be limited to the broad question of whether to go to war or not. The scheme should avoid dragging the Chiefs of Staff into the political debate. A distinction would have to be maintained between existing treaty obligations under which the Crown must be allowed to exercise its discretion and new so called “wars of choice”, in which Parliament could exercise greater authority. Some restraint would have to be exercised by Parliament in debating military operations once they have begun. These restraints might have to be indicated in any legislation. Even if Parliament has a statutory role in the process of war, the Crown would need the leeway to prepare a military operation well in advance without informing the legislature. Such preparations, if subsequently revealed, should not be interpreted as subverting the will of Parliament. The Crown should retain a significant discretion as to the information it releases to Parliament during a debate authorising the use of force.

5. Changing the current war powers is a complex business. What is needed is the right balance of parliamentary involvement whilst retaining an adequate flexibility for the Government to respond to potentially rapidly moving events. Any changes would have to preserve a simple, effective chain of command. Solutions can be found, and were found in many democracies but they all entailed some compromise over these issues and they all retained a very large measure of discretion for the Executive.

November 2005

### **Memorandum by Professor Peter Rowe**

#### **SUMMARY**

1. I have taken the term “deployment” to mean to “bring the [armed forces] into action” (OED). Deployment of the armed forces would include:

- (a) to meet an immediate attack against the UK
- (b) to take part in armed conflict under UN Security Council authorisation (express or implied)
- (c) to assist in the enforcement of action such as an embargo required by a UN Security Council resolution
- (d) to take part in armed conflict under NATO authorisation

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7 December 2005

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- (e) to contribute to a UN peacekeeping operation
- (f) to station UK armed forces abroad under a status of forces agreement or MOU
- (g) to gather information by special forces in an area of tension
- (h) to rescue British nationals abroad
- (i) to provide humanitarian action within another State
- (j) to contribute UK armed forces to assist a foreign government during an internal armed conflict within that State
- (k) to take part in a non-international armed conflict within the UK
- (l) to assist the police/civil power including during a national emergency
- (m) to replace strikers in key industries
- (n) to protect UK fisheries interests and enforce UK law in UK territorial waters.

2. The practice of other States will often turn on particular constitutional provisions.

3. The boundaries between the different forms of deployment will often be difficult to draw if authorisation is required in one or more but not in others. It is unlikely that the current prerogative powers could be replaced satisfactorily by statute.

4. Deployment by virtue of the United Nations Act 1946 (measures short of armed force) may be said to have secured the approval of Parliament. If it were considered appropriate to require Parliamentary approval of any treaty which may envisage deployment of UK armed forces any such deployment might be considered to have received Parliamentary approval unless this approval were subsequently to be withdrawn.

5. It is unlikely that Parliament would approve the creation of a specific criminal offence to cover acts of members of the armed forces where no authorisation is given, should it be required. The consequence can, however, feed through into the requirement to obey lawful commands and in the non-acceptance of a defence of superior orders. It is unclear whether the immunity from the English law of murder applying to “combatants engaged in combat” would apply during an armed conflict which had not been authorised by Parliament should this become a requirement precedent to deployment.

6. Other forms of deployment are less likely to raise the same issues where Parliamentary approval is not forthcoming.

## 1. INTRODUCTION

1.1. The inquiry being conducted by the Select Committee on the Constitution relates to “the use of the royal prerogative power by Government to deploy the UK’s armed forces.”

1.2. I have taken the word “deploy” to mean “bring [the UK’s armed forces] into effective action”<sup>1</sup> which is consistent with the overarching title of the inquiry, namely “War Making Powers.” This might be contrasted with the wider meaning of issuing orders for units of the armed forces to move from one place to another and the much narrower term, “declaration of war.” Deployment (within this definition) might be for any of the following purposes—

- (a) to meet an immediate attack against the UK
- (b) to take part in armed conflict under UN Security Council authorisation (express or implied)
- (c) to assist in the enforcement of action such as an embargo required by a UN Security Council resolution
- (d) to take part in armed conflict under NATO authorisation
- (e) to contribute to a UN peacekeeping operation
- (f) to station UK armed forces abroad under a status of forces agreement or MOU
- (g) to gather information by special forces in an area of tension
- (h) to rescue British nationals abroad
- (i) to provide humanitarian action within another State
- (j) to contribute UK armed forces to assist a foreign government during an internal armed conflict within that State

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<sup>1</sup> Oxford English Dictionary.

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7 December 2005

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- (k) to take part in a non-international armed conflict within the UK
- (l) to assist the police/civil power including during a national emergency
- (m) to replace strikers in key industries
- (n) to protect UK fisheries interests and enforce UK law in UK territorial waters.

## 2. SELECTED RESPONSE TO THEMES SET BY THE SELECT COMMITTEE

### *Theme 2: Practice in other democratic States*

2.1 Whilst the practice of other democratic States may be interesting to study a major point of difference between them (as a group) and the UK is that in the former discussion is likely to turn on particular provisions of a written constitution. A useful example is illustrated in a case before the Federal Constitutional Court of Germany in 1994, *International Military Operations (German Participation) Case*.<sup>2</sup> The Court decided that “every deployment of German armed forces for military or peace-keeping purposes required the consent of the Federal Parliament (Bundestag) under the Basic Law. In principle, that consent should be obtained before German forces were deployed.”<sup>3</sup> The practice of other Western European States varies considerably.<sup>4</sup>

### *Themes 3 and 4: Role of Parliament in the decision to deploy armed forces*

2.2 It is relatively easy to accept that Parliament (whatever the means selected to achieve this) should be required formally to approve the UK making a declaration of war since this is unlikely to take place in modern practice.<sup>5</sup> Since, however, a declaration of war need not be in any particular form it may be difficult in some cases to distinguish this from an authorisation of force made by Parliament.

2.3 The boundaries within each form of deployment may not be clear cut and circumstances can change quickly. Nor may it be clear at the time whether UK armed forces are engaged “in actual use of force.” Unless Parliamentary approval is required for all the various deployments referred to in para. 1.2 above it will be necessary to distinguish some forms of deployment from others. It is unlikely that prerogative powers relating to the deployment of the armed forces could be replaced satisfactorily by statutory powers.

2.4 The Armed Forces (Parliamentary Approval for Participation in Armed Conflict) Bill relates to one type of deployment, namely, participation in armed conflict (whether of an international or of a non-international character and whether resulting in a declaration of war or not). It may not always be clear when it is proposed that the UK armed forces “participate in an armed conflict” (Clause 1(1)) since the term “armed conflict” is not defined in the Geneva Conventions 1949 nor in the Additional Protocols 1977. Moreover, UK armed forces may be placed in a situation where there is an on-going armed conflict but in which they are not participating, such as in a UN peacekeeping mission.

### *Theme 5: Different approaches*

2.5 The types of deployment referred to in para 1.2(b)-(f) are likely to follow from existing treaty arrangements. The UN Charter 1945, can prevail over other treaty obligations assumed by the UK, even if such obligations have been implemented into English law.<sup>6</sup> An obligation under the UN Charter (dealing with measures short of the use of force) has been implemented into English law by the United Nations Act 1946. It is difficult to accept that any deployment of the UK armed forces under this Act (see para.1.2(c)) would be without the approval of Parliament. If it were considered appropriate to require Parliamentary approval of any treaty which envisaged the deployment of the UK’s armed forces any such deployment might be considered to have received Parliamentary approval, unless subsequently changed.

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<sup>2</sup> (1994) 106 International Law Reports 320.

<sup>3</sup> *Ibid* at p.321.

<sup>4</sup> See G.Nolte (ed) *European Military Law Systems* (Berlin, De Gruyter Recht, 2003), p.197 (Belgium); p.243 (Denmark); p.294 (France); p.358 (Germany); p.450 (Italy); p.526 (Luxembourg); p.566 (The Netherlands); p.668 (Poland); p.741 (Spain).

<sup>5</sup> See *Parliament and the Use of Force*, Standard Note SN/1A/1218 (25 February 2003) p.5. The use of military force without a formal declaration of war is not sufficient to bring into operation the provisions of the Trading with the Enemy Act 1939, *Amin v Brown*, 27 July 2005, High Court.

<sup>6</sup> See *The Queen (on the application of Al Jeddah) v Secretary of State for Defence* [2005] EWHC 1809 where the UK’s obligations flowing from UN Security Council Resolution 1546 (2004) prevailed over the UK’s obligations under the European Convention on Human Rights 1950 and the Human Rights Act 1988.

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7 December 2005

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*Theme 7:* Jurisdiction of courts on decision to use force and/or manner in which force is used

2.6 There have been a number of applications to the High Court in respect of the decision to use armed force in Iraq.<sup>7</sup> None has succeeded.

*Theme 8:* Would it (and what might make it) present an unacceptable burden or create barriers to the armed forces undertaking their job effectively? Would it have any legal implications for members of the armed forces (the possibility of involving the courts in action against a particular soldier etc) and how might national obligations differ from those they already have under international law?

2.7 This will depend on whether authorisation by Parliament is required for some deployments or for all deployments, the uncertainty and the consequences of no authorisation being forthcoming. If the consequence of no authorisation is that the use of the armed forces becomes unlawful under English law this may generate a clash between national law and the UK's international obligations under an existing treaty arrangement.

2.8 It is unlikely that Parliament would approve the creation of a specific criminal offence to cover acts of individual members of the armed forces where no authorisation is forthcoming. The consequence can feed, however, into the requirement to obey lawful commands and the non-acceptance in English law of a defence of superior orders. Thus, a soldier might refuse to obey an order because it is unlawful or because he believes it to be unlawful in that no Parliamentary authorisation has been given. Indeed, it is unclear whether the immunity from the English law of murder applying to "combatants engaged in combat"<sup>8</sup> would apply during an armed conflict which had not been authorised by Parliament, where there was a requirement to do so.

2.9 The effect of the International Criminal Court Act 2001 is that the offences of genocide, crimes against humanity and war crimes charged against a member of the UK armed forces would, in practical terms, be tried in an English court in which English law would apply. Any direct inconsistency between international law and English law (eg over the limits of the defence of superior orders) would be resolved in favour of the latter.

2.10 A deployment outside the UK where no armed conflict is envisaged and where authorisation by Parliament is not forthcoming is less likely to give rise to the issues discussed above.

2.11 A deployment within the UK (apart from taking part in a non international armed conflict within the UK) would not give rise to obligations under the international law of armed conflict. The legality of the soldier's acts would be judged by English law.

23 November 2005

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<sup>7</sup> *R v Jones (Margaret) et al* [2005] QB 259; *Ayliffe et al v DPP* [2005] 3 All ER 330. A case is pending over whether an RAF officer failed to obey a lawful command to return to serve in Iraq, *Sunday Times* 16 October 2005.

<sup>8</sup> *R v Howe* [1987] AC 417, 428, Lord Hailsham, LC.

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### Examination of Witnesses

Witnesses: PROFESSOR IAN LOVELAND, City University; MR SEBASTIAN PAYNE, University of Kent; and PROFESSOR PETER ROWE, Lancaster University; examined.

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**Q47 Chairman:** Good afternoon and welcome. Thank you very much for coming to help us in our deliberations. Before we start I have to ask Members of the Committee if they have any interests to declare. As you know, we are inquiring into war-making powers and the role of Parliament, if any, in decisions to involve this country in situations of conflict. All of you have a distinguished scholarly record in this matter and it is a great pleasure to welcome you. I wonder, just for the sake of the record, if you would be kind enough to identify yourselves, starting with Professor Rowe?

*Professor Rowe:* Thank you, my Lord Chairman. Professor Peter Rowe, Head of the Law School, Lancaster University.

*Mr Payne:* Sebastian Payne, barrister and academic from the University of Kent, in the Law School.

*Professor Loveland:* Professor Ian Loveland, Professor of Public Law at City University.

**Q48 Chairman:** Thank you very much. I wonder if I could get the questioning going and give you a chance, perhaps briefly, to state your overall position on the subject of our inquiry. What, if any, would be, in your individual views, the benefits and/or disadvantages of introducing legislation that would require parliamentary approval in some form for the deployment of our Armed Services in conflict situations? Professor Rowe.

*Professor Rowe:* Thank you, my Lord Chairman. I think my view is, essentially, that to provide in legislation for the deployment of the Armed Forces would be a difficult legal task, simply because the

deployment of the Armed Forces can take a tremendous variety of forms. It can range from what might be called a war of choice to United Nations security action, action in self-defence, deployment of the Armed Forces to enforce United Nations embargoes. I think I would come from the point of view that unless the deployment was for a particular type of activity, or even a particular group of activities, the term deployment itself of the Armed Forces is so wide it would have to be narrowed if it were going to be placed in legislation, simply because I do feel the barriers between these different forms of deployment may be difficult to draw.

**Q49 Chairman:** Could you give us an example of what you mean by that more narrowly-defined circumstance?

*Professor Rowe:* I think, if one is talking about the war, say, in Iraq in 2003, one can see that is a situation where the executive would know that they were going to place soldiers in a position of an armed conflict, but there may be other situations where the Armed Forces are deployed, say, in peace-keeping operations in which armed conflict is not envisaged but armed conflict actually does occur, even for a short period of time. In a sense, one of the difficulties here is that the term 'armed conflict' is in itself difficult to define and it may last for a long period or it might last for a very short period. I think if one is talking about deployment into an armed conflict then there might difficulty in defining what that armed conflict is, although the Iraq war was an example perhaps of where it could be foreseen more easily than in some other situations. I think it is possible that when the British Armed Forces are deployed abroad they might become parties to an armed conflict, even though for a very short period of time.

**Q50 Chairman:** Thank you. Mr Payne.

*Mr Payne:* I think there are two issues about the advantage of legislation or statutory basis for war powers, what I believe in the previous meeting you referred to as a broad-gauge issue, and I will not speak about that other than the question that the source of the power of government should be arguably by statute. More specifically, with the war prerogative, obviously there are some clear advantages but I think those advantages are very double-edged. The advantages could be, of course, that there is public support for the action, that is manifested also in parliamentary support, obviously significant both politically and militarily, also that the Chiefs of Staff enacting know that they have widespread political backing for the action and, lastly, in the political context, 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. The Chiefs of Staff might have to take into account those conflicting aspects in the parliamentary debate, there may be problems with the position stated that went up to make the majority, so, in fact, there may be no clear underlying rationale for the war as expressed through Parliament, other than the vote authorising it. Likewise, if the Government is dependent, for instance, on the Opposition Party for its support, as in the Iraq vote, that in itself might create problems. There are clear advantages but I believe they come with a corresponding risk as well.

**Q51 Chairman:** Of course, at the time of the Iraq war, although there was substantial support from the official Opposition, the truth is that there was also a very considerable majority on the Government side for action with a minority of Government supporters dissenting, so the hypothesis you gave over Iraq is not actually what happened, is it?

*Mr Payne:* No.

**Q52 Chairman:** You are saying it could happen?

*Mr Payne:* It is possible, any permutation they depended on, and they had Opposition support, obviously that strengthened their position, but in a future scenario we do not know quite where the support will come from. Obviously that is a corresponding risk as well as having the political support is an advantage.

**Q53 Chairman:** That is a very clear balance of advantage and disadvantage; thank you. Professor Loveland.

*Professor Loveland:* Thank you, my Lord Chairman. I would have, I think, two primary concerns with any deployment of Armed Forces on a substantial scale. The first is an expectation that the general public could feel comfortable that the Government's deployment, firstly, was done in good faith and, secondly, that it was done on a plausible evaluation of a credible body of evidence relating to the threat that was being addressed. For those reasons, I would have severe doubts about the utility of any system of prior authorisation, in either the House of Commons or the House of Lords, for the deployment of Armed Forces. I do not think any particular useful purpose would be served by that, because I would doubt, in many circumstances, that many people would be in a position to form an accurate and informed judgment of both the good faith and the credibility of what the Government was doing. Indeed, I would be concerned that any statutory prior authorisation could be counterproductive because it may lend a spurious and undeserved legitimacy to whatever it is that the Government has decided to do and for which

it has won majority support in whichever House of Parliament was needed. I would think there is a great deal to be said, however, for a statutory regime which imposes *ex post facto* or continuing scrutiny, within either the House of Commons or the House of Lords, of continued deployment. Certainly a requirement that ministers were to address the House on a regular basis and accept argument, criticism and discussion of the merits both of the original decision to deploy and the continued deployment of Armed Forces would be extremely sensible.

**Q54 Chairman:** Thank you. That distinction between prior approval precedent and approval of continuing deployment is a very interesting one, because it deals with an anxiety which several witnesses have expressed about emergencies and the ability to act expeditiously, so it is an interesting distinction to make. Would you accept that, in a parliamentary democracy, given that all governments would prefer to go into conflicts with the support of the country and that it is difficult if that support is not there, it is better to express approval, one way or another, through Parliament than through opinion polls, or if you need an expression of support in a democracy, is not Parliament the place to look for that?

*Professor Loveland:* It is the place to look for it but with the caveat that the opinion that is forthcoming within Parliament is an important one. I would have particular concerns, in the light of recent experience, that many of the MPs who voted in support of the Government's position would not have done so in the light of information which was revealed in subsequent months. For example, had the Attorney General's opinion been before the House of Commons when the crucial vote was taken, we may well have found that a substantial number of backbench MPs, of all parties, would have felt much more equivocal about lending their support to the Government's position.

**Chairman:** Thank you very much.

**Q55 Baroness O'Cathain:** Professor Loveland, how would you gauge the public opinion, because the first thing you said was the "general public"? Are you suggesting perhaps there should be a referendum, if we have a bit of a fracas down in the Middle East and we have to set up a referendum and then find out, or do we actually take a march, which was the biggest march ever, I believe, against the war in Iraq? It is a very difficult one, because the problem is, as the Lord Chairman was saying, speed is of the essence when you get into that sort of situation.

*Professor Loveland:* Yes, certainly I think there is no strong case for requiring prior authorisation in any parliamentary sense either and emergency situations will arise. I think public opinion, public concern, can

express itself through Members of Parliament, if they are constantly brought to consider the issue that is before them and if it is a constant subject of discussion in the press and in the country at large. If there is a statutory requirement that there is a formal and substantial parliamentary debate on the continued deployment of Armed Forces then public opinion, press opinion will be brought to bear on MPs. MPs will make, I would imagine, a much better and more informed judgment as to the desirability of what is actually being done in our name.

**Q56 Lord Rowlands:** I wonder if any of the witnesses have seen the bill that is presently before the Commons. I think Professor Loveland would not agree with the bill in principle, but I wonder if you have any observations on Clare Short's bill, as to its practicality or its probability, or whatever?

*Professor Rowe:* Yes, I have looked at that bill and, in line with my earlier comments, I see one of the difficulties with it is that it would be activated when the Prime Minister intended to use the Armed Forces to participate in an armed conflict. Whilst there may be situations where that could be foreseen, there may be other situations where it might not be foreseen. Then the difficulty might arise as to whether, if the Armed Forces are deployed, there should be some form of authorisation for that, if armed conflict is either about to occur or is actually occurring. If that were the case then how would this authorisation come about? I think trying to define precisely when the Armed Forces would participate in an armed conflict may not be easy.

**Q57 Lord Rowlands:** The bill does give permission, does it not, for endorsing a deployment that has been made in particular circumstances; would not that cover your point?

*Professor Rowe:* I think the difficulty there is that once the bill does that there may be other situations where it is unclear whether authorisation is required. That seems to me to be the key issue, as far as I see it.

**Q58 Chairman:** Thank you. Mr Payne, would you like to react to Lord Rowlands' question?

*Mr Payne:* Yes, I would. I have read Clare Short's bill and, although I think the objective is laudable, I think I agree with Professor Rowe that there is going to be a problem in some scenarios of military action, in particular those actions which are in response, for instance, to Article Five of the NATO Treaty. Although obviously, as you mentioned, they can be authorised subsequent to action, the whole basis of that treaty, as I understand it, is that there is a guarantee of response. When Clare Short was here a couple of weeks ago she did talk about there being no automaticity, I think was the word she used, about the commitment of troops. Of course, what she was

implying there was that Parliament might negate the sending of military troops abroad following a NATO treaty. Obviously it is up to Parliament whether it did that, but the problem with that is it undermines the whole function of the NATO Alliance, as I understand it.

**Q59 Earl of Sandwich:** First of all, can I come back to your comments on Iraq, because your paper has so many interesting alternative means of deployment and yet the public will demand from a meeting like this that we look at Iraq, because that is what really concerns them, as to how that went. What I really want to ask you is, Professor Loveland talked about continuing scrutiny, now this is *post hoc facto*, it is afterwards. What about scrutiny when you have a special situation on the scale of Iraq, where you have military build-up over some weeks and then, before that, long negotiations with the United Nations; is there not a case for prior scrutiny, before you get to the, what you might call, automatic approval of Parliament which we are talking about now?

*Professor Rowe:* My Lord Chairman, I think there will be situations, as you quite rightly say, where there will be a long build-up period, there will be troops deployed, as there were in the Iraq war, if we concentrate just on the Iraq war, Parliament no doubt will be very anxious and will have statements made to it about that particular build-up. In a sense, it may be fairly obvious what the Government is going to do; one or two possibilities in the Iraq war. One is that if the Security Council Resolution had been forthcoming then the action would have taken place on the basis of that. I suppose, in situations like this, it is always a possibility that the troops will not actually be committed to armed conflict. Whilst I accept that the deployment of the Armed Forces will occur, and has occurred, on a fairly regular basis, both before and particularly after conflicts, my concern really, and referring to Lord Rowlands' question, about the bill that has been presented, is the need for prior approval and the consequence that if prior approval is not forthcoming the deployment of the Armed Forces will become unlawful, the consequence of that, insofar as that runs through various aspects of the deployment.

**Q60 Earl of Sandwich:** Does not that depend on the staging of the approval? It does not need to be a resolution of the whole House, it does not need to be legislation in a formal sense; could one not envisage a progressive approval over a period?

*Professor Rowe:* Yes, I think that could be done for certain types of armed conflicts. I think my view would be that if that were to occur it might apply to certain types of armed conflicts but not apply to other possible deployments.

*Mr Payne:* I think the Earl of Sandwich has actually gone to the nub of the matter, at least in terms of my view, where Parliament could actually make a big impact, or have a big role. Clearly there is a difference between an emergency situation, where there has to be swift reaction, and the category which seem to be actions that are predicated on our treaty obligations, which are not really optional so long as we are party to the treaty. Then a situation, as you mentioned in the context of Iraq, which has a very long lead-in period and I think that is exactly the scenario where Parliament should make its power and authority felt. I think that there are several dimensions to this, it is not just a question of an Act of Parliament which says there will be a yes or no decision to war but there must be other factors in play as well, an obligation on the part of the executive to report regularly on this. Also there is a further issue, which is actually crucial and obviously crucial in the Iraq war, which is the question of intelligence, clearly there was inadequate intelligence provided to Parliament to make an informed decision. I think you are absolutely right, that it is situations where there is a long lead-in period where in fact something particular and structured could be done.

**Q61 Earl of Sandwich:** Does that make the prerogative wholly inadequate?

*Mr Payne:* My own position is that, in fact, the prerogatives, as a class, should all be brought onto a statutory basis, but there are particular problems with the war prerogative. Really the issue is, if, as I suggest, you were to shift all prerogatives to statute, that is a question of source but that does not resolve the issue of structure, how you are going to structure that power. I think, in the particulars of the war prerogative, we are looking at a power that is going to be given high discretion, where some of the prerogatives put on a statutory basis obviously would be given a much more limited remit.

**Q62 Chairman:** On the point that you both made, surely it is very unlikely that any treaty obligation would carry an automatic commitment to deploy troops? Even in the case of NATO, which is the most binding alliance of which we are a part, it is merely a strong political duty to deploy, but it is still a decision of each member country whether to provide troops for a particular operation. I am a little bit confused at this idea of automaticity?

*Mr Payne:* Automaticity was the word of Clare Short in this. The United Kingdom is not compelled to send troops, but it is integral to the very purpose of the Treaty, so that if we are part and parcel of NATO then certain things are expected of us, but, of course, you are quite right, we are not compelled to do so.

**Q63 Lord Carter:** Is it not now the parliamentary reality that, after the example of Iraq, where there was a debate and a vote on a substantive motion, that it is inconceivable now that a Government could embark in future on an operation like Iraq without a vote on a substantive motion? We will come later to the role of the House of Lords, but let us leave it in the Commons for the moment. To some extent, if we have them, are not our concerns met by that fact of, as I describe it, the parliamentary reality that it would be almost impossible now, indeed inconceivable, for a Government to undertake an operation like Iraq, in same for Iran, for example, without the approval at least of the House of Commons?

**Professor Loveland:** I certainly would wish to draw a distinction, I think, between formal approval, approval for its own sake, as it were, and approval that actually is based on sound substantive reasons. It may well be that if a vote of this sort were put to the House again in the near future many Members would be a great deal more sceptical about the basis on which they were being asked to approve Government action than was previously the case. That in itself would be a good thing. The reason, in my view, why there is a case for statutory intervention in a procedural sense here is, of course, that, for the most part, effectively the Government controls procedure within the House of Commons. It is entirely possible that at any moment a motion of ‘no confidence’ could be tabled against the Government because of its conduct of the Iraq war, and if that were lost then we assume the Government would fall. There is no compulsion though that the matter be subject to substantial debate on any regular basis. There is no way at present to insist that happens within the House of Commons and it is for that reason, I think, that statute is necessary, to take away from the Government its capacity to control the agenda of the House.

**Q64 Lord Peston:** Just briefly, because I am very puzzled, wearing my economics hat, if I go back to Adam Smith and the role of the Government to defend the realm, that is one of his dicta; when one looks at the war in Iraq, I find it almost impossible to fit the war in Iraq as part of the defence of the realm. To go back to a war which some of us know a lot better, namely the second world war, which I can remember as a boy when I was evacuated being made to hear Chamberlain’s statement, which just ends up, after his use of the peculiar words *Herr Hitler*, all the time, “We are now at war,” not the words “We declare war,” “We are now at war,” and it was all because of the logic that fell through, and that was it, we were now at war. What was interesting, and I was just reflecting on this, listening very interestedly to what you were saying, where Parliament came in was later, when after the catastrophe of the Norway

Campaign Parliament said, more or less, not “We’re not going to be at war,” but “We’re not going to be at war with you at the head of it,” essentially. Is not there a distinction? I know we are inquiring into the law-making part but Parliament does have other roles and it relates to the Government having a large majority, it does not arise in the case of Iraq, but without a large majority Parliament could say at least “Really we don’t want you as the Government to be conducting this war.” Is not that another aspect of the matter that we ought to reflect on?

**Mr Payne:** I agree that the Government has many different roles and that was what I was trying to emphasise, the changes that are needed if there is to be proper parliamentary oversight but also to retain effective military capacity is polycentric, or lots of tasks to hand, one of which, of course, is the question of who is the Government. With regard to Iraq, you are right that of course it was not directly in defence of the realm so it does not fall into the category of a war that has to be fought, it is what military experts refer to as a war of choice, it was part of a global alliance, done for strategic reasons. I would think it is just that sort of war where Parliament should have a strong record.

**Q65 Viscount Bledisloe:** I might worry about this concept of Parliament going on looking at conflict after it had started and particularly Professor Loveland’s suggestion that they go on looking at whether it was justified to start it. Once you have started a conflict, surely very often it is not in your own hands to stop it, because the other side may want to go on bashing you. It may not even be in your position to withdraw your troops, because it may be that the military advisers would say “We cannot withdraw in these circumstances because they will massacre us on the beaches.” Is it really desirable, when you have got troops out there, risking their lives, to have Parliament, or anybody, back here saying that really they should not be there, it is all a wicked war, and so on? If a mistake has been made starting it, surely it does not mean necessarily that the right thing to do is stop it?

**Professor Loveland:** No, but it does mean certainly that the right thing to do is force the Government constantly to justify and defend the position into which it has led us and that it has not led simply itself or the Armed Forces into that predicament but it has led the entire country into that predicament. It may well be that this development of circumstances means that the lesser of various competing evils is that conflict continues. Given the enormity of what the Government has done on behalf of the country in introducing troops in the first place, it seems to me that Members of the Government should be under a constant and extremely onerous responsibility to justify what they have done.

**Q66 Viscount Bledisloe:** You are not worried about the enormous damage that would do to morale amongst the troops?

*Professor Loveland:* If the continuance of the conflict is based on false, misleading or inaccurately perceived information then it seems to me it is the lesser of two evils that truth be acknowledged.

**Q67 Lord Goodlad:** This is really to Professor Rowe, and you might like just to respond to Lord Carter's point that it would be inconceivable for a Government to conduct a conflict without the support of Parliament now, the Falklands, Iraq, the matter has been brought up every week, if not practically every day. With Lord Peston going back even to the Norway expedition, the Norway debate was actually a motion for adjournment and the Government won it, but not by enough, so I would be interested to hear what you have to say about that. In your written evidence, Professor, you suggest that deployment of Armed Forces by virtue of the United Nations Act of 1946 can be said to have secured the approval of Parliament. I think we would be most interested to hear if there is an example of a situation where deployment would be taken under this Act, and how does possible use of this statute reconcile with your view that legislation would not be a satisfactory replacement for the Royal Prerogative?

*Professor Rowe:* My Lord Chairman, in response to that, the United Nations Act of 1946, as far as I am aware, is the only piece of legislation that gives effect in English law to our obligations under the United Nations Charter. Of course, the United Nations Charter is not a part of English law directly, which reinforces the point you made earlier about the Government having the choice, at the end of the day, whether to comply with United Nations Security Council Resolutions, even though it is unlikely that they would not comply with them. The United Nations Act gives effect to one other aspect of the United Nations Charter, which is Article 41, which effectively deals with trade embargoes and the prohibition of moving goods or trading in arms, and that sort of thing. The United Nations Act gives power to make Orders in Council, and there are quite a large number of these in any one year, relating to a wide variety of situations, not just Iraq. There is power in one of these, and probably in a number of others as well, for British ships, for example, to be searched by an "authorised officer" and an authorised officer can be a member of the Armed Forces. In a sense, if you were to take deployment in a rather wide sense, that the Armed Forces are deployed to enforce an arms embargo which is based on a Security Council Resolution, itself calling upon all states to enforce embargoes, this will give some power to the UK through that

Order in Council to deploy maybe a ship, or whatever, to search a British ship for prohibited goods, or the transit of cultural property, in relation to Iraq. It is a very limited power. The only reason I picked that one out is that I can see this might suggest that putting the deployment of the Armed Forces on a statutory basis, well here is an example of it, but it does not refer directly to the deployment of the Armed Forces, I have taken note of it merely because it is an example of where we do have a statutory power which has been taken on the back of our membership of the United Nations.

**Q68 Baroness Hayman:** I was going to explore, my Lord Chairman, some of the difference between wars of choice and treaty obligations, but I think you have covered some of that already. Listening to the conversation, is there an issue, in your minds, of the difference between the political necessity of debate in Parliament before action, in order to create legitimacy, and the enactment of a statute that would make a war illegal, or the deployment of troops illegal, unless there was parliamentary approval? Two questions. One, is that because there is a concern about whether military action can be judged legal in two different matrices, the international legal one and the domestic one, and the possibility of conflict there? If that is so and that is a problem, would there be any possibility of constructing legislation which ensured debate, either prior to or immediately after, so that you could deal with emergency situations, and the necessity for the Government to put before Parliament the legal basis, in international law terms, for their intention to undertake military action?

*Mr Payne:* I think there is a difference between the political debate and a statute that required approval, for instance. Lord Carter has mentioned that it is inconceivable that future Governments will not hold a debate and a vote and that may turn out to be right but we do not know that will be right. Although Lord Carter referred to that as a fact, it is only a fact that it has been said, it is not a fact that this is what will happen. I think both are important, both a statutory basis for the war powers but also, as you described, the other elements as well, the requirement, as I understand what you were saying, of reporting back to the House prior to war. Clearly, there is a difference. I do not see that difference between debate and a statute as relating to two separate questions of legality, I think they are part of the same overall package which will be required for parliamentary supervision. For instance, the implication of Lord Carter's hypothesis, I am not saying that is his view necessarily but the hypothesis, that we can depend on an undertaking of debate, I do not think that is one and the same thing.

**Q69 Baroness Hayman:** What I was trying to tease out was whether there is in your mind a difference between an obligation to have a debate and an obligation to have a resolution. The question of prerogative could be dealt with by ending the prerogative and transferring it to the Prime Minister; in the sense you do not need to transfer it to Parliament, as such, if you chose to take that route. Is there a route for a statutory obligation for debate that still gives the power to commit troops to the Government?

*Mr Payne:* I think that is perfectly feasible, the distinction that you make. I think that is a question of how Parliament considers the discretion of Government to be structured and it might either be structured in a very tight way, as Professor Loveland suggested, with a continuing requirement to justify, which, I have to add, I disagree with, or it could be in the scenario that you mention, which is a requirement to have a debate but then to leave high discretion as to the act of sending troops abroad in the hands of the Government. Yes, there is a definite distinction.

**Q70 Baroness Hayman:** Am I wrong to worry about international law and national law? Is it possible to have both, side by side, and for it not to be a potential problem? That is not something that would worry you, having two regimes?

*Professor Rowe:* There are two regimes at the present time. In most cases one would hope that the regimes would not clash and that the law would be such that a soldier would be able to do his, or her, duty on the basis of his, or her, international obligations which would match in with the national. Where the international obligation was broken, such as by ill-treating prisoners of war, that also would be a breach of English law. Hopefully, the two would tie in together. The difficulty I see though is where if the deployment of the Armed Forces is considered to be unlawful then this might create uncertainty, as far as soldiers are concerned.

**Chairman:** Which was the point you made in your opening remarks. Lord Carter has a question about the role of this House.

**Q71 Lord Carter:** I think, in his opening remarks, Mr Payne referred to parliamentary support and, of course, we are used to Members of the Commons regarding the word 'Parliament' as co-terminous with the House of Commons. There are of course two chambers of Parliament. Is it appropriate for both Houses to be required to give their approval for deployment? The obvious supplementary is, if it were required, supposing they disagreed?

*Mr Payne:* I think that is a broader issue about what is the function of the second chamber and really I think it is the Government that has to answer for

that and properly complete its reforms, if that is what it plans to do. Obviously, the arguments in favour of only the House of Commons having the vote are because they are elected. It would appear that the Government is uncertain about what the function of an upper house is, but were the upper house to be elected then it seems to me very difficult, for instance, to deny the upper house the chance to vote.

**Q72 Chairman:** If the upper house were, let us say, partly elected?

*Mr Payne:* This is a problem endemic to a bicameral system. What happens, of course, is that it is magnifying the problem of committing troops being subject to more than one voice. It is not an easy question to answer, but it is made worse by the Government's inability to clarify the position of the upper house.

**Q73 Lord Carter:** Is not the situation, in fact, that in the Lords we acknowledge and recognise the primacy of the Commons and even if, in fact, the House were to be partially elected, let us say, there could be a clear statement that the Commons had primacy. I think the crucial fact is that if there were to be an issue of confidence that would have to be decided in the House of Commons and it could be that if a Prime Minister were to lose a vote in the Commons on war then certainly he would have to resign. In fact, is it not better to leave it as it is and let the Commons take the decision? It is significant that in the Iraq case, although the Lords had a number of debates on Iraq, and distinguished debates too, there was never any question of the House of Lords even thinking that they should vote on the matter.

*Mr Payne:* As the House is now, of course it is difficult for the upper house to veto, in terms of constitutional principle, but were matters to change and the upper house were not just a revising chamber but more powerful then I think it would be difficult to say that you automatically exclude the upper house.

**Q74 Chairman:** It is partly, as you say, a definition of the role of the upper house but partly also, implicitly, the issue you raise of legitimacy?

*Mr Payne:* Yes.

**Q75 Viscount Bledisloe:** My question arises out of your paragraph 2.8 and something you said a moment ago about the doubt as to the position of a combatant if Parliament had not authorised the war. Let us take a situation where the legislation normally requires the consent of Parliament but allows action without consent of Parliament in an emergency. The Government announces that there is an emergency

and the Crown orders its soldiers to go and fight; they kill someone. It is inconceivable, is it not, that in those circumstances that soldier could be prosecuted, on the basis that there was not really an emergency and therefore the order was unlawful, because the Crown that was prosecuting him would be the same Crown that had told him to go there and the prosecution would then be having to say the Crown's order was unlawful? You would have to have, would you not, a situation that, so far as your soldiers were concerned, as opposed to the Government was concerned, if the Government announced that there was an emergency and declared a war, that decision was binding as a justification to anyone taking part?

*Professor Rowe:* Yes. My Lord Chairman, I think you are completely correct. My concern would be, I suppose, on two grounds. One is the uncertainty, in a possibly fairly easy to foresee situation that does not fall full square into the Iraq type of case, of where the soldiers themselves are not sure as to the legality of the conflict or what they can do. At the present time, one would hope this would not arise. If there are legal trip-wires, of one sort or another, where conflict is either declared to be unlawful or it is not clear whether it is unlawful, I think there is a risk then that soldiers themselves may be making the wrong decisions, they are not lawyers, they would not be expected necessarily to get legal advice on all occasions. 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. I think the law should be clear and the soldier should know what it is that he, or she, is expected to do.

*Lord Windlesham:* I wanted to raise, in fact, a new issue but one which you could reply to concisely, I think. Is there any other western power, if we limit ourselves to that, which offers a precedent balancing flexibility and accountability, the two principles? Is there any comparative data which would be of interest and value in this context?

**Q76 Lord Rowlands:** There is a supplementary question to Lord Windlesham's case. I think we have been a little bit hidebound on some of these issues. The Federal Court in Germany forced the German legislator into having to draft laws and ever since 1994 to the present day there have been 42 consents. I am sure they went all over these arguments but the thing appears to have worked. Why are we so hidebound in our thinking on this?

*Mr Payne:* I would like to respond to that. I think the crucial part of Lord Windlesham's observation is this question of a comparison, what is an appropriate comparison, because, as Lord Rowlands says, Germany has created these parliamentary strictures and there are other countries too, such as Sweden, but Sweden has never gone to war under their strict

parliamentary regime. The real basis of comparison is other countries that have a global military reach in western democracies, and the only countries that can afford for that to happen are the United States and France, as well as the United Kingdom. If you look at those countries, there is a fascinating situation whereas, although there are constitutional constraints, in both the case of France and the case of America, there has been a drift away from the actual practice of the constitution constraining them. The War Powers Act in America and Article 35 of the French Constitution both produce some constraints but both powers, actually, effectively leave the matters in the hands of the executive, so there is no real comparison of a successful match between a substantial military power and one that has perfectly balanced parliamentary oversight.

**Chairman:** That was a most interesting answer.

**Q77 Baroness O'Cathain:** In your view, is it anomalous to give Parliament a role in the prerogative power to deploy Armed Forces without seeking to do the same for all the other remaining Royal Prerogative powers?

*Mr Payne:* I would like to answer that because that is my special interest. Yes, I think it is anomalous but I think there is a curious political issue here. I do not believe that this Government, or indeed a future Conservative Government, will agree to change the Royal Prerogative, if you deal with just the prerogative, plain and simple. I think, if you look at major constitutional changes, they have come in, certainly for this Government, at the very beginning of their Government as part of a commitment to change. I think the overall purpose of changing the prerogative is seen only when you look at the whole class, which is, it is the sort of power that is wrong, and by focusing, alas, on just the war prerogative, because it is going to be power of high discretion, I think, in fact, probably you will lose the force of the real arguments of why you should change the whole class.

**Q78 Chairman:** Is not the history of the Royal Prerogative one of it being gradually shrunk by parliamentary encroachment; is not that actually what has happened, historically?

*Mr Payne:* It is too gradual. You might be talking about this in 200 years' time.

**Q79 Baroness O'Cathain:** You want to ditch the lot?

*Mr Payne:* Yes, I do, and I think Parliament should be the source of Government's power and the only basis of change would be when the basis of legality of Government actions is a major part of one of the winning parties' manifesto.

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7 December 2005 Professor Ian Loveland, Mr Sebastian Payne and Professor Peter Rowe

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**Chairman:** I think that is a challenging note to go out on. Can I say how grateful we are for your evidence and I do hope that all three of you will feel free to

write to us if there are matters which you feel you were not able to cover adequately. What you have said today has been very useful. Thank you very much indeed.

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### **Memorandum by Professor John Bell, University of Cambridge**

The declaration of war involves three practical issues:

1. the effect in international law on the status of actions and individuals (troops and others);
2. the deployment of armed forces; and
3. the ability of the Government to take emergency measures.

These three issues are distinct and are not triggered by the same procedures. The right to deploy armed forces may be independent of whether there is a war. Emergency measures may well be introduced, even without a war—the current situation in France is a good example. This division of principles does, of course, omit one central feature: finance. Whatever the powers to deploy troops or to wage war, there is a need for the Government to have access to flexible amounts of finance to pay for all this activity.

#### **1. The Source of Powers**

European legal systems have different approaches to the sources of powers in the areas just identified. The particular configuration of powers is largely determined in reaction to the history of a particular country, rather than by any deep legal or constitutional ideology. Very broadly, I would divide the systems into two groups.

##### *Inherent powers*

In certain countries, it is taken for granted that the state has some inherent powers to carry out its activities. Most of the powers relate to the functions of the “nightwatchman state”: to provide for security and public order and to run a bureaucracy. Both the United Kingdom and France fall into this group, since they have non-statutory “common law” powers granted to the State.<sup>9</sup> By and large, these are a relic from a pre-democratic constitutional system and were established in the seventeenth century.

##### *Conferred powers*

In other countries with modern democratic constitutions, the notion of the *Rechtsstaat* (a version of the “rule of law”) requires that all power is conferred by law and controlled by it. The State can only do what it has been explicitly authorised to do. As a result, there must always be a legal text that provides the legal basis for action. This principle was set out in article 18 of the Austrian Constitution of 1920 and has been adopted in most democratic constitutions in Europe since 1945.<sup>10</sup>

Thus, the expectation in most European constitutional systems is that the areas of national defence, the armed forces and emergency powers will each be regulated by statutes, which set out the powers of the executive and the procedures by which decisions are taken. The United Kingdom has 20th century statutes in most of these areas: Defence of the Realm, Army, Navy, Air Force, and Emergency Powers.

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<sup>9</sup> In the UK, we would talk of “the Crown”, rather than “the State”, but in a European context, it seems better to use the more generally applicable term, even if it does not exactly mean the same as “the Crown”. See J Bell, *French Constitutional Law* (1992), pp 82–4, 287–91.

<sup>10</sup> For a short survey of the European positions, see E Garcia de Enterría and T-R Fernandez, *Curso de derecho administrativo* (Madrid 1997), pp 426–431. See, for example, Belgian Constitution (1994), arts 35 and 105; German Constitution (1949), art 20; Spanish Constitution (1978), arts 9§ 1 and 103 §1.

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7 December 2005

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## 2. National Security and the Declaration of War

Again, historical experience makes most countries reluctant to leave the executive with the power to declare war or take other action without prior authorisation from Parliament. But two situations are envisaged.

### *Defensive action within the territory*

Most constitutions envisage some kind of legitimate military action by way of defence of national integrity. The Spanish Constitution of 1978 (art 116 §3 and Ley organica 4/1981 of 1 June 1981) envisages a “state of exception” where there is a threat to the democratic order. The French Constitution of 1958 art 16 also sets up emergency powers. The Dutch Constitution (art 96 § 2) envisages a situation where military action already taken against the Netherlands obviates the need for a declaration of war. Similar powers exist in other Constitutions.<sup>11</sup> A number of constitutions reject the idea of war except for defensive purposes: Italian Constitution, art 11; German Constitution, art 26; Norwegian Constitution, art 26; Austrian Law on Neutrality, 26 October 1955.

The German Constitution’s concept of a “State of Defence” (art 115a and following) is typical. Where there is a threat to national security and the integrity of the territory, then Parliament (the Bundestag) votes by a special majority to allow the government to deploy armed forces and override a number of constitutional powers, especially of the Länder. In essence, this is a constrained power to declare war, because it does not envisage that troops will be used outside the national territory.<sup>12</sup>

### *Offensive action outside the territory*

In terms of *offensive action*, ie action outside the national territory, the general pattern of European constitutions and legislation requires prior authorisation by Parliament.<sup>13</sup> The typical conditions would be an action at the request of another State, or of the UN or of another international organisation.<sup>14</sup>

### *What happens if Parliament cannot act?*

Most constitutions envisage the situation where either speed or the physical condition of the country make it impossible for Parliament to act before something needs to be done. (For example, where the country has been invaded).<sup>15</sup> In such situations, the Head of State (the Executive) may take appropriate action. Some Constitutions envisage some alternative bodies which must be consulted (the business committee of the Parliament<sup>16</sup> or the Speakers of the houses of Parliament.)

The parallel is with powers of internal emergency. Here, all countries envisage that the Executive can act immediately, but then needs to obtain approval from Parliament within a short period of days (typically 15 days).<sup>17</sup>

### *The formal declaration of war*

I know of no Constitution in Europe that leaves the declaration of war in the hands of the Executive, except in the formal sense that the Head of State declares war once this has been approved by Parliament.<sup>18</sup> In France, it was considered of sufficient seriousness to have been transferred from the Crown to Parliament in 1792.<sup>19</sup>

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<sup>11</sup> Swedish Constitution (1975), chapter 10 art 9 (1) and (3).

<sup>12</sup> Norwegian Constitution art 25.

<sup>13</sup> See Dutch Constitution art 96 §1; Swedish Constitution, chap 10 art 9(2); Norwegian Constitution (1814), art 25; French Constitution art 35; Portuguese Constitution, art 138(c); Italian Constitution, art 78.

<sup>14</sup> See art 19 of the Ley Organica 5/2005 of 17 November 2005, BOE 18 November 2005, no 276, 18933.

<sup>15</sup> For example, Chap 10, art 9(1) of the Swedish Constitution; art 115a(4) and art 87a of the German Constitution; art 19(2) of the Portuguese Constitution.

<sup>16</sup> Portuguese Constitution, art 138 (c).

<sup>17</sup> See the British Emergency Powers Act 1964; the French law of 1955 on state of emergency; Spanish Constitution art 116 and Leyes Organica of 1 June 1981 and 21 February 1992; Portuguese Constitution, art 137(d). The British period before Parliament has to approve is longer.

<sup>18</sup> See the provisions mentioned in footnote 7. See also Italian Constitution, art 87(9); Spanish Constitution art 63(3).

<sup>19</sup> See F Luchaire and G Conac, *La Constitution de la République Française* (2nd edn Paris 1987), 775–7.

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7 December 2005

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### 3. Deployment of Armed Forces

Because of well-known historical experiences, the national statute on the army not only deals with its organisation and the use of military discipline, but also sets out the values that the armed forces must serve. The idea of unfettered executive power to deploy the military conjures up fears of dictatorship in countries such as Germany, Greece, Italy, Spain and Portugal.

There is usually a detailed law on the organisation of the armed forces, similar to the UK Army Act 1955, etc. The credits available to support a particular programme of deployment are contained in the annexes to the annual Finance Act, but the broad policy will not normally be the subject of legislation. It may be the subject of a specific vote in Parliament, typically where troops are deployed abroad.<sup>20</sup>

The deployment of the armed forces as an operational matter is usually in the hands of the executive, and decisions cannot be challenged in the courts.<sup>21</sup> National public law will usually set out the organisational framework within which decisions are taken. This will usually take the form of a defence council linked to the ministry of defence. Clearly policy issues can be challenged in Parliament, but it is not necessary that the detailed policy deployment be approved.

### 4. Emergency Powers

All systems envisage that the Executive can take action to deal with emergencies. Some constitutional systems envisage a variety of emergencies: a state of siege (internal insurrection or external threat), a state of disorder (where the normal functioning of society is imperilled) and a state civil disaster (catastrophe or health threat).<sup>22</sup> In these cases, Parliament is consulted in a relatively short time, but a number of ordinary legislative rights and powers may be suspended during the period.

### Conclusion

The UK is out of line with its European neighbours because it does not have clear legislation governing the declaration of war. Such legislation could be expected first to stress the essentially defensive use of armed forces, and secondly, the need for prior parliamentary approval.

December 2005

### Memorandum by Dr Katja S. Ziegler<sup>23</sup>, University of Oxford

#### THE MODEL OF A "PARLIAMENTARY ARMY" UNDER THE GERMAN CONSTITUTION

##### SUMMARY

1. **The Status Quo:** Since the adoption of the Parliamentary Participation Act on 18 March 2005, the German Government has needed the consent of Parliament (Bundestag) to deploy military forces abroad. The Act codifies the requirements set out by the Constitutional Court in a seminal Armed Forces decision in 1994. The Act can be summarised as follows:

- In principle, any "deployment of armed forces abroad" requires the consent of the Bundestag, irrespective of the type of deployment and whether or not it is within a multilateral or collective security action. However, no consent is required for preparatory measures, planning and humanitarian services and assistance of the army where weapons are carried solely for self-defence and the soldiers are not expected to become involved in armed action.
- The Act provides for a standard and a simplified procedure of obtaining consent. Under the standard procedure the government submits an application with detailed information about the intended deployment. The parliamentary plenum votes on it by simple majority in a procedure resembling normal legislative procedure (two readings divided by a committee phase). Under the simplified procedure for minor involvements, consent is deemed to have been granted unless Parliament becomes active within seven days after being informed.
- In emergency situations and for the rescue of nationals abroad, consent may be given *ex post*.

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<sup>20</sup> See very clear statements in art 17, Ley Organica 5/2005 of 17 November 2005.

<sup>21</sup> CE Ass 29 September 1995, *Greenpeace*, AJDA 1995, 749 (nuclear testing).

<sup>22</sup> Spanish Constitution, art 116; Portuguese Constitution, art 138. The French Constitution art 16 (state of urgency) envisages the first two, but there is also the emergency powers under the law of 1955, which were invoked in October 2005 to deal with the second.

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7 December 2005

- The Act gives Parliament no right of initiative and no right to change the modalities of a deployment. It is a “take-it-or-leave-it” decision. Together with allowing for ex post consent in emergency situations, this has been seen as striking a balance between the core area of the Executive’s responsibility and parliamentary involvement in deployment decisions. It has also been criticised as unduly limiting Parliament’s competences.

2. **Leading up to the Status Quo:** Although the general approach to the relationship between the Executive and the Legislature in foreign policy is tilted towards the Executive, the Constitutional Court required parliamentary consent for the deployment of the military in its Armed Forces decision of 1994. The reasoning relied on extracting the concept of a “parliamentary army” from various provisions of the German Constitution.

3. **The Democratic and the Rule of Law Argument (“Essential Question” Doctrine):** An alternative legal basis for the Act is the general constitutional doctrine that “essential decisions” (like those affecting human rights or the existence of the state) require democratic legitimation by Parliament. This argument goes back ultimately to the principles of democracy and the rule of law. Also—according to this view—it follows from the greater proximity of Parliament to the people that it must at least be possible for it to assume responsibility, should it so wish, by imposing a consent requirement.

4. **Additional Arguments from the International Level:** Internationalisation of areas of law reduces parliamentary (democratic) legitimation and accountability. This can be counter-balanced by increasing national parliamentary involvement, especially in foreign policy matters. Also, an international trend towards increasing standards of democratic governance (constitutionalisation) provides justification for greater parliamentary powers.

5. **Justiciability and Judicial Review in Foreign Policy Decisions, Including the Deployment of the Military:** Under German constitutional law no state measures are exempt from judicial review. Most deployments of the military were judicially reviewed by the Constitutional Court. On the substance, the Constitutional Court grants a wide margin of appreciation in politicised areas like foreign policy (judicial self-restraint). The standards of judicial review are rather fluid and casuistic. In foreign policy there may be the additional problem that *faits accomplis* have been created, further reducing the level or effectiveness of judicial review. Reduced judicial review may be considered as an argument for increased political *ex ante* control by Parliament.

## OUTLINE

I. German Debates in Context .....	4
II. The Status Quo: A Parliamentary Army.	
<i>The Parliamentary Participation Act</i> of 18 March 2005 .....	5
1. Consent Requirement for Deployment of Armed Forces Abroad .....	5
2. Standard Procedure .....	7
3. Simplified Procedure in Cases of Deployments of Low Intensity and Importance .....	9
4. Exceptional <i>Ex Post</i> Consent .....	10
5. Review of the Initial Consent Decision and Revocation .....	11
6. Extension of Deployment .....	12
III. Leading up to the Status Quo:	
Useful Comparisons that can be Drawn from the German Model .....	12
1. Deployment of the Military as the Exception of Parliamentary Involvement in Foreign Policy .....	13
2. Systematic Arguments Resulting from the German Constitution—esp. Provisions on Defence ( <i>Wehrverfassung</i> ) .....	14
3. The Democratic and the Rule of Law Argument:	
Reservation to Statute/Law for “Essential Questions” .....	15
IV. Additional Arguments From the International Level .....	16
V. Justiciability and Judicial Review of Foreign Policy Decisions, Including the Deployment of the Military .....	18
VI. Annex I: Extracts from the German Constitution .....	20
VII. Annex II: Parliamentary Participation Act .....	22

7 December 2005

## I. GERMAN DEBATES IN CONTEXT

The German Constitution lacks a general rule that would define the specific approach of a democratic constitution towards the military.<sup>24</sup> Rearmament was not on the agenda in 1948/49, so all provisions dealing with the military result from later constitutional amendments of 1954, 1956 and 1968.<sup>25</sup> It is established today that the military is no “fourth power” but just an instrument of government,<sup>26</sup> and, therefore, no special chapter in the Constitution is dedicated to it. Military issues cut across all topics and powers.<sup>27</sup>

The German debate on despatch of the military brings together a number of debates, some of which are peculiar to Germany in the light of its historic experience; others are more general in nature and possibly transferable. The following contextual debates cannot be pursued here:

- whether the Constitution permits the deployment of the military abroad at all outside the scope of self-defence of the territory of the Federal Republic or at most the NATO states’ territory;
- whether such use of force is limited to participation in operations within systems of collective security (UN, NATO<sup>28</sup>);
- who gets involved in such missions—problems around the military draft;
- use of the military to combat non-military or internal security threats (demarcation of functions of military and police), especially in combating terrorism.

## II. THE STATUS QUO: A PARLIAMENTARY ARMY—THE PARLIAMENTARY PARTICIPATION ACT OF 18 MARCH 2005

### 1. Consent Requirement for Deployment of Armed Forces Abroad

On 18 March 2005<sup>29</sup> the German Parliament passed an Act requiring in principle prior parliamentary consent for the “deployment of armed forces abroad”.<sup>30</sup> The Act was passed a good ten years after a decision of the Federal Constitutional Court on 12 July 1994 (Armed Forces Decision)<sup>31</sup> that first laid down binding rules<sup>32</sup> requiring Parliament’s consent in principle and laying down more specific rules. The Court had also called for such a statute to codify the practice that was shaped by the Court<sup>33</sup> and subsequently by the Government.<sup>34</sup>

<sup>24</sup> G Frank, ‘Einrichtung und Kontrolle von Streitkräften’ in Alternativkommentar zum Grundgesetz (October 2001) nach Art. 87, para. 10.

<sup>25</sup> Survey by G Nolte and H Krieger, ‘Military Law in Germany’ in G Nolte (ed), *European Military Law Systems* (De Gruyter Recht, Berlin 2003) 337 ff.; G Nolte, ‘Germany: Ensuring Political Legitimacy for the Use of Military Forces by Requiring Constitutional Accountability’ in C Ku and HK Jacobson (eds), *Democratic accountability and the use of force in international law* (Cambridge University Press, Cambridge 2003) 231 ff.

<sup>26</sup> Cf. S WeiB, *Auswärtige Gewalt und Gewaltenteilung* (1971), p. 62; M Lepper, *Die verfassungsrechtliche Stellung der militärischen Streitkräfte im gewaltenteilenden Rechtsstaat* (Bielefeld 1962), p. 79 ff.; K Hailbronner, ‘Kontrolle der auswärtigen Gewalt’ (1997) 56 *Veröffentlichung der Vereinigung Deutscher Staatsrechtslehrer (VVVDStRL)* 7, 9; WG Grewe, ‘Auswärtige Gewalt’ in J Isensee and P Kirchhof (eds), *Handbuch des Staatsrechts III: Das Handeln des Staates* (C. F. Müller, Heidelberg 1992) § 77, para. 6, 11.

<sup>27</sup> U Fastenrath, *Kompetenzverteilung im Bereich der auswärtigen Gewalt* (1986), 79. Generally for foreign policy WeiB (n 4) 55 ff., 61, 65 ff.

<sup>28</sup> The Constitutional Court classifies NATO as a system of collective security for the purposes of the relevant provision (Art. 24 (2)) of the German Constitution, Reports of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgericht, BVerfGE) 90 BVerfGE 286, 346 ff., 349, 351 = (1994) *Neue Juristische Wochenschrift (NJW)* 2207; R Schmidt-Radefeldt, *Parlamentarische Kontrolle der internationalen Streitkräfteintegration* (Duncker & Humblot, Berlin 2005), 65 f.

<sup>29</sup> (2005) *Bundesgesetzblatt I* 775. See English translation in Annex II. For the legislative procedure including explanatory memoranda see *Deutscher Bundestag, Drucksache 15/2742* of 23 March 2004. See also Bill of the FDP at *Drucksache 15/1985* of 12 November 2003. First Reading on 25 March 2004, s. *Deutscher Bundestag, Plenarprotokoll 15/100*, p. 8977 ff.

<sup>30</sup> § 1 *Parliamentary Participation Act (Parlamentsbeteiligungsgesetz)*.

<sup>31</sup> 90 BVerfGE 286, 387 f.

<sup>32</sup> § 31 BVerfGG.

<sup>33</sup> Further Decisions after the 1994 *Armed Forces* Decision involved the participation of the Bundeswehr in NATO forces in Kosovo 100 BVerfGE 266 (1999); the involvement in NATO following adoption of its New Strategic Concept in 1999 104 BVerfGE 151 (2001) and the policing of Turkish airspace after the break-out of the Iraq war 2003 108 BVerfGE 34 (2003).

<sup>34</sup> For the debate see also D Wiefelspütz, ‘Konstitutiver Parlamentsvorbehalt und Entsendeausschuß’ (2004) *Jura* 292 ff.

7 December 2005

As of 19 December 2005, Parliament had given 47 consent decisions on deployment of troops on the basis of the Court's decision, normally by a great majority.<sup>35</sup>

The consent requirement applies irrespective of the type of deployment,<sup>36</sup> except where there is an imminent danger.<sup>37</sup> Even where troops are deployed within a NATO or UN mission, where membership (including the obligations resulting from membership) has been approved by transforming statute, the specific participation in operations needs to be approved.<sup>38</sup>

Hence there is an inherent tension between the specific consent requirement regarding deployment of the military and the obligations from accession or membership in systems of collective security (UN, NATO<sup>39</sup>). The Constitutional Court stated that the constitutional requirement of consent to troop deployment must not impair the Federal Republic's military capacity to act on the international plane and to become a member of an alliance.<sup>40</sup> This apparent contradiction may be reconciled by a graded system of parliamentary involvement by which the contribution to military integration, for example in command structures in international or regional alliances' headquarters, is covered by the implementing statute. The concrete participation of such staff on a command and planning level in a conflict would be a responsibility typically resulting from military integration and covered by the implementing statute,<sup>41</sup> but the participation of contingents of soldiers in a specific operation is subjected to the additional consent requirement.<sup>42</sup> The application for interim measures to confirm that parliamentary consent would be needed when Germany deployed aircraft to monitor Turkish airspace when the war started in Iraq 2003, is of further interest for the balance struck between executive policy-making, parliamentary involvement and judicial review: the Constitutional Court refused to grant interim measures that would have made the deployment of troops contingent on a parliamentary approval that was lacking at that time. In the light of the uncertainty of the need for consent and the capacity to act within an international alliance, the Court rated the detriment to the core responsibility of the Government in foreign and security policy higher than the requirement of the consent of the Bundestag.<sup>43</sup>

The threshold of "deployment of armed forces" triggering the consent requirement laid down by the Court was not sufficiently clear.<sup>44</sup> The Act defines this—although still criticised by some for not adding much clarity<sup>45</sup>—as "where soldiers of the *Bundeswehr* (army) are included in armed operations" or where such inclusion is expected.<sup>46</sup> Even where strictly defensive, the threshold would be crossed where the army is deployed in an operational zone<sup>47</sup> as the soldiers would be inseparably involved in an armed conflict.<sup>48</sup>

<sup>35</sup> According to an unofficial survey of the Federal Ministry of Defence. In the case of Germany's participation in the mission "Enduring Freedom" in Afghanistan, a narrow vote was expected. The Federal Chancellor therefore linked the vote of consent with a vote of confidence, Bundestags-Drucksache 14/7440; Schröder (n 13) 113 f.; cf D Wiefelspütz, *Das Parlamentsheer* (Berlin 2005), p. 2, 288 ff.; R Biermann, "Der Deutsche Bundestag und die Auslandseinsätze der Bundeswehr. Zur Gratwanderung zwischen exekutiver Prärogative und legislativer Mitwirkung" (2004) *Zeitschrift für Parlamentsfragen* 607, 614 f.; A Gilch, *Das Parlamentsbeteiligungsgesetz—Die Auslandsentsendung der Bundeswehr und deren verfahrensrechtliche Ausgestaltung* (University of Würzburg 2005); D Wiefelspütz, "Der Einsatz der Streitkräfte und die konstitutive Beteiligung des Deutschen Bundestages" (2003) *Neue Zeitschrift für Wehrrecht* 133, 146. F Schröder, *Das parlamentarische Zustimmungsverfahren zum Auslandseinsatz der Bundeswehr in der Praxis* (Carl Heymanns Verlag, Köln 2005), 39 ff.

<sup>36</sup> Only the legal justification of military deployment varies according to the type (self-defence, UN Security Council authorisation, "other deployments" such as in Kosovo and the Tirana/Albania rescue mission on 14 March 1997).

<sup>37</sup> 90 BVerfGE 286, 288. R Pofalla, "Die Bundeswehr im Ausland—Eine Zwischenbilanz des Gesetzgebungsverfahrens" (2004) *Zeitschrift für Rechtspolitik* 221, 224 f. D Wiefelspütz, "Das Parlamentsbeteiligungsgesetz vom 18.3.2005" (2005) *Neue Zeitschrift für Verwaltungsrecht* 496, 498.

<sup>38</sup> This is established practice: The deployment of up to 3,000 soldiers in the framework of the UN-authorized NATO mission in Bosnia-Herzegovina (SFOR, later Althea or EUFOR) was given parliamentary consent in December 1996.

<sup>39</sup> *Supra* n 6.

<sup>40</sup> 90 BVerfGE 286, 388.

<sup>41</sup> Cf. participation in the planning of a quick reaction force to support and protect (with a view to pull out) UNPROFOR forces in Bosnia-Herzegovina, Schröder (n 13) 50 f.

<sup>42</sup> This may be a case treated under the simplified procedure, *infra*, p. 9. Wiefelspütz (n 15) 498; D Wiefelspütz, "Die militärische Integration der Bundeswehr und der konstitutive Parlamentsvorbehalt" (2004) *ZaöRV* 363, 376. SC Spies, "Parlamentsvorbehalt und Parlamentsbeteiligung bei Einsätzen der Bundeswehr im Ausland—Ein Beitrag zur Diskussion um ein Parlamentsbeteiligungsgesetz" in Raap (ed), *Krisensicherung und Humanitärer Schutz—Crisis Management and Humanitarian Protection, Festschrift für Dieter Fleck* (Berlin 2004) 531, 547.

<sup>43</sup> 108 BVerfGE 34, 44 = (2003) *NJW* 2373. M Krajewski, "Das 'Parlamentsheer' als Kollateralschaden des Irak-Krieges? Zum AWACS-Beschluss des Bundesverfassungsgerichts vom 23.3.2005, 2 BvQ 18/03" (2003) *Archiv für Völkerrecht* 419.

<sup>44</sup> See, for example, 108 BVerfGE 34, 43.

<sup>45</sup> F Schröder, "Das neue Parlamentsbeteiligungsgesetz" (2005) *Neue Juristische Wochenschrift* 1401, 1405; W Weiß, "Die Beteiligung des Bundestags bei Einsätzen der Bundeswehr im Ausland—eine kritische Würdigung des Parlamentsbeteiligungsgesetzes" (2005) *Neue Zeitschrift für Wehrrecht* 100, 103.

<sup>46</sup> § 2 (1).

<sup>47</sup> The deployment of 75 unarmed military observers in the framework of the UN mission to implement the 2005 peace agreement in Sudan (UNMIS) was subjected to the consent procedure and consent granted in April 2005 after debate by an overwhelming majority.

<sup>48</sup> Wiefelspütz (n 15) 498.

7 December 2005

Whether deploying aircraft in NATO territory over Southern Turkey on the eve of the Iraq war in 2003 technically amounted to a deployment in a “territory prone to war” which was not strictly speaking a war-zone and hence requiring consent is still debated<sup>49</sup> and pending with the Constitutional Court.<sup>50</sup>

The Act explicitly excludes<sup>51</sup> from the definition of the deployment of armed forces, and hence from the consent requirement, the following actions:

- preparatory measures and planning;
- humanitarian services and assistance of the army where weapons are carried solely for self-defence and the soldiers are not expected to be involved in armed action.

## 2. Standard Procedure

Procedurally, the Federal Government has to apply for consent “in good time” before the commencement of the deployment.<sup>52</sup> The application must contain certain detailed specified information about the mandated region of deployment, legal bases, maximum number of soldiers and abilities of the forces to be deployed, the intended duration and the predicted cost and financing of the deployment.<sup>53</sup> The application must be sufficiently precise for Parliament to exercise its control and give informed consent, which ultimately results from the principle of legal certainty and hence the rule of law.<sup>54</sup> The general right to be informed and the corresponding duty of the government is especially weighty in the context of parliamentary consent to deployment.<sup>55</sup> The Parliament has no right of initiative or to alter the application of the Government; it is expressly a “take-it-or-leave-it” decision.<sup>56</sup> To take the initiative and to determine the modalities of deployment is seen to fall within the Executive’s own sphere of responsibility.<sup>57</sup>

In this respect, the Constitutional Court and the Act have (rightly) been criticised for limiting Parliament to a “take-it-or-leave-it” type of decision. This restricts the autonomy and involvement of Parliament by depriving the Bundestag of the power to impose conditions or have a say on certain subjects. Parliament is not constitutionally restricted in its autonomy.<sup>58</sup> A simple statute—notwithstanding a constitutional amendment—cannot abridge the Parliament’s competences under the Constitution. It must be assumed that the Parliament may introduce modifications should it so wish.<sup>59</sup>

Such a reservation to separate consent was, for example, put in by the Bundestag with regard to the statute ratifying the Maastricht treaty and accepted by the Constitutional Court.<sup>60</sup> The entry into the third phase of the economic and monetary union, introducing the Euro in January 1999 provided for by the Maastricht Treaty, was made subject to a separate consent of Parliament.<sup>61</sup> Hereby, Parliament reserved a separate decision which—following the jurisprudence of the Constitutional Court regarding dynamic integration in international organisations<sup>62</sup>—might not have been required if it had not been reserved. Even where non-essential normative question are at issue, the legislature can narrow the competence of the government with regard to unilateral acts in foreign affairs, eg by prohibiting the stationing of weapons, etc.<sup>63</sup>

<sup>49</sup> 108 BVerfGE 34, 43 (para. 34); Schröder (n 13) 128 ff.

<sup>50</sup> The decision in the main proceedings (BVerfG, 2 BvE 1/03) is still pending without a date being fixed as of 23 December 2005.

<sup>51</sup> § 2 (2).

<sup>52</sup> Schröder (n 23) 1402 criticises the lack of differentiation calling for more precise periods according to more specific conditions.

<sup>53</sup> § 3 (1) and (2).

<sup>54</sup> D Wiefelspütz, *Der Einsatz bewaffneter deutscher Streitkräfte und der konstitutive Parlamentsvorbehalt* (Nomos, Baden-Baden 2003) 44 f, 59 f.

<sup>55</sup> Wiefelspütz, (n 32) 60.

<sup>56</sup> § 3 (3).

<sup>57</sup> “Kernbereich exekutiver Eigenverantwortlichkeit” or “Eigenbereich exekutiver Handlungsbefugnis und Verantwortung” (in 90 BVerfGE 286, 389).

<sup>58</sup> Wiefelspütz (n 15) 499.

<sup>59</sup> Wiefelspütz (n 15) 499; G Kretschmer, “Art. 45a GG” in B Schmidt-Bleibtreu and F Klein (eds), *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland* (10 edn Luchterhand in Wolters Kluwer Deutschland, Neuwied 2004) Art. 45a, para. 16.

<sup>60</sup> 89 BVerfGE 155, paras 144-146.

<sup>61</sup> Gesetz zur Einführung des Euro of 9 June 1998, (1998) Bundesgesetzblatt I 1242 ff. of 15 June 1998; W Kluth, *Diskussionsbeiträge*, in: R Geiger (ed), *Neuere Probleme der parlamentarischen Legitimation im Bereich der auswärtigen Gewalt* (2003), p. 34; R Wolfrum, “Kontrolle der auswärtigen Gewalt” (1997) 56 *Veröffentlichung der Vereinigung Deutscher Staatsrechtslehrer (VVDStRL)* 38, 57; Kokott, *Kontrolle* (n 67) 940.

<sup>62</sup> 58 BVerfGE 1, 36 f.; 68 BVerfGE 1, 97 f.; Fastenrath (n 5) 240 f.

<sup>63</sup> Fastenrath (n 5) 242 f.

7 December 2005

It has become established practice that parliamentary consent is given for a certain period in time, usually for a maximum of one year. Also, the practice has become established that the Government or MPs of the Foreign Affairs or Defence Committees minute certain commitments or requirements or legal opinions, like reporting in certain periods of time or reporting or reviewing the deployment in the cabinet after a fixed period of time or maximum duration of the deployment allowing for further participation of the Parliament in a possible renewal decision.<sup>64</sup> This may be in reaction to amendments requested by Parliament. In practice, therefore, the “take-it-or-leave-it” restriction is softened.<sup>65</sup> Generally, the procedure is characterised by its informality and cooperation between the institutions, resulting from the successive evolution of the practice and the fact that there are only few written rules.<sup>66</sup> The parliamentary procedure is modelled on the legislative procedure except that the *Bundesrat* (federal legislative chamber/“upper house”) is not involved. The application for consent undergoes a first reading, is sent to committees (foreign affairs, defence, budget and further ones as the case may be) and then is submitted to the plenum for a second reading.<sup>67</sup> Practice has shown that in urgent cases this can happen on a single day.<sup>68</sup> Generally, the view in military circles seems to be that the time required to procure consent is negligible in relation to the time normally taken by preparation and planning of deployments. Consent is given by a simple vote of the Bundestag, requiring simple majority.<sup>69</sup>

### 3. Simplified Procedure in Cases of Deployments of Low Intensity and Importance

The Act provides for a simplified procedure of consent where deployment is of “low intensity and importance”. Consent is deemed to have been granted unless the Parliament becomes active within seven days after having been informed.<sup>70</sup> From a practical perspective, this means that only important or politically controversial deployments need to be discussed in the plenum, whereas minor ones can be approved more easily. The simplified procedure is modelled on the way the Federal Chancellor proceeded in a rescue intervention in Tirana/Albania in 1997 to evacuate German and other EU nationals in a situation of civil unrest. Under the simplified procedure, the Government has to apply, via the chairman of the Parliament, to the chairmen of the political groupings in Parliament and the Chairmen of the Foreign Affairs and the Defence Standing Committees as well as one member of each political grouping represented on these committees. The application is also circulated to all MPs. Parliament is only consulted in full if a political grouping represented in the Parliament or 5 per cent of its members request it within seven days. The short time limit has been both lauded as a practical approach<sup>71</sup> and criticised as restricting parliamentary participation.<sup>72</sup>

A deployment is defined as of low intensity and importance if the number of soldiers is small, the deployment on the basis of the circumstances is of low importance and if it is not participation in a war.<sup>73</sup> By way of presumption this is as a rule the case where the deployment is a reconnaissance mission bearing arms only for self-defence, where only individual soldiers are concerned within the framework of personnel exchanges with allied armies, and where individual soldiers are deployed in the framework of a UN, NATO or EU mission or that of another organisation fulfilling a UN mandate.<sup>74</sup>

### 4. Exceptional Ex Post Consent

In emergency situations consent may be given *ex post* in order to maintain the Republic’s capacity to defend itself. The same applies to rescue missions of individuals in danger where the publicity entailed by a parliamentary procedure would endanger the lives of the people in question.<sup>75</sup> Nevertheless, the Act requires that the Parliament must be informed before the commencement and during the operation “in a suitable

<sup>64</sup> Wiefelspütz (n 32) 52 f; Schröder (n 13) 115 f, 302 ff; Spies (n 20) 553.

<sup>65</sup> Schröder (n 13) 136.

<sup>66</sup> Also Schröder (n 13) 137 ff.

<sup>67</sup> Wiefelspütz (n 13) 313, 497.

<sup>68</sup> Participation in ISAF mission (mandated by Security Council Resolution 1386 of 20 December 2001 (Afghanistan). The Government applied for consent on 21 December 2001, the committees were involved on 22 December and the plenum consented on the same day in an especially convened session. Further examples for quickly approved deployments: participation in “Allied Force” (Kosovo) 12–16 October 1998, although contentious; participation in EUFOR (“Artemis”) in the Democratic Republic of Congo 17/18 June 2003; cf. Schröder (n 13) 76 ff, 121 f, 131 f.

<sup>69</sup> Art. 42 (2) of the Constitution. § 45 of the Standing Orders of the Bundestag require a quorum of at least 50 per cent of the MPs.

<sup>70</sup> The Act did not adopt the much discussed proposal by the FDP parliamentary grouping to create a parliamentary “Deployment of the Military” committee dealing with questions of despatch of the military *in lieu* of the plenum. See Schröder (n 23) 1402 f.; Wiefelspütz (n 12) 292 ff; maintaining the responsibility of the plenum is positively viewed by Weiß (n 23) 115; Gilch (n 13) 184 ff.

<sup>71</sup> BT Drs and Plenarprotokoll.

<sup>72</sup> § 4 (1).

<sup>73</sup> § 4 (2).

<sup>74</sup> § 4 (3).

<sup>75</sup> § 5 (1).

7 December 2005

manner”,<sup>76</sup> and the consent has to be obtained without “undue delay”. There is no concrete indication of the interpretation of these terms in the Act. In practice, the Government has in the one case that arose (rescue mission in Tirana 1997) informed the chairmen of the political groupings in Parliament and the Chairmen of the Foreign Affairs and the Defence Standing Committees, together with representatives of each party in Parliament in these committees, in advance. It procured consent of the parliamentary plenum immediately after the termination of the deployment. If consent fails to be obtained, the operation has to be terminated.<sup>77</sup>

## 5. Review of the Initial Consent Decision and Revocation

The previously much debated right to review an initial decision authorising deployment later on and to call back the military<sup>78</sup> is explicitly stated.<sup>79</sup> The refusal of an *ex post* authorization likewise must lead to termination of the deployment.<sup>80</sup> This clarification of potential reversibility can be welcomed.<sup>81</sup> However, it applies only to situations where the Bundestag approved of deployment, not where it was not involved in the first place, for example, because the Government did not think the threshold of a “deployment of armed forces abroad” was met and did not ask for consent.<sup>82</sup> The latter case is still not explicitly regulated.<sup>83</sup> However, the principle of popular sovereignty as the source of all state power demands that the final decision be at least potentially always with the Parliament. This would mean that Parliament could assume competence in matters primarily left to the Executive if it so wishes.<sup>84</sup>

Whereas the Act clarifies the previously debated question of a right to revoke,<sup>85</sup> the conditions are still somewhat debated. Starting points are the competences of the Executive in foreign policy and the obligation on Parliament not to impair the Federal Republic’s military capacity to act on the international plane or to become a member of an alliance, as ruled by the Constitutional Court.<sup>86</sup> To subject the right of revocation (and the consent itself) to the restraint that it may not be exercised in an arbitrary manner is one approach.<sup>87</sup> This has been justified by the argument that it has to be exercised in accordance with principles of “loyalty of constitutional organs” (*Verfassungsorganstreue*) which means there must be an important reason.<sup>88</sup> Another approach is to allow revocation only in the case of a change of factual circumstances.<sup>89</sup> As the decision to revoke is ultimately a political one, the Bundestag enjoys a wide margin of appreciation. Within the evaluation of important reasons, the interests of military alliance partners will have to be considered.<sup>90</sup> The prevailing view seems to be to allow for revocation even where only the political circumstances change.<sup>91</sup>

<sup>76</sup> § 5 (2).

<sup>77</sup> § 5(3).

<sup>78</sup> Cf. G Nolte, “Bundeswehreinätze in kollektiven Sicherheitssystemen” (1994) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 652, 680 ff.

<sup>79</sup> § 8.

<sup>80</sup> § 5.

<sup>81</sup> It may not be practically relevant as a recall would most likely lead to a governmental crisis, revealing that the Government lacks the support by a parliamentary majority.

<sup>82</sup> See for example, 108 BVerfGE 34, 43 = (2003) NJW 2373—deployment of fighter aircraft in Southern Turkey 2003.

<sup>83</sup> D Wiefelspütz, “Bewaffnete Einsätze der Bundeswehr auf See” (2005) *Neue Zeitschrift für Wehrrecht* 146, 157 ff (for the spectrum of opinions), 161 (follows from general competence in foreign policy in Art. 32 of the Constitution); T Stein, “Völkerrechtliche und verfassungsrechtliche Fragen des Schutzes der deutschen Handelsflotte durch die Bundesmarine” in J Ipsen and Schmidt-Jortzig (eds), *Recht—Staat—Gemeinwohl Festschrift für Dietrich Rauschnig* (2001) 487, 499; T Stein, in JA Frowein and T Stein (eds), *Rechtliche Aspekte einer Beteiligung der Bundesrepublik Deutschland an Friedenstruppen der Vereinten Nationen* (1990) 17 ff, 26; Gilch (n 13) 29.

<sup>84</sup> Likewise, S Kadelbach, “Die parlamentarische Kontrolle des Regierungshandelns bei der Beschlußfassung in internationalen Organisationen” in R Geiger (ed), *Neuere Probleme der parlamentarischen Legitimation im Bereich der auswärtigen Gewalt* (Nomos, Baden-Baden 2003) 41, 53.

<sup>85</sup> Cf. Wiefelspütz (n 32) 64 ff.

<sup>86</sup> 90 BVerfGE 286, 388; Pofalla (n 15) 224 f.

<sup>87</sup> Pofalla (n 15) 224; Wiefelspütz (n 15) 500; A Lorz, *Interorganrespekt im Verfassungsrecht* (Mohr Siebeck, Tübingen 2001) 370; Wiefelspütz (n 32) 66 f; W-R Schenke, *Die Verfassungsorganstreue* (Duncker & Humblot, Berlin 1977).

<sup>88</sup> HH Klein, “Rechtsfragen des Parlamentsvorbehalts für Einsätze der Bundeswehr” in H-D Horn (ed), *Recht im Pluralismus, Festschrift für Walter Schmitt Glaeser* (Duncker & Humblot, Berlin 2003) 245, 257.

<sup>89</sup> J Kokott, “Kontrolle der auswärtigen Gewalt” (1996) *Deutsches Verwaltungsblatt* 937; J Kokott, “Art. 87a GG” in M Sachs (ed), *Grundgesetz Kommentar* (3 edn C. H. Beck, München 2003) para. 30b.

<sup>90</sup> Schmidt-Radefeldt (n 6) 177; Weiß (n 23) 113 f for an unrestricted right to recall as the negative side of a consent as the provision does not contain such a limitation and as the assessment of the situation may change—as may majorities in the Parliament.

<sup>91</sup> Wiefelspütz (n 32) 66.

7 December 2005

## 6. Extension of Deployment

The simplified procedure is also used for renewing existing deployments without changes. In practice, it has become relevant only in this context. Consent is deemed to have been granted after the expiry of seven days. In the meantime, the deployment is deemed to be authorised during this period and for the time of potential deliberation in Parliament (the maximum is the end of the parliamentary week following the week of the parliamentary request for deliberation). In the regular procedure, the extension is deemed to be authorized until the end of the second day of the parliamentary session after the Government's application.

### III. LEADING UP TO THE STATUS QUO

#### Useful Comparisons that can be drawn from the German Model

From a UK perspective, it may be interesting to look at the arguments that the Constitutional Court made in its seminal Armed Forces decision of 1994 to require the consent of Parliament. Legal opinion has undergone several shifts in the past decades. Up to the 1980s, the consent requirement was widely taken for granted since the provisions on the military, especially the last one in 1968, were inserted by constitutional amendments allowing for the military re-integration of Germany into the Western world.<sup>92</sup> This was followed by a prevailing view of executive prerogative which was overhauled by the Court.<sup>93</sup>

#### 1. Deployment of the Military as the Exception of Parliamentary Involvement in Foreign Policy

Although there were a few critics,<sup>94</sup> up to the Armed Forces Decision of the Constitutional Court in 1994, it was the prevailing view that foreign policy generally belongs to the Executive domain of government.<sup>95</sup> Parliamentary consent for the deployment of the military may still be described as the exception from a generally and traditionally very wide competence of the Executive in foreign policy against the backdrop of a rather abstract invocation of the principle of separation of powers.<sup>96</sup> This background reveals the importance attached to parliamentary consent in a military context. It must be noted, however, that there seems to be a general trend towards parliamentarisation of foreign policy, especially concerning EC matters,<sup>97</sup> and of the use of the armed forces.<sup>98</sup>

#### 2. Systematic Arguments Resulting from the German Constitution—esp. Provisions on Defence (Wehrverfassung)

The Constitutional Court resorts to different sets of norms, mostly with an internal thrust, when restricting the government's exercise of competences. By shifting away from foreign policy, it quotes various provisions dealing with the military that reveal an underlying principle requiring the involvement of Parliament where "armed force are deployed" ("*Einsatz bewaffneter Streitkräfte*")<sup>99</sup> and that make the Bundeswehr a "parliamentary army" ("*Parlamentsheer*"), subjected to enhanced parliamentary control:<sup>100</sup>

<sup>92</sup> *Supra*, p. 4.

<sup>93</sup> Wiefelspütz (n 13) 179.

<sup>94</sup> K Ipsen, "Bündnisfall und Verteidigungsfall" (1971) *Die öffentliche Verwaltung* (DÖV) 583, 588; K Kersting, "Die Entscheidung über den Einsatz der Bundeswehr zur Verteidigung" (1982) 24 (3) *Neue Zeitschrift für Wehrrecht* 84, 86, 91; NK Riedel, "Entscheidungskompetenz des Bundestages bei der Feststellung des Bündnisfalles" (1991) *Die öffentliche Verwaltung* (DÖV) 305, 310 f.

<sup>95</sup> R Wolfrum, "Auswärtige Beziehungen und Verteidigungspolitik" in H Dreier and P Badura (eds), *Festschrift 50 Jahre Bundesverfassungsgericht, Volume II* (Mohr Siebeck, Tübingen 2001) 693, 696 ff.

<sup>96</sup> 90 BVerfGE 286, 357 ff, 381; 68 BVerfGE 1, 85 ff.; S Kadelbach and U Guntermann, "Vertragsgewalt und Parlamentsvorbehalt" (2001) *Archiv des öffentlichen Rechts* 563; Wolfrum (n 73) 693; KS Ziegler, "Scope and Limits of the Executive Powers in Foreign Policy: The Decision to Despatch the Military" in Katja S. Ziegler, D Baranger and AW Bradley (eds), *Constitutionalism and the Role of Parliaments* (Hart Publishing, Oxford forthcoming 2006).

<sup>97</sup> Wolfrum (n 39) 38 ff.; NK Riedel, "Die Entscheidung über eine Beteiligung der Bundeswehr an militärischen Operationen der UNO" (1993) *Die öffentliche Verwaltung* (DÖV) 994, 999.

<sup>98</sup> Prior approval to send troops abroad is required in Austria, the Czech Republic, Denmark, Germany, Hungary, Italy, the Netherlands (amendment of 2000), Norway, Sweden and Turkey, according to H Born and H Hänggi, "The Use of Force under International Auspices: Strengthening Parliamentary Accountability" (2005) Geneva Centre for the Democratic Control of Armed Forces (DCAF) Policy Paper No 7, p. 2, 6 (at [http://www.dcaf.ch/\\_docs/PP7\\_Born\\_Hanggi.pdf](http://www.dcaf.ch/_docs/PP7_Born_Hanggi.pdf)); G Nolte and H Krieger, "Comparison of European Military Law Systems" in G Nolte (ed), *European Military Law Systems* (De Gruyter Recht, Berlin 2003) 19, 4; LF Damrosch, "Is There a General Trend in Constitutional Democracies Toward Parliamentary Control Over War-and-Peace Decisions?" (1996) 90 *Proceedings American Society of International Law* 36 ff, 39 f; LF Damrosch, "Constitutional Control over War Powers: A Common Core of Accountability in Democratic Societies War and Responsibility: A Symposium on Congress, the President, and the Authority to Initiate Hostilities" (1995) 50 *U Miami L Rev* 181ff; LF Damrosch, "The Interface of National Constitutional Systems with International Law and Institutions on Using Military Forces: Changing Trends in Executive and Legislative Powers" in C Ku and HK Jacobson (eds), *Democratic accountability and the use of force in international law* (Cambridge University Press, Cambridge 2003) 39 ff; Kokott, *Kontrolle* (n 67) 937.

<sup>99</sup> 90 BVerfGE 286, 387. See also 108 BVerfGE 34, 43.

<sup>100</sup> Frank (n 2) para. 26 ff.

7 December 2005

- Parliament must declare a “situation of defence” as a technical condition for any deployment of the army in defence (Art. 115a GG, similarly, Art. 80a (3) GG);
- There was no intention to de-parliamentarise other uses of the military outside a situation of defence (Art. 87a (1) GG) when the norm was introduced in 1968,<sup>101</sup> when the question of deployment was purely hypothetical;<sup>102</sup>
- The German constitutional tradition since 1918 points towards parliamentary involvement.<sup>103</sup>
- The Constitution reflects various mechanisms of enhanced parliamentary control regarding the military:<sup>104</sup>
  - Art 45a—Standing Committee of Defence, vested with powers of an inquiry committee and scrutinising the Government’s actions relative to the military;
  - Art. 45b—Ombudsman for the Armed Forces as a subsidiary organ of the Parliament to safeguard the human rights of soldiers;
  - Art. 87a (1), 2nd sentence GG—Enhanced budgetary control in the area of military expense (size/number of troops must be indicated in the budget).

In spite of the Court’s generally executive-friendly approach in foreign policy, it does, nevertheless, consider the balance between the powers neither unduly tilted towards the Parliament here, nor to amount to interference with the core area of Executive competence.<sup>105</sup> One reason for this is the fact that in situations of imminent danger and need, the government does not have to wait for the vote of the Bundestag. Further, it finds that the Parliament neither has a right of initiative (ie it cannot require troops to be deployed) nor the power to influence the modalities, extent and duration of such deployment.<sup>106</sup> All of this is reflected in the Parliamentary Participation Act as shown (and criticised) above.<sup>107</sup>

### 3. The Democratic and the Rule of Law Argument: Reservation to Statute/Law for “Essential Questions”

While the Constitutional Court did not explicitly base its 1994 decision on this principle, the invention of parliamentary consent by the Court which has been moulded into the Parliamentary Participation Act can also be explained *mutatis mutandis* by the wider constitutional doctrine of “essential question” (“Wesentlichkeitstheorie”)<sup>108</sup> which may be significant for other legal systems.<sup>109</sup> This is the German variant of the doctrine of non-delegation of US constitutional law,<sup>110</sup> which requires a parliamentary statute where “essential matters” are affected.<sup>111</sup> It is the offspring of the constitutional principles of democracy and the rule of law. “Essential matters” is a somewhat vague concept, but it comprises at least measures that affect fundamental rights, the rule of law, especially legal certainty and existential decisions.<sup>112</sup> The impact, for example, on the soldiers whose right to life and physical integrity may be interfered with by sending them into

<sup>101</sup> Prior to the constitutional amendment of 1968 inserting emergency powers, the constatation of a situation of defence explicitly required a vote of the Parliament (Art. 59a (1) GG—old version).

<sup>102</sup> 90 BVerfGE 286, 382.

<sup>103</sup> Esp. Art. 11 (1) of the Constitution of 1871 (declaration of war by statute) and Art. 45 (2) of the Weimar Constitution of 1919 (declaration of war and peace agreements by the legislature as the main actor, not just the consenting actor), 90 BVerfGE 286, 383; Grewe (n 5) paras 19 ff.

<sup>104</sup> Special control rights in the context of defence, cf. TM Spranger, *Wehrverfassung im Wandel* (Nomos, Baden-Baden 2002) 26 ff.; Lepper (n 4) 182 ff.

<sup>105</sup> See above (n 35).

<sup>106</sup> 90 BVerfGE 286, 388 f.

<sup>107</sup> *Supra*, p. 8.

<sup>108</sup> Kokott, Kontrolle (n 67) 939 ff; Kokott, Art. 87 GG (n 67) para. 30; R Streinz, “Art. 59 GG” in M Sachs (ed), *Grundgesetz Kommentar* (3 edn C. H. Beck, München 2003), para. 27; V Epping, “Die Evakuierung deutscher Staatsbürger im Ausland als neues Kapitel der Bundeswehrgeschichte ohne rechtliche Grundlage—Der Tirana-Einsatz der Bundeswehr auf dem rechtlichen Prüfstand” (1999) *Archiv des öffentlichen Rechts* 423, 448; Nolte (n 3) 243 f; Nolte & Krieger (n 3) 359 f.

<sup>109</sup> Art. 19 (1) of the Danish Constitution of 1953 provides for a similar type of essential question doctrine: “(...) without the consent of the Parliament the King shall not undertake any act whereby the territory of the Realm will be increased or decreased, nor shall he enter into any obligation which for fulfillment requires the concurrence of the Parliament, *or which otherwise is of major importance.*” (italics added). Art. 19 (2) emphasises specifically “The King shall not use military force against any foreign state without the consent of the Parliament.” Art. 19 (3) requires to inform and consult the Parliament: “Government shall consult prior to the making of any decision of major importance to foreign policy.”

<sup>110</sup> LH Tribe, *American Constitutional Law* (3 edn Foundation Press, New York 2000), vol. I, pp. 977 ff; G Nolte, “Ermächtigung der Exekutive zur Rechtsetzung. Lehren aus der deutschen und der amerikanischen Erfahrung” (1993) *Archiv des öffentlichen Rechts* 378, 380 ff.; 400 ff.; Nolte (n 86) 243.

<sup>111</sup> 49 BVerfGE 89, 126 f. (Kalkar); M Sachs, in: Sachs (n 86), Art. 20 GG, para. 117; Kokott (n 67) 937 ff.

<sup>112</sup> M Sachs, “Art. 20 GG” in M Sachs (ed), *Grundgesetz Kommentar* (3 edn C. H. Beck, München 2003), para. 117.

7 December 2005

a war zone,<sup>113</sup> or on civilians who are in their own or in foreign territory, is sufficiently serious to bring the decision under the purview of the doctrine of essentiality. Also, the special political importance of deploying the military, which may lead to counter-attacks and hence ultimately even affect the existence of the Federal Republic, militates in favour of treating it as an essential question.<sup>114</sup>

It has to be noted that this approach would bring “home” a theory originally derived from a foreign policy provision of the Constitution. The Constitutional Court extracted the “essential question” doctrine, among others, precisely from the requirement of statutory transformation of certain treaties (Art. 59 (2) of the Constitution).<sup>115</sup> Nevertheless, it has never before been applied as a general concept in the area of foreign policy.<sup>116</sup> The Court had even previously rejected its applicability in the 1983 Pershing decision.<sup>117</sup> But the doctrine underlies the consent requirement.<sup>118</sup>

Although it is true that the German Constitution does not provide for an all-comprising primacy of Parliament,<sup>119</sup> the Parliament is the more immediate representative of popular sovereignty (Art. 20 (2) GG) which is behind all branches of state power. This does not mean the Parliament is, in principle, responsible for everything in the first instance. But it has the right to assume responsibilities which are normally allocated to other powers in questions which it considers important, unless the Constitution prohibits it.<sup>120</sup> This imposes limits on an excessive use of too abstract a principle of separation of powers in this context.

#### IV. ADDITIONAL ARGUMENTS FROM THE INTERNATIONAL LEVEL

A trend towards internationalisation, supranationalisation and integration, in EC law especially, with its direct effect on individuals, of areas traditionally regulated on a national level, and the mingling or hybrid nature of national and international rules, make parliamentary involvement on the national level even more pressing from the perspective of democratic legitimation of decisions.<sup>121</sup> If such a development is not to lead to a loss of parliamentary participation rights and a “double democratic deficit”<sup>122</sup>, participation in foreign policy decisions must be increased.<sup>123</sup> The principle of reserving essential questions to Parliament and ultimately the principles of the rule of law and of democracy provide the legal foundations. Under the “essential question” doctrine, statutory legitimation is required where new obligations and rights of individuals are created that result from international integration.<sup>124</sup>

A separate argument can be derived from an attested trend of constitutionalisation of the international legal order (eg the UN or the EC system)<sup>125</sup> that in the end requires increased parliamentary control of foreign policy to meet emerging international standards of democratic governance and accountability.<sup>126</sup> Even if the enthusiasm of the halcyon days of attesting a New (more democratic) World Order at the beginning of the 1990s has abated, and in spite of deficits on this level,<sup>127</sup> the trend can still be attested. Counteracting this trend

<sup>113</sup> Riedel (n 75) 998; likewise Schröder (n 13) 195 f.

<sup>114</sup> Ipsen (n 72) 587f; Kersting (n 72) 86, 91; Riedel (n 75) 998.

<sup>115</sup> In 49 BVerfGE 89, 127 (Kalkar); 33 BVerfGE 303, 377 (numerus clausus); 34 BVerfGE 165, 192 f.; 40 BVerfGE 237, 249; 41 BVerfGE 251, 259 (Comprehensive Schools); 45 BVerfGE 400, 417 f.; 47 BVerfGE 46; 58 BVerfGE 257, 268 (Secondary Schools); Kadelbach & Guntermann (n 74) 573; Schmidt-Radefeldt (n 6) 110.

<sup>116</sup> It has been suggested that it shies back from opening the floodgates to introduce democratic principles in foreign policy, Kadelbach & Guntermann (n 74) 573.

<sup>117</sup> 68 BVerfGE 1, 108.

<sup>118</sup> Also R. Streinz, “Art. 59 GG” in M Sachs (ed), *Grundgesetz Kommentar* (3 edn C. H. Beck, München 2003) para. 27.

<sup>119</sup> No “total” reserve (*Totalvorbehalt*) of all conceivable measures to regulation by statute. F. Schuppert, *Die verfassungsgerichtliche Kontrolle der Auswärtigen Gewalt* (Nomos, Baden-Baden 1973) 53.

<sup>120</sup> Kadelbach (n 62) 51, 53.

<sup>121</sup> Schmidt-Radefeldt (n 6) 33 f.; RA Dahl, *On Democracy* (Yale University Press, New Haven 1998) 115, 183; Wolfrum (n 73) 694 f., 698; H. Steinberger, “Der Verfassungstaat als Glied einer europäischen Gemeinschaft” (1991) 50 Veröffentlichung der Vereinigung Deutscher Staatsrechtslehrer (VVDStRL) 9, 39 ff., 40.

<sup>122</sup> Born & Hänggi (n 76) 3.

<sup>123</sup> Cf. Art. 23(3) GG giving the Parliament a right of participation before the Government consents to EC legislation; Wolfrum (n 39) 55 ff.; E. Stein, “International Integration and Democracy: No Love At First Sight” (2001) 95 AJIL 489, 490 f., 524.

<sup>124</sup> Wolfrum (n 39) 41 f and (n 73) 701.

<sup>125</sup> B. Kingsbury, N. Krisch and R. B. Stewart, “The Emergence of a Global Administrative Law” (2005) 68 *Law and Contemporary Problems* 15, 27 ff at [http://www.iilj.org/global\\_adlaw/documents/10120502\\_KingsburyKrischStewart.pdf](http://www.iilj.org/global_adlaw/documents/10120502_KingsburyKrischStewart.pdf); Steinberger (n 99) 11 f., 43 ff.

<sup>126</sup> Krajewski (n 21) 424 f.; Wolfrum (n 39) 41 ff; see also contributions to C. Ku and H. K. Jacobson (eds), *Democratic accountability and the use of force in international law* (Cambridge University Press, Cambridge 2003); G. H. Fox and B. R. Roth (eds), *Democratic Governance and International Law* (Cambridge University Press, Cambridge 2000); Stein (n 101) 515; R. F. Housman, “Democratizing International Trade Decision-making” (1994) 27 *Cornell Int'l L J* 699, 700 f.; T. M. Franck, “The Emerging Right to Democratic Governance” (1992) 86 *AJIL* 81.

<sup>127</sup> Born & Hänggi (n 76) 12 ff.

7 December 2005

on the national level would seem anachronistic. This argument can be reinforced if one considers the number of countries that require parliamentary approval for the declaration of war (but not for “mere” deployment of troops). An argument can be made that these constitutions date from the 19th or early 20th century when the paradigm of deploying the military was in a declared war. Hence these constitutions may be considered as having been overtaken by factual developments with which they have not kept up legally.<sup>128</sup>

A trend towards increased democratic structures on two levels, internationally and nationally, is visible, especially in a European context (“double legitimacy”). This may acknowledge that national parliamentary control may not ultimately be able to compensate for the reduced legitimation in areas where a transfer of competence has taken place.<sup>129</sup> Nationally, new structures, for example European Affairs committees of national parliaments and procedures to keep them informed have been devised.<sup>130</sup> Internationally, on a EU level, the principle of democracy has been reinforced first by directly electing and then by consecutively strengthening the European Parliament, by safeguarding human rights of the individual and by increasing transparency of decision making generally.<sup>131</sup> The trends of the two levels overlap where new structures of involvement of national parliaments are created, such as in the Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC) or in procedural rights of national parliaments to be informed about legislative proposals directly by EU institutions.<sup>132</sup> The informal control by involvement of national parliaments and stake-holders generally by employing the “convention method” as in the drafting of the European Charter on Fundamental Rights and more recently, the Treaty establishing a Constitution for Europe, point into the same direction.

#### V. JUSTICIABILITY AND JUDICIAL REVIEW OF FOREIGN POLICY DECISIONS, INCLUDING THE DEPLOYMENT OF THE MILITARY

As the military is just another instrument of executive power,<sup>133</sup> it is bound by law in the same way, especially by Art. 1 (3) GG, to observe fundamental rights,<sup>134</sup> taking into account the special nature of foreign relations.<sup>135</sup> Likewise, there is no prohibition in principle of judicial review in foreign policy. There is no general exception of US-style doctrines of “political questions” or “act of state” from judicial review.<sup>136</sup> Indeed several decisions to deploy the military were subject to review by the Constitutional Court,<sup>137</sup> and the most important foreign policy decisions dealing with the re-integration of Germany into the society of states after World War II were subject to constitutional review.<sup>138</sup> However, the courts, and primarily the Constitutional Court, will exercise judicial self-restraint in dealing with foreign policy issues.<sup>139</sup> The reasons stated for this are that foreign policy issues are often complex as they are linked to international developments that are difficult to anticipate. Moreover, they involve relationships with other sovereign states that might require scope for compromise. Therefore, the state organs involved in foreign policy are granted a wide margin of appreciation and prognosis.<sup>140</sup> Hence the question of justiciability is not one of principle but one of the existence and density of standards of review. These are, however, far from clear, and already problematic in purely domestic situations beyond the finding that the more basic human rights are affected, the more

<sup>128</sup> Cf. Born & Hänggi (n 76) 20. See also Assembly of the Western European Union, National Parliamentary Scrutiny of Intervention Abroad by Armed Forces Engaged in International Missions: The Current Position in Law, Document A/1762 of 4 December 2001 (Report by Mrs. Troncho), para 2.

<sup>129</sup> Steinberger (n 99) 42.

<sup>130</sup> On the role of the Select Committee on European Scrutiny (House of Commons) and the European Union Committee (House of Lords) with its six subcommittees see AW Bradley and KD Ewing, *Constitutional and Administrative Law* (13 edn 2003), 137 f. For Germany see Art. 23 (2), (3) of the Constitution and Statute on the Co-operation of the Federal Government and the Parliament in Matters of the European Union, (1993) Bundesgesetzblatt I 311; also Stein (n 101) 531 ff.

<sup>131</sup> See Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, Official Journal L 145/43; GF Mancini and DT Keeling, “Democracy and the European Court of Justice” (1994) 57 MLR 175, 177 f.; Steinberger (n 99) 24 ff.

<sup>132</sup> K Lenaerts and P Van Nuffel, *Constitutional Law of the European Union* (2 edn Thomson/Sweet & Maxwell, London 2005), 11-007, 16-012.

<sup>133</sup> Lepper (n 4) 94 ff.

<sup>134</sup> Frank (n 2) para. 29. C Tomuschat, “Die staatsrechtliche Entscheidung für die internationale Offenheit” in J Isensee and P Kirchhof (eds), *Handbuch des Staatsrechts VII: Normativität und Schutz der Verfassung—Internationale Beziehungen* (C. F. Müller, Heidelberg 1992) § 172, para. 53. Cf. Also H Krieger, “Die Verantwortlichkeit Deutschlands nach der EMRK für seine Streitkräfte im Auslandseinsatz” (2002) Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 669 ff. for limitations by the ECHR.

<sup>135</sup> 31 BVerfGE 58, 76 f.; Hailbronner (n 4) 15.

<sup>136</sup> Hailbronner (n 4) 13; Grewe (n 5) para. 91 ff.

<sup>137</sup> *Supra* n 11.

<sup>138</sup> Grewe (n 5) para. 89.

<sup>139</sup> M Schweitzer, *Staatsrecht III* (8 edn C. F. Müller, Heidelberg 2004), para 763; Schuppert (n 97) 159 ff; Kokott, Kontrolle (n 67) 947.

<sup>140</sup> 77 BVerfGE 170, 214 (positioning of US chemical weapons in Germany).

7 December 2005

intensively control may be exercised.<sup>141</sup> In foreign policy, this standard may be reduced further, according to prevailing legal opinion, depending on the specific political situation under consideration.<sup>142</sup>

Some conclusions may be noted: First, there is no principled objection against judicial review. Second, the precise standard is, however, somewhat fluid. Third, in foreign policy, *ex post* judicial review may not be as effective as in other areas because *faits accomplis* are likely to be created in situations of international interdependency. Therefore, the limitations of *ex post* judicial review give rise to an additional argument for strengthening political (parliamentary) *ex ante* control in foreign policy in order partly to compensate for the reduction of judicial control.<sup>143</sup>

## VI. ANNEX I: EXTRACTS FROM THE GERMAN CONSTITUTION

### Article 23 [The European Union]

(1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.

(2) The Bundestag and, through the Bundesrat, the Länder shall participate in matters concerning the European Union. The Federal Government shall keep the Bundestag and the Bundesrat informed, comprehensively and at the earliest possible time.

(3) Before participating in legislative acts of the European Union, the Federal Government shall provide the Bundestag with an opportunity to state its position. The Federal Government shall take the position of the Bundestag into account during the negotiations. Details shall be regulated by a law.

(4) The Bundesrat shall participate in the decision-making process of the Federation insofar as it would have been competent to do so in a comparable domestic matter, or insofar as the subject falls within the domestic competence of the Länder.

(5) Insofar as, in an area within the exclusive competence of the Federation, interests of the Länder are affected, and in other matters, insofar as the Federation has legislative power, the Federal Government shall take the position of the Bundesrat into account. To the extent that the legislative powers of the Länder, the structure of Land authorities, or Land administrative procedures are primarily affected, the position of the Bundesrat shall be given the greatest possible respect in determining the Federation's position consistent with the responsibility of the Federation for the nation as a whole. In matters that may result in increased expenditures or reduced revenues for the Federation, the consent of the Federal Government shall be required.

(6) When legislative powers exclusive to the Länder are primarily affected, the exercise of the rights belonging to the Federal Republic of Germany as a member state of the European Union shall be delegated to a representative of the Länder designated by the Bundesrat. These rights shall be exercised with the participation and concurrence of the Federal Government; their exercise shall be consistent with the responsibility of the Federation for the nation as a whole.

(7) Details respecting paragraphs (4) through (6) of this Article shall be regulated by a law requiring the consent of the Bundesrat.

### Article 24 [International organizations]

(1) The Federation may by a law transfer sovereign powers to international organizations.

(1a) Insofar as the Länder are competent to exercise state powers and to perform state functions, they may, with the consent of the Federal Government, transfer sovereign powers to transfrontier institutions in neighboring regions.

<sup>141</sup> Cf. F Ossenbühl, "Die Kontrolle von Tatsachenfeststellungen und Prognoseentscheidungen durch das Bundesverfassungsgericht" in C Starck (ed), *Bundesverfassungsgericht und Grundgesetz, Band I* (1976) 480.

<sup>142</sup> Hailbronner (n 4) 21 f., 28; C Tomuschat, "Die staatsrechtliche Entscheidung für die internationale Offenheit" in J Isensee and P Kirchhof (eds), *Handbuch des Staatsrechts VII: Normativität und Schutz der Verfassung—Internationale Beziehungen* (C. F. Müller, Heidelberg 1992) § 172, para 38.

<sup>143</sup> Hailbronner (n 4) 11.

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7 December 2005

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(2) With a view to maintaining peace, the Federation may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world.

(3) For the settlement of disputes between states, the Federation shall accede to agreements providing for general, comprehensive, and compulsory international arbitration.

**Article 45a [Committees on Foreign Affairs and Defense]**

(1) The Bundestag shall appoint a Committee on Foreign Affairs and a Committee on Defense.

(2) The Committee on Defense shall also have the powers of an investigative committee. On the motion of one quarter of its members it shall have the duty to make a specific matter the subject of investigation.

(3) Paragraph (1) of Article 44 shall not apply to defense matters.

**Article 45b [Parliamentary Commissioner for the Armed Forces]**

A Parliamentary Commissioner for the Armed Forces shall be appointed to safeguard basic rights and to assist the Bundestag in exercising parliamentary control over the Armed Forces. Details shall be regulated by a federal law.

**Article 59 [Representation of the Federation]**

(1) The Federal President shall represent the Federation in terms of international law. He shall conclude treaties with foreign states on behalf of the Federation. He shall accredit and receive envoys.

(2) Treaties that *regulate the political relations* of the Federation or relate to *subjects of federal legislation* shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning the federal administration shall apply *mutatis mutandis*.

**Article 65a [Command of the Armed Forces]**

Command of the Armed Forces shall be vested in the Federal Minister of Defense.

**Article 80a [Application of legal provisions in a state of tension]**

(1) If this Basic Law or a federal law respecting defense, including protection of the civilian population, provides that legal provisions may be applied only in accordance with this Article, their application, except when a state of defense has been declared, shall be permissible only after the Bundestag has determined that a state of tension exists or has specifically approved such application. The determination of a state of tension and specific approval in the cases mentioned in the first sentence of paragraph (5) and the second sentence of paragraph (6) of Article 12a shall require a two-thirds majority of the votes cast.

(2) Any measures taken pursuant to legal provisions by virtue of paragraph (1) of this Article shall be rescinded whenever the Bundestag so demands.

(3) Notwithstanding paragraph (1) of this Article, the application of such legal provisions shall also be permissible on the basis of and in accordance with a decision made by an international body within the framework of a treaty of alliance with the approval of the Federal Government. Any measures taken pursuant to this paragraph shall be rescinded whenever the Bundestag, by the vote of a majority of its Members, so demands.

**Article 87a [Establishment and powers of the Armed Forces]**

(1) The Federation shall establish Armed Forces for purposes of defense. Their numerical strength and general organizational structure must be shown in the budget.

(2) Apart from defense, the Armed Forces may be employed only to the extent expressly permitted by this Basic Law. (...)

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7 December 2005

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### **Article 115a [Definition and declaration of a state of defense]**

- (1) Any determination that the federal territory is under attack by armed force or imminently threatened with such an attack (state of defense) shall be made by the Bundestag with the consent of the Bundesrat. Such determination shall be made on application of the Federal Government and shall require a two-thirds majority of the votes cast, which shall include at least a majority of the Members of the Bundestag.
- (2) If the situation imperatively calls for immediate action, and if insurmountable obstacles prevent the timely convening of the Bundestag or the Bundestag cannot muster a quorum, the Joint Committee shall make this determination by a two-thirds majority of the votes cast, which shall include at least a majority of its members.
- (3) The determination shall be promulgated by the Federal President in the Federal Law Gazette pursuant to Article 82. If this cannot be done in time, promulgation shall be effected in another manner; the determination shall be printed in the Federal Law Gazette as soon as circumstances permit.
- (4) If the federal territory is under attack by armed force, and if the competent federal authorities are not in a position at once to make the determination provided for in the first sentence of paragraph (1) of this Article, the determination shall be deemed to have been made and promulgated at the time the attack began. The Federal President shall announce that time as soon as circumstances permit.
- (5) If the determination of a state of defense has been promulgated, and if the federal territory is under attack by armed force, the Federal President, with the consent of the Bundestag, may issue declarations under international law respecting the existence of the state of defense. Under the conditions specified in paragraph (2) of this Article, the Joint Committee shall act in place of the Bundestag.

### **Article 115b [Transfer of command to the Federal Chancellor]**

Upon the promulgation of a state of defense the power of command over the Armed Forces shall pass to the Federal Chancellor.

## **VII. ANNEX II: PARLIAMENTARY PARTICIPATION ACT**

### **Act governing Parliamentary Participation in Decisions on the Deployment of Armed Forces Abroad (Parliamentary Participation Act) of 18 March 2005<sup>144</sup>**

The Bundestag has adopted the following Act:

#### **Section 1**

##### **General and Common Provisions**

1. This Act regulates the form and extent of the Bundestag's participation in decisions concerning the deployment of German armed forces abroad. Article 115a of the Basic Law shall remain unaffected.
2. The deployment of German armed forces outside the area of application of the Basic Law shall require the German Bundestag's approval.

#### **Section 2**

##### **Definition of Terms**

1. A deployment of armed forces shall be defined as the involvement, or anticipated involvement, of Federal Armed Forces personnel in armed operations.
2. Preparatory and planning measures shall not constitute "deployment" for the purposes of this Act. Such measures shall not require the Bundestag's approval. The same shall apply to the conduct, by the armed forces, of humanitarian relief or support operations in which arms are borne solely for the purposes of self-defence, provided that no involvement of the service personnel in armed operations is anticipated.

#### **Section 3**

##### **Request for Deployment**

1. The Federal Government shall forward its request for approval of a deployment of the armed forces to the Bundestag in good time, prior to the start of deployment.
2. The Federal Government's request shall contain the following details in particular:

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<sup>144</sup> (2005) Bundesgesetzblatt I 775 of 23 March 2005, unofficial translation.

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7 December 2005

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- the operational mandate,
  - the operational area,
  - the legal bases for the mission,
  - the maximum number of service personnel to be deployed,
  - the capabilities of the armed forces to be deployed,
  - the planned duration of the mission, and
  - the anticipated costs and funding arrangements.
3. The Bundestag may approve or reject the request. Amendments to the request shall not be permissible.

#### **Section 4** **Simplified Approval Procedure**

1. For deployments of minor scope and intensity, approval may be granted in a simplified procedure. The Federal Government must give reasons why the proposed deployment is of minor scope and intensity. The President of the German Bundestag shall refer the request for approval to the chairpersons of the parliamentary groups, the chairpersons of the Committee on Foreign Affairs and Defence Committee and one spokesperson of each parliamentary group on these committees, and shall arrange for the request to be distributed to all Members of the Bundestag as a printed paper. Approval shall be deemed to be granted unless, within seven days of the printed paper's distribution, a parliamentary group or five per cent of the Members of the Bundestag demand that the Bundestag hold a debate. If a debate is demanded, the decision shall lie with the Bundestag.
2. A deployment shall be deemed to be of minor scope and intensity if the number of service personnel deployed is small, it is apparent from the accompanying circumstances that the deployment is of minor significance, and it does not entail any participation in warfare.
3. As a rule, a deployment shall be regarded as being of minor scope and intensity if:
- it involves a reconnaissance team bearing arms solely for the purpose of self-defence,
  - it involves individual service personnel who are serving with allied armed forces on the basis of exchange agreements, or
  - it involves the deployment of individual service personnel within the framework of a mission led by the UN, NATO or the EU, or by another organization in fulfilment of a UN mandate.

#### **Section 5** **Ex-post Approval**

1. Deployments in the event of imminent danger which allow no scope for delay shall not require the Bundestag's prior approval. The same shall apply to operations whose purpose is to rescue persons from particularly dangerous situations, provided that the holding of a public debate in the Bundestag would endanger the lives of the persons in need of rescue.
2. The Bundestag shall be informed appropriately prior to and during deployment.
3. The Bundestag's *ex-post* approval for the deployment must be sought promptly. If the Bundestag rejects the request for approval, the ongoing operation must be terminated.

#### **Section 6** **Obligation to Furnish Information**

1. The Federal Government shall inform the Bundestag regularly about the progress of the missions and about developments in the operational area.
2. In cases dealt with in accordance with Section 4 (1) (Simplified Approval Procedure), the Federal Government shall report promptly to the committees responsible and to the spokespersons of the parliamentary groups represented on these committees.

7 December 2005

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### Section 7

#### Extension of Deployment

1. The procedure defined in Section 4 shall also apply to decisions to extend the approval of deployments in cases where no substantive amendments arise.
2. If the Federal Government requests the extension of a deployment, approval shall be deemed to be granted until two days of sittings have passed following distribution of the request as a Bundestag printed paper. If the request is dealt with in accordance with the simplified procedure defined in Section 4, approval shall be deemed to be granted until the expiry of the time period defined in Section 4 (1), fourth sentence; if a debate in the Bundestag is demanded within the time period, approval shall be deemed to be granted until the end of the sitting week following the demand for a debate. The period of validity of the original approval shall remain unaffected by the provisions of the first and second sentences.

### Section 8

#### Right of Revocation

The Bundestag may revoke its approval for a deployment of armed forces at any time.

### Section 9

#### Entry into Force

This Act shall enter into force on the day after its promulgation.

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#### Examination of Witnesses

Witnesses: PROFESSOR JOHN BELL, University of Cambridge; PROFESSOR CHRISTOPHER GREENWOOD, London School of Economics; Ms ELIZABETH WILMSHURST, Chatham House; and DR KATJA ZIEGLER, University of Oxford; examined.

**Q80 Chairman:** Good evening and welcome. It is very good of you all to come and give us the benefit of your advice and insight. As we have come to realise, I think, over the past few weeks, this issue is a great deal more complicated than perhaps we thought when first we adopted this inquiry, so it will be useful to hear what you have to say. Perhaps if I could suggest we start the same way, and I know some of you were here for the previous session and if I could start with the same question I asked last time. I wonder if each of you in turn would first identify yourself, because we are televising this, and then give us your views briefly on what you think the benefits and disbenefits would be of introducing legislation which required the approval of Parliament for the deployment of Armed Forces into conflict situations?

*Professor Greenwood:* I am Christopher Greenwood. I am Professor of International Law at the London School of Economics and I am a practising Queen's Counsel. In terms of introducing legislation, I speak from the standpoint of an international lawyer rather than a constitutional lawyer, obviously there are very important constitutional questions about the balance between the two Houses, the balance between Parliament and Government. I would like to take us on to a slightly different matter, which is that I think there are two rather serious dangers to keep in mind if legislation is to be introduced in this area. One is to avoid what I think has tended to happen at times in the United States, which is that the debate about

whether there has been compliance with some domestic United States law requirement has come almost to oust the question of whether the use of force is consistent with the rules of international law. Of course, it is obvious that no matter what we might enact in this country we cannot give ourselves an authorisation to use force, which international law does not permit us and I think it is more important to focus on the question of international law than to become tied up in constitutional niceties internally. The second difficulty that I can see is that we no longer have this very clear dichotomy between peace and war that was thought to be a feature of the world of pre-1939. I do not think this country has declared war since the 1940s; my own recollection is that the last declaration of war by Britain was on Japan, possibly on some of the allies of either Japan or Germany in the later stages of world war two, but this country has not declared war since that date. In fact, the last formal declaration of war of which I am aware is the Soviet Union on Japan in 1945. Since that date, the practice has been instead to engage in armed conflict, with no very clear beginning, in many cases, and often with no very clear end. The difficulty, I think, of having legislation which says you must go to Parliament and you must get a vote authorising military action is if you leave taking that vote too late then you can run yourself into a position where it is extremely difficult to comply with constitutional requirements on a timetable that is going to work

7 December 2005

Professor John Bell, Professor Christopher Greenwood,  
Ms Elizabeth Wilmshurst and Dr Katja Ziegler

with what is happening internationally. Secondly, if you go to the other extreme and hold your vote in Parliament too early then I think you can very significantly ratchet up the tension internationally. A vote in Parliament authorising what is, in effect, British Armed Forces to go to war would be seen, and I think seen rightly, as a very important step internationally down the road to warfare. I am not saying that you cannot get round both of those obstacles but I think they are very serious obstacles and ones that need to be kept in mind in enthusiasm for legislation.

**Q81 Chairman:** Thank you very much indeed. Ms Wilmshurst.

*Ms Wilmshurst:* Elizabeth Wilmshurst, International Law Fellow at Chatham House. I think the benefits of legislation are democratic accountability and democratic legitimacy. I think there should be, in principle, legislation requiring the Government to obtain parliamentary approval before committing troops to at least some kinds of conflict. I think the difficulties of determining the scope of that requirement are more than matters of detail and great care would be needed to avoid the unwelcome consequences that were discussed by your previous witnesses. I see three principal problems, which I believe can be overcome but they are serious problems. First, the difficulty of defining what kinds of deployment or what kinds of military conflict you are talking about. Peter Rowe, in his written evidence, listed various kinds of deployment. I think there are even more. What has not been explored fully perhaps are the Special Forces deployments, some of which I understand are undeclared, and that problem would have to be addressed, as well as the different kinds of conflict in which one could be involved. Secondly, the legislation should not take away the need for flexibility from Government, both as to timing, as was mentioned by Christopher Greenwood, as well as emergency situations. Thirdly, the consequences of failure by the Government to obtain parliamentary approval need to be looked at very carefully, but you do not have to begin a statute "It shall be unlawful. . ." as the Clare Short bill does. It must be inconceivable that soldiers would need to have to worry about the failure to obtain approval, but it is possible to legislate to do away with that. It is also necessary to avoid confusion, as was being discussed earlier, between different kinds of legality. I think it is possible to do that.

**Q82 Chairman:** Thank you very much indeed. We are moving to a more constitutional perspective with our next two witnesses. Professor Bell.

*Professor Bell:* I am John Bell, from the University of Cambridge. I speak as a comparative lawyer, not as an international lawyer, and comparative European law rather than America or elsewhere. I think the first point would be, as the French writers make clear, declaration of war is a constitutional anachronism. As has been pointed out, it just does not happen. The real question is about the deployment of Armed Forces abroad; that is the issue which most constitutions and most bits of legislation in recent years have had to deal with. The normal principles on which government exercises power in most constitutions in Europe is under the rule of law. That means that you have to have specific authorisation to exercise powers. Having a rule about authorising the exercise of powers is just a natural consequence of that principle. In terms of the deployment, I think what you get is a better justification, a better thinking out of the process before you get to Parliament. For example, if you look at the recent situations in, say, The Netherlands, where the Dutch government has to go to the Parliament to inform it about troop deployment abroad, the structure of those reports, with the risk assessment, signed by the Minister of Defence and the Minister of Foreign Affairs, gives you a clear idea that they had internally to do lots of work beforehand. And there they were sending only observers, etc, to Sudan, for example, in a report they did a couple of weeks ago. That process feeds itself back into the governmental decision-making process, because you have an internal step before you actually go out to Parliament. I think it is in creating a structure of decision-making, both in Parliament and feedback into Government, that this tends to work, so, in other words, the legal form simply has an impact on the governmental decision-making procedure. I think probably that is the issue that the more modern changes in the laws are found. By contrast, where, for example, the French, according to the Defence Select Committee in its discussions two or three years ago, were having great difficulty in finding appropriate procedures to get the Government to explain what it was doing and why.

**Q83 Chairman:** In your opinion, this orderly, preparatory process, before you come to Parliament, would not include safer government, for instance?

*Professor Bell:* No. There is debate. For example, the Dutch currently are having terrible trouble with discussing the issue of whether they are going to Afghanistan or extending their remit in Afghanistan. That is a political debate before you get into Parliament. However, it does lead to greater deliberation. All because all constitutions are written with history in mind and the Dutch have particular histories that they would rather forget, in relation to that sort of deployment.

7 December 2005

Professor John Bell, Professor Christopher Greenwood,  
Ms Elizabeth Wilmshurst and Dr Katja Ziegler

**Q84 Chairman:** Thank you. Dr Ziegler.

*Dr Ziegler:* My name is Katja Ziegler. I am a Lecturer in Law at the Institute of European and Comparative Law in Oxford. In reply to the question, the principal benefits of introducing legislation, I would like to make four points. One is very much in line with what John Bell has said already. The first advantage of approval in Parliament is that it will confer procedural legitimacy and credibility on the decision of deployment and I think such legitimacy is necessary for civil society basically to accept the sacrifice it is asked for in such an important situation. I think the long-term benefits resulting from that may even lead to depoliticising the decision in Parliament, and will outweigh the short-term, individual disadvantages of lack of or losing flexibility in the individual deployment. The second point is, I think, for me the most important, the democratic legitimisation of far-reaching essential decisions. This is plucked almost directly from the German situation, but Denmark for example has a similar approach, requiring parliamentary consent for essential decisions both in an external and an internal respect. External because, of course, of the effect internationally of deploying the military—but also internally, and I would strongly make this case for the soldiers risking their lives somewhere on other shores, that taking this risk must be legitimate, that they are not kept in the noose there. This can be supported by current and historic trends to parliamentarise this decision. The third is strengthening the civilian control and accountability of the army, per se, in democracies.

**Q85 Chairman:** May I interrupt you. Surely, there is no implication that the Government are not civilians? Was your third point that there should be civilian control of the military?

*Dr Ziegler:* It is an aspect of civilian control over the Army.

**Q86 Chairman:** Surely there is no suggestion that the Government is not civilian? We do not have a military Government in this country. I am sorry to interrupt you.

*Dr Ziegler:* Broader civilian control. The fourth point is that, besides safeguarding the democratic control at the national level, I think the parliamentarisation of the deployment of the military would partly compensate for the trend of losing control, and influence in situations where the military is integrated internationally, that is for the loss of control by internationalisation. Parliamentary involvement in such a situation on a national level would probably not entirely prevent but at least reduce the so-called double democratic deficit on a national and

international level caused by internationalisation and integrating on an international level.

**Chairman:** Thank you. That is very clear. Thank you all for those opening remarks.

**Q87 Baroness Hayman:** I would like to explore with you a little this distinction between treaty obligation military action and war of choice military action and ask whether really it is so relevant in the context of this sort of legislation. We discussed earlier that there is no absolute obligation to deploy troops under a treaty obligation, there is always the opportunity for the prerogative to decide what to do. If this is about national legitimacy action and democratic control, is there a justification for making a distinction between the two? Is it perhaps that the international legality is there on the face of the bill, if you like, with the treaty obligation action and has to be argued at more depth with the war of choice, but actually that is not what the democratic control issue is all about? I am sorry, that came out very convoluted.

*Ms Wilmshurst:* I do not think that there is significant difference between these different forms of conflict. Wars of obligation really do not exist. I think Article Five of the NATO Treaty is broad and no country would consider that it had to produce its military if its Parliament did not want to. It is not conceivable that the Security Council would impose an obligation on the United Kingdom, without the United Kingdom's consent, to use force. There was a partial exception to that in 1966, with the Beira patrol, where there was a Resolution calling on the United Kingdom to act but that was certainly with the United Kingdom's approval. I do not think this is a real problem at all, and the same considerations of democratic legitimacy, as you say, apply to both.

*Professor Greenwood:* My Lord Chairman, I agree entirely with what Ms Wilmshurst has just said. The notion of a war of choice as opposed to a war of obligation appears to me to be completely flawed, first of all because there is no obligation to use force, even under the NATO Treaty, certainly not under the UN Charter. Secondly, the fact that, even if there were, hypothetically, a legal obligation under a treaty to use force, that would not necessarily make that use of force lawful under international law. The fact that a group of states agrees that in certain circumstances they must use force would not in itself render that action compatible with the Charter, which has a higher status in international law.

**Q88 Lord Goodlad:** This question is directed to all or any of the witnesses. Do you think that parliamentary approval of all Armed Forces deployment would compromise the discharge of any of our obligations under NATO and the United Nations? Has that been the case in other NATO and

7 December 2005

Professor John Bell, Professor Christopher Greenwood,  
Ms Elizabeth Wilmshurst and Dr Katja Ziegler

United Nations member countries, such as Germany and Denmark, whose legislatures have the right of prior authorisation?

*Professor Bell:* I cannot think of a situation where it has been compromised in those circumstances. I think the deal is that they look at the situation rather carefully, and there are usually provisions in any legislation or constitutional legislation which have a get-out clause if there is absolute urgency and then it gets considered by the Parliament or by a sub-division of the Parliament at the earliest opportunity. I cannot think of any obligations which would get compromised by that process of approval. If you know you have got to get it then you build your timetable around it.

**Q89 Lord Goodlad:** The obligation to the United Nations or to NATO is in that case subordinate in all those cases to subsequent legislative process?

*Professor Bell:* The point that Professor Greenwood made was that there is no obligation to act. There is a request to act. Therefore the national government and the national parliament have to make up their mind whether they will accede, in terms of committing the finances, committing the troops and committing political capital to it. I think, in all the circumstances I know of, people have taken a hard look before they have actually committed themselves, and that is precisely, for example, what the Dutch are doing at the moment in relation to Afghanistan.

**Q90 Baroness O’Cathain:** Just on this point, as a non-lawyer, could you define what obligation is then?

*Professor Bell:* An obligation is a duty to do something, whereas a request made by a government is something which gives you an option to say no. I think that Professor Greenwood was saying there are not any straight obligations to commit their military forces.

*Professor Greenwood:* My Lord Chairman, I do not know whether I might be able to assist. The analogy would be this. A police officer, under English law, has an obligation to take action in the event of seeing a breach of the peace taking place in front of their eyes. A private citizen has no obligation to do so but the law authorises them to do it. If they do take action to prevent a breach of the peace taking place, that action would be lawful but it is not compelled by the law. Likewise, the United Nations Charter provides that the Security Council can compel states to impose non-military sanctions, economic sanctions, for example, but it cannot compel them to take military action. There is provision under which that could happen but the necessary steps to bring it into operation have not been taken.

**Q91 Lord Windlesham:** What you have just said is very orderly and methodical and constitutional. In my mind is the largest-scale war in modern times and that is Viet Nam. Can you just remind us what action was taken by the United States? As I recall it, it was sheer escalation from relatively localised actions in Viet Nam—there may be others who have a much better knowledge than I have—and the question of formal declarations of war did not arise at all, did they?

*Professor Greenwood:* My Lord Chairman, no, there was no declaration of war in Viet Nam. In fact, at one point, I think in about 1968, the Secretary of Defense was asked at a Congressional Committee why there had been no declaration of war and his answer was really quite telling, that in the post-1945 era a declaration of war had come to be seen as a statement of a commitment to the total destruction, the unconditional surrender, of your opponent, the values of the second world war. That was not what the United States was seeking to achieve in Viet Nam and therefore it would be wholly inappropriate for a declaration of war to be made. The only two cases of which I am aware since 1945, when states, without making a formal declaration, nevertheless have said in public that they regard themselves as being in a state of war, are the Arab States vis-à-vis Israel, when indeed it was seen expressly as a commitment to the destruction of the State of Israel, in the early years of that conflict, and, secondly, between Iran and Iraq in the conflict of 1980 to 1988.

**Chairman:** Thank you very much.

**Q92 Lord Rowlands:** Ms Wilmshurst, you said that there would be problems of legislating but, in principle, it was not a bad idea, I think I would agree. I infer from that you would support a bill, of the kind of Clare Short, but not if it is a flawed bill. I wonder, if you have that view, if you could tell us what sorts of changes you would make to the Short bill to accommodate the problems but at the same time support the principle of legislation?

*Ms Wilmshurst:* I have to say that it would be quite a lengthy exercise to go carefully through the bill. I would also say that I think a great deal of thought needs to be given on the kinds of policy decisions, of what kinds of conflict should be covered by such a bill, including whether you are covering every deployment for every military conflict, however small, and whether you to cover peace-keeping operations when they are in a conflict. All of those decisions would need to be taken before you started to draft. I do not think they have been considered adequately in this bill.

**Q93 Lord Rowlands:** It had been in the Geneva Conventions, had it not?

7 December 2005

Professor John Bell, Professor Christopher Greenwood,  
Ms Elizabeth Wilmshurst and Dr Katja Ziegler

*Ms Wilmshurst:* It refers to any conflict at all and conflicts need not be of a major kind. It is rather unclear, when you talk about conflicts within the Geneva Conventions. You would not want constantly the Government to be in court under judicial review, arguing about what a conflict is. It is a very difficult question. As I have mentioned, I do not think the bill is right to say simply that it is unlawful for Her Majesty's Armed Forces to participate in armed conflict, etc. I think it would be possible to impose a duty on the Government to obtain parliamentary approval and then to have a section later on providing that the troops themselves would not be considered to be in unlawful action, in certain circumstances, and to provide for the legal consequences of failure, for example.

**Chairman:** That is very helpful indeed. I saw you referring to some very learned-looking papers. If there is evidence you would like to submit in writing subsequently, this is an extremely important topic Lord Rowlands raised, so we would be very grateful.

**Lord Rowlands:** Would you like to write to us.

**Q94 Chairman:** If you have heard anything you can share with us, please let us know. I saw Professor Bell nodding when you were speaking. Is there anything you want to add?

*Professor Bell:* Simply that the Spanish Parliament met three weeks ago and enacted a text, where they have gone down the road of having very specific indications that it does include humanitarian and defensive activities. They take the view, as the Dutch do, that it covers all deployments and for whatever purpose, because they feel that precisely things will escalate, or can escalate. It would cover far less than Clare Short's bill. The relevant clauses 17 to 19 of the law they passed is very short but very precise.

*Dr Ziegler:* Just a word on the German situation, which requires quite broadly. The threshold criterion is that soldiers are involved in an armed operation or that such an involvement can be expected. There are certain exceptions from the consent required laid down. Although these are those laid down quite specifically, the boundary of what is an involvement in an armed operation is still, in difficult cases, not quite clear. There is a case pending in the Constitutional Court concerning the deployment of aircraft in Turkey before the outbreak of the Iraq war. It is about whether it is already enough to trigger the consent requirement of if there is a conflict-prone area but not a war-stricken area. Difficulties are, I think, difficulties inevitable in defining the threshold criterion.

**Chairman:** This is a very interesting question to consider in respect to Germany, how far the provisions in the German Constitution spring from Germany being a constitutional state, or *Rechtsstaat*,

and how far they spring from Germany's history in the 20th century and what sort of mixture of politics and constitutionality the German set-up has.

**Q95 Viscount Bledisloe:** I think primarily this is a question for Professor Greenwood and Ms Wilmshurst. I think everyone accepts that if you have a requirement for prior authorisation there has to be an exception for emergencies, and presumably emergencies would include situations where the Government say "We can only do this if we do it secretly, and if we debate it we've blown our cover and the thing becomes impossible." If that is so, does not that give any government really a coach and horses to drive through the requirement of authorisation? Can it not almost always say, when there is an emergency, "We've started; we're now coming to take Parliament's view about it"?

*Professor Greenwood:* I do not think that it would have that effect necessarily, no. You may opine from my opening remarks that I am not particularly enthusiastic about the idea of legislation, but I think it could be crafted. You would have to have some sort of emergency exception, I think, for two reasons. The first is the need to use force very quickly, for example, in a situation such as the rescue of a 'plane-load of hostages; but secondly that there is another, quite different scenario where I think one has to be very careful, and that is, if authorisation is given for a relatively limited operation, it is very easy for that to develop, through an unfolding series of emergencies, into something quite different. Most of the governments that sent troops to Somalia, for example, at the beginning of 1992, did not envisage that they were going to end up fighting a full-scale urban combat that was going on by April of that year. I do not think we considered, when we first sent troops to Bosnia at roughly the same time, that by the summer of 1994 they were going to be engaged in something which I would have real difficulty describing as anything other than an armed conflict within the sense of the Geneva Conventions.

**Q96 Viscount Bledisloe:** I see that, but I was worried about the emergency exception really making the requirement for primary authorisation almost unnecessary. For example, take Drake's expedition to singe the King of Spain's beard. If that had been debated in Parliament beforehand the King of Spain could have put some defences around Cadiz, so really it had to be done without prior debate. Obviously, you can have some slightly more modern analogy, but does not that almost always enable government, if it wishes to, to say "Well, we're going to do this, we had to do it because . . . and now you can debate it"?

7 December 2005

Professor John Bell, Professor Christopher Greenwood,  
Ms Elizabeth Wilmshurst and Dr Katja Ziegler

*Professor Greenwood:* I do not think so, no. The Falklands conflict, for example, of 1982 I think would not have fallen within a natural definition of an emergency exception, nor would either of the two conflicts over Iraq. I do think that some situations where, for example, you have a peace-keeping operation which has started to go wrong would require the use of an emergency exception, unless, of course, one takes the view that the initial authorisation to send troops to take part in a peace-keeping force necessarily carries with it the authorisation of military action of a quite different character, in the event of a situation on the ground unfolding in a particular way.

**Q97 Lord Rowlands:** You heard a previous witness (Mr Payne) testify that he thought the German experience was not really valid because Germany was not global, as opposed to France, the United Kingdom and the United States. How would you answer his point?

*Dr Ziegler:* I think maybe until 1990 that would have been a valid statement. I think there is a shift in the self-understanding and engagement at least in multilateral frameworks in the UN and NATO where Germany understands itself to re-enter, so to speak, the world stage. Germany contributes significantly to various multilateral missions today.

**Q98 Lord Rowlands:** The detailed evidence you have given us in written form, I was fascinated by it, explaining how all this has happened since 1994 in German legislative terms. Do you think that experience shows, and there have been 42 consents, I gather, in that period, that some of our hang-ups on these issues actually can be overcome by such legislation?

*Dr Ziegler:* The German experience shows that even controversial missions like Kosovo and Afghanistan which were debated for hours in the Parliament were then nevertheless consented to by an overwhelming majority. I think parliamentarisation does not mean necessarily that the process is abused politically. I did some research, because there was one question that showed some concern of this Committee about the multilateral involvement environment in NATO that has been discussed. Apparently Hungary, which required a two-thirds majority to deploy troops, made an exception from the consent requirement for deployment within NATO because that procedure was hi-jacked nationally. That is the only problem case I have found.

**Q99 Earl of Sandwich:** Dr Ziegler, I have been looking through your paper for some definition of what an emergency situation is. Can you use perhaps

Afghanistan as an example? How would you define that?

*Dr Ziegler:* The definition, is still debated; there has not been a case that has come under the emergency definition. There is the additional provision that rescue of nationals abroad comes under that. The fact that the statute separates this out would suggest that it would not automatically be covered by an emergency situation, as it is stated separately. There was one case in 1997 when Germany went into Albania to rescue people—there was a financial pyramid scheme that broke down and subsequent civil unrest in Albania and Germany went in and got out German and other foreign nationals. That is the only case that came to under the clause.

*Professor Bell:* On that point, my Lord Chairman, I think the linking in of most of the European legal orders of the deployment of troops abroad with treaty commitments means that the chances of real emergencies coming up are problematic because it depends really on the existence of some debate in either the UN or NATO, and so on. I think that is why one sees very few examples—I cannot think of any where the emergency situation has been developed. The emergency situation usually has been written into constitutions with a retrospective look at the German invasions of 1940 in mind.

**Chairman:** Thank you very much for that.

**Baroness O’Cathain:** I want to ask a brief question about legal advice. What are the present arrangements for giving the Government and Parliament advice on the legality in international law of a potential conflict involving British forces, and do you think these could be improved? Secondly, would you think it appropriate for Parliament to take its own legal advice where deployment of Armed Forces was concerned?

**Q100 Chairman:** If I can say, I would be particularly interested in your answer on that, Ms Wilmshurst?

*Ms Wilmshurst:* Thank you, my Lord Chairman. Both the Foreign Office and the MoD have their own legal advisers, but when there is a question of deployment of troops into a conflict the Attorney General’s advice is always sought.

**Q101 Baroness O’Cathain:** Is that paramount?

*Ms Wilmshurst:* His advice is paramount, yes.

**Q102 Viscount Bledisloe:** It is paramount for Government but there is no reason why it should be paramount for Parliament?

*Ms Wilmshurst:* It is paramount for Government. I am sorry, I was talking only of Government. With regard to the question of Parliament, I think really that is for Parliament to decide how best it can satisfy

7 December 2005

Professor John Bell, Professor Christopher Greenwood,  
Ms Elizabeth Wilmshurst and Dr Katja Ziegler

itself, if it is not satisfied with the advice which is given by Government.

**Baroness O’Cathain:** I asked do you think it would be appropriate for us to do it, to seek legal advice, would you advise it; if you were advising us, would you be prepared to say just now? No, perhaps that is an unfair question.

**Chairman:** You are clearly right, it is for Parliament to decide, but I suppose the interesting speculation is would it be helpful to have two sets of advice in circulation, one to the Government and one to Parliament? This, of course, is very common in the Congress, this happens all the time, that the Administration has one set of legal advice and the Congress has another. It is a very common phenomenon.

**Q103 Lord Rowlands:** I think, Professor Greenwood, you have given evidence before select committees, have you not?

*Professor Greenwood:* I have given evidence before select committees, yes.

**Q104 Lord Rowlands:** Before the Foreign Affairs Select Committee you have given evidence on the legal issues?

*Professor Greenwood:* Yes. That, of course, was retrospectively. That was in relation to Kosovo some time after the conflict had finished.

**Q105 Chairman:** I am afraid that we are going to have to stop now, but if I could ask just one final question, for anybody who would care to answer. Is there a distinction to be made usefully between the legality of wars and the legitimacy of wars, legitimacy, I suppose, embracing an idea which ranges all the way from a just war, at one end, right

through to the notion of a popular war supported by the populous, at the other, but somewhere in an area of political legitimacy as opposed to narrow legality? Is that useful?

*Professor Bell:* Normally we would talk in terms of constitutional principle—is it consistent with constitutional principle, and concepts like the rule of law would come into that, and that would be different from the pure technical legality—have you followed the steps through. There is a quite fundamental distinction between the two. The legitimacy is concerned with the way in which decisions have been taken and the consensus that builds up about the appropriateness of the whole process of making decisions. I think one would say that constitutional principle and appropriateness of procedure as well as substance matter much more, probably, than technical legality, having followed the steps laid down.

*Ms Wilmshurst:* So far as I am concerned, I would say that legality under international law would be essential, but then you have to decide, as a matter of policy, acceptability, constitutionality and political acceptability whether then you want to go to war. Whether you use the term legitimacy or not, I find that not a very helpful term, but certainly the concepts that some people mean when they use that term have to be applied as well.

**Chairman:** Of course, this Committee, of all the committees, finds constantly that seeking constitutionality in this country, where we do not have a written constitution, can often be quite elusive but we do our best. Can I thank you all very much indeed. I should say that a transcript will be sent to you for correction, and may I reiterate that if any of you have anything that you would like to draw to the attention of the Committee we would be extremely grateful. Thank you again very much for coming.

### Supplementary memorandum by Professor John Bell, University of Cambridge

I am responding to the questions which the Committee did not have time to cover at the evidence session on 7 December.

#### RECENT SPANISH LEGISLATION

I have made a brief translation:

#### *Spanish Organic Law 5/2005 of 17 November 2005 on National Defence*

Art. 17: 1. To order operations abroad that are not directly connected with the defence of Spain and its national interests, the Government must consult the House of Deputies and receive its authorisation.

2. For missions abroad that, in accordance with international agreements, require a rapid or immediate response to specific situations, the requirements of prior consultation and authorisation shall take place through urgency procedures that permit compliance with those agreements.

7 December 2005

3. In the circumstances envisaged in the previous paragraph, where reasons of extreme urgency do not make prior consultation possible, the Government shall submit the decision it has taken to the House of Deputies as soon as possible for its ratification.

Art. 18: The Government shall inform the House of Deputies periodically, and at intervals of never greater than a year on the progress of the operations of the Armed Forces abroad.

Art. 19: In order that the Armed Forces may undertake missions abroad which are not directly connected to the defence of Spain or its national interests, the following conditions must be satisfied:

- (a) that they take place at the express request of the government of the state in whose territory it takes place, or they have been authorised by resolutions of the Security Council of the United Nations or by agreement, in an appropriate case, by international organisations of which Spain is a member, especially the European Union or the North Atlantic Treaty Organisation, within the sphere of their respective competences;
- (b) that they fulfil the objectives of defence, of humanitarian aid, of establishing or maintaining peace as provided for and ordered by the organisations already mentioned;
- (c) that they are consistent with the Charter of the United Nations and do not contradict or breach the principles of customary international law which Spain has incorporated into its legal order in conformity with article 96.1 of the Constitution.

Q.8 *Where there is a bicameral system, do both Houses have to approve the deployment of armed forces?*

There is no uniform pattern. The French (art. 31 of the Constitution) and the Dutch (art. 96 of the Constitution as amended in 2000) require both Houses of Parliament to approve war, and both are informed of the deployment of troops (though this is a requirement only of art. 100 of the Dutch Constitution). The Spanish law of 17 November 2005 and the German legislation require the lower House of a federal Parliament to approve the deployment of troops. The focus is thus on the most representative chamber of the nation as a whole. In practice, the Dutch duty to inform Parliament does not pose problems and leads to significant debate before deployment happens, though this does not seem to compromise operational effectiveness.

Q.9 *Non-statutory controls*

Because of the principle of the rule of law, there are few examples of non-statutory controls. There are two reasons for this. First, there has not been the background of broadly consensual relations between government and opposition such as would permit the equivalent of our transfer of information “on privy counsellor terms”. In countries such as Italy, France and Spain, in which the Communist Party used to be a major political force, there was a greater tension between government and opposition. Secondly, the development of parliamentary select committees is not as well advanced in many countries. For example, the French National Assembly committee on national defence and the armed forces reported on 30 January 2002 that there were many instances where Parliament had no way of finding out how troops were being deployed, except when budget credits were being sought for the expenditure involved. There were even secret clauses in treaties with former African colonies that justified the deployment of French troops, about which Parliament knew nothing.

By contrast, the limited statutory duty under art. 100 of the Dutch Constitution for the Government to inform Parliament of the deployment of troops actually works well, because the Government (Foreign and defence ministries) produces detailed reports and risk assessments. For example, the report of 18 November 2005 on the sending of Dutch troops as observers to the UN Mission in Sudan provides a very detailed report covering 12 pages to justify the expenditure of €1.5 million. By contrast, the complaint is made of the German authorisation that it is too general. Thus the approval for participation in “Operation Enduring Freedom” in Afghanistan included participation in NATO activity in “the Arabian Peninsula, Middle and Central Asia, and North-East Africa, as well as in the neighbouring sea areas”. The key issue is the level of mutual trust between Government and Parliament and the willingness of both to engage seriously in a public debate over the deployment of troops. In France, the Government is too secretive and distrusts Parliament, whilst the Bundestag seems too willing to support the deployment of troops. The Dutch seem to have found a good balance, and this seems to be the intention in Spain under the new law.

27 December 2005

7 December 2005

### Supplementary memorandum by Elizabeth Wilmshurst

At the Evidence Session of the Committee on 7 December I was asked to provide comments on the Armed Forces (Parliamentary Approval for Participation in Armed Conflict) Bill (“the Bill”). I discuss below some questions which I believe are raised both by the Bill and by any proposal for legislation requiring Parliamentary approval for certain kinds of military deployment.

#### FOR WHAT KIND OF ACTION SHOULD PARLIAMENTARY APPROVAL BE REQUIRED?

1. The scope of a requirement to obtain Parliamentary approval is perhaps the most difficult issue to be decided in relation to any future legislation.

2. The Bill requires approval to be obtained when UK armed forces participate in armed conflict. Conflict is defined as meaning “any use of force which gives rise, or may give rise, to a situation of armed conflict to which the Geneva Conventions of 1949 or the Additional Protocols of 1977 apply”.

3. The Geneva Conventions and Protocols do not themselves provide a definition of conflict and it is notoriously difficult to decide when violence has reached a threshold where there is a “conflict” between parties, as opposed to disorganised violence of low-level intensity. For example, is there a conflict in all parts of Afghanistan or just in some? It may be that not all members of NATO would agree on the answer to that. Is there a conflict in all parts of Iraq, including in the North? Difficult questions on the existence of a conflict could no doubt be submitted to the courts on judicial review, but a clearer trigger for Parliamentary approval would be desirable if it can be achieved.

4. The approaches of other states have been examined by the Committee. The German law<sup>145</sup> requires Parliamentary consent for each military **deployment** abroad where soldiers are included in armed operations or where such inclusion is expected. Specifically excluded from the requirement are preparatory measures and planning, humanitarian services and assistance of the army where weapons are carried solely for self-defence and the soldiers are not expected to be involved in armed action. The Spanish law requires authorisation for **operations or missions** abroad; the wording would seem to include military observers and assistance with humanitarian aid. The Dutch have a similarly broad provision.<sup>146</sup> In Sweden the deployment of Swedish troops abroad, which otherwise requires Parliamentary consent, has been delegated to the Government by legislation in the case of peacekeeping forces abroad at the request of the OSCE or the UN and in the case of participation abroad in training exercises for peace-enhancing activities.

5. For what kinds of military deployments is it appropriate to require the approval of Parliament in this country? The question of principle and policy needs to be answered before the formulation of any provision is addressed.

- But it may be easier to arrive at a clearer provision than that in the Bill if an approach similar to the German one is used: that is, to require approval for **all deployments for armed operations to countries other than the UK, with certain specified exceptions**. Use of troops for military and training exercises, stationing under status of forces agreements (eg NATO), advisory functions and defence diplomacy would not be included in the term “deployment for armed operations”. There would need to be a list of exceptions, but it may be easier to draft exceptions to a wide category (deployment for armed operations) rather than to try to draft, as the Bill does, a sufficiently clear exhaustive requirement (participation in conflict). If such an approach were to be taken, the following might be included in the list of exceptions not requiring approval from Parliament: assistance with humanitarian operations, policing operations in aid of the civil authority, operations under a UN mandate except for one authorised under Chapter VII of the UN Charter (for Chapter VII deployments approval would be required). (“Country” would have to be widely defined, but it may be useful thereby to exclude the high seas).
- The legislation might also provide for adding to the list of exceptions by Order in Council approved by each House of Parliament. The advantage of that procedure of course is that Orders could be amended more easily than amending an Act, if the kinds of military operation, or views on them, change in the future.

<sup>145</sup> For this information I rely on the evidence given to the Committee by Dr Ziegler.

<sup>146</sup> For information on Spanish and Dutch legislation I rely on evidence given by Professor Bell.

7 December 2005

6. The timing of a request for Parliamentary approval has to be considered along with the trigger for the request. To ask for approval for participation in a conflict may risk exacerbating a situation by debating the matter in Parliament at a difficult time; to choose a time which is neither too early nor too late may not be easy. It is however difficult to see how to avoid this potential problem; it does not seem possible to remove it by the manner of drafting.

7. In relation to almost any requirement for Parliamentary approval the issue of the use of special forces will need to be separately considered.

8. The Bill does not provide for Parliamentary approval for UK participation in a conflict other than by its own forces: that is, approval would not be required for use by an ally of UK airfields to launch an attack against another country. Should it?

#### WHAT SHOULD BE THE LEGAL CONSEQUENCES OF FAILURE TO OBTAIN APPROVAL?

9. The formulation in the Bill (“shall be unlawful...”) has the consequence that troops themselves are acting unlawfully if the government fails to obtain Parliamentary approval. Is that desirable? An alternative approach would be to impose a duty on the government to obtain Parliamentary approval, and to specify elsewhere that no provision in the Bill renders the military liable if approval is not obtained. Clause 8 of the Bill would have to be revisited if this approach were to be followed.

10. In discussing legal consequences in this context, there needs to be care not to confuse different questions of law.

- (i) Whether or not an armed conflict is lawful in international law has to be assessed independently from the question of legality under domestic law. (Consequently the reference in clause 2(b) to legal authority should be amended to make clear that it is a reference to international law.) If Parliament approves participation in a conflict, that in itself does not mean that it is internationally lawful; if Parliament disapproves, that does not answer the question whether the UK may lawfully participate in the conflict in accordance with international law.
- (ii) Whether or not Parliamentary approval is obtained, the troops in a conflict must comply with international law and domestic law regarding the conduct of the conflict: that is, they must not commit war crimes.

#### WHAT PROCEDURE SHOULD BE USED?

11. Careful consideration needs to be given to whether the approval of both Houses of Parliament is required. Should the Lords be given a veto in circumstances in which there is no provision for the Parliament Acts procedure to be used, so that the veto would be a veto indeed?

12. Secondly, the Bill provides for the same procedure to be used whether or not the conflict is a major one. The only exception to the requirement for prior approval relates to matters of urgency. In cases of urgency, Parliament would have to be recalled if not in session, even where the conflict in question was a small one, or where it was uncertain whether disorganised violence would develop into a conflict under the Geneva Conventions.

- The German Act provides for a form of simplified procedure for consent where deployment is of “low intensity and importance”; consent is deemed to have been granted unless Parliament takes action within seven days after having been informed. A deployment is defined as of low intensity and importance if the number of soldiers is small, it is of low importance and if it is not participation in a war.
- Consideration might be given to such a simplified procedure.

#### *Caveat*

13. This paper does not purport to give views on all the points of drafting which arise from the Bill and which may need consideration. Clause 4, for example, points up the difficulties of reconciling Parliamentary control with the realities on the ground, and would need to be considered in detail at some stage.

January 2006

7 December 2005

### Supplementary memorandum by Dr Katja Ziegler, University of Oxford

#### ANSWERS TO THE WITNESS QUESTIONS ON WAR-MAKING POWERS EVIDENCE SESSION

#### I. Are both Houses required to give their consent in countries which have a bicameral system and where the legislature is required to approve the deployment of armed forces?

From a comparative perspective,<sup>147</sup> there is no uniform approach to whether consent of the second house is necessary where consent is required in principle. Often consent requirements differ according to the type of deployment, most notably whether it is in a formalised state of war or a “simple” deployment, ie outside a formally declared war. Many states that require parliamentary consent for a declaration of war do not require it to deploy troops in lesser situations. Moreover, the functions of second houses vary among different constitutional systems depending whether they are federal or unitary systems or parliamentary or presidential democracies.

Here are some examples of different categories:

1. Consent for “simple” deployments is required by: Austria, Czech Republic, Denmark,<sup>148</sup> Germany, Hungary,<sup>149</sup> Italy, Netherlands, Norway, Sweden,<sup>150</sup> Turkey.<sup>151</sup>
2. Of the countries that require consent to deploy troops, there is only one house in Denmark, Hungary, Sweden and Turkey.
3. The consent of the “lower” house only is required in Austria and Germany.
4. Consent of both houses is required in the Czech Republic, Italy<sup>152</sup> and the Netherlands.
5. There is a special duty to inform parliament about deployment decisions, even if no consent is required, in Belgium, Finland,<sup>153</sup> Netherlands (amounts to consent requirement in practice) and Poland.
6. No special duty to inform exists in France, Luxembourg, Spain and the UK, but parliaments in these countries often insist on their general right to be informed.

The following examples illustrate the wide variety of arrangements among different countries:

**Austria:** Military deployments require the consent of the lower house (Nationalrat), but not of the federal assembly (Bundesrat).<sup>154</sup>

**Belgium:** No consent is required, but there is a duty to inform both Houses.<sup>155</sup>

**Czech Republic:** Declarations of war and “simple” deployments require consent of both houses, as does the ratification of treaties of alliance and peace treaties.<sup>156</sup>

**Finland:** Declarations of war and peace require consent of Parliament (only one house exists). Parliament is also consulted on other deployment decisions.<sup>157</sup>

**France:** Consent of both Houses is required for a formal declaration of war and domestic states of emergency within 12 days. Other deployments do not require consent of either house. International treaties—also those involving deployment of troops—have to be transformed by Parliament;<sup>158</sup> however, in practice, the Assemblée is not always aware of treaties as the Government only submits to Parliament those that are of

<sup>147</sup> G Nolte and H Krieger, “Comparison of European Military Law Systems” in G Nolte (ed), *European Military Law Systems* (De Gruyter Recht, Berlin 2003) 19, 58 ff; R Schmidt-Radefeldt, *Parlamentarische Kontrolle der internationalen Streitkräfteintegration* (Duncker & Humblot, Berlin 2005), 143 ff; M Troncho, “National Parliamentary Scrutiny of Intervention Abroad by Armed Forces Engaged in International Missions: The Current Position in Law” Assembly of the Western European Union, Document A/1762 of 4 December 2001.

<sup>148</sup> Art. 19 (2) Danish Constitution.

<sup>149</sup> Majority of two-thirds required.

<sup>150</sup> Chapter X § 9 Swedish Constitution.

<sup>151</sup> Art. 92, 104 Turkish Constitution.

<sup>152</sup> Art. 1 Legge 18 February 1997, n. 25, Gazzetta Ufficiale n. 45 of 24 February 1997 uses the collective term of “Parlamento”.

<sup>153</sup> Art. 97 Finnish Constitution.

<sup>154</sup> Art. 79 (3) Austrian Constitution and §§ 1 and 2 Bundesverfassungsgesetz über die Kooperation und Solidarität bei der Entsendung von Einheiten und Einzelpersonen in das Ausland, Bundesgesetzblatt I Nr. 38/1997.

<sup>155</sup> Art. 167, 168 Belgian Constitution.

<sup>156</sup> Art. 43 (1), (3) and 49 of the Italian Constitution, respectively.

<sup>157</sup> Assembly of the Western European Union, National Parliamentary Scrutiny of Intervention Abroad by Armed Forces Engaged in International Missions: The Current Position in Law, Document A/1762 of 4 December 2001 (Report by Mrs. Troncho), para 43 f.

<sup>158</sup> Art. 53 of the French Constitution of 1958.

7 December 2005

major importance for national defence, eg protocols on NATO enlargement. Consideration is being given to reforms to grant Parliament a right of consultation in deployment decisions, but there has been no formal commitment so far.<sup>159</sup>

**Germany:** For simple deployments of the military, under the terms of the Parliamentary Participation Act 2005<sup>160</sup> and 1994 Constitutional Court judgement,<sup>161</sup> no involvement of the second house (Bundesrat) is required. The Bundestag (Parliament or “lower house”) decides by simple majority.

Where the envisaged deployment would be in the context of a formally declared “state of defence”, triggering also the domestic use of emergency powers, both houses need to consent.<sup>162</sup> In this case a qualified majority of two-thirds of the Parliament (Bundestag), with a quorum of at least 50% of the MPs present, is required.

**N.B.:** From a functional perspective, Germany does not have a true bi-cameral system. The “second house” (Bundesrat) is one of the checks and balances in the federal system. It confers democratic legitimation less directly than the “lower” house (Bundestag) because its members are not directly elected, but are members of the governments (Executive) of the Länder.

**Italy:** Consent of both houses is required for a declaration of war<sup>163</sup> and for international treaties of a political nature.<sup>164</sup> Deployment of the military of all types requires parliamentary approval.<sup>165</sup>

**Luxembourg:** Consent of parliament (only one house exists) is required for a declaration of war<sup>166</sup> but not for a “simple” deployment of troops.

**The Netherlands:** Consent of both Houses (“estates”) is required for a formal declaration of war and domestic states of emergency.<sup>167</sup> For other deployments of the military there is a duty to *inform* both Houses. Although this is not a formal right of assent it amounts to one in practice. The Government would not deploy troops without the assent of a large parliamentary majority (“substantive right of assent in practice”<sup>168</sup>).

**Poland:** Parliament (the Sejm only, not the Senate) decides on a formal state of war and—within 48 hours—on a state of domestic emergency.<sup>169</sup> There is no general consent requirement for individual military deployments, but there is a statutory duty to inform Parliament immediately after a deployment decision. Moreover, the decision must be based on an international treaty or a statute.<sup>170</sup> This requirement of the Constitution gives Parliament a significant role in matters of defence because both the Sejm and the Senate are involved in the legislative process.

**Spain:** Parliamentary authorization by the Cortes Generales (Congress and Senate) is necessary only for declarations of war and emergency.<sup>171</sup>

**USA:** The War Powers Resolution of 1973 requires both Houses to consent within 60 days.

## II. Have any other countries successfully implemented non-statutory measures to ensure greater accountability of the executive’s power to deploy armed forces?

This answer will be confined to Germany. The concept of constitutional conventions is not reflected in German constitutional law. Although there are numerous limitations and safeguards relating to the military, they are generally statutory (including constitutional) measures.

1. In addition to the limits imposed by the Parliamentary Participation Act 2005 and the *Armed Forces Decision* of the Federal Constitutional Court of 1994, Parliament can apply its general rights of control and oversight to deployment decisions. These rights include parliamentary questions, interpellation, debates, hearings, inquiries and constructive votes of no-confidence.

<sup>159</sup> M. François Lamy, “Rapport d’Information sur le contrôle parlementaire des opérations extérieures” of 8 March 2000, at <http://www.assemblee-nationale.fr/rap-info/i2237.asp>.

<sup>160</sup> 2005 Bundesgesetzblatt I 775.

<sup>161</sup> 90 BVerfGE 286, 387 f.

<sup>162</sup> Art. 115 a of the German Constitution.

<sup>163</sup> Art. 78, 87 (9) of the Italian Constitution.

<sup>164</sup> Art. 80 of the Italian Constitution.

<sup>165</sup> Art. 1 Legge 18 February 1997, n. 25, Gazzetta Ufficiale n. 45 of 24 February 1997.

<sup>166</sup> Art. 37 (6) of the Constitution of Luxembourg.

<sup>167</sup> Art. 96, 103 of the Dutch Constitution.

<sup>168</sup> M Troncho, “National Parliamentary Scrutiny of Intervention Abroad by Armed Forces Engaged in International Missions: The Current Position in Law” Assembly of the Western European Union, Document A/1762 of 4 December 2001 para 66.

<sup>169</sup> Art. 116, 231 of the Polish Constitution.

<sup>170</sup> Art. 117 of the Polish Constitution.

<sup>171</sup> Art. 63 (3) of the Spanish Constitution.

7 December 2005

2. Further, there are some *special control measures* to strengthen civilian and parliamentary control of the military, but they are not specific to deployment decisions (listed under III.2 of the submitted paper):

- (a) A *Standing Committee of Defence* is vested with the powers of an inquiry committee to scrutinise Government actions relating to the military.<sup>172</sup>
- (b) An *Ombudsman* for the Armed Forces, as a subsidiary organ of the Parliament, exists to safeguard the human rights of soldiers, recognising their special vulnerability in peace and war.<sup>173</sup>
- (c) Enhanced *budgetary control* is required in the area of military expenditure in so far as numbers of troops must be indicated in the budget.<sup>174</sup>

3. Deployment decisions may be—and indeed often are—subject to judicial review, especially *constitutional judicial review*.<sup>175</sup> This right is, of course, not confined to military deployments.

4. A practice has evolved that somewhat resembles non-statutory measures: the *minuting of conditions and commitments or legal understandings* in the parliamentary committees (for instance the Foreign Affairs Committee, the Defence Committee and other committees that may be involved in areas such as human rights or development) and in the plenum when consent is first given. Such conditions or commitments may include an obligation to review the situation after a certain time or provide for an expiry period for the consent, allowing Parliament to stay involved.<sup>176</sup>

The reason for this practice is that there has been a constitutional debate about whether Parliament should have power to amend the Government's application for consent or impose conditions. At present the Parliamentary Participation Act 2005 explicitly allows only approval or refusal of an application for deployment. Amendments are ruled out.<sup>177</sup> Although on the one hand, some question the constitutionality of this restriction of Parliament's competences, it is the current law on the level of statute. The practice of negotiating commitments and conditions allows informal flexibility and more defined control in spite of this restriction. On the other hand, the binding nature and enforceability of these commitments and conditions is questioned because the practice of minuting them in parliamentary committees and in the plenum is a constitutional novelty. The prevailing view is that these commitments and conditions are not binding.

### III. Can you explain in more detail your argument that a trend towards internationalism and supranationalism in EC law make parliamentary involvement more pressing in terms of democratic legitimation?

The “thinning out” of democratic legitimation is a general phenomenon of the transfer of powers to a higher level in any area of law. It is, however, of special concern in foreign policy decisions, including especially deployment decisions, which are traditionally and notoriously not subject to very dense or intense democratic (and judicial) control at national level, despite the various mechanisms described above. This trend has both practical and legal aspects.

On a practical level, transferring competences, or allowing tasks to migrate, to a supranational level reduces the scope of decisions made at national level. This reduces overall democratic control if there are no compensatory mechanisms of democratic control at international level (hence discussion of the “double democratic deficit”). For instance, parliaments can be marginalized 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.

The legal aspects of the problem involve three main issues:

- The legal implications *per se* of transferring decision-making to a different level.
- The effect that this can have on national legal systems and individuals within them (“piercing the veil of the state”), particularly under EC law, which both confers and restricts individual rights.

<sup>172</sup> Art 45a GG.

<sup>173</sup> Art. 45b GG.

<sup>174</sup> Art. 87a (1), 2nd sentence GG.

<sup>175</sup> Cf. recently, for example, 108 BVerfGE 34, 43 = (2003) NJW 2373—deployment of fighter aircraft in Southern Turkey 2003.

<sup>176</sup> D Wiefelspütz, *Der Einsatz bewaffneter deutscher Streitkräfte und der konstitutive Parlamentsvorbehalt* (Nomos, Baden-Baden 2003) 52 f; F Schröder, *Das parlamentarische Zustimmungsverfahren zum Auslandseinsatz der Bundeswehr in der Praxis* (Carl Heymanns Verlag, Köln 2005) 115 f, 302 ff; SC Spies, “Parlamentsvorbehalt und Parlamentsbeteiligung bei Einsätzen der Bundeswehr im Ausland—Ein Beitrag zur Diskussion um ein Parlamentsbeteiligungsgesetz” in Raap (ed), *Krisensicherung und Humanitärer Schutz—Crisis Management and Humanitarian Protection, Festschrift für Dieter Fleck* (Berlin 2004) 531, 553.

<sup>177</sup> § 3 (3) of the Act.

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7 December 2005

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Applying these general thoughts to the transfer of competencies regarding military deployments, for example in NATO, the UN or the EU, even if membership does not automatically involve troop deployments, one can see the potential for concerns over democratic control, particularly if further integration develops.

In order to reduce this “double democratic deficit”, one may conclude that it needs to be tackled on the national and international levels.

- On the national level:
  - Democratic control should be further reinforced by the creation of special parliamentary monitoring procedures and bodies. In EU matters is being already implemented, for example, through the creation of EU Select Committees and subcommittees.
  - Where the military are deployed within a treaty framework, adequate national control mechanisms should be devised, even going beyond simply granting or withholding consent.
- On the international level:
  - At present undemocratic structures prevail in international governmental organisations, as summed up by catchwords such as “lack of transparency”, “democratic deficit” and “lack of parliamentary control”. Mechanisms on the international level are needed to increase democratic control.<sup>178</sup> Recently some moves have been made in this direction by the use of the “Convention method” to draft new European legislation (Charter on Fundamental Rights, Treaty Establishing a Constitution for Europe). Parliamentary cooperation among Members States to influence decision-making on the international level<sup>179</sup> and rights of national parliaments to be informed directly by EU institutions about EU legislative proposals are other approaches to be taken further.
  - Since international law both influences and is influenced by national legal systems, it could develop more democratic standards and thereby in turn influence national legislatures to require strengthening of democratic controls over national and international decision-making processes and bodies.

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<sup>178</sup> Schmidt-Radefeldt (n 1) 231 ff, 259 ff.

<sup>179</sup> Cf. Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC).

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WEDNESDAY 18 JANUARY 2006

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Present	Bledisloe, V Elton, L Goodlad, L Hayman, B Holme of Cheltenham, L (Chairman)	O’Cathain, B Peston, L Sandwich, E Smith of Clifton, L Windlesham, L
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**Memorandum by Field Marshal The Lord Vincent GBE KCB DSO**

Thank you for your letter of 13th October concerning your Committee’s Inquiry into War Making Powers. Based on my own service experience, including my appointments as Chief of Defence Staff and Chairman of the NATO Military Committee at a time when both our national and NATO forces were committed to operations, I have set out, in the following, some of the main issues which your Committee may feel are relevant to this Inquiry.

1. In considering the use of alternatives to the Royal Prerogative in order to authorise the deployment of our Armed Forces it is important to understand the unique nature of military operations and the considerations that have to be borne in mind if their effectiveness—and therefore the final outcome—is not to be prejudiced. Such decisions can lead to service men and women being sent without any choice at very short notice to put themselves in harm’s way which is accepted as a fundamental part of their “contract” by members of the Armed Forces. For their part the Country at large, including the Armed Forces, should have confidence in such decisions, particularly regarding a clear understanding of the objectives of such operations, the legal basis for pursuing them and the adequacy of the forces and other resources needed for securing those objectives, including any post-combat reconstruction phase.

2. Because combat operations have no equivalent elsewhere, it was Clausewitz who first defined the “Principles” on which the planning and conduct of successful military operations should be based, taking account also of the possible actions of potential adversaries. The degree to which these “Principles” remain relevant today depends on the nature of the operations concerned, which can range from high intensity combat (eg the initial war fighting phase in Iraq) to peace keeping and support for reconstruction. Against this background it is relevant for Governments and Members of Parliament (the great majority of whom now have no first hand experience themselves of combat operations) to be aware of these important considerations based, where relevant, on the original “Principles” developed by Clausewitz. For these “Principles”, in whole or part, can provide important guidance to those deciding on the possible commitment of our Armed Forces to operations, both with regard to the most appropriate fora for taking such unique decisions and in respect of other key issues that may need to be addressed in order to maximize the prospects for the success of the subsequent operations.

3. In essence, Clausewitz defined “The Principles of War” as:

- *Definition and maintenance of the objective* (to ensure adequate legal authority and to structure, plan and commit the forces concerned in the most relevant manner)
- *Maintenance of morale* (of the Armed Forces concerned to maximise their effectiveness)
- *Offensive action* (ie where appropriate and rather than leaving the initiative with your adversary)
- *Security* (eg to maximise the chances of success and to reduce the risks to surprise our own forces)
- *Concentration of force* (ie on the adversary’s most vulnerable elements to enhance the prospects for success of our own forces)
- *Economy of effort* (to make the most effective use of the resources available)
- *Flexibility* (to respond effectively to the unexpected)
- *Cooperation* (eg with allies and those engaged in post-conflict measures)
- *Administration* (to ensure adequate and timely logistic support and adequate flexibility in our operations).

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18 January 2006

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4. Based on the considerations outlined above, the overriding requirement before launching military operations today is that there should be a sound legal basis for doing so which, in turn, needs to be wholly consistent with the defined objective(s). The right to legitimate self-defence is authorised under the UN Charter without the need for further authorisations, which therefore allows for an early response when a nation's vital security interests are threatened or attacked. In other scenarios government decisions to employ our Armed Forces may rest on clear but sensitive intelligence which cannot be divulged without the risk of compromising the source or the subsequent operations themselves. It may also be important, in order to ensure the success of such prospective operations, to maintain this security to achieve an element of surprise and the significant operational benefits this can achieve. At the other extreme, national contributions to a UN operation authorised under specific UN Security Council Resolutions will inevitably be a more measured and open process.

5. My conclusions from the above are that the options for the national authorisation of military operations will need to be appropriate to the nature of the operations themselves. Whether such operations have to be authorised, as now, by Royal Prerogative, or by a more open process (eg by Parliament), the Government should always define clear objectives and ensure that there is a legitimate legal basis for pursuing them.

20 October 2005

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### Examination of Witnesses

Witnesses: GENERAL SIR RUPERT SMITH, ADMIRAL LORD BOYCE, FIELD MARSHAL LORD BRAMALL, FIELD MARSHAL LORD VINCENT OF COLESHILL, and AIR MARSHAL LORD GARDEN, examined.

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**Q106 Chairman:** Good afternoon, gentlemen. I wonder if we could make a start. Thank you for coming, my Lords and General Smith, it is very good to see you here. We have a set of exceptionally distinguished witnesses and I am sorry we have you jammed together at this table. I apologise for that. What I am going to suggest for the moment is that you might each briefly like to make an opening statement so we do not treat it quite so much as we do the normal single witness and give you a chance to say what each of you believes and feels on this matter. I have to say, as Chairman of the Committee, that I am quite sure it is to the credit of the House of Lords that we can muster from amongst our own number such extraordinary expertise from all Services, a dazzling display of top brass. I am sure it does not intimidate Sir Rupert but I have to say, as a former very junior officer, by God it frightens me. It is very good to see you here. What I would like to do is remind you we are going to be on television and invite each of you to say relatively briefly what you think are the pros and cons of parliamentary involvement and/or parliamentary assent in the deployment of the Armed Services abroad. I wonder if you would be kind enough as you make your statement to identify yourself for the record. Without the slightest regard to seniority, quite the reverse, I am going to suggest we go along the table—I hope this is agreeable to more senior officers—and start with you, Sir Rupert.

*General Sir Rupert Smith:* My Lord Chairman, thank you very much. It is most unusual to find myself in the circumstances of being in front of my fellow witnesses. I start from the view that Armed Forces use or threaten force; that is what they do. They are only effective if the opponent, actual or potential,

knows or believes that the military will fight and do so to such effect that it will be defeated by force of arms. My experience is that the force of British arms, small as they are, is greatly enhanced by the opponents' expectation that we will fight and win and that the popular will at home is more or less disaster-proof. I start from that position in considering whether or not we should have a great debate on whether or not we should do something with our Armed Forces. I do not wish to see us arrive at a situation where what I have described is damaged in any way at all. By conducting such a debate I think we would find ourselves getting confused between the legality of the action we are intending to undertake and its morality 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 force. Are we to decide this thing wherever we deploy our Forces around the world and is this not an implicit expectation that we will use force? If we are deploying Forces with no implicit expectation that we are going to use force, why are they there? They would become a hostage to fortune as we have seen during the 1990s with United Nations Forces in Bosnia. In short, I believe that if we carry out such a debate in any depth at all to be worthwhile we will run the risk of weakening our capacity to act in the field at the time necessary. Clearly, though, we must be able to carry the popular will behind us if we do this. Again, I am not sure that that is necessarily tested by a debate in Parliament.

**Q107 Chairman:** I am going to ask members of the Committee to hold questions to the witnesses until we have had the opportunity to hear from them all. Your

18 January 2006

General Sir Rupert Smith, Admiral Lord Boyce,  
Field Marshal Lord Bramall, Field Marshal Lord Vincent of Coleshill  
and Air Marshal Lord Garden

words were very interesting and have prompted questions, I am sure. Lord Vincent?

*Field Marshal Lord Vincent of Coleshill:* I believe this is a timely moment to make this review, not least because the international environment has changed almost out of recognition since the ending of the Cold War when it was, on the whole, a very black and white scenario where, for example, under the right to self defence and under UN Article 51 the Washington Treaty which founded NATO gave them the right of automatic collective self-defence and an attack against one was an attack against all. That, of course, has moved on very considerably since then. Therefore, now, in reflecting on what is an appropriate way for granting war-making powers I think we have to recognise that there is an enormous range of potential scenarios and that one form will not necessarily fit all. Let me take one extreme example, the hostage rescue operation in Sierra Leone, where we refused to pay ransoms and then suddenly the leader of the West Side Boys, whoever he was, said very well, they were going to throw out a body of the hostages they held every day, which included a section of British infantry. I know, although I was not involved in this, that a plan had been prepared on a contingency basis and, given the nature of the scenario, it was absolutely essential that the principles of secrecy, security and surprise were brought in if we were going to fly in in large helicopters and not risk having one of those helicopters brought down with over 40 people in it. We knew through Special Forces where the hostages were and we had to fly in, totally surprise and disorientate the hostage takers 15 minutes before first light, get the hostages out and get away again. You cannot have a debate about that if you are up against those sorts of timescales. I quote that as one extreme. What do I think in general are the most important considerations? The first is that any government, before it deploys its armed forces on an operation or considers doing so and asks them to prepare for it, needs to define the objectives. You cannot do that, if you are responsible for preparing those armed forces with adequate resources, adequate sustainability, adequate rules of engagement which have got to be approved, unless the government of the day defines the objectives. Those objectives have got to cover not only the immediate war-fighting possibilities but who is going to clear it all up afterwards and bring it to a conclusion. The other important thing about defining those objectives is that today members of our Armed Forces, if I understand the human rights law correctly, can no longer claim as an excuse for violating international law that they were ordered on operations. If those operations were illegal my understanding is that they are accountable for taking

part in operations that did not have a proper legal basis. I may have interpreted that incorrectly but, whether that aspect of it is true or not, I think defining the objectives (which is fundamental to planning the force and the concept of operations) and willing the means to do the job also enables you to hold the objectives up and say, "Is there a sound legal basis for doing this"? Thereafter the form of approval has to be weighed, I believe, against the nature of the operation that is envisaged. I was Chairman of the Military Committee when the NATO/IFOR operation took over from General Sir Rupert Smith's UNPROFOR operation in Bosnia. It was the first time that NATO had ever gone on such a military operation. It had never fired a shot in anger throughout the whole of the Cold War. I had to present the plan to the North Atlantic Council which took 18 hours to check every semicolon in it. What amazed me were the complex arrangements that some nations had got for getting national clearance for doing that. Germany was going to participate for the first time since the Second World War, sending forces outside German territory. That required a Cabinet approval, it required a Defence Committee approval and it required a free vote in the Bundestag, and when I asked the German Ambassador how long all this would take he said, "Maybe up to three weeks". I said, "If we hold the whole operation up for three weeks and give away anything that we want to hold close to our chests so that we can make an impact and meet our objectives as economically and efficiently as possible, then I cannot recommend that we can wait all that time; you will have to join us later". I cite that as an example of circumstances where we still have to recognise that in some operations secrecy, security and surprise, as General Sir Rupert Smith said, may be needed initially when we find ourselves in a very demanding conflict scenario. I cited in my written submission what Klauswitz told us about the principles of war, not necessarily because they will all apply, but because I think anybody who is considering making a decision on this needs to look carefully down those principles to make sure that none of them is seriously compromised. I think therefore that we would have to keep the current arrangements for certain operations. Albeit retrospectively, I think Parliament could call that in, as it is allowed to now, and ask the Government what the objectives were and what the legal basis was for them and so forth. Some of these operations would have to be launched very quickly. Others, such as a multinational operation authorised by many UN Security Council resolutions, would be a much more long, drawn out, open process.

*Admiral Lord Boyce:* I think before we start engaging on this discussion we need to be very clear about just what we mean by deployment because that is at the

18 January 2006

General Sir Rupert Smith, Admiral Lord Boyce,  
Field Marshal Lord Bramall, Field Marshal Lord Vincent of Coleshill  
and Air Marshal Lord Garden

heart of the whole decision, to understand what that means. Do you include the strategic deterrent? Do you include covert operations, including Special Forces? Do you include the reconnaissance missions which might lead to some sort of engagement? I am sure this Committee is not land-centric, therefore, I presume you are thinking about ships and aircraft. If you are not land-centric you are unusual! Every time a ship deploys on a so-called peacetime mission for six months it is fully equipped and ready and trained for war so it can be flipped from one mission to another wherever it may be, even if it is going, as I said, on what is supposed to be a peacetime mission. What about missions that we are going to where we are joining up with an alliance operation? I think the Committee is well aware that we have been engaged in an Article 5 operation in the eastern Mediterranean for the last two years to which we send our ships. There is no more serious operation in the world than an Article 5 operation. We are engaged on it. The second point I would make on definition is the use of the word "legitimate" which appears from time to time. Just what do we mean by "legitimate", and I would be interested in the Committee's definition of that. If you want my view on it, if we accept the Government's mantra "a force for the good", and that is, of course, a strap line in our defence policy, then presumably anything we go and do, provided it comes under that strap line, is therefore legitimate. That is a definition and it is very important to understand what we mean by the word "legitimate". As for the substance of the debate, in where one is going to move if you go away from our current use of the prerogative, the sorts of things that one must consider are, for example, speed of response. Lord Vincent used the example of Sierra Leone, which is a very good one; and, of course, there is a general wish amongst our allies, given that many of our operations will be in an alliance shape of one sort or another, a coalition shape, to improve the process of decision-making anyway amongst alliances. There is also certainty, or rather uncertainty if you do not have the present process, and that can be bad for morale. If you have uncertainty while you wait for the debate to run out that will affect morale. There is the problem of escalation through rhetoric. In other words, the more this is paraded around, the more it is debated, the more the potential of escalation arises in the perception of the minds of the people you are going to operate against. There is the whole business of the nature of intelligence which will form the whole framework around which you make the formal decision on whether to go or not, most of which will not be able to be revealed in public. There is the whole matter of operational security, when you give away

what your Forces are going to do before they arrive and so they get murdered as they arrive because everybody was expecting them. The whole business of flexibility must be considered once it has been approved that a certain operation should go, if it is approved by Parliament. What happens when the situation on the ground or at sea or in the air changes? Do you have to get back to Parliament for another debate to sort that out, let alone the effect this would have on the whole concept of British Armed Forces doctrine which is based on mission command, which is to delegate down to the lowest possible level the ability of people to take decisions on the ground as the situation does change? You would have to unravel British doctrine if you did decide to do that. There is the whole business of preparation also. When do you start your preparation? Do you have to wait until the debate has happened before you can start getting your lorries loaded, your ships fuelled or whatever the case may be? There is, of course, the view of the allies and the enemy if the process starts getting drawn out and, of course, there is the whole business of early notice of intent. Another great concept of British doctrine is that of poise, certainly as far as the Navy is concerned, and you would probably remove that particular ability to have strategic poise. I have to say that 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. In fact, it is a serious drag on the whole operational effectiveness business. Therefore, my feelings are very strongly that I cannot see any advantage whatsoever in shedding the current practice for 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.

**Q108 Chairman:** Thank you. That is very clear. Lord Bramall?

*Field Marshal Lord Bramall:* Thank you, My Lord chairman. I would like to start with a peripheral but related problem. I think it is quite clear that the Armed Forces, whose loyalty is to the Queen through the elected appointed ministers, have a duty to obey any lawful command, which has been taken in the past to mean anything which does not infringe the law of the land. They cannot pick or choose conflicts and situations which they would like to be in or would not like to be in. If they are given an order in a certain situation they must obey it. You have only to look back in history to the Karra incident in 1914 to see some of the problems raised by that, so they have to do their duty. However, on grounds of

18 January 2006

General Sir Rupert Smith, Admiral Lord Boyce,  
Field Marshal Lord Bramall, Field Marshal Lord Vincent of Coleshill  
and Air Marshal Lord Garden

focused commitment, laying their lives on the line, high morale, a popular or legitimate war, if you could call it that, may be easier for them to live with and digest. Also, the law, and particularly litigation, has become much more internationalised than it used to be, certainly since the old imperial days, and indeed before there was general, if somewhat grudging, acknowledgement of the ultimate authority of the United Nations Security Council. In the past, to put rather a crude interpretation on it, international law was more or less what you could get away with. Now, with human rights a key issue, the European Court of Human Rights, the International Court for War Crimes in The Hague, extradition from one country to another and lawyers roaming the area of conflict hoping to pick up rich pickings from civil actions, there is a risk that servicemen and women could be brought to book to answer charges of criminal acts even when they fully perceive they are doing their duty.

*The Committee suspended from 4.35 pm to 4.45 pm for a division in the House*

**Q109 Chairman:** Is there anything more you would like to add?

*Field Marshal Lord Bramall:* I was about to say what the three points were that the Armed Forces needed to be reassured of before being committed to a large scale military operation. First, they would like to know that they had the support of the country, secondly, that they had the support of Parliament and, thirdly, that what they had been asked to do was legal, not just within the law of the land but if possible within a wider international context which would put the legality of the use of force beyond doubt. Chiefs of Staff, for the reasons I have given, need to be reassured, and I believe that the Chief of Defence Staff at the time of the coalition based in Iraq, my noble and gallant friend, asked this very question in advance. Straightaway, My Lord Chairman, you see the important agreement of Parliament. You can dabble in popular polls, take account of demonstration on the streets, but Parliament represents the will of the people and if Parliament supports the action, which it did in Iraq, the Armed Forces can take heart that constitutionally the country supports it. Equally, Parliament is the ultimate law-making body. With Parliament's support any order given by a minister of the Crown is a lawful command. In Iraq, of course, the Attorney General felt able to extend that legitimacy into a wider context. It did not satisfy everyone but I think it gave the Chief of Defence Staff the assurance that he required. Before the Prime Minister commits our forces to large expeditionary operations, therefore, I

believe that it would be madness not to consult and indeed get agreement upon them. This does not necessarily mean that you want to abandon the present pragmatic, flexible approach which allows for the prerogative powers to be linked with parliamentary consultation at the appropriate time, and that has worked satisfactorily in earlier conflicts. Suez may have been an exception. In any case, even if some war-making powers were to be transferred, it would have to be clearly defined exactly what constituted a deployment requiring parliamentary agreement and, because of the sensitivity of intelligence, the risk of revealing future intention or just speed of response, which is essential, certainly in Special Forces (as we heard in Sierra Leone), it would not be appropriate to seek it before the event, and that actually might be difficult to fathom. Certainly, before the Prime Minister commits our Forces to anything bordering on expeditionary operation outside UN control, or perhaps with an already agreed NATO plan, I would sum up by saying that it may not be constitutionally essential but it would be, and perhaps should be, political suicide not to do so in a major conflict.

**Q110 Chairman:** Thank you very much indeed. Lord Garden?

*Air Marshal Lord Garden:* My Lord Chairman, I find myself in the advantageous position of having heard my four colleagues and I would, I think, align myself closest to the views of the noble and gallant Lord, Lord Bramall, who has just spoken. I start from the position that the use of military force is so important, it is a unique capability where the state authorises the use of lethal force, the ability to go out and kill people legally, that Parliament must necessarily take a view on when and where it is used, if it is to be used. I do not think the current arrangements are satisfactory. I would start from the position that says that the default should be that there should be parliamentary process and approval by Parliament before military force is to be used, and then I would look at the disadvantages, the exemptions, the problems that that gives and look at ways round them. We do have a problem now that we do not ever declare war, of course, as I am sure the Committee knows. We find ourselves in conflicts, in heavy peacekeeping operations, in humanitarian assistance in a hostile environment; we go and help allies who have been attacked so we do a sort of self-defence by proxy with UN authorisation; we go and do reconstruction quite often in places that we went and bombed in the first place. These things are all sorts of different kinds of operations and one of the speakers suggested that there is always the possibility that we will use force. Of course, we do military operations where there is

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18 January 2006

General Sir Rupert Smith, Admiral Lord Boyce,  
Field Marshal Lord Bramall, Field Marshal Lord Vincent of Coleshill  
and Air Marshal Lord Garden

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no possibility that we will use force. We go off to tsunami rescues, we go to Pakistan after an earthquake, we go and do training missions in places as part of defence diplomacy, so one can separate out some things where the use of lethal force is not going to be a factor. We need to look at and define those areas where the possibility of lethal force being used should be authorised. The reason I feel it is important is not only because we are in a parliamentary democracy and the people should, through their elected representatives, have a say in when such an important authorisation is given, but there is also the other half of the equation, which is the role of the military in this. The military need to know that what they are doing is legal, and their recent experience means that they probably need to be even more certain of that than perhaps in the past, not only because they are at hazard from international law on a personal basis now, but also because if you are going to conduct a military operation you want to know that what you are doing is lawful and that is not a recent development. The stamp of approval from Parliament helps that process. I do not say that it completes it necessarily. The other thing is that the military will work much better if they think that what they are doing is right, is justified, has widespread support, and I agree totally that in that case the voice of the people is here in Westminster; it is not on the streets, and thus Parliament has a role in telling our military that what they are doing is approved by the elected representatives. Those are the pluses. You asked for pluses and minuses. The minuses we have heard a number of. There is the question of what you do if an instantaneous response is required; you have been attacked. That is not really a problem although currently it is, of course, British Government policy that we are not going to be attacked, that we are not under threat of territorial attack for the foreseeable future. Nevertheless some of us worry about those things. One would expect within such legislation the ability to respond in time of dire emergency to an attack. There is the question of covert operations, of which we have heard something. I think that can be addressed by having a threshold in terms of size of deployment that we are talking about that Parliament will want to consider. I was musing about what sort of number one would be talking about and I think you would want to discuss it, but it could be as large as 500 perhaps and things below that could be exempt from Parliament. Parliament might have to be informed eventually but not approve. There is a problem which the noble and gallant Lord, Lord Boyce, addressed, which is the question of the Navy. I think it has a particular difficulty in this, that it goes and poises; it is part of the role of the Royal Navy, but when it comes to historical examples of when

naval firepower is used, it was connected in the past and I think is even more going to be connected in the future to joint operations in which the other ways would click in to get parliamentary approval. For the Air Force, again, there are technical problems. The threshold would be quite small because a single aircraft could be used many times with lots of weapons, but again it would tend to be a joint operation, although I think that Kosovo under these sorts of proposals had an air campaign, and we would need to have authorisation for it, but I do not think it is beyond the powers of drafters of legislation to find particular thresholds that would be appropriate. I think you would also need to consider the timescale, how much time before you give authority. There are examples from other countries, and I was struck by the notion that countries that require parliamentary assent are not terribly good at being military. Of course, the United States does require under the War Powers Resolution that Congress look at it, and we have all said they are really quite good, but they tend to give it very early and, of course, that is a problem, that if you authorise the use of force too early it is blanket coverage into the future. I think you would need to think about the period ahead of an operation when such authority could be given and I would recommend it being relatively short. If post-authorisation is needed because there is an emergency of some sort, again, the timescale needs to be quite short and you also need to think about how often you will come back to renew the authority. One might think of annually as perhaps being the sort of timescale for that. These are just ball-park figures. You also need to think about the change of scale of operation and whether there is a threshold for needing assent to some change in magnitude. 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. Let me take a practical example to conclude. If I can consider what we are about to do in Afghanistan as an example of where, it seems to me, Parliament should be consulted, we have a relatively small number of British forces in Afghanistan at the moment. We are going to deploy the ACE Rapid Reaction Corps Headquarters, which will involve about 900 UK personnel, a total of 1,350 military personnel with the rest made up from other nations, and that seems to me a significant deployment, a significant increase to a hostile environment. Parliament should consider and approve that. On top of that NATO is saying it wishes to extend its area of operations into the south and into the east and we

18 January 2006

General Sir Rupert Smith, Admiral Lord Boyce,  
Field Marshal Lord Bramall, Field Marshal Lord Vincent of Coleshill  
and Air Marshal Lord Garden

know that the British Government has put into the force planning process probably a number between 2,000 and 4,000 troops that it will send into what is a very hostile environment. I would see that as a second decision which needs to be taken, a different one. It is a much bigger scale but they are doing different things. What I am saying is that one can take practical examples and see how, if you set the thresholds right, Parliament gets a grip on this very important ability for a state to send people out to kill other people.

**Q111 Chairman:** Thank you very much. I thank noble and gallant Lords and Sir Rupert for a very rich set of observations which I am sure will prompt a number of questions from fellow members of the Committee. If I could start with Lord Vincent, I think all of us will have been very struck by your point of clarity of objective being the key to successful military operations. One of the legitimate questions, I think, is whether—and this is true of all legislation incidentally—governments being forced to explain themselves to a forum such as Parliament is more likely to produce pressures on them to define what they are doing and why in a way that might help with the clarification of objectives rather than proceeding in a more secluded and unaccountable way, because I think that it would be very difficult even for a lay group like this to argue with your point, and we have seen instances of it perhaps as recently as Iraq, that a lack of clear objectives can impair the effectiveness of our operations. Is it possible that having to explain to a Parliament or to a parliamentary committee what you are doing and why with the ability of others to question it and say, “Is that the right objective? Have you thought it through?” (and I think back to some debates in our own House), could be a help or whether it is necessarily a hindrance as some evidence has suggested?

*Field Marshal Lord Bramall:* My Lord Chairman, like you, I believe clarity of objective is key. If you have not got it then those responsible for planning and delivering this operation have no basis on which to size it and shape it and make sure that it has the capabilities needed to have a successful outcome, so in principle I think it is a key issue. The only caveat I would put on that is that if in some complex scenario spelling out all subsets of this objective led you into territory that might compromise the security of the operation I think you would have to be very prudent and cautious about that, and there could be parts of it that did that, that just could not become a matter of open debate without seriously risking the effectiveness of the operation.

**Q112 Chairman:** And that is, of course, somewhat linked to Sir Rupert’s point about, as it were, the advance deterrent effect where the clarity of objectives sends a signal to the other side, and the detail of the signal you might not want to have out there, but the main message of the signal might form part of the message deterring the other side from doing the wrong thing. May I ask Lord Bramall something that exercises the Committee, and you, gentlemen, among you know a great deal more about than we do, which is this question of morale? I do not want to address in this question the matter of legality and the proliferation of threats to individual service people from the potential illegality of their actions. I just want to address the much simpler question, which is fundamental to military success, of morale. Would it not be better for morale for our Armed Service men and women to know that in a modern democracy the country is behind them? Is that not better than thinking that it is just the Government, albeit the Government, of course, is the elected Government? It is the morale question.  
*Field Marshal Lord Bramall:* Yes, my Lord Chairman, it would be better for them. I do not want to overstate this. A soldier’s duty, when he joins, is to obey his officers and obey his command. If he has a good commanding officer, and, of course, it all depends on the leadership, and a good regimental corps he will do his duty, but it is a bit better if you have got a good cause to fight for because not only have you got to do your duty up to a point, you have got to do it right up to the ultimate amount and if necessary lay your life on the line. It is obviously better if you are thinking that you have got the cause and the people are behind you; it must be a help. 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.

**Q113 Lord Peston:** I am slightly puzzled by one or two of your remarks. I take it for granted that we have our set of Armed Services because we wish to defend the realm, which is *prima facie*, and again *prima facie* they are legitimate. We are not spending a vast amount of money on very expensive equipment and men and women with the notion that they are not there to be used. It seems to me the role of Government is absolutely to say, “These are our soldiers, sailors and airmen and we will use them when they are required”. That should not require a Parliament to suddenly say it is legitimate or not; that should be taken for granted. That is my personal view. I would like to take us onto the whole question of clarity of objective and that sort of thing. We are used to Neumann’s game theory and

18 January 2006

General Sir Rupert Smith, Admiral Lord Boyce,  
Field Marshal Lord Bramall, Field Marshal Lord Vincent of Coleshill  
and Air Marshal Lord Garden

I am wearing my game theory hat. It is frequently not optimal to make clear what your objective is or what you are going to do, let alone how you are going to do it. A great deal of optimal strategy is in fact to confuse the enemy. What worries me enormously about going through a parliamentary process, and I personally have not come to a view on this, is that it would be very hard for the Government on all occasions to tell the truth. In fact, we know that very frequently not telling the truth is the optimal strategy. I would like your response to that. If the Secretary of State for Defence was asked, "What are you going to do?", he has got to find a way of saying, "I am not going to tell you".

*Admiral Lord Boyce:* I absolutely agree with the point Lord Peston is making. It is almost certain you will not achieve clarity by debating in Parliament unless you reveal all your intelligence, break all your operational security and give away the whole game. I do not think going to Parliament for a debate is of any use at all unless you decide there are other things of overriding priority, in which case you might as well give up the main principles of war: flexibility, surprise and other things as well. I think the point being made is absolutely fundamental. The other thing which we need to remember, and I have been through this enough times, is that no-one is suggesting that the Government is not accountable to Parliament. I have spent many hours with relevant secretaries of state and ministers so they are able to tell Parliament what is going on at the appropriate moment. We are not going to blow away all the military advantages of having security, surprise and so forth. Government ministers have always known that at the end of the day they must come before Parliament and be accountable for what they have done and so forth. The process of the recognition of being accountable to Parliament is going on the whole time, every time you write a piece of paper out. At the end of it you are thinking, "This must be revealed at the appropriate time. We must be shown to have done something which is sensible and that fits within the overall mantra of what the Government's policy is", et cetera. I would not like to think that at the end of the day the Government is not accountable to Parliament and I am sure the Government would agree with that as well. It is just that the time that accountability is realised should not compromise military success. I believe that going through Parliament for approval for deployment will compromise military success in every circumstance.

**Q114 Chairman:** The Committee has had to recognise that emergency operations or operations requiring surprise or security do need to respect that

and cannot be made part of a one-size-fits-all approach. Could I say in terms of process, and we have ten minutes or so to go, that I would be grateful to bring Lord Garden and Sir Rupert in on this question and I have got one or two colleagues who want to ask questions as well.

*Air Marshal Lord Garden:* Very briefly, in response to Lord Peston's interjection there, I would agree with him if his first statement had been correct, that is, that the role of the Armed Forces is the defence of the realm. It used to be but now, if you read the Strategic Defence Review and subsequent documents, we are not expecting an attack and indeed the defence of the realm is now in the hands of the Home Office, oddly enough, according to the White Paper, because the attacks we expect are from strange things which are combated by the intelligence services and the police more than the military. I have drawn attention to that in the past. What we are in—and I see Lawrence Freedman has arrived—is what he has called in the past "wars of choice". We do not for national survival have to go and do these wars. We go and do them for different reasons. "A force for good" is the great strap line that we heard about. If they are wars of choice it is a question of who is choosing the particular operations. I do not buy this argument that there is some compromising of military strategy by having a debate about the grand strategy. Should we have an operation to relieve Kuwait? Do we intend in that operation to take the rest of Iraq in 1991 or not? Those are the sorts of questions, and those are the questions that get debated in the United Nations just as much as they do in parliaments. The important thing is that we have clarity on what the UK position is because in all these wars of choice we tend to be operating with allies and we have to come to a national position in order to operate and come to an alliance position.

**Q115 Chairman:** That is part of the distinction Lord Vincent was making between grand strategy and operational objectives, is it not? Sir Rupert?

*General Sir Rupert Smith:* I am in danger of repeating everybody else but I do not think there is any difficulty, and indeed there should be discussion, about the outcome to be achieved by this employment of force. What I would not want to have discussed at all is the actions to be taken to achieve it. I think that is how I would draw the distinction and say that also, in informing Parliament, I as a senior staff officer was sent on a number of occasions to brief the leaders of the Opposition on operations that were ongoing or about to take place during my time in the Ministry

18 January 2006

General Sir Rupert Smith, Admiral Lord Boyce,  
Field Marshal Lord Bramall, Field Marshal Lord Vincent of Coleshill  
and Air Marshal Lord Garden

of Defence, so again there was at least an extended process by which this was going on.

**Q116 Viscount Bledisloe:** I want to ask Lord Garden about escalation and renewal but I would like to follow up what Lord Bramall said about morale. Yes, of course, if the Houses of Parliament vote overwhelmingly for a war it is good for the troops, but what if you get a split vote, particularly a split along party lines, and a large number of your troops heavily back the party that voted against? Is that much worse than not having a vote at all?

*Field Marshal Lord Bramall:* I suppose you got that to some extent in the Suez operation when there was a tremendous split in the country. If you were on to a good thing and the Government decided it was in the national interest to do it I think the Government would be responsible for seeing that they rallied parliamentary support. If they could not rally parliamentary support it would be a question of whether the thing was in the national interest, I would say.

**Q117 Viscount Bledisloe:** Lord Garden, you talked about going back to Parliament for escalation and for renewal but, once you have started a war, and I am using “a war” in a flag sense, it is not your choice necessarily whether you stop, is it, because the other chap may have something to say about this? He may not be prepared for you to walk away. You could very often have a situation, let us say, when there was a change of government, where they would not have gone there but they think they have got to stay there, though they think it is a bad war, because it would be too damaging to the military or to their prestige to draw out. Is it really practicable to go on having debates about whether we should be there or whether we should escalate when maybe the true reason for escalating is that it is sending out troops to enable you, let us say, to withdraw with greater dignity?

*Air Marshal Lord Garden:* It is a judgment as to whether this is something that Parliament should be involved in. It is my judgment that if there is a significant change in the force level, and one could come up with models that would give you what would be a significant change, then it is likely that the war is not going the way that Parliament was told originally and therefore Parliament may want to get another bite of the cherry. In terms of renewal, it seems to me that if you have been fighting a war for a year Parliament ought to be interested in saying, “How is it going?”. I do not think that is an onerous task to put on it. Most times we are not in those sorts of operations but, if you are going to change the grand strategy, and it

is about the grand strategy level that I think we are all agreed we are talking, that is where Parliament gets involved. If the mission changes in some way that requires different forms of forces then you have got to come back for a re-authorisation; that is what I am suggesting.

*Field Marshal Lord Bramall:* Could I make two points which I think are a common thread among us, first of all, the reason why it may be necessary to involve Parliament, not for everything but rather more often and rather more quickly than in the past, is that the nature of war has changed and international pressures have changed. Secondly, under no circumstances must parliamentary approval be allowed to go into the tactical field or the minute field of the way you carry out the operation. It is the aim of the exercise really and what you hope to achieve as a result.

**Q118 Chairman:** Of course, this question is one which is very relevant to the United States where I noticed what Lord Boyce said about our allies being less effective in deployment unless, of course, the United States formally requires Congressional approval, and the issue that has just been discussed was true—

*Field Marshal Lord Bramall:* Except for the Marine Corps.

**Chairman:**— at the time of Vietnam when there was an escalation in force levels over a period of many upwards without any formal point until the Gulf of Tonkin Resolution. I am very sorry about this but in the interests of time we have only got two more members of the Committee who will be able to get in.

**Q119 Earl of Sandwich:** Can I stay with Lord Garden’s significant increase in deployment and put this question to Lord Boyce? You were responsible, I believe, at the time of our Afghanistan campaign. How would you feel now if you were faced with this present NATO deployment about, let us say, not necessarily Parliament as Parliament but a committee of Parliament which was recognised by the public, because it is also public perception that is so important, getting so directly involved in the campaign?

*Admiral Lord Boyce:* I cannot see that that is going to be of any help whatsoever and I am watching the performance that is going on at the moment with another country which is slow coming forward because of parliamentary process and which is absolutely sending into stagnation the whole NATO process. If you go to Brussels it is like looking, to quote General Smith who has been mentioned, at headless chickens, where no decisions can be made

18 January 2006

General Sir Rupert Smith, Admiral Lord Boyce,  
Field Marshal Lord Bramall, Field Marshal Lord Vincent of Coleshill  
and Air Marshal Lord Garden

and the people who have been most disadvantaged are the Afghanistani people themselves because of this very process, so I have huge difficulty with that. I must come back to the point, and this is a real implication in some discussions, that perhaps somehow Parliament is not kept informed. This is absolutely not the case. It was not the case, in all the operations I did, as soon as they started to come to public awareness, that the minister was not in Parliament saying, "This is what we are doing, this is how many people are going", et cetera. The ministers were being accountable to Parliament in telling Parliament what was going on; Parliament has not been kept uninformed.

**Q120 Earl of Sandwich:** Would you not accept that there is a blurred category at the moment, it is not perceived as a decisive committee of Parliament?

*Admiral Lord Boyce:* I do not see how a committee, formed by the good folk who would be on this committee, would be any better qualified than the committee that currently exists in the shape of the DOP(C) in other words, the Cabinet, the Ministry of Defence and the Foreign Office team which currently contributes towards the final decision. It has got all the expertise you would want on it and furthermore is completely apolitical in informing that decision.

**Q121 Baroness O'Cathain:** I think my question has been answered, about going back to Parliament on the basis of information rather than seeking approval. Once there is Parliamentary approval of the objectives, the Armed Forces would like to be allowed to get on with it. The process would involve going back on the continuing basis of information rather than going back for approval, approval, approval. Is this correct?

*Air Marshal Lord Garden:* Can I come back quickly on that because I think it is slightly more than just the grand strategy objective. It is Parliament's chance to see whether the country should be involved in this, whether the military are provided with sufficient resources to do it and whether allies are aboard. 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.

**Chairman:** Clearly though, it is not unanimity which Parliament expects from so expert and distinguished a group. There is a lot of very useful material and I am extremely grateful to Sir Rupert and the noble and gallant Lords who have come along. I wish we had three times as long but thank you very much indeed.

### Examination of Witness

Witness: PROFESSOR SIR LAWRENCE FREEDMAN, examined.

**Q122 Chairman:** Sir Lawrence, welcome. It is very good of you to come and share your wisdom with us. Would you perhaps open the session by just broadly, for a minute or two, giving us your views on the pros and cons of parliamentary involvement to a greater extent than has been the case hitherto, right up to formal assent? "War-making Powers", we have decided, is probably not quite the right title for the inquiry. Let us call it "The Deployment Abroad of Armed Forces". Would you be kind enough to identify yourself?

*Professor Sir Lawrence Freedman:* Yes, my name is Lawrence Freedman. I am Professor of War Studies at King's College in London. I am also Vice Principal of the college. I have to start by saying I am not a lawyer. My background is in social science and now as a historian and that is to some extent how I came to look at these things. I would say first that it seems to me that any government which does not involve Parliament, especially if things get tricky, is going to look very foolish, that parliamentary involvement is essential, and it also seems to me that most governments recognise that.

You mentioned just before the end of the last session the American War Powers Act. That came about because Congress felt that a whole series of decisions had been taken about escalation in Vietnam in which they had been misled. Each one had been made in an incremental way so that it was only as you suddenly realised where you were that you realised just what a commitment the country had made. Congress has the War Powers Act, which all Presidents have bitterly resented, although all Presidents have gone back to Congress, and they have gone back to Congress because they knew that their decisions would not have a wider legitimacy after Vietnam unless it was shown that there was wider participation. What they did not want was to have their hands tied at the particular moment of choice and, as you may know, the War Powers Act does not require prior congressional approval before deployment but it does require in 60 days the President to go back to Congress to get authorisation. Then there is the question of what is a war and what is not a war. Just to take an example from Britain with Sierra Leone, how serious was

18 January 2006

Professor Sir Lawrence Freedman

that? The numbers of troops involved were not that great but the impact was quite serious. I recall parliamentary discussion at the time of Sierra Leone expressing considerable misgivings about mission creep, about the dangers of going in for one ostensible purpose, which was to look after expatriates, and then all of a sudden it was saving Sierra Leone, which, in fact, it did. Retrospectively, this was a very good operation. In terms of the US War Powers Act it was over, in terms of what we could now call main combat operations (it was a lingering deployment), before the 60 days would have been up and the numbers of forces involved were not large. I think it was right that Parliament was talking about it all the time but it is unclear at what point Parliament would have come in to authorise it. Would it have been useful if Parliament had been saying, "We have only authorised you to bring out expatriates? The fact that we now see from the evidence of the commanders on the ground that you can now save Sierra Leone from being overrun by pretty vicious rebels—I am sorry; that was not your legal authorisation". That, frankly, does not seem to me to be very helpful. Just to give you another example, the Falklands. The day after the Argentine invasion there was a special session of Parliament, unusually, on a Saturday morning. All the MPs came back to Parliament and debated what was widely seen as a national humiliation and what to do with it. The Prime Minister of the day did not seek Parliament's advice. She told Parliament that a task force was on its way because it was considered absolutely essential in terms of rescuing Britain's position that it was demonstrated as soon as possible that we were going to respond. It is an interesting question, because if it had been necessary to wait even 24 hours (because in fact the decision on deployment was taken before the Argentine invasion was confirmed) whether, with a very rowdy parliamentary occasion, quite what would have been the result of that day. Whereas the Government would say, "Parliament was allowed to debate the issue", there was not a proper vote at the end; there was not a vote on the Falklands Campaign until just before the landing at San Carlos. Parliament was not told, for very understandable operational reasons, that there was going to be a landing at San Carlos and most people would have considered it to have been extremely odd if it had been. Here was a significant escalation that was going to take place and it was one of the most fateful political decisions that Government took in some ways, but there was no way that they could have told Parliament exactly what was planned because they would have been telling Argentina as well. Just to conclude on the Falklands, one of the problems with the Falklands, one of the reasons why the crisis over South Georgia

in March 1982 turned into something more than it might have done, was that statements made in Parliament in order to reassure backbenchers about the British readiness to respond to what might otherwise have seemed to be quite a small incident were played back into Buenos Aires where they seemed like the British were going to send a major force to the South Atlantic and pre-empt Argentina's future plans, so it actually helped to bring about the crisis. I admit that the way it turned out maybe it was better that the crisis was provoked in April rather than October, which was when it was otherwise likely to have happened. All I am saying is that when you are in the middle of conflict any information about future plans you are bound to be sharing with those you are opposing and that seems to me to be bound to be a limitation. My basic view is that any government that does not take Parliament into its confidence as much as possible may well pay for it, and they should, but it would be unwise to create a very strict framework in which this should happen.

**Q123 Chairman:** Thank you very much. That is extremely interesting. Of course, as historian of the Falklands you know every step of that process probably better than anybody else. In fact, I can recall, and I am not sure you were not there, that I was at the Coley Centre conference in Cambridge and I remember when the news came through of the invasion, I think on the Friday evening or Saturday, that there was a certain amount of light-heartedness among the various politicians there that this was faintly Mickey Mouse in some way, and that by the time they came back from Parliament they were full of patriotic zeal and the drama and emergency of the moment. I think one thing that can easily be ignored on this is that Parliament has its own dynamic at these moments of national crisis and is not immune, the same as the general public, from being seized by the moment.

*Professor Sir Lawrence Freedman:* That is entirely my recollection.

**Q124 Chairman:** I wonder, given your unique expertise in this, whether you could just give us the taxonomy—and you have given one or two examples—of the various categories of involvement in the modern world that the British Armed Services are likely to be called on to take part in.

*Professor Sir Lawrence Freedman:* Yes. I heard Lord Garden before mentioning wars of choice. The basic idea here is that our Armed Forces prepared for what we might call wars of necessity, that the country was under an existential threat so that if you did not respond to this threat then in some very basic way our vital interests, our way of life, would be threatened, and when you are looking at certain

18 January 2006

Professor Sir Lawrence Freedman

such situations these were great national occasions. The difficulty we now face with wars of choice is that they are discretionary and that governments are weighing a number of factors against each other. I mentioned Sierra Leone but Rwanda passed us by, which many people would think was an occasion when it would have been worth getting involved. There was Sudan and a lot of things have been said about Darfur but not much has happened. These tend to be conflicts that arise out of civil wars into communal violence in other parts of the world, which are often under way before we get involved and so our decision is whether or not to get involved. By and large these are debated so that there is quite a lot of discussion beforehand about the wisdom of it, but it can happen quite incrementally. If you take the case of Bosnia, for example, initially British forces went in under the aegis of the UN and were deployed as a UN peacekeeping force very lightly defended, dependent upon the consent of both parties for their position, and then gradually it became apparent that this action was not of great help. They were alleviating a certain amount of distress but they had made themselves almost hostages to the Serbs and so that was changed even during the course of the war into a much more robust deployment and General Smith in fact was the key architect of that change. I do not recall but I am pretty sure there was not a parliamentary debate on that particular shift. So that even within one operation you can move from being a group which is trying to interpose itself between other warring parties to essentially taking sides. Then we have Iraq, which is obviously behind a lot of the current discussion, which is quite unique. I cannot believe there are other occasions when there has been pre-emption. Here we have a situation where the Government was taking a decision on the basis not that there was an immediate threat but that if they did not act a threat could develop in the future, and how much in the future was obviously part of the debate and, as we saw, there was a very controversial decision of Parliament involved at each stage. One may suspect that because of the experience of Iraq governments are not going to be in a great hurry to do that again and that if they do they are going to have to say, "You told us this, that and the other with regard to Iraq. Why should we believe you now?", which essentially is the problem the Americans had after Vietnam. It is the same basic question, that if you have been hurt on these things you are going to ask hard questions in the future. Iraq was a very unusual situation where it was not an ongoing conflict. If we had waited things would not have been that different in two or three months' time and so, instead of us responding either to aggression by somebody else, as with the Falklands, or to developing humanitarian distress,

as in the Balkans, we decided that security considerations for the future required immediate action. That is a very unusual circumstance. Just to go back to the 1990 war, when Parliament's approval was sought, there was plenty of time. There was an ongoing situation and Kuwait was being plundered by Iraqi forces, but there was a very clear procedure, the UN was involved and Parliament was involved as well, and they were obviously trying to replicate that before the 2003 war. It just did not work out that way. The 1991 experience, I would have thought, in the future is likely to be more normal than the 2003 experience.

**Q125 Lord Smith of Clifton:** Following on this theme of mobilising public support and so on, most people accept now, since the end of the Cold War, that the nature of war itself has changed. The Falklands was really a 19th century expedition and the jingoism that was excited after the Parliament meeting in the MPs was all part of that and lends credence to that 19th century aura about the whole thing. My point is that if the nature of war has changed considerably I would argue that the nature of modern democracy in that time has changed considerably and the role of Parliament has had to and is still trying to adapt to that. In other areas of this House you will have endless debates going on about how Parliament should become more accountable to the people and so on. I think that, in terms of the categories that you have described, by and large (with one or two exceptions) the top brass we had earlier talked almost in a 19th century liberal institution sense about the role of Parliament and that really does not reflect the fact that Parliament itself is struggling with this. As for the argument that covert discussion off the record in Privy Council terms somehow involves Parliament: of course it does not. It is a useful technique but it does not pass muster in credibility by itself any more. Indeed, if you couple that with the fact that we now have wars of choice, as you put it, and the lead time of wars of choice means that you can have a lot of debate in the country, let alone formally in Parliament,—and you mentioned that governments have to try and bring public opinion with them, particularly after Iraq and things like that, as the Americans did after Vietnam—what sorts of devices for communication and in a sense participation do you think there should be, because I think the mobilisation of public opinion was something you could do when you had colonial wars and that sort of thing but mobilisation does not sit very well with the modern idiom of democracy and people talk increasingly about participation and so on? How do you square that circle in the modern context?

18 January 2006

Professor Sir Lawrence Freedman

*Professor Sir Lawrence Freedman:* First, there is an awful lot more information out about what is going on in these conflicts than there ever was before. The media expect to know more and by and large do know more. In 2003 you had BBC people describing aeroplanes flying off and BBC people describing the consequences when they got to the other end. You are working within very intense information environment in ways that were not the case before, and often that information is not correct, so that is also part of the problem, that you are often responding to disclosures that turn out not to be true. Just to give you one example in the United States, the Cuban missile crisis, President Kennedy knew, I think, on 17 October 1962 that he had a problem. He did not share it with the American people until he had decided what to do, which was on 22 October. Every possible option was discussed in that period in government and then they decided on what turned out to be the optimum one. I think that would be almost impossible these days. It would get out; there would be a blog somewhere that would be discussing all these things that were going on. It forces governments in fact to make much quicker decisions—and I am not saying they are not considered decisions—and I think it is much harder therefore to keep things secret. Whether Parliament is part of the formal dialogue or not is an interesting question, but it is part of the general environment and that is manifestly one of the major ways that information goes out. The second example in what has changed, which is very critical and where the Falklands is relevant, is the question of casualties. This was one of the major issues raised after Vietnam. In the Falklands we lost 255 killed. We have not actually lost as many as that, if you exclude Northern Ireland, in all the conflicts since, including the current war. I never use the word “only” in connection with casualties, but if we compare that with the tens of thousands on the first day of the Somme or D-Day or even some of the casualties that were being taken in the 19th century colonial wars, they were of far higher magnitude and though public opinion is often more robust on this than commentators assume nonetheless it puts an added pressure on governments to justify themselves and explain themselves because if these are wars of choice and you do not have to do it and the price is being paid in British lives, then families are very soon demanding explanations. I think the nature of the wider public debate has invariably changed as a result of the different sorts of conflicts that we are fighting and the expectations of the media. I do not have a lot to help you with Parliament itself but I think that is the background against which this has happened.

**Q126 Lord Smith of Clifton:** Sir Lawrence, I do not want to put words into your mouth but it seems to me that the implication of what you are saying is that the

information explosion, the whole fact that we all want to know everything almost instantly, means that between government decisions and everyone knowing about it Parliament is being short-circuited out of the picture to some extent.

*Professor Sir Lawrence Freedman:* Yes, and it is not necessarily always Government’s fault. I think Government has started to get better on this and to realise that sometimes they are allowed to say, “We are still making up our mind. We do not have all the information”, and so on, but the pressures on Government to make quick decisions or the knowledge in the community that some sort of decision appears to have been made are disseminated far more quickly. I think it does create questions for Parliament as to at what point it can come in with something original to do and say.

**Q127 Chairman:** One suggestion has been made to this Committee which I would be interested particularly in your view of, which is that there should be a joint committee on the Armed Services, which would be, if you like, a more knowledgeable watchdog, dealing in a sense with this question of what is the parliamentary *locus* to keep a knowledgeable eye on these issues. I wondered whether you had come across this proposal and what you might think of it.

*Professor Sir Lawrence Freedman:* I have not come across it. I was for a number of years an adviser to the House of Commons Defence Committee, which was in itself a novel development, but, of course, that was dealing with questions of weapons procurement and a whole range of questions connected with the Armed Forces which did not necessarily deal with military deployments. Indeed, it is very difficult for a committee of that sort to deal directly with them. I was on the Committee during the Falklands and it may be a useful example to you that the first question that it was able to examine was the media. There had been lots of complaints from the media about the way that they had been treated during the Falklands, and equally there had been a certain number of reservations about stories that had come out and so on. What the Committee was able to do was provide first a platform for people to grumble and complain but then, as time went on it, it was able to bring a degree of realism from both sides to the discussion, by which time, of course, the conflict was well over. It is always going to be difficult for committees to comment in public on ongoing deployments, or Parliament to comment in detail on ongoing deployments beyond that which the Government thinks it is safe to discuss. I also think that, by the nature of modern communications, when issues are brought forward Parliament and public opinion are probably better informed these days than most governments might like or have expected in the past.

18 January 2006

Professor Sir Lawrence Freedman

I see it much more in terms of wide conversations going on in which there are many participants, of which Parliament happens to be one but a very important one, rather than being able to focus this sort of public discussion within any parliamentary setting.

**Q128 Lord Goodlad:** You said, Professor Freedman, that you thought that any modern day government would be extremely ill-advised to engage in overseas hostilities without carrying Parliament along with it. We have seen over recent decades that that philosophy has been put into practice where Parliament has had at all times debates on the course of hostilities; it has had regular if not daily statements. Lord Garden, who is still with us, has said that is not an ideal way to proceed, to have an hour of questions and answers, but in supplementing debates it helps no doubt to give everybody a chance to ask what is on their minds. There is a whole raft, is there not, of instruments available to the House of Commons, ranging from the vote of censure to the Adjournment Debate, to the debate on the motion, and then there are Parliamentary Questions every day to keep the Government accountable in detail (subject to the accuracy of the information they may produce and the constraints of military confidentiality) on what is happening and to reflect the views of the House if the views of the House change in any way. Can you think of a single instance over the past 50-odd years when having had a legislative framework in the place of this mechanism would have been in the public interest?

*Professor Sir Lawrence Freedman:* One comes back to Suez, I suppose, where there was collusion, which was denied, and great unhappiness about what was going on. Parliament discussed it so it was known, but you have a different problem there if Government is making it up. Then you have a different sort of issue. I think the expectations have changed over this period. Having said that, in the British conflicts that I have looked at, and the Falklands is the one that I have obviously looked at most closely but I have looked very hard at the 1991 crisis over Iraq as well, there were statements to Parliament all the way through. I think with the Falklands it was also quite important that the Government realised that Parliament was an important weapon in its diplomacy because by and large the Prime Minister was more worried about that segment of popular opinion that would be cross with a sell-out than would be cross with the war and those were the parliamentary messages that she was getting. I cannot think of Parliament not being consulted but as having opportunities, as you describe them, and I think they are used. I think the difficulty is not so much the occasions but what information you can release. That is what the main issues seem to me to be

around. What is it that it is safe to talk about given that you may be putting the lives of our forces at risk? If you are not prepared to talk about some of those things, will Parliament feel later on that it has been misled? That seems to me to be the crux of the issue and I am not sure quite how the legal framework sorts that one out for you. It could at the end of the day just be matters of judgment.

**Q129 Chairman:** Can I ask you on a related but somewhat different topic why you think the Armed Forces were particularly active in trying to ensure that they got legal advice about the legality of the Iraq operation? Was it the fact that this was almost seen to be a prior condition the wholehearted engagement of the Armed Services than the Iraq operation? Is that unprecedented? What do you think was going on there?

*Professor Sir Lawrence Freedman:* I think it comes back to the unique character of this war. The Forces, indeed everybody, were very much in uncharted territory here. With the Falklands we had Article 51 of the UN Charter on the inherent right of self-defence. It was quite straightforward, it was a UN resolution which backed us in that it confirmed the inherent right of self-defence. The legal problem was not difficult, British territory had been seized, we were trying to take it back. With Iraq in 1991 you had UN resolutions and that created an expectation of future UN resolutions as justifying participation in a war in which British interests were not directly at risk, although British interests certainly were at risk in more indirect senses. Korea is the only other war that has been able to take place under UN aegis. It is highly unusual for military deployments to have that sort of authorisation. Even with the Balkans engagements, which you could trace back, you had a variety of UN resolutions surrounding them. The "all necessary means" sort of language was apparently less valued here than in the Gulf. Kosovo, of course, was one where, you could not have a UN resolution because of Russian and Chinese objections but there was nonetheless a sense of legitimacy about it because you had the whole alliance and past resolutions on Kosovo. I think that with Iraq there is this sense that you are having to depend very much on a UN history that was controversial in conditions in which there is far greater sensitivity to the responsibility of individual service men and women as they are engaged in combat, the war crimes issue itself, as it were. You bring these two together and it is quite understandable that the chiefs are nervous about their people being put in a position where they can be claimed to have been killing people in an illegal setting, and that is why they want the Government to be clear that they are the ones who are taking responsibility for this and that they have got the legal arguments that they think can take it through. This

18 January 2006

Professor Sir Lawrence Freedman

sense of legal requirement is again quite unusual because by and large Article 51 dealt with almost every eventuality you could think of, and you could at a stretch have used it in an anticipatory version by saying if you did not pre-empt you would have a problem in the future. I think that would have been quite a stretch.

**Q130 Lord Peston:** Obviously, if the experts tell us it is now wars of choice and all the old-fashioned ideas are wrong we have to accept that, but do you think remotely that people in this country would accept that we have this massive group of Armed Forces, a lot of armaments costing an enormous of money so a government could decide a few wars of choice? I find it totally unconvincing. In other words, if we ever had a parliamentary debate on wars of choice, and on wars we do not get to vote on how much money we would like to spend, I find it very difficult to believe that the general public, nothing to do with British security or defence of the realm; this is wars of choice, would ask, "Do you want to spend several billion a year?". Would they do that, do you think?

*Professor Sir Lawrence Freedman:* They have done.

**Q131 Lord Peston:** I know they have done because I think they do not believe in the concept of wars of choice. I never even knew about wars of choice until I started coming to this Committee.

*Professor Sir Lawrence Freedman:* Concepts are just ways of trying to make sense of issues. It is not that the old ideas are wrong. It is that you are trying to make sense of a new situation. We are in a position where, in the Third World in particular, and leaving aside the question of Iraq, there are many ongoing conflicts in which, if we think it is important that order is brought to these conflicts in some way, if humanitarian distress is alleviated, if people are worried about asylum seekers or criminal gangs or whatever that may develop out of these conflicts or terrorism, there is a case to be made to intervene. Against that there are costs involved: the money, the lives, the risk of being stuck in a place you do not want to be for a very long time, the problems of nation-building and so on, and these have to be set against that. It is a choice; it is discretionary. It is not saying it is an interesting optional extra. It is saying there is a very difficult choice that faces Government so that sometimes you do get involved, belatedly on Bosnia, more quickly on Kosovo, and the Americans did it with Somalia but they got burnt so we did not do it with Rwanda. These are choices that Government is genuinely making and life goes on if it decides not to get involved, but for those places in which we have not got involved the distress continues. There is a very important report that has come out recently called *The Human Security Report* by a Canadian institute, which charts very clearly

that things are moving in the right direction. There are fewer wars than before, fewer people are getting killed and this is not unrelated to the fact that in a number of these cases western countries have agreed to get involved. I think it is a genuine choice because it is not an easy thing to do, to get involved, and sometimes you just cannot. You cannot get involved in Chechnya. There are all sorts of good geo-political reasons why not, but where you can get involved, such as in Sierra Leone, you can do good.

**Q132 Viscount Bledisloe:** Are there not two different kinds of war of choice? The Falklands was a domestic dispute between us and Argentina about a country which in our view belonged to us. We could have decided that the game was not worth the candle and not gone and fought it and then that war would not have taken place at all. There are other international situations where many people think that outside force is called for to try and tidy up the situation but where that could happen without our participation, and there the question is not should there be that war but should we take part in it. Is that an important distinction?

*Professor Sir Lawrence Freedman:* Yes. I think the Falklands is almost a special case, and there is a danger in these neat distinctions, because it may well have been that however much we wanted to use force we had no good options. If Argentina had attacked at a different time, a year later, we would have been quite embarrassed if we had tried to put together a response. I think that would have had a significant effect on British political history. The country would have been changed by not fighting as it was changed in some ways by fighting. You are quite right: on these other occasions we are far less directly involved and others may well take it up. Britain has tended to assume more recently, as a permanent member of the Security Council, that whenever we have any sort UN flag flying possibly we ought to be involved. Here is another statistic from this report, 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.

**Q133 Lord Elton:** Concrete examples are always helpful. Forgive me if I missed something you said but Lord Goodlad asked you a specific question about whether you could give an example where the sorts of mechanisms we are talking about would have brought an advantage in the last 30 years, and you gave a very general answer.

*Professor Sir Lawrence Freedman:* Yes. As I said, I think the problem is not opportunities but questions of disclosure of information.

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18 January 2006

Professor Sir Lawrence Freedman

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**Q134 Lord Elton:** Do I deduce from that that really we are pursuing something which is either unnecessary or would not work?

*Professor Sir Lawrence Freedman:* I could not possibly comment on that. I think it is very important that Parliament is involved in these decisions. I think the debates prior to the 2003 decision were some of the best debates Parliament has had. I have read all the debates that took place during the Falklands. They were serious occasions. It was not silly point-scoring. People recognised that this was not trivial and were responsible but quite different points of view were expressed. When Francis (now Lord) Pym, felt that he had said something that was not quite right he

came back and corrected himself. That is exactly how Parliament should conduct itself. I think there is plenty of very good practice about the role that Parliament can play as the focus of that national debate on these issues. That should happen and if it does not happen I think the Government will suffer. My question is on the difficulties of discussing operational issues.

**Chairman:** And that has been a recurring theme. I am really most grateful, Sir Lawrence. Thank you very much indeed. If there is anything in retrospect you feel you can share with us in terms of a letter please feel free to do so. Meanwhile, thank you very much indeed.

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WEDNESDAY 25 JANUARY 2006

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Present	Bledisloe, V Carter, L Goodlad, L Hayman, B Holme of Cheltenham, L (Chairman)	O’Cathain, B Peston, L Sandwich, E Smith of Clifton, L Windlesham, L
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**Examination of Witness**

Witness: COLONEL TIM COLLINS, examined.

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**Q135 Chairman:** Colonel Collins, thank you very much for coming to share some of your experience and insight with us. We are very grateful. I should say that this will be televised, so perhaps you would be kind enough just for the record to identify yourself.  
*Colonel Collins:* Colonel Tim Collins, formerly an officer in the British Army.

**Q136 Chairman:** Thank you very much. Perhaps I could get the questioning going. I noticed in your recent article in *The Guardian* that you said of the Iraq war that if the war had been part of the war on terror—and that of course is part of the argument, what exactly the war was for—had it been designed as part of the war on terror, it would have been the best recruiting sergeant that al-Qaeda could have had. That is a recent article, so presumably you still hold that view?  
*Colonel Collins:* Yes.

**Q137 Chairman:** Would you care to expand on it a little?  
*Colonel Collins:* Ultimately, I think that when we look back at the wars of the twentieth century and the needs, and if one accepts that war is an extension of foreign policy, it is a continuation of politics by other means. The logical extension of that is that politics fail and then war breaks out, but at some point war is either won, we achieve our war aim, in which case we have won and then politics continue, or some stalemate or agreement is reached, in which case politics continue. It strikes me that the war on terror as a phrase has no real meaning. There is no apparent war aim in the war on terror; indeed we are not certain who our enemies are on the war on terror. Ultimately, if the Iraq war was some form of extension or part of the war on terror, because of our failure to take account of the needs of the Iraqi people and our failure to take account of a replacement regime and stabilisation of the country, it could look to the people who are feeling isolated and therefore aggrieved against the West and against the United Kingdom and the United States as an attack without any particular care on their way of

life, and indeed on them as an entity, whether it be Islamic or Arabic peoples. In that regard, because we failed to show goodwill and good intent by our actions after the war, we in that case exacerbate the *casus belli* of those who attacked the Twin Towers in 2001 and arguably started this particular war.

**Q138 Chairman:** That is very interesting and one thing we have heard from even more senior officers than yourself, past serving officers, is that it is imperative for military success to have clarity of objectives. One of the areas of discussion about the idea which this Committee is considering of greater parliamentary involvement in the authorisation of the deployment of forces overseas and one of the issues which keeps coming up is whether an open discussion of the objectives of the action deprives us of surprise, hampers in some way military effectiveness versus the notion that clear objectives send a signal to potential foes and produce a greater solidarity of purpose in our own forces. So we have been hearing that there are pros and cons of setting out on the table (particularly in Parliament, which is not inclined to be shy about these issues) exactly what the objectives are. So both from a military point of view and an operational point of view and in terms of your sense of the pros and cons, how do you weigh that up?

*Colonel Collins:* There are, of course, pros and cons, but there again without making it too complex in the way in which we approach that and the way in which we deal with the discussion, because it is a serious subject like war it can be kept in committee, it can be kept in camera and therefore we need not necessarily reveal to our potential enemies our current thinking. But I think that if such a mechanism existed prior to the Iraq war, it would have been a useful discipline to ally, even if it was just the Cabinet (if not Parliament more widely, or indeed Parliament and the Lords), to discuss and analyse what it was we actually required from the war and to remind ourselves why we were going to war and, furthermore, to take it to a point where, having decided what it was we sought to take away, sought to address in going to war, then allow

25 January 2006

Colonel Tim Collins

ourselves the discipline to ask ourselves the second order questions: what next? What must we prepare? What must we tell our troops? The manifestation ultimately of that is that I found myself coming to notoriety with my speech, but that speech which I gave to our men in Fort Laramie before we crossed the border into Iraq was borne of the fact that one of my soldiers, a southern Irishman, asked me on the way back from brigade, having received our final orders, what indeed the war was about, and I suddenly realised. He said, "I don't wish to be funny. I want to emphasise the boys are keen to go, but we've no idea why we're going to war," and I thought to myself that this must be one of the first wars, certainly the first war of the twenty-first century but one of the first major wars which the UK has been involved in where the very troops on the ground do not entirely understand why it is they are committing. It is more important, also, to understand (and it struck me forcibly) that this question was asked of me by a southern Irishman, bearing in mind that our soldiers who served to fight for the Crown, unlike soldiers in England, Scotland and Wales, have never had conscription. So every Irishman from the fields of Waterloo to the Boer War, to the First World War and to the Second World War have all been volunteers, and indeed all the men I led across the border into Iraq were volunteers, many of them passport holders of the Republic of Ireland. The motivation, especially for those who came from the Republic, has been since the Republic was formed, and before that, as they say, is so that small nations may be free. Although we had senior commanders from the coalition forces who before that were telling us that we were going to "kick ass," I wanted to make it clear that certainly the men of the Royal Irish Regiment were not going to kick anybody's ass. We were going to liberate a nation. But I was passing that on from my own viewpoint. I think it would have been hugely important had the United Kingdom's Government, which was sending this force to war, made it clear what it was exactly those soldiers were to do when they crossed the border, why it was they were going to risk their lives being taken and to take life, and indeed to set out the needs for war. Furthermore, when we arrived there we were left to our own devices to explain to the Iraqis whom we had liberated why it was indeed we had come, because they did not know. So what we ended up with was a deeply confused situation.

**Q139 Chairman:** You have put that in your own words very eloquently, but I guess the burden of what you are saying is that it would have been easier for you and easier for your men if they had had a clearer set of well-recognised objectives and perhaps (although I do not want to put words into your mouth) it would also have helped with this

enormously contentious issue of the follow-through to the war and what the implications of the second stage after the military victory were in terms of consolidating a free Iraq? It would have helped to have clearer precedent objectives?

**Colonel Collins:** In many respects, I would regard it potentially as an historic blunder in that the nation of Iraq was created by a British man called Wilson in 1920, bringing together three unlikely bedfellows, and certainly I found shortly after arriving in Iraq that amongst those who sought audiences with me to sit down and try and understand the situation primarily were people from the former regime and they wanted to know where they stood. They also wanted to emphasise the fact that they looked forward to a nation of Iraq and wanted it to stay together and was that part of our planning. Of course, there was no planning. But ultimately in discussions with them I came to the conclusion that the root of our misunderstanding is that we regard the nation of Iraq as a concave problem, a problem into which all the problems of the region tend to flow and churn about and we need to be there and do something about it. That is certainly the view of the United States. I have come to the conclusion, talking to Iraqis and people in the region that it is in fact quite the opposite; it is a convex problem. The entity of Iraq, like a black hole, affects all the countries around it in the region and achieves stability in Iraq and achieves bad things coming out of Iraq and affecting its neighbours. In fact it would stabilise not only Iraq but the areas in the region. To allow Iraq to be unstable, like a trembling convex jelly it then destabilises countries. Ultimately, what I am saying is that we have blundered into what is a regional problem potentially with global effect with no clear aims, no clear war aims and no understanding. One is left wondering, as the crisis in Iran looms, who is next? Is it the Iranians? What happens? Do we just keep going until we hit the Pacific and then turn south? Where is the war aim and what is the plan?

**Chairman:** The issue which you have raised of what next is very relevant to the work of this Committee. Whereas we are not strictly a Committee investigating the Iraq war, we are a Committee trying to work out what the proper process in a modern democracy is of the balance between military necessity and parliamentary democracy. That is what we are wrestling with. I want to bring in one or two of my colleagues. Lord Carter.

**Q140 Lord Carter:** On that very point about the parliamentary democracy, as you know, in the run-up to the war there was a major debate in the Commons and a very important vote. Did that have any effect at all on the military in your thinking about the war or your discussions?

25 January 2006

Colonel Tim Collins

*Colonel Collins:* It did not filter down, and indeed what myself and my soldiers were watching more closely in the run-up to it were two things: first of all, the deliberations in the United Nations, which the United Kingdom was an important part of, and also the deliberations within the Arab summit which was going on at that very time, indeed with representatives from Saddam's Iraq. By and large, we were at that stage still trying to guess would a war go ahead. What I could also say from my experience, without again straying into sensitive or secret areas, bearing in mind we are being broadcast, as a colonel in charge of the special forces operations and the targeting and all that goes on with that is that during my career with conflicts in places like Kosovo and Bosnia, and indeed the no-fly zone in Iraq, very often decisions to commit war-like acts, if not war itself (but these in my regard stand on equal parity in terms of what we are doing overseas), and the impact which they would have, a simple mission, a carefully targeted attack from the air, for instance, or a strike from one of our nuclear fleet with a Tomahawk missile, a precision strike, could have an effect which would prevent a war potentially, or indeed could prevent a hostile action. Very often these were left to the decision, rightly so, of target administrators to decide on the decision whether to go or not based on the targeting as presented. But I think within the broader scope of these things, in the modern world with the effect of modern weapons such a surgical strike can have such an important impact. I think if there were greater discussion about the broader war aims of a campaign that would more easily satisfy, as a function for the ministers and also those people providing the targeting, what it was they needed to do to achieve it. The final thing I would say on that is the way in which military men increasingly work (and it has been the way that we have waged war in these islands for over a thousand years) is that people tend to be given directions and told to carry on. Ultimately, in the modern world we call it "mission command" and mission command means that even without written detailed orders you understand the intent of your commander, and indeed the higher commander above. You understand where he would like to see the operation going and with that understanding it means that without any formal orders you can get on with your task much more effectively and, as a book recently written about the Battle of Trafalgar argued, that is how we won that battle. The British naval captains were able to prosecute their own battles towards the common good, whilst French ships stood idle waiting for detailed orders from above, which never came.

**Q141 Lord Goodlad:** If I could just come back to what you were saying earlier, Colonel Collins. Like my Lord Chairman, I do not want to put words into

your mouth, but do you think that doubts about the objectives of the operation in Iraq and about its legality and legitimacy affected the morale of people under your command, and indeed their effectiveness?

*Colonel Collins:* I think that it did not affect the morale of people under my command. It could have done, but because of the nature of the British regimental system people tend to fight and obey those around them and they are fighting for the regiment. As we go towards a much more loose form, these super regiments ("super" as in out-of-town superstores as opposed to super good) with less identification, then it simply could affect morale on the basis that soldiers are seeing a public reaction at home which is clearly unpopular and that places a seed of doubt in their minds as to the legitimacy of their actions which they are going to take, bearing in mind these are young people who will be involved in that most decisive of all actions, the taking of other human lives, and potentially losing their own lives. Without a clear understanding of why this must be so, then it has the potential to affect morale. That was my particular circumstance. But I look at the Army, which of course I have left now, where it is now into a situation where there is no clear way forward in Iraq but much discussion of what might be and soldiers deployed there and soldiers warned for deployment there. Furthermore, I look at the failures of operations like Afghanistan, and I understand very shortly we are to hear a detailed account of what our intent and plans are for Afghanistan. Soldiers are slightly left wondering, "Where is this all leading to? For how long will I be involved and what does our Government, and indeed our nation, wish us to be?" With those two different things, the will of the nation and the will of the Government, and whenever a confusion like that exists then I believe that is potentially a flaw which could lead to downfall.

**Chairman:** Thank you very much. Lord Bledisloe.

**Viscount Bledisloe:** I fully understand your disillusionment. You went there to free these people, give them an orderly government, and so on, and the result has been, perhaps it is fair to say, a mess. But is that not more a question of the fact that nobody had worked out how they were to achieve the objectives rather than the objectives not existing? Your complaint as recorded here is that there was no real plan to replace anything. I fully agree with you, quite frankly, though that is irrelevant, but do you really see a debate in Parliament before one goes to war (let us call it) actually being able to discuss, "And when we have won the military part of it we will then go on and we will invite certain members of the ruling party to do this and we will have records of who will remain criminals," and so on? Is that something one could ever get down to in a debate about whether to go to war and if, as I rather agree with you, what one wants to know is has the Government got a clear plan, is not

25 January 2006

Colonel Tim Collins

a very much better tribunal for finding that out a committee, which can sit for longer and examine things more carefully, rather than a parliamentary debate?

**Q142 Chairman:** Just before you answer, because we are in danger of focusing overmuch on Iraq and your recent experience there, let me just enlarge it to whether post-war aims, post-military victory aims in which inevitably the military get engaged in trying to help deliver this—and you have experience in other theatres as well—provide part of what your troops need to understand and you need to understand as part of the objectives, and then revert to Lord Bledisloe's question. Is it then helpful if that has been debated, and the Government has been under pressure to clarify that, in Parliament?

*Colonel Collins:* There must be a debate and whether it is in the Cabinet or in committee or in Government, there must be established before we go forward broad principles of that which we wish to take forward. I think of the wars in which I have taken part—and the one which has the most relevance, of course, is Iraq, and indeed the intervention in Sierra Leone—we have to ask the second order questions so that we can identify those whom quickly after the conflict is resolved we need to contact and establish. Had we had the debate, for instance, establishing these broad principles in Sierra Leone, or indeed Iraq, then we would have had a clearer picture as to what steps we need to take in the immediate aftermath to contact people who are potential allies and also to deal with potential threats which we have identified by dint of this and scenarios which (as much as one can identify scenarios) we would not wish to happen, the rise of a particular group or the influence of a particular group. So the circumstance comes down to the fact that we end up with, as mentioned in the briefing notes, the danger of mission creep. That is inevitable when there is no clear direction. As much as war is an imprecise art, if one thinks of how education is debated and the manifestation and implementation of educational plans are discussed, or health services, or even transport, there are broad ideals of what we would like, what we will accept and what we will not accept, yet it seems that we undertake something as solemn as warfare without these guidelines and norms, and indeed no discussion of them. It seems to me foolhardy at best and ultimately, again as I have said in my book and in broadcasts, the danger is that you create a vacuum, and nature abhors a vacuum. You must live with the consequences, if you do not fill that vacuum, of what fills it. We are living with the consequences of that in Iraq. We lived with the consequences of that in Iraq. We lived with the consequences of that from a series of half-hearted interventions in Sierra Leone until we were forced to put a significant and very short order intervention

into Sierra Leone, and even then it has taken us a while to decide what we want to do there. Thankfully, because we have now addressed the broader regional issues in Sierra Leone and stabilised Liberia, that place, God willing, is returning to some form of stability. But we got there by a pretty roundabout manner, as opposed to identifying early on (which we could have done) broad aims and directions which then military commanders on the ground fulfil their part, and then look to the non-governmental organisations and our colleagues and other offices of government to come and fulfil their part in it. At least we have got some form of plan to roll out and that is better than just hoping for the best.

**Chairman:** Thank you. I have got two more colleagues who have questions for you, Colonel Collins. Lord Windlesham.

**Q143 Lord Windlesham:** I would be interested to know whether you decided to leave the Army voluntarily in order to publish your book with some vocal criticisms of the strategy in Iraq, or could you have made your views known without leaving? Could you have made your views known to the decision-takers within the Armed Forces?

*Colonel Collins:* The Army in its own way indicated to me very clearly that, for whatever reason, my career was over and that I could stay for as long as I liked, a dog in the manger, sitting in the chair. They would not push me, but there would be no further advance. I knew that because the way in which people progress in the British Army is by dint of their annual confidential reports (or, as they now call them, officers' joint annual appraisals) and the quality of your annual appraisal decides how much further your career goes. I went from an officer who before the war had already been promoted and asked to stay on and take a loss of pay, because I did not take my promotion, in order to lead troops in the war and recommended for higher command and staff course to someone who—I did not just get bad reports, I did not get any reports. No one reported on me from the day and hour I crossed into Iraq until the day and hour I left the Army, and they did not even have the good courtesy to inform me of the fact that I was awarded an OBE. I had to find that out from Radio 4. So if you had a marriage where your wife did not ever speak to you, you might come to the conclusion the marriage is over, and that is how it was with me and the Army.

**Q144 Lord Windlesham:** At what point did you become disillusioned?

*Colonel Collins:* I became disillusioned ultimately by the vigour with which the Army sought to expose what were frankly ridiculous allegations against me to the papers, and when even the papers turned their noses up at these then the Army—and it must have

25 January 2006

Colonel Tim Collins

come from deep within the MoD—quickly exposed every single flaw in my character, including a badly informed debate on the affair of Ranger Cochrane, who committed suicide whilst under my command. Three inquiries were carried out into that, which are available to look at. I have to say, I was never allowed to see the conclusions of any, but was told that I bore no responsibility whatsoever and actually I did everything in my power to look after him. This was all held in public debate. Ultimately, it came to a point where because what the Army were putting up was so unsatisfactory to national papers, it had to make some allegations up about me which involved murder and when I asked the Army to just point out that I was never being investigated for murder they declined to do so. So I had to put my mortgage on the line to take out a private litigation. Bearing in mind the Army prevents a soldier from speaking up to defend himself, by dint of the understanding any honour would suggest that if you take away that privilege then you represent that soldier, even if it is sort of minimum representation. When they choose not to do it at all, there is a breach of trust and contract.

**Q145 Lord Windlesham:** And you resented that?

*Colonel Collins:* Well, there was just nothing left between us. How could one continue? Ultimately, I decided that I was capable of providing myself and my family with a living outside the Army because, in my belief, there had been a breach of trust and honour.

**Chairman:** Thank you for being so candid with us. This is the final question. Baroness O’Cathain.

**Q146 Baroness O’Cathain:** I want to go back to the point you made about when you first went to Iraq. It is not to do with the Iraq war, but it seems to me that you had the feeling that you did not know what the objectives were, or the troops certainly did not. A statement you made was that your troops were actually looking at what was happening in the United Nations and looking at what was happening in Iraq, but why did you not look at what was happening back here, because there was a lot of debate and a lot of comment. I got a firm view, probably wrongly, of what the objectives were about going into Iraq. Whether they were right or wrong is something to one side, but I worry about the fact that you say morale was very low and that there were no objectives. How could this be so?

*Colonel Collins:* Morale was not low, because within the battalions morale remained. They buoy up their own morale. What one was seeing from the papers and from Sky news, which we were provided with, was a great deal of protest and counter-protest in the country and a division within Cabinet, and for common soldiers this was deeply confusing.

**Q147 Baroness O’Cathain:** I think that is actually a very valid point. Now that you have had that experience of how the objectives were not necessarily translated to the troops, if we found ourselves in a position like that again how would you think the objectives should be communicated to everybody?

*Colonel Collins:* There is a number of ways in which that could be undertaken, but to focus particularly on soldiers, the military commanders need to be taken in and have it explained to them that the choice for war, having considered all alternatives, has been taken. “Here are the clear war aims. You must now go to your soldiers through the chain of command and explain to the soldiers why it is we are going to wage war.” They do not necessarily need to know what the ultimate outcome is, because that might not be clear at the time, but we certainly should know why it is we are taking this solemn step, and then down through the chain of command. As ultimately I had to do of my own initiative, someone stands up in front of the soldiers and says, “This is what we are going to do. You must consider these people as your enemy, these people as innocents and these people to be won over,” so that the soldiers then embark on the enterprise very clearly understanding what it is they have to achieve without direct orders from me and ultimately they can make sense of the mayhem which they will shortly be amongst.

**Q148 Baroness O’Cathain:** So in fact that is the level at which the objectives are translated to the soldiers and the tactics then would relate back to the objectives of war?

*Colonel Collins:* Absolutely, and not only for our soldiers. One of the things I did immediately on crossing into Iraq was to surround myself with Iraqi advisers, because I had no way of making sense of the chaos that I was seeing. There were oil well fires burning, there were people apparently looting in every direction, and having been told by that oxymoron military intelligence that we are facing, Iraqi battalion, we discovered that we had over 1,000 prisoners and probably captured more than a brigade, and indeed many of their officers, who had been trained at the Royal Military Academy, Sandhurst, were coming to me and speaking in good English and saying, “What’s going on? What’s the plan?”

**Q149 Chairman:** I do not know if you have read what Sir Michael Rose said, that wars are won when the people, government and army work together for a common cause in which they genuinely believe? Presumably you would agree with that proposition as stated?

*Colonel Collins:* Absolutely, and I can imagine that soldiers from my regiment, as they waited to go—and on D-Day I know people were writing and saying,

25 January 2006

Colonel Tim Collins

“As soon as this wretched Mr Hitler is defeated you can come home and all will be well.” What must mothers have been writing to my soldiers? “What everybody in the village would like you to be doing is finish,” and we had no idea how long that would be for. “I hope you come home in one piece,” and you are having to keep going, and the soldiers themselves, of course, would not be able to write these things home, but they would be wondering, “What is it we’re hoping to achieve.” Ultimately, even, as I say, the people of the country who have taken their sovereign right to rule their own country. You have

captured their country and they are rightly coming to you and saying, “Where do we now stand? What is it you are hoping for? Are you interested in our point of view as to what needs to be done right now to secure the situation?” If one is not clear as to one’s relationship, then chaos must ensue.

**Chairman:** Thank you very much, Colonel Collins. It has been a great pleasure to hear from you and if on some of the questions we have warned you of in writing you have other views you have not had a chance to express, feel free to write to the Committee. We would be very interested to hear them, but for now thank you very much indeed.

### Examination of Witness

Witness: LORD KING OF BRIDGWATER, examined.

**Q150 Chairman:** Lord King, welcome. Thank you very much for agreeing to come to share your insights with the Committee. If I might say so, we are particularly fortunate that you have been able to do that because the combination of your own experience as Defence Secretary and Secretary of State for Northern Ireland, and the involvement in the Commons with the Intelligence Committee means that you have three loci which are very relevant to the issue we are investigating. These proceedings are, I think, being televised so if you would be kind enough to identify yourself for the camera.

*Lord King of Bridgwater:* Tom King, Lord King of Bridgwater. I was, as you say, Secretary of State for Northern Ireland and Secretary of State for Defence in the First Gulf War and Chairman of the Intelligence and Security Select Committee.

**Q151 Chairman:** I wonder if I could start with the question, as you may have heard, I just asked Colonel Collins, whether you agree with that proposal of Michael Rose’s that wars are won when the people, government and army work together for a common cause in which they genuinely believe? Would you agree with that proposition?

*Lord King of Bridgwater:* I do not think you will win without it, but that is not necessarily all the conditions you need. There is more to it than just the will, but yes, I think it is very important. I listened to the end of Colonel Collins’s evidence and I certainly think (and I think Lord Vincent made this point as well in your earlier evidence) that in the sorts of situations in which we now find ourselves, which are not perhaps the traditional war—when it is pretty obvious you are defending your own country you do not need to spend too much time spelling out what the objective is, but now we are getting involved in more complicated situations and intervening in other people’s affairs, albeit allies, albeit for a very good reason, it is very important indeed that people know

what the objective is. I certainly saw in my time as Secretary of State for Defence that a very real part of my job was not to fight the war, not to fight the battles in the sense that that was the generals, but to make sure that as politicians of the Government that we delivered not only full parliamentary support but full support from the country as well. I would claim that actually in the first Gulf War that was achieved without question. Admittedly, we had an easier task because the defeat of aggression, the invasion having been the invasion of Kuwait, and the need to repel the aggressor was a very simple and clear objective which could be spelt out. I think because it was an event which arrived more or less from nowhere, unexpected, unpredicted by the Intelligence Services, we suddenly found ourselves in this situation and there was huge public interest in it. One of the things I remember particularly, which surprised Peter de la Billiere, who was the General commanding our forces in the Gulf, was when we launched what I think was called BFPO 3500, where anybody who wanted to send a parcel to our troops in the Gulf over Christmas (because they were stuck there at that time) and the huge avalanche of presents which came showed how people were totally behind the Forces, and what it meant to the morale out there of the Forces in knowing that the country was really behind them. That is a long way of saying I believe that very strongly indeed.

**Q152 Chairman:** If I could just pick up one part of your very interesting response when you talked about parliamentary and public approval. As you know, what this Committee is wrestling with is what role Parliament should and could play in mustering and expressing public approval and legitimising action which has traditionally been taken as a straightforward executive Crown privileged decision. That is what we are wrestling with and we have found out already it is a great deal more complicated than

25 January 2006

Lord King of Bridgwater

we thought it was when we started, but I would be grateful if you would just develop for us your own thoughts on the pros and cons of parliamentary involvement at whatever level and how that could work in the future?

*Lord King of Bridgwater:* I am in absolutely no doubt, and I think Lord Bramall said this to the Committee, that at some time Parliament has to be fully involved and it has to be able to give on behalf of the nation clear evidence of support for action which may be taken. We do not seem to go to war any more, but armed conflict in those situations. But at the same time the thing I noticed is that none of these events are the same. If you took three different events, Falklands, Iraq number one and Kosovo, they are quite different in character and origin. I am obviously very influenced by Iraq one, and I might just rehearse the dates, which I think are interesting in this connection. The Committee asked me to appear and it gave me an opportunity to read back and I dug up Margaret Thatcher's speech of 6 September on the recall of Parliament after the invasion of Kuwait. Actually what happened was—and whether Saddam Hussein had read Hansard and knew Parliament was going to recess, and Congress also, but actually the House rose on 26 July, Saddam Hussein invaded Kuwait on 2 August and I was in Scotland, Douglas Hurd was in Devon (he told me this afternoon) and I think Margaret Thatcher was on her way to Aspen to receive the award of the Freedom Institute in Aspen at that time. So our political defences were disorganised, Parliament had spread to the winds and yet the action which had to be taken (which was immediate) had considerable implications that it could lead to armed conflict in the future. Actually the first actions we took could be described as peace-keeping. We put in place what was called the Desert Shield. The Americans acted extremely quickly and we followed them up and we put Tornados into, I think, Saudi Arabia, we had Jaguars into Bahrain, we put an air shield in, with the absolute implication against what was a very real possibility at that time that after the ease of the invasion of Kuwait—which I think surprised the Iraqi generals themselves—of course the real risk and fear was that Saddam Hussein would keep going and the eastern province of Saudi Arabia with its oil resources would have been a huge prize. There is considerably subsequent intelligence evidence that that was his intention and his intention was actually to smash up Saudi Arabia and to partition it, the Yemen taking the south, perhaps Jordan annexing the Hejaz, and Saddam Hussein taking the oil provinces. So we put in immediate place this defence shield and that was done in the first week of August. The Government then continued to take necessary steps. It is quite interesting because actually the Government recalled Parliament and I do not think there was a huge

pressure in the weeks of August, it gradually grew that actually perhaps Parliament ought to meet. But there was not much doubt, I think, at that time, it was not very controversial, that what the Government had done had to be done, action had to be taken to stop this and there was public support. I do not exactly remember the details of that. It is interesting that it was a month after the invasion before actually Parliament met.

**Q153 *Baroness Hayman:*** It is very interesting to hear you describe the different situations in which military action can take place and it seems to me that the arguments which have been put to us for our approval by Parliament fall into two quite separate categories. One is the constitutional propriety argument, if you like, that a government should be held to account by Parliament for this most serious of activities, exposing its troops to potential harm or to harming others. Would I be right in thinking from what you said that perhaps the diversity of situations which you encountered would suggest that the timing of such parliamentary involvement would have to be specific to the circumstances rather than that it would be possible to construct a system where parliamentary approval was always given other than in offensive emergencies for any type of action, whether it was special operations in advance of something else or whatever? That is one question. The other is about the second set of reasons which are given, which have been very much about military morale and the feeling that this would prove that the nation was in support of the Government. Do you think that is proper? I have listened to what the Lord Chairman said when he introduced the question, about whether Parliament was there to 'muster public approval for the enterprise'. That was in the form of a question. Parliament is not normally there to muster public approval, it is normally there to expose debate, and I would be interested in your view of whether soldiers (as we have heard from Colonel Collins) might have been concerned because there was argument about whether it was the right thing to do, to go to Iraq and whether there would have been any comfort in parliamentary debate, or indeed whether there should be comfort in these situations, which are complex, which require judgment and in which people of goodwill will disagree about the right thing to do. Is that not a sort of romantic ideal that we can have, the Government, the people and everyone completely behind an enterprise?

*Lord King of Bridgwater:* I am of the view that Parliament's job is to reflect. They are there to represent. I do not think my Lord Chairman meant "mustering" in that sense. The Government has got to try and muster and it is Parliament which has got to assess whether it agrees with the mustering efforts or not, putting it in that language. I do not want to

25 January 2006

Lord King of Bridgwater

get into the Gulf War two because I do think it is a real problem, bluntly. It is a much more difficult case to explain, I do not think it has been explained actually, and I think there is a real problem and I think it is very unfair to our soldiers if they do not have a very clear understanding of why they are there and know that there is strong public support for them in very dangerous situations. It is interesting to come here today on a day when the Secretary of State for Defence, John Reid, has had to stand up and make an extremely long statement all about whether there has been a leak to *The Sun* newspaper about the deployment of troops in Afghanistan, an extra deployment. Another interesting point, though I do not know whether it is relevant, my Lord Chairman to your inquiries, is that at the moment we do not know whether the Dutch Parliament is going to vote to be part of the alliance, which is rather a key part of the whole thing. So we have the contrast of those two systems actually demonstrated today. It is why you have to keep the flexibility, which I think is the first point of your question, and you cannot lay down precise timetables or dates. The thing which is interesting about the First Gulf War was the mission creep, by which I mean—and I had actually forgotten this—Margaret Thatcher, when she spoke on 6 September, said that the whole purpose of our exercise and the strategy was sanctions and the preferred method was comprehensive economic sanctions, collectively and effectively in place. That is what we wanted to do to get Saddam Hussein out of Kuwait. We wanted to put a shield in, self-defence, aiding our allies, Bahrain, Saudi Arabia, Oman and the Gulf States, and then economic sanctions. But the United Nations resolutions which were passed at that time she took and claimed on the floor of the House on 6 September that actually if that did not work entitled us then to proceed to military action and a voice which came from the backbenches put his finger absolutely on it, Mr Tony Benn, who said, “As I understand it, what the Rt Hon Lady has said is that the United Nations’ Charter and the resolutions which have been passed have already here and now given her legal authority, if it comes to it and is decided, to take military action against Kuwait. I take it that if we vote for the Rt Hon Lady’s lobby tomorrow night”—this is when she was recommending economic sanctions—“she will claim that to be an endorsement of that view. Is that her view? People think”—there is a certain similarity here—“that America may go to war and Britain, which is quite a minor part of the operation, will be dragged into it before the House resumes.” That was 6 September 1990. So what I mean about this is that that is what happened, of course. We had mission creep, we had peace-keeping, we had economic sanctions, we then had ship sanctions and, if you remember, we started climbing aboard their ships

and there was a bit of violence on the ships, there was an escapade when they came across the border and there was a gun fight then, and gradually the thing builds up. Then, of course, you actually move to the situation in which they do not get out and the implication of the resolutions is that you then actually go to armed conflict.

**Q154 Baroness Hayman:** Does Parliament have to rely on the good faith of the Government to come back at the appropriate time when mission is creeping?

*Lord King of Bridgwater:* What you have to do then, because it was in early January that we actually started the campaign—we kept reporting and we had a number of votes and each time we had a vote I think the majority was greater than the last time, admittedly on the adjournment.

**Q155 Baroness Hayman:** But you kept reporting that was a voluntary action?

*Lord King of Bridgwater:* Yes, but I think it was the correct action for a government, because I think it is absolutely essential that a government knows that it has the support of Parliament and people through Parliament.

**Chairman:** I am grateful just for the chance to set the record straight. I was not actually recommending that Parliament was a cheerleader!

**Baroness Hayman:** Describing something rather than advocating it.

**Q156 Lord Carter:** Before I ask you a question about the parliamentary mechanism, you said there was a number of votes in 1990 on the adjournment. So on the last Iraq war, would you say that in the most recent vote in the House of Commons that was actually on a motion of support for the Government which was voted on?

*Lord King of Bridgwater:* I think that is right.

**Q157 Lord Carter:** Is there in fact a distinction between a vote on the adjournment and a vote on the motion to support the Government?

*Lord King of Bridgwater:* Usually there is an amendment to the vote on the adjournment and that in itself is perhaps in the negative, the reverse way, the vote of confidence in the Government if that amendment is defeated.

**Q158 Lord Carter:** So the idea that when the Commons voted as they did in 2003, that was not unique, that had been done before in effect on Iraq one?

*Lord King of Bridgwater:* Yes. As I say, I think ours were entirely votes on the adjournment, but somebody can confirm that.

25 January 2006

Lord King of Bridgwater

**Q159 Lord Carter:** The main question is, we have heard that a joint parliamentary committee should be established, with a watching brief over the work of the Armed Forces and the power to trigger parliamentary debates or recommend military action. What do you think of this idea?

*Lord King of Bridgwater:* This is this difficulty about keeping flexibility. If you start to give them some sort of executive authority, I think you get into real trouble. I think for a parliamentary committee to recommend military action is an appalling idea, actually. I am sorry to be so blunt.

**Q160 Lord Carter:** This suggestion is a joint parliamentary committee, which of course involved the House of Lords. We have had discussion about what would happen, if there were to be votes to go to war, or whatever, if there was a vote in the House of Lords. I do not think we have had a vote in the House of Lords. We certainly did not on the last Iraq war. I do not think there were votes in the past; it has always been left to the Commons. What would happen if there were votes in the two Houses and in fact they differed on deployment, or whatever?

*Lord King of Bridgwater:* It depends on the circumstances, does it not? In the Falklands would anybody have said, "No, give them to Argentina. We don't want to send a task force"? My experience of these votes is that they have got, I think, progressively more difficult and the reason why actually I am not against some form of parliamentary post-check on executive action is that at least it would discourage ministers from too easily sliding into the option of some military intervention here or there. I think we tend at the moment to be slightly in danger of thinking, "We've got our Armed Forces. We might as well use them and when something comes up somewhere why not get involved and earn a bit of goodwill here or a bit of goodwill there?" I think this needs to be considered very seriously. So in that respect I think it is important, but I think it has to be an executive decision and it has to then be prepared to take scrutiny from Parliament in one form or another. I actually thought that what the Prime Minister said on this made sense. In the real world, although perhaps the last illustration is not a terribly convincing example of this, if the Government gets it seriously wrong they will pay a heavy price for it.

**Q161 Chairman:** I am coming to Lord Bledisloe in a moment and then Lord Sandwich, but do you have any thoughts on how Parliament could itself get organised to provide that effective post-scrutiny, including the sorts of issues of mission creep which have come up? Looking at it as a parliamentarian, as opposed to a former minister, do you have any sense of what Parliament should do to make itself more effective in that way?

*Lord King of Bridgwater:* Perhaps I will just go back a bit, because you said post an event. I do think as much as possible should be done pre.

**Q162 Chairman:** Well, pre and post perhaps?

*Lord King of Bridgwater:* Yes, because whether it is the briefing of Privy Counsellors, whether it is the briefing of opposition parties—you see this in the States—and perhaps calling in the Chairman of the Armed Services Committee, maybe the Intelligence Committee, whatever it may be, some sounding of the ground. I think you are a pretty brave Prime Minister, Secretary of State for Defence, whatever you are, if you do not have some idea how colleagues are going on this. I do not know if anybody saw Mr Reid today, but apparently the Cabinet has not yet been consulted on the statement which he is going to make tomorrow. That is what he said in the House and that is why he did not want to make the statement today, but you do need to have a bit of an idea of what your colleagues are going to say about the view you take on it, and I mean by that parliamentary colleagues as well. One of the ways which of course helps to ensure post the even the best possible outcome is the more you can take into your confidence pre the event who in a sense are committed to it at that stage can be very helpful, and that is true of any parliamentary policy.

**Q163 Chairman:** That is clearly very desirable, but let us look at it from Parliament up rather than from the Government down. How can Parliament make sure that happens? How far can Parliament in an organised way assert its power to make sure that happens?

*Lord King of Bridgwater:* Well, it does, does it not? I think it is backbench power which has to do it, and I think it does do it. In my experience, we always had debates. The Falkland debates. I remember the House being recalled on a Saturday. A pretty dramatic Saturday that was in the House, and I think Lord Goodlad and others may remember that. The Government also, in my experience, is pretty anxious to know that it has got Parliament with it, because it is only just heading down a black hole if it does not ask Parliament before it goes. I forget the exact circumstances, but Baroness Thatcher in her speech on the 6th said that the Government had asked for Parliament to be recalled. I do not know whether that might have been a mutual decision, but I think a sensible Government will want to keep Parliament involved rather than storing up trouble. As I said, all these things are different, but if it is of a gravity and seriousness that people get seriously involved and concerned about then backbenchers will insist on the opportunity to debate it and if it is controversial they will vote it, albeit under whatever parliamentary

25 January 2006

Lord King of Bridgwater

convention, an adjournment, whatever form it may take.

**Chairman:** Thank you. I would like to bring Lord Bledisloe in.

**Q164 Viscount Bledisloe:** If there is to be a formalised parliamentary control over some types of deployment of Armed Forces, how on earth is the degree of deployment to be defined? Clearly, the Gulf War and the Falklands are new deployments and major deployments, and that is easy, but I would like you to look at this perhaps with your Northern Ireland hat on, so to speak. I would presumably be right in thinking that we have always had some troops in Northern Ireland and that as the Troubles got worse we sent somewhat more troops there, and then perhaps some of them came back. Then it got worse again and some more went, and presumably their tasks changed somewhat. In circumstances like that, do you see it being practical, and if so how do you define the changes in deployment or level of deployment, or level of mission, which do need parliamentary scrutiny or parliamentary approval and which do not?

*Lord King of Bridgwater:* The tactical deployment of troops is very much a matter, I think, for the officer commanding. I used to have a Security Committee in Northern Ireland, but it would be a pretty brave Secretary of State who actually completely countermands what your security advisers are saying, for instance on the level of troops and what is required in those areas, if you have the Chief Constable and the GOC coming pretty strongly about what their requirements and needs are. The idea that Parliament will actually then second-guess that as well I think is quite difficult. I stand on the basic principle that the Government has to take the decisions and then has to be prepared to justify them and stand up to scrutiny, and that is very much the job of Parliament and it should do it. I understand the desire of the Committee to find the best way to do it, but there is a procedure here in that sense that you must not take away from where the executive authority and responsibility has to lie and hold people accountable.

**Q165 Viscount Bledisloe:** I see that, but you were talking in certain circumstances about pre-approval from Parliament. Presumably, if we suddenly decided that we needed twenty times as many soldiers as we had in Northern Ireland that would be a real change which needed, in these circumstances, parliamentary approval. But how does one measure where it is just a new tactical deployment or where it is a total departure into a new field?

*Lord King of Bridgwater:* I do not think that even the introduction of troops into Northern Ireland, when Prime Minister Callaghan originally announced that,

had any parliamentary process attached to it other than a statement in the House. I may be wrong about that.

**Q166 Viscount Bledisloe:** That is what is being suggested should be changed.

*Lord King of Bridgwater:* I see. I think scrutiny by select committee, the Defence Select Committee, scrutiny by Parliament through debates, through other mechanism after the event, and maybe sensible anticipation in certain circumstances. But I think it is very difficult to have sort of pre-approval, if that is the idea, or parliamentary approval of specific details, even if they are of a significant scale.

**Q167 Chairman:** May I ask a supplementary to that. I thought your opening statement about the role of the Secretary of State, the Defence Secretary, was extremely interesting and presumably part of the answer to Lord Bledisloe's question is the point at which a Secretary of State for Defence would think, "Hang on, I'm being asked to change the mission in a significant way, perhaps with a concomitant change in resources applied," would be in political terms a parliamentary issue and not simply an executive military implementation, an operational issue? It would be more than that, it would be a step change of some sort. I just wonder whether from your experience you can identify the sort of change in mission that I am talking about?

*Lord King of Bridgwater:* Well, you are going to get it tomorrow when John Reid is going to make a statement about the deployment of a significant number of more troops, as I understand it even irrespective of any vote which subsequently comes from the Dutch Parliament. That he has assessed. It is interesting that he has already assessed that he had better come to the House today to answer this urgent question as to whether the story in *The Sun* was correct, which he said was not in terms of the fact that it had already been decided. But we may well find tomorrow that the details of it are not hugely different, when he makes the statement tomorrow. But his political assessment is that he had better make that statement in the House, and I think that is absolutely right.

**Q168 Earl of Sandwich:** Could I continue with that example, Lord King. Would you not say the Government has got away without very much scrutiny of the Afghanistan campaign over the last two and a half years?

*Lord King of Bridgwater:* Well, it has certainly been very much screened by the events in Iraq.

25 January 2006

Lord King of Bridgwater

**Q169 Earl of Sandwich:** But I do not detect that you are recommending any changes to the present position whereby there is not automatic scrutiny through select committees?

*Lord King of Bridgwater:* I have not seen the work programme of the Defence Committee, the Commons Defence Select Committee, but I know they certainly examined it and raised a number of issues on Afghanistan. I do not know how many times they have scrutinised different aspects of it, but I am sure they have.

**Q170 Lord Smith of Clifton:** Lord King, like Baroness Hayman, I was quite taken with your distinction between the different sort of wars and that they have their own specific context, but we have heard a great deal of evidence that of course since the Iron Curtain came down the nature of war has changed rather a lot. The Falklands was almost a nineteenth century war, in a way, a throw-back, and indeed Iraq one because of Saddam Hussein's preemptive strike. Coming on to Afghanistan, it is a war of choice (if any of the wars are at the moment) and it seems to me that the legislative oversight of wars of choice is likely to be somewhat different from ones where you have to resort very quickly, in the case of the invasion of Falklands or Kuwait. When you start them or when you finish them—perhaps you cannot finish them so easily, but when you start them it does not make much difference whether it is July, August or December, or something like that. Does this not imply that Parliament ought in some way to be able to intervene in these sorts of choices, rather than simply having executive action and post-executive action scrutiny, that there should be more informed debates about, if you like, the nature of British intervention in various parts of the world, why we go into Afghanistan, what we do if we go into Rwanda, for example? It seems to me that that is what is lacking. If the nature of war has changed, so has the nature of democracy to some extent in the same period. I think with the change in technology, and so on, the electorate is better informed and somehow Parliament has not quite caught up with this new situation?

*Lord King of Bridgwater:* Would you define “war of choice” as anything which was not the direct defence of your own country? I think that is probably true. That may be a war of obligation. I do not know what you would call it, the defence of our own country if we are under attack, and that after that they all become wars of choice. I am sure if President George W Bush was sitting here he would not say it was a war of choice, but he would have said that having been attacked on 9/11 by terrorist groups which have been supported by the Taliban in Afghanistan it was a war of necessity for the defence of the United States and that it was carried out in self-defence, and that

Rwanda had never attacked them. So you start to submission-divide what is a war of choice. How much choice have you got, I suppose is the answer, in those wars of choice? I do think you are on a serious mission here in this Committee in the sense that the temptation to start getting involved in all sorts of different parts of the world and how you can sharpen up just a further little pressure on ministers. The Armed Forces are there. The great failing of the Armed Forces is that if you ask them to do something, their instinctive reaction is to stand to attention, to salute and say, “If that’s what you want, Secretary of State, of course we’ll do it,” and it is only afterwards that you find that they actually considered it absolutely ludicrous. That is a rather frivolous comment, but it is one of the wonderful things, that they are trained to carry out orders. The danger then is that ministers who may not be particularly familiar with the military and the issues involved may think they are easier than they are and may think the resources are more unlimited than they are, and there is the need for some post-scrutiny and making people understand they have to answer for their account. One of the points you have not raised is the question about giving people access to intelligence and whether there should be some greater access by a parliamentary committee or scrutiny. I think it is quite difficult actually. We all lived through “the dossier” experience and you see the difficulties which can arise in that field, as to whether you are really being given enough, or know whether you have got enough to really validate a decision I suppose is what I am saying.

**Q171 Chairman:** I want to bring Lord Carter in probably with a final question, but could I just revert to what you were saying before your point about intelligence. In a sense the Defence review and the way in which the Armed Services’ future organisation is thought through in the Defence review is structuring the choices which you can make in the future. So the Defence review is saying that you will have certain sorts of capability and you will not have other sorts of capability, and therefore almost by definition the decisions you are making as a Secretary of State for Defence with the Defence review is to cut off certain options and to leave other options which seem more likely open. So at a strategic level you are pre-making a certain number of possible choices. You are not actually agreeing deployment, but you are making some deployments possible and recognising others may be something which this country cannot take part in because our services cannot cope with that particular operation. So I wonder whether there is a question at the level of pre-approval or pre-parliamentary involvement about the way in which Parliament has insight into and

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25 January 2006

Lord King of Bridgwater

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oversight of the major strategic future capability of the Armed Services?

*Lord King of Bridgwater:* I think Parliament has to delegate that to its own Defence Select Committee and its advisers. I do not think there is any other way. The complexities of military strategy and procurement cannot be handled in any other way than that. The history of the Defence Committee shows that they have focused a lot of their attention on procurement issues which, as you say, my Lord Chairman, can really pre-determine the sorts of capabilities we are going to have and the sorts of initiatives that we can undertake. Indeed, we have found ourselves pretty exposed at times and the hiring of C17s and other things gives us a greater mobility. That is an illustration of where we have not actually planned sufficiently in advance to give ourselves the mobility which we then found we needed for rapid deployment in unexpected areas. Undoubtedly with the other war which was never a war, the Cold War, we were so long immersed in that and completely bogged down in that that we took time to adjust to the new and much more varied situations which we face.

**Q172 Lord Carter:** There is one change which we have not mentioned in what happens in these situations, which is the role of the media now with journalists actually embedded in the actual operations and the 24/7 news and all the rest of it. How does that react on the role of Parliament in holding the Government to account? This is in fact a quantum difference, is it not?

*Lord King of Bridgwater:* I think it comes down to the fact that Members of Parliament of both Houses get rather better information than they would otherwise get.

**Q173 Lord Carter:** Exactly, that is the point. Does that replace the role of Parliament or does it change the role of Parliament?

*Lord King of Bridgwater:* I do not think it does. It is part of the process. In the first Gulf War I saw it as a very clear part of my responsibility to make sure that the country was as well-informed as it could be as to

what was going on. We were very proud of what we were doing. We believed our objectives were absolutely honourable and fair and wanted people to know that and be proud of the way our Forces were going about it. The Ministry of Defence at that time was still—not under the shadow, but it had never quite shaken off the image of Mr Macdonald in the Falklands War, who gave everything out, if I remember, at dictation speed in a pretty sombre voice. We were very keen to break away from that. It is a bit of a digression, but one interesting thing is the importance of communication, which is important because Members of Parliament read newspapers as avidly as anybody and so it is an alternative source of communication. They know many of the defence correspondents and they know the sort of people they respect whose views are worth reading and hearing what is happening. It is a tremendous challenge in some of these areas and Peter de la Billiere could not understand why I was always ringing up and saying, “I want the latest information.” They have just had a press conference in Riyadh. With the time change, five hours later we were on in London and five hours later Dick Cheney (who was then the US Defence Secretary) was having a press conference in the Pentagon. The challenge of keeping in step and the challenge of feeding the media and making sure they had something and knew what was going on was a really difficult problem. We tried to ensure also that we had media-friendly officers presenting it.

**Q174 Chairman:** On that deeply impressive note, thank you very much, Lord King. It has been very useful to have your insight. Thank you very much indeed. If, in retrospect, there is something you feel you would like to develop, please feel free to do so.

*Lord King of Bridgwater:* Thank you very much. I appreciate that courtesy and I might well because you are making people like me focus on issues. I am not a lawyer and I have not addressed the niceties of some of the legal background to this, but I do actually think you are on a very serious point, although I have entered the caveat about why in the final analysis the ability for executive action by Government must not be impeded in the interests of national security.

**Chairman:** Thank you very much indeed.

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WEDNESDAY 8 FEBRUARY 2006

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Present	Bledisloe, V Elton, L Goodlad, L Hayman, B Holme of Cheltenham (Chairman)	O’Cathain, B Peston, L Sandwich, E Smith of Clifton, L Windlesham, L
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**Memorandum by Dr Andrew Blick, Professor Paul Hunt, Professor Stuart Weir, Democratic Audit,  
Human Rights Centre, University of Essex**

**Summary**

Prerogative powers in general should be placed on a statutory basis, but as a matter of priority the United Kingdom requires an Act making Parliament the source of authority for the deployment of the armed forces and for their hostile engagement abroad. The UK is exceptional in that it has no formal procedures for involving the legislature in war-making and the argument that a convention could remedy the position is ill-conceived.

The international model most often cited for consideration is the US 1973 War Powers Resolution. A UK equivalent should take into account the weaknesses we cite in the US version. Other nations, such as Sweden, offer alternative arrangements.

We advocate a two-tier system for parliamentary approval of troop deployments allowing for non-combat and “potential or actual” combat situations. The latter would require statutory arrangements for formal approval, detailed reporting and regular renewal of the parliamentary mandate. We take into account the need for possible emergency action by the executive.

Parliamentary involvement in war-making is compatible with the North Atlantic Treaty, which allows for the “constitutional processes” of member states. The government must be obliged to satisfy Parliament that troops placed under the operational control of another state will respect domestic and international law.

The Attorney General’s legal advice on any potential conflict should be published in full. Parliament should be able to supplement that advice, either through establishing its own legal officer, or having the power to commission an opinion.

The courts would naturally have the power to ensure that a government conforms to future war powers legislation and international law. An Act of Parliament would regulate the courts’ use of such power and bring making war within the democratic process in a way that is not possible while it remains a matter of executive discretion under the Royal Prerogative.

Democratic Audit has just participated in a joint study of the relationship between the executive and Parliament in making UK foreign policy. We found that the extensive use of the Royal Prerogative over a wide range of external policies, including the deployment of armed forces abroad, makes for negligible and spasmodic parliamentary scrutiny of the executive’s foreign policy-making and in effect also rules out judicial scrutiny.<sup>1</sup> The broad, and necessarily retrospective, doctrine of ministerial responsibility to Parliament is too vulnerable to executive power to be an effective check on executive use of the prerogative.

**1. What alternatives are there to the use of royal prerogative powers in the deployment of armed forces?**

It is said that the processes by which the UK joined in the invasion and occupation of Iraq have established a convention that the executive must now seek parliamentary approval before engaging in hostile action abroad. For various reasons, we believe that this view is mistaken. What seems to be certain, anyway, is that the executive does not accept that such a convention would require a vote on a substantive motion approving military action abroad (see the Prime Minister’s comments to the Commons Liaison Committee, February 2005). Conventions are also notoriously elastic and the rules on going to war in a democratic state require clarity. We recommend that prerogative powers in general should be placed on a statutory basis, and agree with the Public Administration Select Committee that those relating to making war and treaties require urgent

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<sup>1</sup> *Not in Our Name*, by Simon Burall, Brendan Donnelly and Stuart Weir, is to be published by Methuen (Politico’s) in January 2006. This is a joint study by Democratic Audit, the Federal Trust and One World Trust.

8 February 2006

attention.<sup>2</sup> The legislature should be the source of authority for the deployment of the armed forces and for their hostile engagement abroad. This is not only a democratic issue. Good policy-making depends on effective parliamentary scrutiny and wide public debate.

## 2. Can models, drawn from the practice of other democratic States, provide useful comparisons?

The UK is once again “exceptional” among democratic states in that it has no formal procedures for involving the legislature in war-making. In our view, Sweden provides the most useful European model. Its “Instrument of Government” applies to all foreign troop deployments—not just declarations of war or involvement in battle. Military deployments and engagements in action are subject to various requirements including consent from the *Riksdag* (Parliament) and compliance with domestic statute and international agreements. There is provision for emergencies and self-defence.<sup>3</sup>

The model which is most often cited for consideration is the US 1973 *War Powers Resolution* (commonly, but incorrectly, known as the “War Powers Act”).<sup>4</sup> Under the US Constitution, Congress is responsible for declarations of war while the President is Commander in Chief of the Armed Forces. Presidents however have been able to participate in *de facto* warfare stopping short of a full declaration of war. The War Powers Resolution was Congress’s response to such presidential activity, especially in Vietnam, and it requires prior consultation with Congress, wherever possible, where “the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities” is likely. We regard this “commonsense” formula as preferable to an attempt to create a precise legal definition. The Resolution requires a detailed report within 48 hours of military action, with follow-up reports at least every six months. If Congress does not authorise the action, then troops should be withdrawn within 60 days or may be withdrawn at any time through concurrent Congressional resolution.

The Resolution has not in practice strengthened Congressional control over the President’s war-making powers. Prior consultation is a vague concept, stopping well short of prior authorisation, which we recommend for the UK. Congress has proved reluctant to use the powers at its disposal, for instance failing to enforce the 60-day rule after President Reagan’s deployment of troops in the Lebanon in 1982. Successive presidents have denied the constitutionality of the Resolution since it was passed over President Nixon’s veto. If Parliament is to play a greater role in decisions over war-making, MPs must be willing to use the powers given to them; and a major constitutional realignment such as this in the UK would have to win widespread acceptance.

There is also a need to legislate for specific, clearly circumscribed mandates for military action; otherwise the purpose of such legislation can be nullified by open-ended authorisations. For example, in the aftermath of 11 September 2003, a joint resolution in Congress allowed the President to “use all necessary and appropriate force against those, nations, organizations, or persons” he deemed culpable, in order to stop future international terrorist acts. In October 2002 the President was given the go-ahead to act “as he determines to be necessary” to defend national security against Iraq and enforce relevant UN Security Council resolutions. We believe that under UK legislation such wide executive discretion should never be granted. Regular, affirmative renewals of authority and clear parameters should apply in all cases.

## 3. Should Parliament have a role in the decision to deploy armed forces?

Yes. Parliament’s exclusion from formal involvement in such decisions is unacceptable from a democratic standpoint and reduces the level of scrutiny of executive activity, making bad policy-formation more likely.

## 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?*

Yes. Legislation on the deployment of troops could introduce a two-tier system. An Act could require the executive to present an annual report to Parliament, setting out total deployments in both hostile and non-hostile circumstances. This report should be separate from the present MoD annual report and could be

<sup>2</sup> *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*, Public Administration Select Committee, HC 422, 16 March 2004.

<sup>3</sup> See *How to Go to War: A Handbook for Democratic Leaders*, by Andrew Blick, Methuen 2005: 61–66.

<sup>4</sup> *War Powers Resolution of 1973*, Public Law 93–148, 93rd Congress, H J Res. 542, 7 November 1973. See also *The War Powers Resolution: After Thirty Years*, by Richard F. Grimmett, Congressional Research Service, Library of Congress, 11 March 2004; and *War Powers Resolution: Presidential Compliance*, also by Grimmett, Congressional Research Service, Library of Congress, 14 November 2004.

8 February 2006

debated by the plenary of both Houses and formally approved by a vote of the Commons (after scrutiny by the appropriate committees).

Parliament would also be asked to approve individually all troop deployments falling into two categories—non-conflict deployments involving more than a fixed number of troops; and deployments into “potential or actual” combat situations. In both cases the executive would be required to submit a report specifying the purpose of an operation, its likely duration and cost, provision for civilian and troop safety, and so on.

Special conditions should be attached to deployments in “potential or actual” combat situations. The executive should be required to inform Parliament as fully and precisely as possible without prejudicing the success of an operation or the safety of British service personnel. There should be no provision for open-ended authorisations of the kind that have sapped Congress’s role in the United States. A statement of compatibility with international law and human rights obligations would be required. There could be an accompanying collective endorsement of the operation, issued under the names of all Cabinet members who were present when the action was agreed. Depending in part on future arrangements for the House of Lords, such deployments could be debated by a plenary assembly of both Houses, but would require the specific approval of the House of Commons.

Legislation should be drafted to “catch” all significant military action and deployment and not simply major engagements. For example, the process of going to war against Iraq in 2003 was subject to public and parliamentary debate and approval. But hostile action against Iraq began earlier with the “spikes” of US and UK air raids under cover of enforcing the established protection zones over Iraq. These strikes and their purpose were concealed from Parliament. Further the plans and deployment of UK forces for hostile action against Iraq began long before the final parliamentary vote. If Parliament is in recess at the time of potential or actual combat, the executive should be required by statute to recall Parliament. (Non-combat deployments would not require the same urgent attention.) The government should be required to report regularly to Parliament and renew its mandate for action on the basis of this periodic report (say, every 60 days). If Parliament refused renewal, troops would have to be withdrawn immediately, subject to their safety and that of non-combatants in the area. If the government wished to alter its mandate, it would require specific parliamentary approval, either within or separately from the periodic renewal. There might also be provision for a resolution of the Commons or both Houses forcing the withdrawal of troops at any time.

Given the executive’s reluctance to recall Parliament on previous occasions, it would be wise also to give Parliament its own power of recall, as recommended by the Hansard Society Commission on Parliamentary Scrutiny<sup>5</sup> and the joint Democratic Audit/Federal Trust/One World Trust report.<sup>6</sup> It would also be important to give Parliament its own legal counsel to complement the advice that the executive receives through the Attorney-General; and also to strengthen Parliament’s ability to scrutinise the government’s foreign policies, possibly through a new parliamentary scrutiny agency and/or new select committee arrangements. A joint committee of both Houses could be set up with a watching brief over foreign policy as a whole, but with a remit to identify potentially hostile military actions and the power to trigger parliamentary debates when it judges the government has engaged in operations that may end in conflict. It should be able to exercise plenary powers when emergency circumstances make a full parliamentary gathering impossible (similar arrangements exist in Germany). It could also take on a more positive remit, for instance recommending military action for humanitarian purposes.

Major internal troop deployments of the past—including into potentially hostile circumstances in Northern Ireland—have been of great significance and controversy. Domestic operations of the future, for instance in relation to a terrorist threat, may be too. But directing the disposition of the armed forces *within* the UK is also a prerogative power. A clear, formal parliamentary role, mirroring that for foreign deployment, is therefore essential.

(b) *Should Parliamentary approval be required before British forces engage in actual use of force? Is retrospective approval ever sufficient?*

Government will always plead the need for discretionary powers to take urgent executive action over democratic accountability. Recent history suggests that occasions on which urgent action is necessary are very rare. But as in Sweden, it is possible to specify the circumstances in which a government is not required to seek prior parliamentary approval—for instance, rapid responses to surprise attacks—or it is not prudent to do

<sup>5</sup> *The Challenge for Parliament: Making Government Accountable*, Hansard Society Commission on Parliamentary Scrutiny (chairman, Lord Newton of Braintree), Vacher Dod Publishing, 2001.

<sup>6</sup> See note 1.

8 February 2006

so—say, hostage rescue missions. But the presumption should be that government would seek approval whenever possible; and reports would have to be presented to Parliament within a specified period (say, within 48 hours) for retrospective judgment and approval. MPs could then disavow or halt the operation.

**5. Is there a need for different approaches regarding deployment of UK 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?**

(a) No. The UK is party to the North Atlantic Treaty, a mutual defence pact. It may be argued that the commitment is incomplete if its fulfilment is subject to parliamentary approval. But the Treaty provides for signatories to execute its provisions “in accordance with their respective constitutional processes.”<sup>7</sup> Thus a statutory duty on government to obtain parliamentary approval for military action is compatible with NATO membership. The War Powers Resolution has certainly not inhibited US participation in NATO. As well as the US most NATO members have greater constraints than the UK upon the war-making powers of the executive—including monarchies such as Holland and Sweden. Furthermore, the UK is unusual amongst NATO member states in having no formal role for Parliament in treaty-making—a fact which compromises the democratic legitimacy of UK participation in NATO still further. For instance, the Dutch Constitution states that “The Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the Parliament.”

(b & c) No. Such actions would by their very nature comply with international law, but it would still be proper to seek democratic approval in the UK and to comply with any statutory requirement to that end. Major military actions of the past in pursuit of UNSC resolutions include the Korean and the first Gulf wars; participation in these would ideally have been subject to a government report and a parliamentary vote.

Moreover, as discussed above, the *de facto* campaign to remove Saddam Hussein arguably began in 2002—under the guise of ongoing action to enforce UNSC resolutions. The detailed reporting we envisage could have exposed the use of this tactic and required parliamentary authorisation.

The United States UN Participation Act allows for deployments of up to 1,000 non-combatant troops without specific Congressional authorisation. A similar provision may be included in the relevant UK Act, but in principle such deployments should be subject to parliamentary approval, especially as the distinction between peacekeeping and engagement in conflict may not be clear.

(d) Any commitment to placing troops under the operational control of another state must be subject to full parliamentary approval. Government should be required to satisfy Parliament that any military action under the operational control of another state would remain within the bounds of international legality.

**6. Should the Government be required, or expected, to explain the legal justification for any decision to deploy UK armed forces to use force outside the UK, including providing the evidence upon which the legal justification is based?**

Yes. Government should be required to publish in full the Attorney-General’s advice. Parliament should also either have its own legal counsel or the power to commission its own legal opinion.

**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?**

Yes. Two weaknesses in the US War Powers Resolution are that there is no effective mechanism for judicial review nor an explicit reference to the need to comply with international law. Placing the power to go to war on a statutory basis would make judicial review clearly possible in a way it has not been for the use of prerogative powers. War powers legislation should oblige the government to comply with international law.

<sup>7</sup> *North Atlantic Treaty*, Article 11.

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8 February 2006

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We recognise that this requirement would reduce a British government's flexibility in action, and perhaps especially with regard to humanitarian intervention. The UK government should therefore continue to support the UN's attempts to create a legal framework for such interventions and so develop customary international law.

As to the question of justiciability some might argue that it is not appropriate for courts to intrude into areas of political decision-making. We believe that it would be entirely proper and possible for a court to decide whether a government was acting within statutory regulation of its power, or was in compliance with international law, without inhibiting the application of political judgement by ministers.

22 September 2005

### **Memorandum by New Politics Network**

#### **Summary**

In a Democracy decision-making should be scrutinised and must be accountable to the elected representatives and ultimately to the people. The decision to send troops into armed conflict is one of the most serious that any state can make. That this decision-making process is unaccountable and cannot be effectively scrutinised, is quite simply unacceptable.

Parliamentary scrutiny is not just about influencing the decision of the executive but is also about the constitutional principle of accountability both to Parliament and the people and ensuring that all issues are debated and examined. Clearly the deployment of armed forces is a sensitive issue and information should not be made public that would endanger the lives of service personnel. However this does not mean that only the executive can ever be involved in making these decisions.

Although there was a vote on the deployment of troops there was an issue about independent access to information. MPs were dependent on the executive for the information, specifically the details of security risks, in order to make their decisions. The Chair of the Joint Committee should also sit on the Joint Intelligence Committee so that the Committee can be aware, independently of the executive, of any particular security threats or issues which may influence their decision making. They can then, where necessary, give assurances to Parliament, independently of the executive. There are obviously security considerations which would have to be taken into account and it may well be necessary for these meetings to be held *in camera*.

The plans for the conflict should also be subject to parliamentary scrutiny. One of the key issues to have arisen from the troop deployment to Iraq is the lack of planning for eventualities after the initial military operation. There is significant military experience in Parliament, particularly in the House of Lords, which could have been much more effectively utilised. We recognise that there are issues of operational security that have to be taken into account. However examples from abroad suggest that it is possible to ensure the security of the armed forces whilst also allowing for scrutiny of executive decision-making.

Parliament should approve the deployment of armed forces through a vote on a substantive issue in the House of Commons. In exceptional circumstances where this was not possible before the troops were deployed, the debate and vote would be retrospective. In addition to a vote there should also be parliamentary scrutiny of the military plans, not just the decision to deploy troops. There should be a special joint committee of both Houses to oversee the armed forces, with responsibility for scrutinising the work of the armed forces and in particular any plans for armed conflict.

The New Politics Network the leading political and campaigning think tank, concerned specifically with issues relating to democratic renewal and popular participation in politics. We work with a wide range of groups and individuals to provide a forum to look at emerging ideas in society. Our goal is to provide an independent and innovative debate on the future of politics.

#### **Introduction**

In a Democracy decision-making should be scrutinised and be accountable to the elected representatives and ultimately to the people. The decision to send troops into armed conflict is one of the most serious that any state can make. That this decision-making process is unaccountable and cannot be effectively scrutinised, is quite simply unacceptable.

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8 February 2006

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The question of parliamentary approval for going to war has become a major issue in the context of the decision to go to war with Iraq. Some believe that better parliamentary scrutiny would have led to a different decision. This is probably not the case as there was, for the first time, a vote in parliament, on a substantive issue related to the proposed military action. Parliamentary scrutiny is not just about influencing the decision of the Executive but is also about the constitutional principle of accountability both to Parliament and the people and ensuring that all issues are debated and scrutinised. Clearly the deployment of armed forces is a sensitive issue and information should not be made public that would endanger the lives of service personnel. However this does not mean that only the executive can ever be involved in making these decisions; as demonstrated below there are ways of enabling Parliament to approve the deployment of troops, without endangering national security.

Parliamentary scrutiny would also ensure that not only the decision as to whether to deploy troops was open to parliamentary scrutiny but crucially the plans for the conflict. One of the key issues to have arisen from the troop deployment to Iraq is the lack of planning for eventualities after the initial military operation. There is significant military experience in Parliament, particularly in the House of Lords, which could have been much more effectively utilised. We recognise that there are issues of operational security that have to be taken into account. However examples from abroad suggest that it is possible to ensure the security of the armed forces whilst also allowing for scrutiny of executive decision-making.

### **1. What alternatives are there to the use of royal prerogative powers in the deployment of armed forces?**

Currently there is no requirement for the deployment of UK armed forces to even be debated within Parliament. The decision is part of the Royal Prerogative, delegated to the Prime Minister. Although much has been made of the vote to send troops to Iraq, Parliament still has no formal role in the process and is dependent on the goodwill of the executive to hold a debate on a substantive motion rather than an adjournment debate. While some would argue that this has created a precedent, this is certainly not the Prime Minister's view and an issue of such national importance should not be left to either goodwill or interpretation of precedent.

The alternative would be for Parliament to approve the deployment of armed forces through a vote on a substantive issue in the House of Commons. In exceptional circumstances where this was not possible before the troops were deployed, the debate and vote would be retrospective. There should also be a special joint committee of both Houses to oversee the armed forces, with particular responsibility for scrutinising the work of the armed forces and with the ability to scrutinise any plans for armed conflict. There are obviously security considerations which would have to be taken into account and it may well be necessary for these meetings to be held *in camera*. The Chair of the Joint Committee should also sit on the Joint Intelligence Committee so that the Committee can be aware, independently of the executive, of any particular security threats or issues which may influence their decision making. They can then, where necessary, give assurances to Parliament, independently of the executive.

### **2. Can models, drawn from the practice of other democratic States, provide useful comparisons?**

Yes, there are three case studies that the New Politics Network would like to draw to the Committee's attention, the USA, Sweden and Germany. In each case the legislature has a key role to play in the deployment of armed forces, and troops have been successfully deployed in compliance with these measures.

#### **USA**

The War Powers Resolution (1973) is perhaps the best known example of the legislature being involved in the deployment of troops. Under the resolution Congress is responsible for declaring war while the President is Commander in Chief of the armed forces. The President is required to consult with Congress where the United States Armed Forces are being sent into hostilities, or into situations where imminent involvement in hostilities is likely. The President is required to give Congress a detailed report within 48 hours of military action, as well as follow up reports at least every 6 months. If Congress does not authorise the action then troops should be withdrawn within 60 days.

The resolution has not significantly increased the Congressional control over the President's war making powers, not least because successive Presidents have declared it unconstitutional and Congress has proved unwilling to use the powers set out in the resolution.<sup>8</sup> In practice this resolution has been circumvented by the

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<sup>8</sup> Grimmett. R War Powers Resolution: Presidential Compliance Congressional Research Service brief for Congress, The Library of Congress 2004.

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8 February 2006

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President deploying troops without a formal declaration of war. The concept of prior consultation is rather vague and is much easier to skirt around than the prior authorisation currently being proposed in the UK. It has however ensured that the President reports regularly to Congress, there is a formal mechanism for Congress to hold the President to account.

#### SWEDEN

The Swedish Constitution states that “a state of war may not be declared without the Riksdag (parliament) other than in the event of an attack on the Realm” This does not apply to action permitted under international law or which follows from an international agreement or obligation which has already been approved by the Riksdag. The Government also needs the approval of the Riksdag for funding military operations abroad.<sup>9</sup>

This model has worked well in practice and also demonstrates how the legislature can be involved in these decisions in a constitutional monarchy. For example in 1999 at the time of the Kosovo crisis, Parliament took a decision on Sweden’s mandate and participation in KFOR. The decision was based on a Government Bill and prepared by a Joint Committee made up of the Committee on Foreign Affairs and the Committee in Defence. The force’s mandate was extended by a new parliamentary decision in March 2001.

#### GERMANY

Germany has perhaps the most stringent parliamentary scrutiny of war making powers, which reflects its recent history and reticence to deploy troops. It does however provide an interesting model of how parliamentary committees can play an important role in the process of deploying the armed forces. A Federal Constitutional Court ruling in 1994 requires that the Government must seek parliamentary approval before any deployment of troops. In exceptional circumstances where this is not possible such as where there are time constraints, approval may be sought after the deployment of troops but parliament would be entitled to terminate the ongoing operation. Parliamentary approval is not required for humanitarian relief as long as there is no involvement in armed operations.<sup>10</sup>

In addition to requiring the prior approval of parliament to deploy troops, the German Constitution also established a Defence Committee, which may consider any defence related matter of its own motion and under such circumstances become a committee of inquiry. The Bundestag also elects a Parliamentary Commissioner for the Armed Forces who has specific responsibility for reconciling democratic scrutiny with armed forces requirement.

### 3. Should Parliament have a role in the decision to deploy armed forces?

Yes. It is unacceptable that there is no formal role for parliamentary scrutiny of what is the most serious decision a state can take. Not only is this unacceptable from a democratic accountability standpoint but it also increases the likelihood of bad policy decisions. Parliament should also have the power to recall itself to ensure that this scrutiny can take place. Recall could be triggered by a certain percentage of MPs contacting the speaker to request a recall of Parliament.

### 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?

Yes, it is essential that the principles of executive decisions being subject to parliamentary scrutiny and approval, are established. Legislation should be drafted to include all significant military action and deployments rather than just major engagements or declarations of war. This would also allow for scrutiny of the military plans by Parliament and draw on expertise in Parliament to improve policy decisions and the safety of service personnel.

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<sup>9</sup> Committee for Parliamentary and Public relations National parliamentary scrutiny of intervention abroad by armed forces engaged in international missions: the current position in law Assembly of Western European Union Interim Security and Defence Assembly 2001.

<sup>10</sup> German Parliament website <http://www.bundestag.de/htdocs—e/orga/03organs/06armforce/index.html>

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8 February 2006

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**(b) Should Parliamentary approval be required before British forces engage in actual use of force? Is retrospective approval ever sufficient?**

If scrutiny of the decision to deploy troops is going to be meaningful then Parliament has to have the opportunity to approve the action before the troops are engaged in action. Government will always argue, rightly, that the executive needs to be able to respond to emergency situations and that there may be cases where there is simply not enough time to hold a parliamentary debate. However it must be recognised in any legislation, that these would be exceptional circumstances, rather than the norm. The Swedish model already outlined has clearly defined and limited situations where retrospective authorisation is acceptable. The presumption should be that the Government would seek parliamentary approval wherever possible, before troops are deployed. Where this is not possible a report should be made to Parliament for retrospective approval within a specified time period, for example 48 hours.

**5. Is there a need for different approaches regarding deployment of UK 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?**

No, procedurally the approach should be the same even if politically it may be handled differently. The principle should remain that whenever UK troops are deployed it must be approved by Parliament. This is particularly significant bearing in mind the principle of parliamentary sovereignty, where Parliament can, in principle, refuse to be bound by commitments made by an earlier Parliament. We are not suggesting that this would be an advisable or desirable course of action and in practice it is highly unlikely that this would ever happen but the principle remains that Parliament should have the right to approve or reject any deployment of UK armed forces. However the debate should be framed in such a way as to make clear the nature of the international obligations and the political consequences of a negative vote.

**6. Should the Government be required, or expected, to explain the legal justification for any decision to deploy UK armed forces to use force outside the UK, including providing the evidence upon which the legal justification is based?**

Yes, if parliament is to be able to effectively scrutinise a decision then it has to have access to the legal reasoning behind it. The presumption should be that documents and information should be made available to Parliament as the representatives of the people rather than not. One of the key issues in terms of scrutiny and accountability of the decision to go to war with Iraq was not that Parliament did not have a vote but that Parliament did not have access to information independently of the executive. Obviously there are security issues which have to be considered and not all information regarding a potential threat can be made public on the floor of the House. This is why we propose the creation of a special Joint Committee on the Armed Forces, similar to the German Defence Committee, whose Chair would sit on the Joint Intelligence Committee. This would give Parliament an additional independent source of information.

**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?**

This would be a significant shift in the UK's constitutional settlement. The Government has already made clear that it has no intention of the new Supreme Court becoming a constitutional court, which would have to be the case if rulings on the legality of the use of force were to be made. In the longer term it may well prove to be desirable but is not something we would recommend at the present time.

26 October 2006

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8 February 2006

### Examination of Witnesses

Witnesses: PROFESSOR STUART WEIR, DR ANDREW BLICK, Research Officer, Democratic Audit, and MR PETER FACEY, Director, New Politics Network, examined.

**Chairman:** Good afternoon and welcome Professor Weir and your colleague Dr Blick, and Mr Facey. Thank you for coming. Before we start, I have to ask the members of the Committee whether they have any interests to declare.

**Lord Smith of Clifton:** My Lords, I should declare that I was in at the foundation of the Democratic Audit, that I financed corporately through the Rowntree Trust a number of its studies, and that I am on the advisory board of Democratic Audit at the moment.

**Q175 Chairman:** Thank you. Any other interests? These proceedings are televised, so I would be grateful if each of you would be kind enough, starting with you, Professor Weir, to identify yourselves and perhaps briefly tell us what your organisation does.

*Professor Weir:* I am Professor Stuart Weir from Democratic Audit, which is a research body attached to the University of Essex, more specifically the Human Rights Centre, and our basic work is to audit democracy, events of democracy and human rights both in the UK and internationally.

**Q176 Chairman:** Dr Blick works with you there?

*Dr Blick:* Yes, I am the Research Officer for Democratic Audit.

*Mr Facey:* I am Peter Facey, Director of New Politics Network. We are a political think tank which works on democracy and participation.

**Q177 Chairman:** Thank you very much. Perhaps I could open the questioning. The royal prerogative powers are in the news at the moment and some people have said to this Committee and to others that of all the royal prerogative powers, why is this whole area of decision reserved effectively to the Executive without parliamentary approval. Why select this issue of war-making powers and why treat this in advance of and separately from the whole question? I would be very interested, Professor Weir and Mr Facey, in your thoughts on that.

*Professor Weir:* Well, partly because your Committee decided that this was the priority.

**Q178 Chairman:** That is a rather circular argument.

*Professor Weir:* It is, and partly because the Public Administration Select Committee, which looked at the whole area of the royal prerogative, also suggested that it is such a complex and wide-ranging area that it might be better taken in bits rather than taken as a whole so that something could be done, and that there was an urgent need actually not just for looking at the war-making powers but also looking at

treaty-making and the issuing of passports as the first stages. We are very concerned, in fact, that there is a danger that if only war-making is tackled and only war-making takes precedence then we might get a very narrow solution on that issue itself and that other really important parts of the royal prerogative would be neglected. We would certainly be very pleased if your Committee, when issuing its report, does actually make the report within that perspective, that there is a range of prerogative powers which need to be put on a statutory footing and that simply the most urgent are on treaty making and the areas which require reform.

**Q179 Chairman:** So is your position that the prerogative powers ought to go anyhow and do you see this as the sort of Trojan Horse which will bring the whole edifice tumbling down?

*Professor Weir:* We did initially see this as an opportunity, as a Trojan Horse if you like, but I think our concern now is that it might simply be a way of closing everything off by getting a fairly narrow reform in this one area, rather than tackling the whole range of prerogative powers. That is our concern at the moment.

**Q180 Chairman:** Thank you very much. Mr Facey?

*Mr Facey:* We would broadly agree in the sense that we would like to see the whole issue of the royal Prerogative addressed across the board. However, I would say that there is a particularly strong case for dealing with this specific area because, unlike the issuing of passports, this is an area where we are ultimately talking about life and death decisions. Therefore, for this area there is a particular issue about Parliament actually taking the decision, not just the Prime Minister. So while I would advocate broad reform of the royal prerogative—I would say that there is a strong case for starting here because in fact it is the one which cries out for reform. The idea that our Forces can be put into conflict situations without Parliament giving approval sounds completely out of date in comparison to most western democracies.

**Q181 Chairman:** We have certainly found from our inquiries so far that this issue is in practice more complicated than it seems because of the wide variety of situations in which armed servicemen and women may be required to serve abroad in conflict situations, and that the variety of situations and the conditions which create them are really extremely various. I wonder if you feel that there is a “one size fits all”

proposition in terms of parliamentary approval, any of you?

*Mr Facey:* In our submission, when we were given the opportunity of categorising which areas should have approval or not we took the general principle line that Parliament should effectively approve all significant deployments, whether that be peace-making or in areas of conflict. I think if there is wider reform of things like treaty-making powers and Parliament has scrutinised already that area, then I think we can exclude those. It is similar to how the Swedish Parliament operates, because they take a decision that if they have debated the treaty-making powers and under that troops are being sent to the UN mission, or whatever else, then it does not need to be debated by parliament. But until that is the situation, I would simply say that Parliament would need to have effectively the approval mechanism across the board rather than trying to find a definition which allowed you to weave your way through it, because it would be very difficult to actually do that.

**Q182 Chairman:** Do either of you want to add anything to that?

*Professor Weir:* I think because of the fact that other European nations manage to find ways of legislating for troop deployments in all the circumstances, I am sure it is not beyond the wit of people in this country to do the same. In fact in Sweden we have noted that they actually do have slightly separate kinds of categories of conflict or potential conflict and different rules for all of those, and in each case they require prior parliamentary approval, discussions between the executive and the relevant committees under those on a bill. So there is quite a long process, but it is certainly possible—in Germany as well—to actually legislate for all these eventualities. I am sure there are difficulties about the precise wording of it, but we are quite confident that it is perfectly possible. On this point, I think it is very important—and this is why one is worried about it being too narrow a focus—that Parliament actually takes on the role of supervising and being involved in the making of treaties because those treaties have profound implications across the board for the deployment of troops in various circumstances.

**Q183 Baroness O’Cathain:** Could I ask, surely the difference between making treaties and deploying forces overseas is one of timing? Usually we do not have a long time to discuss whether or not troops should be deployed, and getting Parliament back, et cetera. This point was made to us by the ex-Chiefs of Defence Staff when they were witnesses, that it is much more instantaneous or at least more rapid. If something is going to go horribly wrong somewhere,

we do not have the luxury of time. That is the difference, is it not?

*Professor Weir:* We take the view that one of the roles of Parliament is to dispose and the role of the Executive is to propose, and if Parliament is going to dispose then it must do so in a collective, deliberate way. It has got to really live up to that responsibility. If you are entering into treaties, then you are entering into potential conflict situations, certainly in some of them, and therefore it is very important that Parliament takes a long-term view of these issues and that it is not simply reacting to an immediate emergency here or there. It is far better to know precisely what you may be letting yourself in for and to have a policy framework in which you would actually, through Parliament, be considering a particular potential conflict or an actual conflict rather than the conflict simply popping up without Parliament having had a long-term strategic view of what is going on. This is why we have proposed that there should be a joint committee of both Houses to overlook the whole process, so that it is not just a one-off here and a one-off there, it is a much more considered, deliberative process in which Parliament plays a very leading role.

*Dr Blick:* I would add that within the terms of a treaty you can have provision for involving Parliament in a decision of the deployment of Armed Forces, as we have seen in Holland recently. They are signed up to the North Atlantic Treaty. Their parliament has the power to ratify treaties. Also, when they are deploying forces within the terms of that treaty, they have also had a discussion of that deployment. So the two things do not preclude each other.

*Mr Facey:* I would disagree with the joint Chiefs in the sense that I think Parliament can actually take decisions either retrospectively or in advance. It does not actually have to move so fast that you cannot have parliamentary approval, because we are not necessarily talking about the approval of the detailed plans. In most cases we are talking about a time process in which Parliament can actually be recalled, or mechanisms like the joint committee can actually be brought into the process. So although I would agree that we can do treaty-making powers and that that should definitely be for Parliament, I would disagree that the implication is that we cannot actually do crisis situations as well and therefore we need to leave it to the royal prerogative in that area.

**Chairman:** In terms of timing, we are going to have to stop at five o’clock because we have other witnesses and it is going to be easier if perhaps from now on perhaps one member of the panel could take the question, because we will be able to get more questions in.

**Q184 Lord Windlesham:** This is brief and jogging back really to the previous session. Could you just remind the Committee, myself in particular, what

was the actual process taken which authorised the use of British troops in Iraq and was it satisfactory, in your view, the way the decision was taken?

*Professor Weir:* I think it was unsatisfactory.

**Q185 Lord Windlesham:** Could you just say what the procedure was first?

*Professor Weir:* I cannot take you through each of the votes now, but there were two substantive votes and in fact the majority against action increased on the second vote. In our view it was unsatisfactory because it is not good enough, I think, to say (as the Prime Minister does) that of course Parliament will be asked for its opinion, as it were. I think it is very important that any decisions of those kind are taken within the kind of framework which we have indicated and that Parliament actually has a continuing strategic role in looking at these things, otherwise it is perfectly possible (as the Prime Minister did and as, in fact, President Bush did in the United States) to prepare for a moment when you want to go to war, to prepare for that in advance and to time it so that it becomes politically impossible for the legislative body (Congress in one case and Parliament in the other case) to actually say no. It is politically impossible and everything is loaded on action and I think that is a very unsatisfactory situation. I do not know if that is a sufficient answer to your question?

**Chairman:** Yes, it is. Thank you. I have two other quick interventions, and then I want to move on.

**Q186 Lord Elton:** I rather got the impression from your answer, Professor Weir, and I am not sure whether it was later weakened, that you visualised that every possible conflict can actually be contained. All possible conflicts will be contained with a properly arranged pattern of treaties. In other words, you are looking at a system which deals with events which have been in part foreseen. In fact the world is not like that, is it, and surely there must be alternatives for dealing with events where we are not acting within a coalition or a treaty?

*Professor Weir:* Yes, of course that is true, but the truth is that most of these conflicts or involvements can be predicted in advance. If you had a genuinely able committee taking the strategic view, more of those things would be more readily foreseen, but of course there is the possibility of an unforeseen event taking place. As my companion has said, there are ways in which that can be encompassed within a statute which would allow for Parliament, if need be, to give approval after the event if it is absolutely forced upon the Executive, but also in Germany, for example, it is possible to give the parliamentary role to a committee which can be quickly convened and which can have a view. The joint committee in

Germany has that role and that is a very important part of what we think should happen.

**Q187 Baroness Hayman:** Following on from that, I wanted to ask Mr Facey about how realistic the possibility of retrospective approval, which you put forward as dealing with a range of situations where the prospect of approval was not possible, actually was, particularly given Professor Weir's comments on how difficult it is, once the momentum has built up, for Parliament then to pull back even before an event? How realistic would approval retrospectively be? Would it not always be a rubber stamp, not just for emotional reasons but for reasons of putting people at risk who were already committed in the field?

*Mr Facey:* I have to accept it would be very difficult in practical terms to pull back from a situation unless there were sufficient concerns at the time. You are trying to look into the future, into a crystal ball and work out the circumstances. I am on the whole more happy and more confident that I would have that decision resting with Parliament rather than simply leaving it to the Executive, even if in 99.9 per cent of the time Parliament simply approved the act of the Executive; the fact that it was debated, the fact that the issues were actually out there and there was a process, not only for the approval of the immediate act but also for the ongoing scrutiny of that process. We are not here just talking about authorisation, we are talking about accountability, and therefore even if in nearly every case Parliament approved the act of the Executive, the fact that the process had to be gone through I think would lead to better decisions being taken because the Executive would know that it would have to get that approval in the first place and that there would be ongoing scrutiny. It may come to situations where it may stop something happening because the Executive knows that it would actually fact that scrutiny in the first place.

**Q188 Chairman:** So even if the retroactive approval is a rubber stamp, you are saying the knowledge that it would have to be sought would affect the prior decision?

*Mr Facey:* And the fact that what we are proposing is an ongoing process. We are just not proposing simply authorisation, we are talking about Parliament effectively having the authority and therefore Parliament would scrutinise, as my companion said, the ongoing process. So even if you are right and in the real political world Parliament supported an action, it would put some brake on a Government from acting in a reckless manner because it would know it had to seek it, because in those circumstances it would be debated, it would have public scrutiny, and that would actually give confidence not only to the public but I think also to services personnel.

**Q189 Baroness Hayman:** I do not know whether I am right or wrong because I have not made my mind up, I am trying to listen to the evidence, but then I ask the question the other way round: if accountability and debate is the important issue, can you take away this sliver of authorisation and find another way of getting the same accountability through a convention which held that there always had to be the legal justification put before Parliament, debate or whatever, without actually going to that point of a motion which approves the action?

*Mr Facey:* For me I do not think that you can take away the fact that it is a decision ultimately of Parliament rather than a decision purely under the royal prerogative of the Prime Minister, or the monarch, or whoever because I think ultimately it is not just having legal justification. If you have legal justification for it, you are still leaving nine-tenths of the problem there. Constitutionally, from my position, Parliament is where that decision should ultimately lie rather than through the royal prerogative. Practically, yes, the Prime Minister will actually take the decisions, but by it having been authorised and scrutinised, then ultimately I think the rest flows. If you try and find a way of giving the authority to deploy troops to the Prime Minister and then having a parliamentary debate, then I think therefore the debate is without power and, in the end, meaningless.

**Q190 Lord Goodlad:** Could I ask how the witnesses' proposals for legislation requiring prior parliamentary approval before military deployment differ from Clare Short's Armed Forces Bill?

*Dr Blick:* Our proposal focuses on not just war situations or potential or actual hostile situations, but the whole royal prerogative power to direct the disposition of the Armed Forces abroad and within the UK. So we believe in a whole framework. It does not mean that the same degree of scrutiny applies for all these different types of deployment, but in principle it puts the whole prerogative related to the Armed Forces on a statutory basis. Clare Short's Bill, as I read it, is focused more on deployments in war situations, so that is one difference. Another difference, as has been mentioned already, is that we also, beyond the actual statute, are proposing an institutional framework which will enable Parliament to properly exercise control of what was formerly this prerogative power, particularly through establishing a joint committee of both Houses to help Parliament in its oversight role. So I would see those as being the two main differences.

*Professor Weir:* Could I just add to that what I said earlier in reply to a previous question, that if you leave it all up to convention, if that is what we are getting at the moment, then a leader of this country,

for whatever party, would be able to time and prepare for a *de facto* process of going to war without Parliament really having any influence in the end over what happens because the proposal is put to Parliament at the best possible time to gain approval for whatever the leader might wish. That is why we think it is very important that Parliament has this wider strategic role. We think the appropriate place to give that role to is a joint committee of both Houses.

*Mr Facey:* I think only one other difference between our submission and the one of Democratic Audit would be that we have suggested that the final vote would be of the House of Commons and not of both Houses.

*Professor Weir:* What we are proposing is a joint committee.

*Mr Facey:* We agree on the joint committee, but in terms of the differences between Clare Short's Bill and our proposals, the one difference would be that Clare Short's Bill is a vote of both Houses and we are actually saying in our submission that it should be the House of Commons. Otherwise, we would agree.

*Professor Weir:* We would agree with that as well.

**Q191 Viscount Bledisloe:** As I understand it, you are proposing that virtually any movement of troops in a totally non-combat situation will require parliamentary approval even if it is routine for training or mere reinforcement of sending extra battalions to Northern Ireland, and so on. Is that not taking away totally the power of the Executive and giving it to Parliament, which is not intended to be an Executive? We know in past wars the generals and admirals have complained enough about ministers interfering, but is it really realistic to suggest that Parliament should control whether a battalion goes to Northern Ireland, whether a battalion is sent to Germany for training, and so on?

*Dr Blick:* We are arguing that the whole of what is currently a prerogative power should be placed on a statutory basis. In that sense, it is subject to parliamentary authorisation, but we are certainly not arguing that all the minutiae of military deployments everywhere should be subject to any kind of prior parliamentary vote. We are reserving that for very specific, more extreme circumstances.

**Q192 Viscount Bledisloe:** All right, it is all put on a statutory basis, but what does the statute require prior parliamentary approval for?

*Dr Blick:* The Executive would have to report to Parliament in a way that it does not currently on these deployments.

**Q193 Viscount Bledisloe:** Report to or get prior approval from?

8 February 2006

Professor Stuart Weir, Dr Andrew Blick and Mr Peter Facey

*Dr Blick:* That would be a matter for Parliament to arrive at in devising legislation.

**Q194 Viscount Bledisloe:** What is your proposal?

*Dr Blick:* We propose an annual report laid before the House, which reports on what deployments have taken place during the course of that year, which Parliament could debate and vote on.

**Q195 Viscount Bledisloe:** “By the way, we’ve been to war with Iraq, we’ve attacked the Falkland Islands. You may not have noticed because of the way it’s been in the papers somewhat, but we’ve done that this year and now we’re reporting that to you”?

*Dr Blick:* Yes, or “We have troops stationed in Northern Ireland,” or any number of things, things which might not get as much attention as well.

*Professor Weir:* Could I point out that presumably the Defence Select Committee already has got powers of oversight on troop deployment. We are simply saying that you put that on a statutory basis, on a clear basis, and that Parliament would only become interested if actually they did notice you were about to invade the Falklands. That is the crucial difference.

**Q196 Viscount Bledisloe:** But if you are doing Dr Blick’s annual report and the invasion of Iraq was a month after the last annual report, you will be told eleven months later that they have invaded Iraq and it is just possible that Parliament might have noticed already!

*Professor Weir:* Parliament would have been failing in its duty under our statute to actually make sure that the Executive reported in advance on something like invading the Falklands and gave express approval for that.

*Dr Blick:* There will be provision within the Act so that a deployment of that kind would then be subject to a higher level of approval than just an annual report.

**Q197 Viscount Bledisloe:** An appointment higher than that, but please define what has to have prior parliamentary approval

*Mr Facey:* What we have suggested is that where you are deploying troops into circumstances where you can reasonably expect that their lives would be at risk, that would trigger a higher level of approval. Whether that be peace-making or whether that be a different situation, we are not talking about whether you move a regiment from being in Dorset to Staffordshire, or even to Northern Ireland for that matter. We are talking about circumstances where if you are sending troops overseas and you have a reasonable expectation that they will actually be in danger, that will trigger the process, but the joint

committee would be in an on-going process, over-viewing the situation. I am not going to claim that we can come up with something for every circumstance where an individual can be effective, but what we are talking about is trying to move the situation where we have no accountability or transparency to one where we get the most we can reasonably expect.

**Q198 Chairman:** As you can see, it is the modalities of the proposition which exercise the members of the Committee and we had very interesting evidence from Admiral Lord Boyce, which if you think about it is obviously right, that in a sense the Royal Navy is permanently deployed overseas and it is permanently on active service. So it becomes quite difficult to draw this clear line, which constitutionally one can see the case for, of what is the moment at which there is a movement of Forces overseas for an armed conflict situation. Incidentally, Professor Weir, I do not think it is quite correct to say that the Defence Committee has oversight. It is certainly concerned with policy and the administration of the Armed Services, but oversight in the sense you were suggesting of operations? I do not think so.

*Professor Weir:* No, I did not mean it in that sense. I meant that there is a continuing process of scrutiny by the Defence Committee, by the Foreign Affairs Committee in the House of Commons of a lot of these issues. I do not think what we are proposing would particularly affect the point which the Admiral made about the fact that presumably all our Forces are in a sense on permanent alert, wherever they may be, but it is sensible for Parliament to have a strategic look at all of these things. These things may or may not be relevant to its reports on what is in the best interests of the nation.

**Q199 Baroness O’Cathain:** The question I would like to ask is, what form of words would you use to define “non-combat deployments” and deployments into “potential or actual combat situations”?

*Professor Weir:* We wrote that for you. We wanted to make it clear that we thought there were different circumstances in which troops may be deployed and the degree of hostility or conflict they may encounter. So we do not think this should be a very, very precise thing. I think the Swedish constitution, for example, distinguishes between peace-keeping and peace-enforcement, which is quite a useful distinction to make, and it distinguishes between actually not declaring war but entering into conflict, which these days I suppose is the right way of saying it. I do not think there is any major problem about actually defining these terms in a statute at all. The point is to catch all of them, and to some extent as

8 February 2006

Professor Stuart Weir, Dr Andrew Blick and Mr Peter Facey

best you can to distinguish between them so that you know precisely what the initial commitment is about and what the likelihood of conflict is, and you go on from there.

**Q200 Baroness O’Cathain:** Just as a sub-set, would you include humanitarian in that as well?

*Professor Weir:* Yes. As I think we are all saying, it is impossible to envisage every potential eventuality, but there may well be a humanitarian crisis which demands very immediate action and we would hope that this country could undertake that as speedily and as effectively as possible.

**Chairman:** I think we have time for just a couple more questions. Lord Smith, you have a question.

**Q201 Lord Smith of Clifton:** It has been suggested that legislation could be introduced to simply transfer the deployment of power from the Crown to the Prime Minister, thereby making Parliament the “legitimate” source of authority. Would this satisfy any of your concerns about the current situation?

*Mr Facey:* No.

*Professor Weir:* No.

*Dr Blick:* No.

**Q202 Chairman:** That is a nice, quick answer!

*Mr Facey:* I can explain why if you want, but no.

**Chairman:** Do not be tempted to improve the answer!

**Q203 Earl of Sandwich:** Professor Weir, I am afraid my question is coming to you. The German example. I forget which field studied this particularly, but you expressed satisfaction with the Select Committees, it seems, quite surprisingly—I am talking about our own Select Committees—but what you want to do is put them on a statutory footing. To what extent have the Germans improved on our present position, if you like looking at Afghanistan and not Iraq, where there are successive stages where you have to report back to Parliament from the Committees? How would that work in practice?

*Professor Weir:* I want to correct that. We do not think the present departmental Select Committee processes are satisfactory. We think they are too reactive, too short-term in outlook and the Committees are too busy. This is why we think it is very important there is a joint committee for the more strategic outlook on the whole process, but my friend will answer on the precise details of the German situation.

*Dr Blick:* Our reference to the German joint committee is a specific reference. There is provision under the German constitution for a joint committee which in circumstances of a military

emergency or state of defence (as I believe they call it), where the German parliament is unable to convene and therefore scrutinise what the executive is doing, there is this joint committee which is established, which has members of both houses and which is able to exercise the powers of the plenary in place of a full parliamentary meeting. So that is what our reference to the German committee system was. We believe that these are very unusual circumstances. We are providing for that contingency. The joint committee we are proposing should have the power to convene and at least ensure there is some semblance of parliamentary scrutiny of what the Executive is doing if the full Parliament is unable to meet.

**Q204 Earl of Sandwich:** Could we just take Afghanistan and take us back to the UK. How would you envisage a joint committee reporting to Parliament, and to the public as well?

*Professor Weir:* I think it would be very good if any committee of the current Parliament had been able to report or ask the Executive what its intentions were in Afghanistan. I think one of the problems of the focus in a sense on the Iraq war is that we have just seen a process go through this country in which there was no parliamentary approval, so far as I am aware, for the original participation and invasion of Afghanistan and no subsequent approval or discussion of deploying a further 3,500 troops to Afghanistan. I think that is an utterly unsatisfactory situation and I think it is quite notable that in Holland the parliament has actually had a debate about this. There was certainly plenty of time, by the way, for there to have been a debate in our Parliament about it, and I think this is precisely why we are so concerned about the current situation. Obviously there are problems with modality in terms of our proposal, but there are real problems with democracy, accountability and transparency in the current situation. This is the mote in one eye and the beam in the other, and I think it is really important to get some perspective on how unsatisfactory the current situation is and the need to improve it, even if when you improve it there are difficulties here or there which would have to be worked out in practice over time in a more democratic country than we have at the moment.

**Q205 Chairman:** Thank you. That is a very eloquent note on which to conclude. I am most grateful. We have two distinguished former Attorney-Generals waiting to give evidence and it is my experience one should not keep lawyers waiting, so I am sorry to cut what is a very interesting discussion slightly short. On the other hand, we have had your excellent written paper, which we are most grateful for. If you have any second thoughts

8 February 2006

Professor Stuart Weir, Dr Andrew Blick and Mr Peter Facey

after this session, we are always open to receive further written communications.

*Professor Weir:* Thank you. Could I just say that we have just produced a report and we have brought free copies along for you.<sup>1</sup> It does actually look at the whole area of foreign policy in relation to the royal prerogative, so we hope it might be useful to

you. We have just commissioned an opinion poll through ICM which gives the public's view in all these matters and we could certainly make that available to the Committee if you wished to have it.<sup>2</sup>

**Chairman:** Thank you for both offers. We will take them up. Thank you again.

<sup>1</sup> *Not in our name: democracy and foreign policy in the UK*, edited by Simon Burall, Brendan Donnelly & Stuart Weir, Politico's, 2006.

<sup>2</sup> Press Release on ICM Opinion Poll commissioned by Democratic Audit, Federal Trust, and One World Trust 23 January 2006.

### Supplementary memorandum by New Politics Network

Further to our written and oral evidence, please find below some points of clarification on our proposals.

In a democracy decision-making should be scrutinised and be accountable to the elected representatives and ultimately to the people. The Royal prerogative is entirely incompatible with modern democratic government. We believe that there should be comprehensive reform of the Royal Prerogative and will continue to work for that even if war making powers are reformed.

However there is a significant difference between war making powers and other prerogative powers: it is a life and death decision. The decision to send troops into armed conflict is one of the most serious that any state can make. That this decision-making process is unaccountable and cannot be effectively scrutinised, is quite simply unacceptable.

#### German Defence Committee

In our written evidence we proposed that a Joint Select Committee should be established along similar lines to the Defence Committee that exists in Germany.

This is a separate and different proposal from the Joint Committee in Germany which has never been used. According to the German constitution if the country is deemed to be under attack (this has to be agreed by a vote in both the Bundestag and Bundesrat) then a state of defence exists. During a state of defence if it is not possible for Parliament to meet then a Joint Committee is established and sits in plenary. There is virtually no role for the Joint Committee in peacetime, although the Federal Government must report to it on defence policy every six months.

The Joint Defence Committee we are proposing is in effect a departmental select committee with additional powers, not a mechanism for making decisions during a state of emergency. Although we propose it should have members from both houses this committee is modelled on the German Defence Committee and not the German Joint Committee.

Germany has perhaps the most stringent parliamentary scrutiny of war making powers, which reflects its recent history and reticence to deploy troops. German troops cannot be deployed beyond Germany's border without the consent of both the Bundestag and the Bundesrat. In addition the German Constitution provides for a Defence Committee and a Parliamentary Commissioner for the Armed Forces to ensure effective parliamentary scrutiny of the armed forces.

The Defence Committee in Germany is a departmental select committee, established in Basic Law which, in addition to the scrutiny of Bills and defence related matters, has the power to act as an investigative committee and consider any defence matter of its choosing. The Defence Committee also works in co-operation with the Foreign Affairs Committee and has access to relevant security information.

We propose that a similar committee, a "Joint Defence Committee", should be established in the UK to act as an 'honest broker' between the executive and Parliament. It would have a similar policy remit to the existing House of Commons Defence Select Committee the key differences would be that:

- (1) it would consist of member from both Houses to ensure that expertise from the House of Lords is utilised;
- (2) the chair of the committee would sit on Intelligence And Security Committee so that it would have access to all relevant security information;

8 February 2006

- (3) the committee would have the power to act as a committee of inquiry and therefore to require the presence of persons and papers;
- (4) it would have specific role of monitoring the armed forces and any plans for deployment;
- (5) it would act as a guardian for the rights of service personnel;
- (6) it would have permanent legal advice; and
- (7) it would be able to meet in camera if either the chair of the committee, the Prime Minister or the armed forces deemed it to be necessary for the security of service personnel or in the interests of national security. Committee papers would also be confidential but unlike the Intelligence And Security Committee the committee would be accountable to Parliament and not to the executive.

We believe that the Committee should have members from both Houses of Parliament to take advantage of the considerable expertise in the House of Lords and to help to limit the partisan nature of House of Commons committees.

One of the key issues to have arisen from the troop deployment to Iraq is the lack of planning for eventualities after the initial military operation. There is significant military experience in Parliament, particularly in the House of Lords, which could have been much more effectively utilised. We recognise that there are issues of operational security that have to be taken into account. However examples from abroad suggest that it is possible to ensure the security of the armed forces whilst also allowing for scrutiny of executive decision-making.

#### **When should troop deployments be subject to parliamentary approval?**

The New Politics Network believes that parliamentary approval should be sought for the deployment of troops to peace keeping and peace enforcing missions as well as to conflict situations. It is essential that the principles of executive decisions being subject to parliamentary scrutiny and approval, are established. Legislation should be drafted to include all significant military action and deployments rather than just major engagements or declarations of war.

However we are not suggesting that every movement of troops between different bases (whether in the UK or abroad) or on training exercises should be subject to parliamentary approval. Parliamentary approval should be sought where it is considered likely that the lives of service personnel are at increased risk.

Parliament should also have the power to recall itself to ensure that this scrutiny can take place. Recall could be triggered by a certain percentage of MPs contacting the speaker to request a recall of Parliament.

#### **What would be the process for Parliamentary approval for troop deployments?**

We support the proposals in Clare Short's Parliamentary Approval for Armed Conflict Bill. Under these proposals (clause 2) the Prime Minister shall lay before each House of Parliament a report setting out—

- (a) the reasons for the proposed participation;
- (b) the legal authority for the proposed participation; and
- (c) such information as he considers it appropriate to make public about—
  - (i) the expected geographical extent of the participation,
  - (ii) the expected duration of the participation, and
  - (iii) the particular bodies of Her Majesty's armed forces that are expected to participate.

We are not in any way suggesting that information that would endanger the lives or safety of service personnel should be made public. The Joint Defence Committee that we propose would have access to this information and would be able to reassure Parliament that plans were in place both for the operation and the period following any conflict. The information which we are proposing should be made public is solely about the nature of the deployment and the reasons for it, not specific operational details.

Although the majority of recent deployments have been as a result of international commitments and have therefore involved a long public build up, if there was a need for a greater level of secrecy or surprise or in the case of an emergency then it would be possible for the Government to seek retrospective approval.

8 February 2006

**Would requiring the Government to provide a formal legal justification for military deployments to Parliament be sufficient?**

No. Our concern about the deployment of troops is not just based on whether any particular conflict is legal but is about the way we as a system of government make important decisions. This is not just about Parliament rubber stamping a decision made by the executive but having an integral role to play at each stage in the process and shifting the balance of power between the executive and legislative.

**How our proposals differ from those in Clare Short's Armed Forces Parliamentary Approval for Armed Conflict Bill**

While we welcome the Bill as a starting point to the debate we believe that there are broader issues that need to be addressed than just the formal mechanism for making the decision. Accountability if it is to be meaningful and effective has to be more than just rubber stamping the final decision.

Clare Short's Bill focuses exclusively on the decision to deploy troops whereas we believe that there is a need for accountability and increased parliamentary scrutiny of the process of making the decision to deploy troops, what happens while they are there and how they should leave. The Joint Defence Committee would have responsibility for scrutinising the plans for the deployment and would take advantage of the military expertise in the House of Lords to ensure that there was adequate planning for all stages of the operation.

The main difference between our proposals and the Bill is that in addition to Parliament approving the deployment of troops we are suggesting that there ought to be a Joint Defence Committee which would have access to sensitive information which could not be made available to Parliament and which would have the power to act as a committee of inquiry. We would also only seek approval from the House of Commons rather than both Houses of Parliament.

22 February 2006

**Supplementary memorandum by Professor Stuart Weir, Dr Andrew Blick, Democratic Audit, Human Rights Centre, University of Essex**

1. The First Report of the House of Lords Constitution Committee came to the decision that the Committee would focus on "*significant* constitutional issues", determining what those are by concentrating on the "two p's: principal and principle. In order to be significant, a constitutional issue needs to be one that is a principal part of the constitutional framework and one that raises an important question of principle."<sup>11</sup>

2. The Committee's Fourth Report recognised the need for an authoritative body, outside government, to keep the constitution under review and to monitor parliamentary change. The Committee considered the case for a Standing Commission on the Constitution in the light of its own existence and concluded that the creation of such a Commission was not necessary. At the same time, the Committee recognised that it was also creating a substantial burden for itself, "since we have a major responsibility to discharge".<sup>12</sup>

3. Democratic Audit considers that the existence and the wide-ranging role of the Royal Prerogative passes the Committee's "two p's" test. The prerogative is certainly a principal part of the constitutional framework in the United Kingdom and it raises a major issue of principle: is it legitimate in a representative democracy to confer powers on the executive that ministers may employ in a number of significant policy areas without reference to Parliament? The existence of such powers contravenes the first principle on which Democratic Audit's framework for democracy assessment, which is widely used and accepted around the world, is founded.<sup>13</sup> This framework constitutes a more theoretical, and universal, expression of the basic British constitutional position—that, as Jack Straw recently said on BBC Radio 4, "The government proposes, Parliament disposes".

4. The Public Administration Select Committee considered the role that the prerogative plays in British governance and its report in March 2004 concluded that the case for reform of the prerogative was "unanswerable", recommending that the use of prerogative powers should be made subject to more systematic

<sup>11</sup> Constitution Committee, *Reviewing the Constitution: terms of reference and method of working*, First Report, Session 2001–02, HL Paper 11, 11 July 2001.

<sup>12</sup> Constitution Committee, *Changing the Constitution: the process of constitutional Change*, Fourth Report, Session 2001–02, HL Paper 69, 23 January 2002.

<sup>13</sup> See Beetham, D. et al, *The IDEA Handbook for Democracy Assessment*, The International Institute for Democracy and Electoral Assistance/Kluwer Law International, 2002.

8 February 2006

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parliamentary oversight.<sup>14</sup> Democratic Audit recently combined with the Federal Trust and One World Trust to examine the accountability of the executive to Parliament in its conduct of external affairs and found that the use of the Royal Prerogative was a major obstacle to accountability and transparency of policies that are of great significance to the daily lives of British citizens in the modern globalised world.<sup>15</sup>

5. For the purposes of our previous evidence to the Constitution Committee, we accepted the PASC view that reform of the Royal Prerogative was likely to be a complex and time-consuming task and that it was therefore expeditious to concentrate upon priority areas, such as war powers, treaty making and passports. The Committee's decision to examine the case for and against war powers legislation complied with that view. But we are concerned that this one issue—of parliamentary approval for the deployment of the armed forces—might be resolved very narrowly, in the first instance, not least as the Committee's report might well focus on the flawed Armed Forces (Parliamentary Approval for Participation in Armed Conflict) Bill introduced into the House of Commons by Clare Short MP in 2005. Our wider concern is that piecemeal reform in this one area might close the door on consideration of the continuing use of prerogative powers, and not only in the conduct of foreign policy.

6. Therefore we urge the Committee to consider and report on the question of war powers within the wider perspective of across-the-board reform of the Royal Prerogative. It would be appropriate for the Committee to do so, given the responsibilities of its brief and its developing role as a parliamentary Standing Commission on the Constitution. The Committee's views are likely to prove influential in the light of current cross-party interest in wider reform of prerogative powers. There is one existing model for wider reform. Lord Lester's Constitutional Reform (Prerogative Powers and Civil Service etc.) Bill, which has its Second Reading in the House on Friday (3 March), provides succinctly for parliamentary authority for the exercise of prerogative powers (including war-making powers) and oversight by a joint Executive Powers Review Committee.

7. At the same time, we recognise the importance of dealing with the executive's powers to engage in military actions abroad. The recent deployment of UK troops to Afghanistan has emphasised once more the urgent need to introduce parliamentary control over such decisions. The executive was able not only to embark upon a war without formal parliamentary approval, but has now substantially altered the parameters of British involvement, again without seeking parliamentary approval. There is a marked contrast with other democratic members of Nato, such as Holland, where the Dutch Parliament played a major role in such decisions.

8. However, we do not think that current bills such as that introduced by Clare Short MP are sufficient. As we have seen, in both the UK and the USA in respect to the invasion of Iraq, if we simply require a Prime Minister or President to seek parliamentary or congressional approval in advance (or even in fact after hostilities might have commenced), they can prepare for and wait until the moment arrives when it is politically impossible for members of the legislature to oppose going to war—and in the UK, giving their “whole-hearted support to the men and women of Her Majesty's Armed Forces”. In these circumstances, there is no collective judgment, merely a collective charade. (We can set out in detail how Tony Blair MP and President George W. Bush so prepared the ground.)

9. It is vitally important to strengthen the ability of Parliament to *dispose* when the executive *proposes*. In the case of going to war or despatching troops abroad, Parliament needs to create a deliberative mechanism for doing so to ensure that its members are not rushed into judgement and are enabled to come to a fully considered decision. It is for this reason that we proposed in our initial submission to the Constitution Committee that Parliament should establish a committee of both houses to assume strategic oversight of the UK's international and defence interests and policies. We think that this joint committee should have a wide-ranging brief, taking on important long-term issues, such as international security, geo-political change, intervention in failed states, humanitarian catastrophes, developments in the European Union, world trade, and so on. (The list is potentially endless and here again Parliament should dispose.) Its inquiries and analyses of such issues would provide the perspective for its primary responsibility to consider policies on the resolution of “hot” issues, such as the previous Iraq and present Iran crises, and to maintain a watch over British joint UN and Nato missions abroad, as for example in Iraq, Afghanistan, Bosnia, Kosovo, Sierra Leone.

10. Several members of your House have in fact made the case for a Lords treaty committee, or an international affairs committee. The Power Commission has also recognised the need for strategic oversight in international affairs, with a more specific proposal for an “over-arching Select Committee to scrutinise the Executive's activities in supranational bodies and multilateral negotiations, particularly in relation to the

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<sup>14</sup> Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*, Fourth Report, Session 2003–04, HC 422, 4 March 2004.

<sup>15</sup> Burall, S., *et al* (eds.), *Not in Our Name: Democracy and Foreign Policy in the UK*, Politico's, 2006. Copies of the book were made available to Committee members.

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8 February 2006

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European Union.”<sup>16</sup> We think however that such a committee should have a wider brief; should make use of the more dispassionate expertise that the House of Lords can contribute; and that the model of the Joint Committee on Human Rights is the proper one for such a strategic role (though one of our academic colleagues has suggested that the *collegium fetialis*, the sacred congregation in the Roman republic, charged with sanctifying treaties, declaring war and sometimes carrying out negotiations, provides another looser model).

11. We are aware of the sensitivities around such a proposal. But our study of parliamentary oversight by existing departmental select committees has convinced us that they are too busy, too reactive and too short-term in outlook to take on the wide-ranging strategic role that is required. Indeed, in evidence to our joint inquiry with the Federal and One World trusts, the former chairman of the Foreign Affairs Committee emphatically dismissed the idea that his committee could or should take a strategic view. Thus a Joint Committee would supplement, not supplant, existing committees, and questions of demarcation should and could be amicably resolved. Its joint composition ought to give it a more disinterested perspective than a select committee of MPs could provide.

12. If war is the continuation of policy by other means, then it is imperative to get the policy framework right in the first place and to ensure that any resort to armed conflict or military deployment is undertaken with clear long-term goals in place. The strategic committee could provide the policy background to any international situations in which British troops might be engaged in armed conflict, peace-keeping or other roles. In other words, the committee could enable Parliament and the public to conceive of proposals for war—or military deployment—and judge them in a more dispassionate process. The committee would enable Parliament to dispose, rather than just react.

13. There are various ways in which a more deliberative process could be made effective. For example, the government could be required to submit reports in advance to the committee, as well as the appropriate departmental committees, of any actions that might lead to armed conflict. Transparency should be the norm, but the committee could receive official evidence on a confidential basis (on the model of such bodies as the Newton Committee and Intelligence and Security Committee). Ideally, the committee should have access to a parliamentary legal counsel and be supported by a newly formed External Policy Branch of the parliamentary Scrutiny Unit. In an emergency it could possess the power to recall Parliament if it was in recess. If Parliament was unable to convene, it could exercise the powers of the plenary, to ensure the continuation of some form of scrutiny of executive activity (such an arrangement is provided for by the German constitution, in the form of the ‘Joint Committee’). We also think that the Constitution Committee should consider the whole question of Supply in respect of military deployments—and whether the executive should be required to obtain parliamentary approval for the financing of specific operations.

14. We have noted concerns on the part of Committee members that parliamentary control of executive action that would or could result in armed hostilities might inhibit the executive’s flexibility of action; or that, alternatively, a measure to cater for the need for flexibility might simply give any government room to “drive a coach and horses” through the requirement to seek parliamentary approval for action. Were a government to exploit provisions for emergency action, Parliament and the public would be alert to any abuse and the possibility of judicial review would remain open—in a way that it is not presently while the power to go to war remains a matter for the executive under the prerogative. Though such remedy might not prevent the immediate act it would act as a deterrent to such behaviour. Members have also expressed concerns about the difficulty of drafting a statute precisely enough to cope with the very different (and changing) circumstances in which a government might wish to deploy troops. We believe that relevant laws in Germany, Sweden and elsewhere provide sufficient evidence that such issues can be satisfactorily resolved. The key to drafting suitable and robust legislation is clarity in advance. And that clarity must needs be based on the overriding principles that military action abroad can be undertaken only with parliamentary sanction and must conform with international law.

3 March 2006

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<sup>16</sup> The Power Commission, see <http://powerinquiry.org/home/php>.

8 February 2006

### Examination of Witnesses

Witnesses: LORD MORRIS OF ABERAVON, a Member of the House and  
RT HON LORD MAYHEW OF TWYSDEN, a Member of the House, examined.

**Q206 Chairman:** Good afternoon, my Lords. I am most grateful to you both for coming to give evidence to the Committee. Could I remind you that this is televised, so if you would be kind enough, starting with Lord Mayhew and then Lord Morris, just for the sake of the record to identify yourselves I would be very grateful.

*Lord Mayhew of Twysden:* My Lord Chairman, I am Patrick Mayhew, Lord Mayhew of Twysden.

*Lord Morris of Aberavon:* My Lord Chairman, I am John Morris, Lord Morris of Aberavon.

**Q207 Chairman:** Thank you very much. I have got a question which I would like to ask both of you, which is this: I suppose the conventional wisdom (and for all I know the constitutional position) is that the Attorney-General of the day, as well as being the senior law officer of the Government gives advice to the Government, legal advice on legal matters. Is that advice, in your opinion, constitutionally speaking exclusively for the Government or is it for the Government and Parliament, or is it for the Government, Parliament and the country? To whom ultimately does an Attorney-General give his advice?

*Lord Mayhew of Twysden:* My Lord Chairman, you point towards me, so I will go first. The Attorney-General, in my view, owes loyalty first to the Queen, to the Crown in person (he is Her Majesty's Attorney-General), secondly to the law and thirdly to his colleagues in government. I distinguish, in answer to your question, between the actual terms and words of the opinion which he gives to his colleagues and the character of the advice which he gives. In relation to the character of the advice which he gives, he is obliged, it seems to me, to answer to the House of Commons (if he is a Member of the House of Commons), to answer to Parliament if he is asked for the character of the advice which the Government is acting upon. The actual terms of the opinion are confidential to the Government (as the Attorney-General's client) and that is a privilege which it is entitled to retain, and in my view for good practical reasons should retain it.

**Q208 Chairman:** May I just add a quick supplementary on that: it is confidential because it is governed by a lawyer-client relationship or because of collective Cabinet responsibility?

*Lord Mayhew of Twysden:* I think the first, and I think that is sufficient. If it were to be taken away, then I think 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. That is not to say that the character of the opinion which the Attorney-General would form on a particular problem, a particular proposed course of action, would change but the quality of the opinion would be diminished were it able to be made public.

**Q209 Chairman:** Just help us with what you mean by "the character of an opinion". What does that mean?

*Lord Mayhew of Twysden:* The structure, the analysis of the legal issues and the conclusion is something which an attorney is liable to be questioned about, so it seems to me, in the case of controversial action taken by the Government and it seems to me that he is obliged to answer that. He has a duty to answer that question if it is asked in Parliament, but the actual *ipsissima verba* of the opinion he has given is in a different category.

**Q210 Chairman:** I would really like to, if I may, Lord Morris, ask you the same question.

*Lord Morris of Aberavon:* Yes. Thank you very much, my Lord. I would agree with the thrust of Lord Mayhew's answer. The Attorney is Her Majesty's Attorney and he is the Attorney to the Crown. He is also the legal adviser to the Government and in that capacity he shares collective responsibility with his colleagues. So far as his responsibility to the Crown and his *quasi* judicial functions are concerned, he does not share that responsibility with his colleagues; he is on his own. That is a broad division. He has many responsibilities, charities, *parens patriae* and soon, prosecutions, but generally in that field he is operating on his own. He has certain responsibilities to Parliament. He has a responsibility to advise the House, certainly the House of Commons, and I suspect the House of Lords. He advises on constitutional issues, if asked upon, to the House. He advises on the conduct of Members. For many years he was a member of the Privileges Committee of the House of Commons. When that was enlarged, I ensured he was no longer a member, he merely had papers. That eased his task enormously. But he is open to be asked questions and to answer fully. This is, I think, the distinction which Lord Mayhew is making, which I would agree with, that if asked, "What is the legal position?" he should answer, but that does not mean that he has to give the whole of his reasoning, the caveats he would enter, the chances of persuading the court that it is right. That is the wall which should come down. I always liken him to a family solicitor. None of us would like the advice

8 February 2006

Lord Morris of Aberavon and  
Rt Hon Lord Mayhew of Twysden

given to us by our family solicitors to be broadcast in the market place. As Lord Mayhew said, thereafter he 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.

**Q211 Chairman:** There is one very interesting point which both distinguished former Attorneys have made, which I suppose to the person in the street would come as a surprise, which is this notion of the Attorney-General being quite distinctly an adviser to the Crown and that being separate from the function of advising the Government of the day. That is interesting in the context of this inquiry because the issue of this inquiry, of course, is whether war-making powers should continue to be exercised under the royal prerogative. It seems to me to follow that if they are exercised as at present under the royal prerogative, the implication of what you are saying is that advice given to the Executive, which after all exercises prerogative powers on behalf of a monarch, is not being given, if I understood you rightly, to the Cabinet but is being given to the Crown in respect of an exercise of prerogative?

*Lord Mayhew of Twysden:* It is being given to the Crown's ministers, who, by the processes with which you are very familiar, have become invested with the royal prerogative. The duty of the Attorney-General is multi-faceted. He has a duty to ensure that the Queen's ministers, who act in her name, or purport to act in her name, do act lawfully because it is his duty to help to secure the rule of law, the principal requirement of which is that the Government itself (and its agents) acts lawfully. So it is a unique position.

*Lord Morris of Aberavon:* He is not giving advice under the royal prerogative; it is the ministers who exercise the royal prerogative. He is giving advice as a government minister to the ministers who require it, which perhaps is a road we should not go down.

**Q212 Chairman:** Let me just persist for a moment. Let us assume on this side of the room there are the ministers of the Crown engaged in exercising prerogative powers and on that side of the room there is a government accountable to Parliament within our democratic arrangements. Is the Attorney-General's role different in respect of his Cabinet colleagues as an elected government vis-à-vis the ministers of the Crown exercising historical prerogative powers? Is there any difference?

*Lord Mayhew of Twysden:* I think not. His duty is to secure that his colleagues act lawfully and for that purpose it is his duty to give his best and honest political opinion as to whatever course of action they propose or seek his advice upon. If they persisted in rejecting his advice and acted in a serious matter

which was unlawful, it would be, in my view, his duty to resign; indeed, when asked by Parliament to set out the character of the legal position on which the Government was acting, he would have to say that it was not lawful in his view. So it would for practical purposes be his duty to resign. I do not know of any occasion where he has been put in that position.

*Lord Morris of Aberavon:* Under the Ministerial Code ministers are obliged to act according to law, and international law included, likewise civil servants, likewise soldiers, and that pre-supposes that they are entitled to advice, and he tenders that advice like a family solicitor to his client. It is a client-solicitor relationship.

**Q213 Viscount Bledisloe:** I was really trying to see the distinction which Lord Mayhew in particular was making as to what his advice would look like if it was going to be published. Is an analogy that if I write an advice for my client which comes to the conclusion that he is going to win, I will have set out the possible difficulties? If I am asked then to write an advice which he can show to the public or to the other side, I may well be asked merely to set out my conclusion without giving rise to the hares which I have discussed but dismissed. Is that the sort of distinction you were making?

*Lord Mayhew of Twysden:* Yes.

**Q214 Chairman:** I would like to bring some colleagues in, but could I just ask one more question myself? The burden of our inquiry is whether the prerogative power, which over history has been gradually eroded by Parliament, should be eroded further by Parliament taking back from the prerogative power the right of approval to engage in armed conflict overseas. Is that, in your personal opinions as people of great experience, a right aspiration or not? Lord Mayhew?

*Lord Mayhew of Twysden:* My response to this is the response not of a lawyer but of a politician. 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 in whom it is now vested. There is a number of reasons for that. One of them, without expressing an opinion here about the lawfulness or otherwise of the Iraq war decision, is that decision. There has been such an imbroglio surrounding it, which continues, that I think the public are going to seek comfort which goes beyond the mere exercise of the prerogative power. How is that to be achieved? If you want to legislate for the lawfulness of that kind of action, ideally it would be achieved by saying no such action shall take place without parliamentary consent and consent

8 February 2006

Lord Morris of Aberavon and  
Rt Hon Lord Mayhew of Twysden

shall not be given save for lawful purposes. But as soon as you start to draft that—and much of the evidence you have heard from academics, I see, has focused upon this—the more detail you go into and you find you are required to go into, the greater the number of rooms available for the Devil to reside in, and you find yourself then legislating in a way which is open to judicial review, to challenge, to appeal and to argument and it becomes impractical. Therefore, as a politician, I favour a different way, which is by way of convention. You have had some discussion about that, I know. Perhaps I had better stop there for the moment, but I would say that it is not just a matter of the public, I also look at it from the point of view of somebody who, like all of us, has responsibility for the welfare of our Armed Forces. The Armed Forces increasingly today experience great anxiety, and reasonable anxiety, as to whether what they are being asked to do involves them in collective or even individual responsibility of a criminal character. They are entitled to assurance, too, and I think would look for something like this. I think that parliamentary approval, though it will not be a guarantor of lawfulness, nonetheless does offer assurance of what I think you have been calling democratic legitimacy. I think that is a good way of describing it.

**Q215 Chairman:** If I could ask a personal question? You served in the Armed Services at one point in your life—

*Lord Mayhew of Twysden:* As a lowly national serviceman!

**Q216 Chairman:** Do you think the position has changed from when you were a serving officer? Do you think that times have changed?

*Lord Mayhew of Twysden:* Times have certainly changed, yes. I do not think people thought about whether it was lawful or not. But now these questions have arisen and our international obligations have burgeoned. People hear about the International Criminal Court, and so on. They do not know much about it, but it sounds pretty nasty if you happen to be a serving soldier and you are told to, “Get in there and sort it out, and the Army will stand behind you, lad.” All of this is quite worrying, and it should be worrying. Therefore, they look to seek some sort of assurance, I think. If they do not get it, I think one must face the potential risk (not a probability at all, in my view, but a potential risk) of serious conscientious refusals of duty in certain circumstances, which would be catastrophic for the Armed Forces and would lead to horrific consequences, such as courts martial having to determine the legality or the lawfulness of a campaign, for example.

**Q217 Chairman:** I think we would be very interested at some point to explore your ideas about convention, but I am anxious to bring in Lord Morris. We will reverse the order of the questioning, Lord Morris, so that you do not always come in second, but I would be interested in your overall view of parliamentary involvement or approval in deployment.

*Lord Morris of Aberavon:* You will be told in the evidence, I am sure, that there has been substantial evolution in the convention as regards the royal prerogative—since 1688. It is convention, after all. It was Churchill who said that now it is no longer a royal prerogative, it becomes the privilege of the people. As a democrat, I think one should look at that evolution and see what is applicable both as regards democratic acceptability and the point made by Lord Mayhew with regard to the truth. I was a young soldier a long time ago, and a Defence Minister too, but it was the CDS, as I understand it, who was most anxious to be assured of the legality of the action of his troops, otherwise he could well be in serious hot water at the time of the Iraq war. I read some of the evidence by the academic experts and I reached the firm conclusion that going down the statutory road is much, much too difficult, for various reasons. If you look at one Bill, for example, Professor Brazier’s, he talks about armed conflict and refers one to the Geneva Convention. If you look up the Geneva Convention, as I have done, there is no definition of “armed conflict” even in the Geneva Convention, so you are arguing in a circle. So that does not help you at all. Then there are the problems about peace-keeping operations. I suspect that in our time we shall see more and more of peace-keeping operations, as opposed to First World War-Somme, kinds of efforts. I was involved as Attorney-General every day in the Kosovo war. I had to agree targets each and every day of the 69 days. Was that peace-keeping? Was it peace-keeping, plus, or peace-keeping, plus, plus? It is not easy to draw the line between peace-keeping operations on the one hand and full-blown armed conflict on the other. That particular Bill does not touch that. The need, as I see it, is to have democratic credibility, to have an embracing situation which you cannot conjure to anticipate the needs of 20, 30 or 40 years ahead in a statute. You could argue the point of it and I do not think you would be much better off at the end of the day. I think one could develop a parliamentary convention. There are still difficulties of drafting and definition, which Lord Mayhew may touch upon, but I think it is a much better road if one had all the party leaders agreeing on the convention, that our troops would not perhaps be sent overseas without parliamentary approval, and perhaps sealed by a Speaker’s conference. In my youth, Speaker’s

8 February 2006

Lord Morris of Aberavon and  
Rt Hon Lord Mayhew of Twysden

conferences were held on matters of electoral reform and things of that kind. It gave a special seal of approval and the Speaker of the day would try to get the parties together. It might well be that each party's leader at the time of an Election would upgrade his commitment at the time of his manifesto, and if he did not he might be asked about it and that could be difficult. In that way you could anticipate the generality of the problem, not be too specific, cater for peace-keeping, cater for special operations which are not touched upon in any of the matters I have read, and I think that would meet the situation. We can be taken to international courts. I was taken to an international court and I spent five long days in the International Court of Justice in the Hague on whether Yugoslavia could get an injunction to stop the bombing, leading Professor Greenhill, of whom we have already heard, and although Miss Wilmhurst was not part of the team there she was part of the legal team in the FCO at the time and I am sure her views were considered, and what we were doing was examined. That is the liability of our troops now we have the International Criminal Court. So our soldiers want to know, and I think in that way Parliament could play a very significant role. We began in the Iraq conflict by having a substantive resolution. We have been told that we are unlikely to go to war in the future. The last war was declared in 1942 against Siam. It is armed conflict now and a state of fact, as the Attorney has told the House from time to time. I think that is the road which we should develop and it may be the way forward.

**Q218 Chairman:** It is impressive to find this cross-Attorney unity on the issue of a convention and I imagine, Lord Mayhew, that your version of a convention would be rather similar to that of Lord Morris's?

*Lord Mayhew of Twysden:* Yes. 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 UK 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.

**Q219 Lord Windlesham:** Why not Parliament rather than the House of Commons?

*Lord Mayhew of Twysden:* That is for discussion, of course, by whoever is interested in this. 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.

**Q220 Lord Windlesham:** Please forgive me, but just to continue this line for a moment or two longer, to what extent would that be enforceable in a war-like situation, only the House of Commons? Supposing the House of Lords took a markedly different view. This is stretching the imagination, perhaps, but nevertheless it might. There might be a motion, the motion might be carried and there might be a groundswell of opinion in the public. So why limit it to the Commons?

*Lord Mayhew of Twysden:* I have given such reason as I can for limiting it to the Commons. It would be perfectly legitimate, of course, to require the approval of both Houses of Parliament and if the Lords, for example, disagreed with the House of Commons you would then have a difficult situation, but the Government would not have the approval which was required. I am not sure that that is very desirable, given the objectives which I am setting out. I do think that it is a mistake—and Lord Windlesham has not made it—to suppose that the Government will always get its way because it commands the majority in the House of Commons. My experience in any event at the Despatch Box was that the sharpest darts came from behind and in matters of constitutional lawfulness I think Members of Parliament will have too great an integrity to support their Government if they believe the Government is asking them to approve something which is unlawful.

*Lord Morris of Aberavon:* I fully understand the feelings of the House (which I am now a Member of) wanting to participate, but fundamentally if it is democratic legitimacy, unless there is a change in the character of this House it has to be primarily that of the House of Commons, although of course the House of Lords may voice its view. The Government has a majority in the House of Commons, it has to have it, but this Government certainly has not got it here. But the bottom line, of course, is that it is the House of Commons which commands supply and if there is a denial of supply then the ambition of the Government falls. We have no role in that way.

**Chairman:** This is one of the reasons we are in the *impasse* we are, because historically the Crown decided to go to war but Parliament had to vote the

8 February 2006

Lord Morris of Aberavon and  
Rt Hon Lord Mayhew of Twysden

supply and so there was that tension. Now, with the sort of fusion of the Crown and the Executive powers there is no tension between the willingness of an elected Parliament to support a war and the Crown's wish to wage war. That is one of the constitutional issues we are wrestling with and this is very helpful.

**Q221 Viscount Bledisloe:** Do you think the right answer to your dilemma is that each House has a debate and a vote and if they differ it goes back to the Commons, which having taken account of what the Lords said then makes a Division (ie a very shortened Parliament Act) saying there will be tight procedure, but that it would be ridiculous not to hear what the Lords has to say when you know there is the enormous degree of expertise that there is here?

*Lord Mayhew of Twysden:* Yes, I would accept that.

**Q222 Lord Elton:** In considering the effect of parliamentary involvement on the public and on the soldiers, what do you suppose the effect would be upon the Government and its quality of decision-making?

*Lord Mayhew of Twysden:* As I believe Lord Carter said in one of your sessions, it is now unrealistic to suppose that a Government would embark upon a course of action, committing troops to armed conflict absent the approval of Parliament. I think he was saying that this is all very interesting stuff for the constitutionalists and the lawyers but the parliamentary reality is as I have just described. I think there is some sense in that, as there nearly always is in what Lord Carter says, if I may say so.

*Lord Morris of Aberavon:* I think the 2003 resolution on Iraq is a Rubicon, a very important evolution of our process.

**Q223 Lord Elton:** In other words, that history rather than the parliamentary process is forcing a review in Government of how it makes its decisions on military matters, is that right?

*Lord Morris of Aberavon:* I think it would be very difficult for a Government to commit troops without the support of the House of Commons.

**Q224 Lord Peston:** I think you have mostly covered what I was going to ask you about, but I do have one or two more general questions. Speaking totally as a layman, would I be right in saying that lawyers of distinction and probity could disagree on what was legal?

*Lord Mayhew of Twysden:* Oh, always, I am glad to say!

*Lord Morris of Aberavon:* If they did not, we would not be in business!

**Q225 Lord Peston:** Therefore the Attorney-General having given his advice to Parliament, as you have said—and the Attorney-General certainly has the distinction of probity—you are a Member of Parliament (taking this abstractly) and you are sitting there and you have just read in your paper a person who also seems to be of considerable distinction saying that what the Attorney-General, we are told, said was legal is illegal. Where does Parliament itself then get its legal advice from, since it is not going to be told the detail of what, as you say, the Attorney-General said to Government?

*Lord Mayhew of Twysden:* That is for Parliament, it seems to me. It is entitled to question the Attorney in the way in which in this Committee you have been considering this afternoon. 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.

**Q226 Lord Peston:** It does not have the ability to appoint a lawyer and say, "Would you please advise us on this," does it?

*Lord Mayhew of Twysden:* It has the ability to do anything it wishes to do. There is no constitutional bar to that. That is one of the questions which I think you had in mind some time ago.

*Lord Morris of Aberavon:* It could set up a Select Committee and appoint its own legal advisers, or take any other advice.

*Lord Mayhew of Twysden:* Yes.

**Q227 Lord Peston:** It sounds a bit hypothetical, but my other question, taking us back to supply, when we were at school we learned about ship-money, and you have referred to this in the *Hampden* case, and at that time the King had the royal prerogative and said that he was going to spend all this money on the navy and Parliament said, "You can't do it." I think I am right (because I have not had the time to look it up) that when it went to a court case the King won, did he not, in the *Hampden* case? I have a feeling that is what happened. Nonetheless, the whole situation, as Lord Morris pointed out, was then totally transformed because from that point on Parliament decided it was going to vote for supply. The position today, though, is very different, as my Lord Chairman pointed out to us, because not only does Parliament produce the majority for the royal prerogative but it also produces the majority for supply. Certainly in my lifetime I have not lived through a Parliament refusing to vote for supply. Therefore, there is a sense at the moment, surely, that we are less democratic than we were? It is odd to say that about the seventeenth century as opposed to today.

8 February 2006

Lord Morris of Aberavon and  
Rt Hon Lord Mayhew of Twysden

*Lord Mayhew of Twysden:* It does depend upon the integrity of Members of Parliament, and we have touched upon that. I would never wish to be a minister seeking supply approval from Parliament (from the House of Commons or this House) for something which was actually seen to be unlawful. I know it is not a direct comparison at all, but the Narvik debate in May 1940, I think it was, about the Norway expedition, nonetheless has a relevance. The government fell, I think it was on a resolution to take note, it was not a substantive resolution.

*Lord Morris of Aberavon:* Adjournment.

*Lord Mayhew of Twysden:* Adjournment, yes, that is right. The government fell, not because it lost its majority but because its majority was substantially reduced because its normal supporters either abstained or voted against. That was not on a matter of probity, that was on a matter of competence. I think it would be all the more so in the case of something which was plainly “smelly” in legal terms.

*Lord Morris of Aberavon:* If one has lived through Governments with majorities of one or less than one, you cannot be assured that you will always get your supply and if we were to lose that would mean the Government would fall. We have all seen a Government issue fall on an issue of confidence.

**Chairman:** Baroness O’Cathain has a question, I think, directly germane to this.

**Q228 Baroness O’Cathain:** Do you think there are any circumstances where the Attorney-General’s legal advice should be made public as a matter of course?

*Lord Morris of Aberavon:* The answer is no for the same reason I mentioned earlier, that he has a client-lawyer relationship, the client is the Government, and we have gone through some of the problems of giving the caveats and the hesitations about whether the advice given would be upheld in the courts. When one has read the present Attorney’s comments on the Iraq war and the hoo-ha about the giving of an edited version, one knows the difficulties of going down that road. Lord Mayhew has dealt with the situation of the need to answer a question, or indeed engage in a debate, and set out so far as he can whether a position is legal or not, but to give the whole advice—I would draw the line there, an emphatic no.

*Lord Mayhew of Twysden:* I agree.

**Q229 Chairman:** May I just follow that up by asking you, if you both agree within the convention that parliamentary approval is desirable and if a consideration for Parliament to arrive at the right conclusion is, in these days of international law looming larger, that legality is one of the keys to

the attitude Parliament should take (in other words Parliament needs to know, in deciding whether to support the war, whether it is acting legally in terms of international law and in other legal ways), it is very difficult, is it not, for Parliament to do that on a simple assertion from the Government of the day, “Yes, we are advised it is legal”?

*Lord Morris of Aberavon:* The privilege, of course, like any other privilege, is that of the client. The client (the Government) can, if it wished to, lift the privilege. I pointed out the dangers. I was pressed on more than one occasion by various Government departments to release the information that I had advised in a certain way and that would have buttressed their case. On each occasion I refused. I did devise a formula, which I think met a great deal of their needs, that they had consulted high authority (which I presumed to be a high authority in that context), but I would not allow it to be said that the Attorney had advised.

**Q230 Baroness Hayman:** I think there is a real problem here, because in saying that something is legal, giving the parameters of the advice but not the detail, in a sense you are pre-empting debate and giving one piece of information which is a very broad brush to Parliament but not giving any of the detail behind it, and that in itself weighs heavy in the scales. I can understand Lord Morris’s view of not saying what the advice was at all. I find it more difficult to give the broad brush conclusions without the reasoning because I think that is in itself tendentious. You have been a minister and you ask about a policy, “If I am judicially reviewed, what are my chances of winning?” and you get advice and you go out and you say, “This is legal.” It seems to me that on issues this germane to national life where there will be huge parliamentary debate, once you have said anything about the legal advice this is going to be pushed and pushed and pushed and the synopsis will never do?

*Lord Mayhew of Twysden:* Yes, it will be pushed. That is perfectly true. I am not at all suggesting that the Attorney’s contribution in the House of Commons, for example, should be limited to, “This is the legal result,” period. I think he can go into as much detail as is necessary to induce confidence in the House of Commons that the matter has been sensibly looked at and a sensible decision has been arrived at. The distinction I am making is between that on the one hand and the disclosing of the full terms of the opinion which he has given to his colleagues, for reasons which we have gone into.

**Q231 Baroness Hayman:** But then we come back to who is the client. I understand it is for the client to waive the privilege when the client is Government,

8 February 2006

Lord Morris of Aberavon and  
Rt Hon Lord Mayhew of Twysden

and we go back to the question of how Parliament gets its advice.

*Lord Mayhew of Twysden:* Yes, exactly, we do, and you have to choose. It is not so much the merits of the individual occasion which lead me to the conclusion which we have both expressed, it is more the consequence for future opinions, future advice which would flow if, in spite of the objections of the Government, the opinion was released. Without going into the merits of the decision again, in the case of the advice which was described to Parliament by the Attorney in the case of the Iraq war, he set out the conclusion and the basic reasons for it, that Security Council Resolution 1441 had been revived by a process which we are familiar with, or can be. He showed the route by which he had reached that decision. It does become more difficult, of course it does, once you produce a skeleton because you are always going to be pushed, and in constitutional affairs there are no terribly tidy lines where you can say, "Well, everybody can agree thus far and no further." I think I have said all that I can sensibly helpfully say about it.

**Chairman:** We will just take two more questions.

**Q232 Viscount Bledisloe:** Is not the further difficulty that no advice can be better than the facts upon which it is based, and many of the facts upon which the Attorney may have based his advice may be facts which cannot be published because they are secret information? To publish his reasoning without the facts is impossible?

*Lord Mayhew of Twysden:* Yes. I am sure he is able to say in Parliament, "There are reasons here and other factors here which, for reasons of security, I cannot divulge." At the end of the day it comes down to confidence in probity.

**Q233 Viscount Bledisloe:** Yes, but then nobody can evaluate the strength of his advice and you cannot put it to somebody else to say, "Is this really right?" if they cannot know what the facts were the Attorney was working on?

*Lord Mayhew of Twysden:* That is perfectly true.

*Lord Morris of Aberavon:* That was the problem on the Iraq advice. Because it was an edited version which became published, everyone started to ask what was behind it, what was the history, what were the facts, and I think it was the wrong road.

**Q234 Lord Goodlad:** If we are looking at seeking parliamentary consent in advance of military action, is it possible to seek that consent in any meaningful sense, taking into account the need for secrecy, security and surprise in military operations?

*Lord Morris of Aberavon:* Even in the Bills which I have read, certainly Professor Brazier's, that is a matter which would have to be remedied as soon as may be thereafter. I think a period of seven days or something is set out there. Yes, it is of the utmost importance in some cases that secrecy, efficiency and security of our Forces is maintained. Therefore, it may not be always, and that is the value of a convention which is fairly loosely thought of rather than strict statute whereby one can, without losing all those three elements, come back to Parliament as soon as may be to get that consent which it was not physically possible or proper to get beforehand.

*Lord Mayhew of Twysden:* The need for that I noticed was really common ground acceptance of it amongst your academic witnesses, and I think each of the three Bills with which you have been dealing makes that provision. There has to be provision for emergency, but as soon as the immediate emergency steps have been taken then there should be provision for Parliament *ex post facto* to vote it. That is common ground, I think.

**Q235 Lord Smith of Clifton:** It seems to me that if it is parliamentary approval after the event, the fact is it is a *fait accompli* and debate is meaningless, it is a ritual, but everyone sees through that ritual. It is pure charade and surely now democracy itself has moved on in the way that the nature of war has moved on? Most of our wars now are wars of choice, the experts tell us, they are not sudden emergencies, and you can therefore, as the previous witnesses said, lay down parameters within which these things might be considered, rather than just simply having an endorsement after the event?

*Lord Mayhew of Twysden:* It is not just, with respect, simply having that, is it? It is having it in circumstances where an emergency certified by the Prime Minister, let us say, has arisen and I would suggest that whatever procedures you have for giving democratic legitimacy to the use of Executive power there has to be provision for that given that we are a global power and our arrangements have to meet the realities which confront a global military power such as ourselves. So I do not think it makes it a charade, and supposing consent is withheld, notwithstanding that it has happened, then the Government is in a very difficult position and it may have to, if it wished, continue. It is a difficult parliamentary position and constitutional position if it wished to continue. I quite agree that there are difficult questions which arise. Lord Bledisloe, I remember, raised one during one of your sessions as to how you get out. It may be necessary to stay in simply because you got in. There is no nice and tidy complete answer to these conundrums, in my view, it is just that I think what we are both suggesting

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8 February 2006

Lord Morris of Aberavon and  
Rt Hon Lord Mayhew of Twysden

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would be better than nothing, than what we have at the moment.

*Lord Morris of Aberavon:* As no doubt my Lord Chairman will be aware, I accept immediately that usually there is a build-up to the involvement of troops and at the end of the day the safety of the state must be paramount. But we can, I think, apart from that kind of contingency, firmly get Parliament back into the saddle in general and maybe almost entirely.

**Q236 Chairman:** I think that is really an admirable note on which to conclude. I must say that we are all of us—and I think I speak for everybody—extraordinarily grateful for a very significant

contribution to our deliberations. If either of you have any *arrière-pensée* and want to come back to us, we would be very grateful. Thank you very much.

*Lord Mayhew of Twysden:* Could I just add as a slightly flippant footnote, my Lord Chairman, your fourth question which you thought might be asked and very helpfully submitted to us asked whether it was the job of the Attorney to find the most plausible case to support Government policy or action. I looked up “plausible” in the Oxford English Dictionary and there is a dichotomy. If it is applied to an argument or statement it means seeming reasonable or probable; if it is applied to a person it means persuasive but deceptive!

**Chairman:** Very good. Thank you.

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WEDNESDAY 22 MARCH 2006

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Present	Bledisloe, V Carter, L Elton, L Goodlad, L Hayman, B Holme of Cheltenham, L (Chairman)	O’Cathain, B Peston, L Rowlands, L Smith of Clifton, L Windlesham, L
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**Examination of Witness**

Witness: RT HON LORD GOLDSMITH, QC, a Member of the House, Attorney General, examined.

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**Q237 Chairman:** Lord Goldsmith, welcome. Thank you for coming to give evidence to the Committee. I think you know the subject of our inquiry. Could I just remind you that the meeting is being televised, so if you could kindly formally identify yourself for the record.

*Lord Goldsmith:* I am Lord Goldsmith, the Attorney General.

**Q238 Chairman:** Thank you. Could I just confirm that a transcript after the meeting will be sent to you and your officials for correction. May I open the questioning by saying that one of your distinguished predecessors, Lord Morris, when he gave evidence to us recently, said that the advice given by the Attorney General to the Cabinet is akin to the advice that a family solicitor gives to his client. Do you think that is a fair characterisation?

*Lord Goldsmith:* It is certainly like advice which is given by a lawyer to his client. I am not absolutely sure what the significance of categorising the lawyer as a family solicitor is, but I do not dissent from the thrust of what he is saying, no.

**Q239 Chairman:** Is that advice, given that it is given in a political context, do you think, one of helping the Government to make a legal case for what it wants to do, or do you think it is pointing out objectively the legal pros and cons of the proposed course of action?

*Lord Goldsmith:* It is absolutely not helping the Government to make a legal case for what it wants to do is that does not have a proper legal basis. 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 when asked to give legal advice. 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.

**Q240 Chairman:** Of course, a lot of legal advice rests on fairly narrow questions of interpretation and judgment and there is not always absolute clarity,

and I think this is one of the questions which is exercising this Committee. Let me pose the question to you this way: would you agree that in a modern democracy when issues of whether our Armed Services should be deployed abroad are on the table and under discussion by the Government that is something in which in a modern democracy, rather than in a medieval monarchy, the people of this country and their elected representatives should reasonably be involved and that certainly they should fully understand the issues? Would you agree with that general proposition?

*Lord Goldsmith:* I think, if I may say so, that is quite a dichotomy which you have posed to me between a medieval monarchy and a modern democracy. I am not sure those are the only two models one can envisage of governance. Do I believe—and this is a personal opinion, not as Attorney General, because I do not conceive that the question you have put to me is really a legal question—that there is a role for the people and Parliament in important decisions which are made by the Executive? Yes, of course there is such a role, but I think the key question—and I know it is the one which this Committee is examining—is just what the nature of that role is. My personal opinion—and you will ask others who have policy responsibility for this, I do not—is that it is for Government to make the decision, but it is accountable to Parliament, and that accountability will mean that any Executive, any Government, will need from time to time in certain circumstances to ensure that it has the support of Parliament. That may sometimes even be before things are done.

**Q241 Chairman:** We have disagreement, obviously, on that issue from many witnesses. Two of your predecessors have taken a contrary view of the extent of the role of Parliament. But whatever the extent of the role of Parliament is, whether it is simply (in your formulation) accountability or whether it is something more substantial, would you not agree that it is very hard for that to be exercised when there are tricky matters of international law without

22 March 2006

Rt Hon Lord Goldsmith QC

Parliament having full access to the same legal advice which the Government has?

*Lord Goldsmith:* I would not agree with that the way that is put. I think it is important, when important decisions and issues are being put before Parliament that it understands the basis upon which they are being put forward. I do, for example, believe that it is important that Government explains clearly the legal basis, for example, for military action (as indeed was done in relation to Iraq), but we will have to go on, I think, to the question of how that is done. In my view, principally this is a matter for the Policy Minister to explain. These issues are often very closely tied up with policy, with political issues, with factual issues, with facts and other elements. Normally, therefore, it is the case that the legal advice is inseparable from the policy and that is why, whether it is a matter of international law or a matter of domestic law, normally it is the relevant Policy Minister who will come forward, explain the policy, explain the justification for it and also explain the legal basis for it. It is what happens, for example, in relation to statements of compatibility with the Human Rights Act under s90 and it is the Policy Minister who does that, not the lawyer. Indeed, it has always been the case pretty much in relation to military action, too. So in relation to Iraq, the Foreign Secretary sent a detailed memorandum to the Foreign Affairs Committee on 17 March. He personally addressed the House of Commons in the debate over 18 and 19 March. In this House his junior minister (if I may so describe her), Baroness Symons, addressed the House in a debate which took place on 17 March on all of those issues. If one looks back over the history, that is what has happened before. I believe that in 1993, I think it was Douglas Hogg (then the relevant minister) who explained the basis of legal action to the House of Commons. In 1998, Baroness Symons again, in relation to Operation Desert Fox, did that. So I think generally it would be right that it is the Policy Minister who does that, but I am accepting that it is right that the legal justification is explained. That is quite distinct, however, in my view, from disclosure of the underlying legal advice and like my distinguished predecessors, Lord Mayhew of Twysden and Lord Morris of Aberavon, whose evidence I have read, I strongly believe that the advice itself which is given to Government should not be disclosed, that that ought to remain confidential for very strong public interest reasons.

**Q242 Chairman:** It is interesting you say that, and before I move on to bring in one or two of my colleagues let me just ask you, given the sequence of events relating to your own advice as Attorney General on Iraq, whether looking back and the fact that your advice was eventually published—and we all know the sequence of political events which led to

this—and you talk about strong public interest arguments, what actual damage was done to the public interest by the publication of that advice?

*Lord Goldsmith:* The advice itself was ultimately published because it was largely leaked. I think it is a very bad precedent. I think the real risk is that in future when it comes to the giving of legal advice law officers and others who are advising will be concerned not to express themselves fully and frankly to those they are advising, as they ought to do. That is the underlying concern, that Government should be frank in seeking advice, it should not hesitate to seek advice because it is worried that its instructions will come out either directly or repeated in the advice which has been given, and that those giving the advice should be full and frank in what they say. I think that is important in private life and I think it is very important in public life as well. It was very well put, I thought—I have it here and, if you will permit me, my Lord Chairman, I will just refer to it—by the then Chairman of the Bar, Sir Stephen Irwin, QC. At the time there was a debate about whether the advice should be published, and he said, “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.” I would add to that that there is a risk they will not be told all the risks, all the dangers, all the questions there may be which they ought to know before taking their decision.

**Q243 Chairman:** So your regrets about it rest on the dangerous precedent, not on the effect that information had on the state of public knowledge and parliamentary knowledge? It was, in your mind, the danger of the precedent set by the publication of your advice?

*Lord Goldsmith:* I think there have been damages to the public interest which have arisen as a result of the disclosure, but of course the disclosure was not at the time and I think the question which is being put to me is on the basis of what would the damage be if the advice had been disclosed at the time, at a time when the conflict had not taken place. One particularly important issue, I think, is the position of our Armed Services. They need clarity about whether what we are asking them to do is lawful, yes or no. You said a moment ago that some of these questions are difficult. Sometimes, it is absolutely right, they are difficult. We have to reach a judgment. Something cannot be a little bit lawful, any more than you can be a little bit pregnant; it has to be yes or no, and the Armed Services are entitled to a clear answer to that question and they do not need to read long, legal advices and then decide as they are, as it were,

22 March 2006

Rt Hon Lord Goldsmith QC

metaphorically being asked to go over the top of the trenches whether they agree with this advice or that advice.

**Q244 Chairman:** You mean simple soldiers would not understand complicated legal advice?

*Lord Goldsmith:* Absolutely not. I am certainly not saying anything about simple soldiers, absolutely not. I am saying that we owe to those whom we are asking to put their lives on the line clarity about whether what they are doing is lawful in the Government's view or not, because they recognise that it is their responsibility to obey the law. As the Chief of Defence Staff, Admiral Sir Michael Boyce (as he then was, now Lord Boyce), said at the time, he wanted a clear, unequivocal answer, yes or no. He did not want anything else; not because, if I may say so, he is a simple soldier, he is nothing of the sort, but because he thought that was what his men and women deserved, a clear answer, so that they could get on with their job, Government having done its.

**Chairman:** Yes, I think it is the clarity of the answer which exercises us all.

**Q245 Lord Carter:** It would be helpful if you could explain the process of giving advice. I am using the word "advice" in a generic way. There is the clear question of the deployment of Armed Forces, but once they are deployed and the conflict starts, am I right in thinking that the Attorney General has to give advice on the rules of engagement? As the conflict develops, are there issues where you have to give legal advice? It would be harder if the conflict was ongoing for that advice to be related to Parliament in any way, I imagine?

*Lord Goldsmith:* You are absolutely right on both points. There certainly are ongoing issues about rules of engagement, about particular targeting decisions, because the present state of international humanitarian law means that there are legal principles which apply to particular targeting attacks and those are matters upon which legal advice, sometimes, from the Attorney General does have to be given.

**Q246 Lord Carter:** Is the process that the Armed Forces, or the Secretary of State, in each case ask you on each occasion, or do you have to volunteer it? What is the process?

*Lord Goldsmith:* In relation to the conduct of hostilities whilst an armed conflict is taking place, first of all there will be some prior decisions, for example, about the rules of engagement upon which the Attorney General may well be asked to advise. We have some standard rules of engagement which do not really need any further consideration. There will be particular decisions upon which advice may be sought, particular attacks where the Attorney

General will be asked to advise on that particular raid, and then there will be delegated authority given to lawyers and commanders in the field, the framework of which will have been approved by the Attorney General before it happens. Some of those decisions will then come up because they are outside the parameters of delegated decision, some will be taken within in.

**Q247 Lord Carter:** As the conflict then proceeds, it would be extremely hard to publish that advice in any way, I would imagine?

*Lord Goldsmith:* I think it would be impossible.

**Lord Carter:** Exactly, yes.

**Q248 Lord Goodlad:** It has been suggested that the Government should be required to give Parliament a formal analysis and legal justification of the deployment of Armed Forces before an armed conflict. Do you see that as presenting problems?

*Lord Goldsmith:* I do see a very strong case for Government having to give that legal justification for military action, as I think has been done generally where that issue has arisen, and I have said something about how it should be done. As to whether it should always be before the action has taken place, I think that would depend on the circumstances. I think if there is no reason not to do it, then it would seem to me appropriate to do it before, but sometimes it will 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.

**Q249 Lord Rowlands:** You said, Attorney General, that servicemen need clarity. Would not prior parliamentary approval of deployment offer also that degree of clarity?

*Lord Goldsmith:* I am sure that Armed Services would find it good to know that what they were doing had the approval of Parliament and had the approval of the people of the country whom they were there to serve. The clarity I am talking about is a bit different, because I think that is more a question, if one uses the phrase, of legitimacy. The clarity I am talking about is this: they know, because we have told them so, that they, and indeed the civil servants, have personal legal responsibilities not to engage in action which is unlawful. I think the important thing, therefore, is that the Government must give them that clarity. It is the Attorney General's job ultimately to make that decision. It is a hard job to have to do, but it has to be done, and one has to give them that answer ultimately, yes or no. My worry about the concept of parliamentary approval is that I am not sure they would necessarily get from a parliamentary debate (still less, perhaps, from two parliamentary debates) that degree of clarity about what the legal position is;

22 March 2006

Rt Hon Lord Goldsmith QC

indeed, if they were to read it in full they might well find there is a range of views on that issue and that might not help on that particular point about knowing that their legal position is protected.

**Q250 Lord Rowlands:** But if a motion has been tabled and the Commons and Parliament had approved it, that does at least strengthen the feeling, surely, in the Armed Services that they are being backed and supported by the elected representatives?  
**Lord Goldsmith:** As I say, I am sure that is right. I do not think it is the same issue that I am talking about, which is the need for them to know that what they are being asked to do is lawful.

**Q251 Chairman:** Just on the point of an informed Parliament before I bring Lord Smith in, can you contemplate a situation where Parliament, deprived of the full extent of the legal advice on some of these, as you say, sensitive and difficult issues of the interpretation of international law, and simply getting the headline, as it were, from the responsible minister, might seek its own advice, which, of course, it is entirely up to Parliament to do if it wishes to? What would you actually feel as the leading Government law officer about two sets of advice on issues in the public realm?

**Lord Goldsmith:** If I may say so, as you rightly say, each House of Parliament has the right to do what it wants. It already has access through particular committees to particular legal advice which it seeks on particular areas, but I think there is a need for caution here. I think there are some potential difficulties and downfalls, as you say, if there were conflicting sets of advice. I can conclude this after we have voted.

**Chairman:** If you are happy, let us go and vote.

*The Committee suspended from 4.40 pm to 4.51pm for a division in the House*

**Q252 Chairman:** I think you were halfway through your answer before you were so rudely interrupted.

**Lord Goldsmith:** The point I was making is that I think there is a need for caution and there are some potential difficulties and pitfalls in having conflicting advice in this area. As I was trying to say before, there is a distinction here between parliamentary approval and legality. There is a difference between Parliament's role and the Government's role, at least the way that I see it. Government will have to make an Executive decision based on all the information and it may be difficult for that information (which may in the particular case affect the legal advice) to be made available to somebody else who is also offering advice. I think it is difficult to envisage circumstances in which it would be possible to engage, for example, counsel to advise Parliament with all the sensitive

information and facts which would be available to legal advisers within Government or which Government may be prepared to share with its own legal adviser, another minister, the Attorney General. So I think there are difficulties there. There is also a danger, which is why I say there is a need for caution, of the possibility of conflicting advice being given, a difference which could not really be resolved by a vote, and I come back to my concern about the position of those whom we are asking to implement the decision, whether it is taken by Parliament or whether it is taken by Government, the Civil Service and the Armed Forces, who need to have clarity as to whether or not what they are being asked to do is legal. They need definitive legal advice and I would worry, if you had two conflicting sets of advice, where that might leave them and therefore their operational capabilities. So that is why I think there is a real need for caution, having in the first part of the answer, of course, recognised that it is for Parliament and each House to do what they choose to do.

**Chairman:** I simply observe that there is an obvious trade-off. The fuller the legal understanding of Parliament, the less it would be likely to need independent advice, but I would like to move on to Lord Bledisloe.

**Q253 Viscount Bledisloe:** I am concerned with the wording of the wording of any legislation which require parliamentary approval for the deployment of Armed Forces overseas? That legislation, presumably, would have to define in unambiguous terms the specific categories and degrees of deployment for which approval was required and the emergency situations in which the Government could deploy troops without prior approval?

**Lord Goldsmith:** Yes.

**Q254 Viscount Bledisloe:** Do you, looking at it as a lawyer, consider that it would be possible to define these matters with the clarity and certainty which is necessary if one is to have an enforceable statutory requirement?

**Lord Goldsmith:** I think it could be very difficult. There would be, I am sure, clear cases, some examples which, as it were, clearly fall into one or the other categories, but I can see, having now been in Government through two major conflicts and a number of lesser deployments of forces, that there are many occasions upon which this issue may arise and one would have, I am sure you are right, to define that with clarity. It would involve potentially also bringing the courts into an area where they have traditionally been very loathe to enter, matters of high policy such as that. You give the example of it is not necessary to go if it is an emergency. There might be a doubt about whether it is or is not an emergency. Government might take the view that it is an

22 March 2006

Rt Hon Lord Goldsmith QC

emergency and someone else might say, “Well, why couldn’t you wait a day or two longer and get parliamentary approval?” There might be very good military, strategic reasons for that and it may be difficult to share them, but then you would be asking the court possibly to rule on that, so I can see there could be difficulties in that situation as well.

**Q255 Viscount Bledisloe:** That brings me to the second half of the question really. If there was such legislation, could you have a sanction which a court or somebody enforced if the Government deployed Forces in contravention of the statutory requirement? Secondly, if you had the situation where you were getting subsequent approval, what would be the consequences if you had gone into the conflict and Parliament did not give approval?

*Lord Goldsmith:* I can see that could be very difficult. Do you try at that point to obey and to extract your troops? It might be very difficult, for all sorts of operational reasons, to do that, perhaps, without causing them or others like innocent civilians a great deal of harm. I think it is one of the difficulties about rigid requirements for approval that these decisions have to be taken in the context of fast-moving situations where the assessment, the military assessment and operational assessment, may change and certainly it is critical to the decision which is being taken.

**Q256 Viscount Bledisloe:** What could the sanction be if, not in an emergency situation, the Government did deploy troops in contravention of the statutory requirement? Do you see that being a criminal offence by somebody, or what?

*Lord Goldsmith:* That would obviously depend on how the statute is drafted. It would not be a criminal offence unless the statute made it such, but if it became a condition of the lawfulness of conflict that Parliament had given its approval, that does give rise to a question, which I would certainly have to consider, as to whether that might therefore make it an illegal act in the general international law sense.

**Q257 Viscount Bledisloe:** And it would then be the duty of all troops to refuse to go?

*Lord Goldsmith:* Whether it is a criminal offence or not, I think that question would arise in any event if a law provided that military action could not be taken without parliamentary approval. Whether that is a criminal offence or not, I think it puts the troops in an enormously difficult position as to what they should do then. Do they disobey Parliament, it having been said that Parliament’s approval is essential?

**Q258 Viscount Bledisloe:** So in reality if there is going to be any form of change, is it right to say that it will have to be in the form of a convention rather than in the form of a statute?

*Lord Goldsmith:* That would be my view, on the hypothesis which you state. I think there is a question about how you create a convention in any event, but I agree that if the hypothesis is between the two, then convention (which does not have binding legal force) at least avoids some of the difficulties which I think you have rightly identified.

**Viscount Bledisloe:** Thank you.

**Q259 Lord Carter:** Whether by statute or convention, if Parliament were to be involved, of course there are two Houses of Parliament, the Commons and the Lords, and one would have to consider what the role of the Lords would be if approval by Parliament (as I said, whether by statute or convention) was required. There has been one proposal that if the two Houses were to disagree, then the view of the Commons should prevail, which I would understand. To take an example, in the House of Lords at the moment there are five retired Chiefs of Defence Staff and if you had a debate in the Lords and even a substantial vote against the Government’s decision but the Commons voted in favour, that would be extremely confusing for the troops on the ground, I would imagine?

*Lord Goldsmith:* I must say, I think it would. I have got enormous respect for this House and for the people in it who have got the sort of experience which Lord Carter identifies. I have equally no doubt that if there were to be a contest between the Houses, the democratically elected House would have to be the one to prevail, but I think even in that situation it would put the troops in a difficult situation because they would see that whilst the Commons had approved, there were people whose opinions they respected and who knew about the things they were doing who perhaps were taking a different view.

**Q260 Lord Carter:** Would the answer then be, as we did on Iraq, where there was a substantive motion in the Commons with the vote but there was never any question in the Lords that we should have such a motion? We had a number of excellent debates, but we never ever thought there should be a vote by the House of Lords.

*Lord Goldsmith:* My personal opinion—and you will have the opportunity of asking those who have got policy responsibility—would be that that is exactly the situation that we ought to prefer, that if there is to be a vote it should be in the Commons; that this House should certainly debate, but should not actually be asked to take a decision through a vote.

22 March 2006

Rt Hon Lord Goldsmith QC

**Q261 Chairman:** Would your opinion on that be modified if this House were substantially elected, or is that such a remote hypothesis?

*Lord Goldsmith:* That is another topic for inquiry! I was hesitating simply because I think that obviously depending upon what the nature of the election to this House was, if there were an election, that could affect the position because I have accepted that the primacy of the House of Commons derives from its democratic credentials and things might differ if this House were in a different position.

**Q262 Lord Elton:** Can you say anything in addition to what you have said in reply to Lord Carter's first question to show us the extent to which you need to be continuously updated during conflict to ensure that our contribution to it remains legal?

*Lord Goldsmith:* Yes, I can, and it does depend upon the nature of the conflict. There will be issues which will arise in any conflict which may call for a specific piece of legal advice as to the way the hostilities are conducted, or as to certain consequences which flow from them. Again, I think it is public knowledge—it should not have been, but it was public knowledge—that I gave advice about the responsibilities that we had as an occupying force after the initial hostilities in Iraq had taken place. But the targeting decisions may need constant consideration, and during the

earlier conflict in Afghanistan I did, I think, see that material on a daily basis during the period of the conflict. So it may be necessary to be updated constantly, and when I was not, then it will have been because other lawyers who would be advising commanders in the field would themselves be advising on the legal position within a framework which, of course, accorded with the general advice the Government was being given by the Attorney General and others.

**Q263 Lord Elton:** That must mean that you have to be almost continuously available, does it not, during the conflict, because otherwise the military has to stand with its sword poised?

*Lord Goldsmith:* Yes. I remember at an early stage I was taken in a submarine and shown where decisions are made and it was pointed out to me that the periscope goes up for twenty minutes and that that is the window of time during which instructions have got to be communicated, and you have got to be around to do that otherwise they cannot act.

**Lord Elton:** Thank you.

**Q264 Chairman:** Lord Goldsmith, thank you very much for sharing that with us. I just repeat that we will be sending a transcript for your review, but thank you again for appearing before the Committee.

*Lord Goldsmith:* Thank you, my Lord Chairman.

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#### **Memorandum by the Rt Hon Lord Falconer of Thoroton, Secretary of State and Lord Chancellor**

1. I am responsible within government for general policy on the Royal Prerogative. Since the armed forces are deployed using prerogative powers I am submitting this memorandum which reiterates policy on the use of the prerogative in this area as a contribution to the Committee's inquiry.

2. As the Government acknowledged in its response to the House of Commons Public Administration Committee's inquiry into the Royal Prerogative in 2004, in many respects the prerogative is a historical anachronism. It is the residue of royal or executive authority that is not founded on statute law. It is open to Parliament to abolish or restrict a prerogative power by statute. In home affairs the prerogative has to a great extent been constrained by statute. In foreign affairs it includes the power to conduct diplomacy, to conclude treaties, to declare war and to make peace, to recognise foreign states and governments and to annex and cede territory.

3. The Government also noted in its response to the Public Administration Committee's inquiry that a pragmatic approach remains the most effective. The prerogative allows ministers to react quickly in complex and dangerous situations. As the Committee itself acknowledged, the prerogative offers much needed flexibility to government and is a well-established part of the constitution.

4. While a government could deploy the armed forces on operations overseas under prerogative powers without the support of Parliament, such an eventuality is theoretical rather than real. The Government recognises the desire for parliamentary scrutiny of decisions to deploy the armed forces and has shown that it will provide opportunities for debate when this arises. A formal requirement to consult Parliament, in

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22 March 2006

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particular one enshrined in legislation, is therefore unnecessary and could prejudice the Government's ability to take swift action to defend our national security where the circumstances so require. It might also lead to difficulties in defining what constituted a deployment requiring a government to consult Parliament.

5. Like the UK, many of our key effective allies retain executive authority over deployment of armed forces: countries such as Australia, Canada, France and Poland. Other countries where there are statutory limits on executive authority eg the US, reflect very different constitutional arrangements. The use by Congress of the 1973 War Powers Resolution is the only way the legislature can constrain the President given the separation of powers. In practice, however, the War Powers Resolution has been a subject of continuing constitutional controversy and Presidents have on occasion committed US forces without specific Congressional authorisation. Other countries that have strict constitutional limits on executive authority over deployment of forces reflect specific historical circumstances eg Germany and Japan. In most countries with some form of statutory control over deployment of forces, significant exceptions are made, which preserve a generous measure of executive authority eg in Hungary, the Netherlands and Spain. It is worth noting that there is no current trend for or against strengthening legislative control over executive authority to deploy armed forces. In recent years, Spain has moved to increase it, whilst Hungary has done the opposite.

6. 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. In the case of the recent military action against Iraq a debate and a vote on a substantive motion in the House of Commons and to take note in the House of Lords were held before the commencement of hostilities. On other occasions different ways of ascertaining the views of Parliament were used. The Government remains of the view that a pragmatic approach, allowing the circumstances of Parliamentary scrutiny to reflect the circumstances of an armed conflict continues to be the most effective approach. Different circumstances will lead to different ways of consulting Parliament being used depending on a number of factors, such as whether Parliament is sitting at the time a deployment is necessary and the scale and nature of any deployment. For instance practice has varied at the start of deployments:

- Statements were made and debates held after military operations in Kosovo had started;
- A statement was made and Parliament voted after the armed forces were already in action during the first Gulf Conflict;
- Parliament was recalled following the Argentine invasion of the Falkland Islands.

7. The Government is also mindful of the need to keep Parliament informed of developments during the course of a conflict through statements and debates as necessary.

8. However, the Government must balance its obligations 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. Furthermore, deployments are made into unpredictable, uncertain and fast-moving situations. It is therefore impossible to predict what action it might be necessary to take in changing military circumstances. As a result, any restriction on a deployment might adversely affect the ability of the armed forces to act effectively and flexibly, either in meeting their objectives or in defending themselves. It might also introduce an unpredictable and damaging level of uncertainty as to the legality of the actions of our armed forces on the ground. The Government therefore takes the view that providing a statutory framework for the deployment of the armed forces would limit their ability to operate swiftly to defend our national security and could risk the safety of our armed personnel.

9. The way in which Parliament expresses its views on any action by government is, ultimately, a matter for Parliament. However, previous use of prerogative powers to deploy the armed forces and the way in which Parliament was consulted show the advantages of a flexible approach allowed by the appropriate use of prerogative powers.

November 2005

22 March 2006

### Examination of Witnesses

Witnesses: RT HON LORD FALCONER OF THOROTON, a Member of the House, Secretary of State for Constitutional Affairs and Lord Chancellor, RT HON ADAM INGRAM, a Member of the House of Commons, Minister of State for the Armed Forces, Ministry of Defence, and DR KIM HOWELLS, a Member of the House of Commons, Minister of State, Foreign and Commonwealth Office, examined.

**Q265 Chairman:** Good afternoon, Lord Chancellor. Welcome to you and your colleagues, Mr Ingram and Dr Howells. We are being televised and I wonder if each of you would be kind enough to identify yourselves for the cameras?

*Mr Ingram:* I am Adam Ingram. I am Minister of State at the MOD.

*Lord Falconer of Thoroton:* I am Lord Falconer, the Lord Chancellor.

*Dr Howells:* I am Kim Howells and I am Minister of State at the Foreign and Commonwealth Office.

**Q266 Chairman:** We are most grateful to you for coming along this afternoon. We have a relatively short space of time and an extremely distinguished panel here, so we will try and get through the questions as economically as we can. May I start with you, in particular, Lord Chancellor, but if your colleagues want to come in, please do. We have been told, for instance, by General Sir Michael Rose that a formal requirement for prior parliamentary authorisation for entering into conflict situations can only be of benefit to members of the Armed Forces. They would have the reassurance that they would not be asked to sacrifice their lives in a cause that was not fully supported by Parliament and the people of this country. That, of course, is the issue which this Committee is wrestling with and we have a lot of evidence both as to the desirability of that, but also as to the problems of that aspiration. The question I would particularly like to address to you, Lord Chancellor, is this: when you appeared before this Committee some months ago you explained your overarching responsibility for the rule of law within the Government, and indeed in the new dispensations you take an oath as protector of the rule of law. Does the definition of the rule of law include this country's responsibilities under international law, UN resolutions, and so on? Does the definition of the rule of law for this country in this small world include our responsibilities under international law?

*Lord Falconer of Thoroton:* Yes, it would. We are a country which commits ourselves to comply with international law. The Civil Service Code explicitly says that civil servants must comply with the law, national and international. The rule of law for us does not just mean the rule of law nationally, it means internationally as well.

**Q267 Chairman:** Does that mean that as protector of the rule of law in the run up to the Iraq war you played any role personally as Lord Chancellor?

*Lord Falconer of Thoroton:* I was the Minister of State at the Home Office at the time during the run up to the Iraq war, so I cannot speak with any personal experience of what went on during that period.

**Q268 Chairman:** I am sorry for that. Would you imagine that your predecessor played any role over and above that played by the Attorney General?

*Lord Falconer of Thoroton:* I do not know. You will have to ask him. I do not want to comment on the detail of what went on in the build up to the Iraq war. I will on points of principle, but I do not want to comment on the actual facts when I do not know them.

**Q269 Chairman:** No. That is fair enough. Perhaps I could ask Mr Ingram to respond to my earlier point about General Sir Michael Rose's evidence? Basically, what he was saying was that the morale of the Armed Services and their sense of legitimacy—and I think it is just worth reminding ourselves not just about legality but about legitimacy—would be enhanced by parliamentary approval, and I wonder from your perspective as Armed Services Minister what you see the balance for advantage of parliamentary involvement and approval as being, particularly in terms of the morale of the Armed Forces?

*Mr Ingram:* I have been in the post for four and a half years, so going through Iraq, Afghanistan, Macedonia and other related events. It just seems to me that when there is any major deployment likely to take place it will take place anyway within a coalition of Forces, whether it is EU, UN or NATO, and therefore there is a considerable debate which would go on on this, both in public in terms of the media and it also would be subject to constant updates to Parliament in both Houses, through statements, perhaps even urgent questions in terms of the House of Commons if some event happens and there is a need for accountability. So it seems to me that in all of that there is constant parliamentary scrutiny going on anyway. Then the question goes into whether that affects morale or not. There is no evidence that the one vote we had, the major vote we had in terms of the Iraq conflict, had any impact on morale one way or the other. It was

22 March 2006

Rt Hon Lord Falconer of Thoroton, Rt Hon Adam Ingram MP  
and Dr Kim Howells MP

controversial. There were big debates going on within the wider public and there was certainly a considerable debate within both Houses on it, but there is no evidence to show that that affected morale because soldiers will be focused on what they need to effectively carry out their job. That will be equipment, good leadership, a very clear mandate coming down through the chain of command, what would be expected of them. They will need to be satisfied at all levels that they have the necessary support to be able to deliver. That is what affects morale. You would need to speak to serving soldiers about this, I can only speak from my received wisdom, but it would seem to me that the morale was not affected because of that vote. But that of itself does not prove anything, because in other conflicts and other events there were significant debates going on anyway. Soldiers will be focused on what the task in hand is. I must say as well that I do not know many members of Her Majesty's Armed Forces who actually do not want to go on these deployments. They actually want to contribute and that is a big part of their thought process as well. They want to serve their country, but they need a clear mandate. They need a clear understanding that the chain of command has got all of those aspects in place which are crucial to their morale.

**Q270 Chairman:** A question, if I may, for all of you. In the last few months the new Leader of the Conservative Party and the second man in your Government have both said, in the case of Gordon Brown, "people would expect these kinds of decisions to go to Parliament." A pretty clear statement of direction, although, as we are finding on this Committee, there is no doubt that it is a matter which is really quite complicated. Is there a position of the Government on this? Does the Labour Government have a position collectively on what the Chancellor has said about the desirability of this sort of decision going to Parliament? Is this a policy area which the Government has reached any resolution on?

*Lord Falconer of Thoroton:* Yes, we do have a policy on this, which we all join in, both those in this room and those outside the room. The Government's position is that the current arrangements on the power to deploy UK troops abroad in conflict should continue as it is at the moment. The power to deploy troops is an Executive power. Such decisions are by their nature most suitable for the Executive to take. They are often made in difficult, uncertain, fast-moving circumstances in which flexibility and operational effectiveness must be paramount. The Executive necessarily will have access to full information, or fuller information, than Parliament. The Executive, however, is

dependent for its existence upon the support of Parliament, in particular the confidence of the House of Commons. It is fully accountable to Parliament. It must at all times maintain the support of Parliament in what it is doing. As the Prime Minister has said—and indeed I think this is a point which the Chancellor of the Exchequer is reflecting—whilst a Government could deploy Armed Forces without parliamentary support, such an eventuality is more theoretical than real. The Government is accountable to Parliament for all its actions, whether under statute or under the Prerogative. To prescribe (as a proposal for statute does or the proposal for convention does) how it 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. Parliament, we all know, is not powerless in the face of the Executive's use of its power. If Parliament decides that the Government is not consulting it to the degree that it should, then of course it is open to Parliament to scrutinise, debate and question the Government through a variety of methods, from asking questions to tabling amendments to motions. Formal constraints, either in statute or in a convention, do not work when faced with the reality of planning and deployment. They would need emergency provisions. In the case of a statutory framework, it would mean the risk of the courts becoming involved inappropriately. The present arrangements, we believe, serve the country well. We would be unwise to change them.

**Q271 Chairman:** Thank you very much. To have that on the record in that way is most helpful. It is a bit puzzling and I wonder whether anybody has broken it to the Chancellor of the Exchequer that he is out on a limb, because his words were, "People expect these kinds of decisions to go to Parliament." You have just spoken at some length about decisions being the sole province of Government. That seems to me incompatible with the Chancellor's words.

*Lord Falconer of Thoroton:* There is no inconsistency with the Chancellor's words. A decision such as the decision to use force in the second Iraq conflict is patently something which everybody would expect to be discussed by Parliament and for the Government to say exactly what they were doing, and they would expect to be accountable to Parliament. But there should be no doubt that the decision whether or not armed force is to be used

22 March 2006

Rt Hon Lord Falconer of Thoroton, Rt Hon Adam Ingram MP  
and Dr Kim Howells MP

in the Iraq second conflict, by way of an example, is a decision for the Executive. If Parliament had made it clear it disagreed with that decision in a vote or in any other way, then the consequence would inevitably have been that there would not have been an involvement. But there should be no blurring of where the responsibility is; it lies with the Executive. Equally, the Chancellor of the Exchequer and the Prime Minister have both rightly expressed the view that in a decision of that magnitude of course the Executive (which exists because of the support of Parliament) would have to go to Parliament, to the Commons in particular, to explain what they were doing and if votes were appropriate, have votes.

**Q272 Chairman:** The way the Prime Minister put it might sound like the foundations for a convention, because if he is saying in practice (as opposed to the theory which you have just put forward) these things would go to Parliament and he cannot imagine circumstances where that would not be the case, it sounds to me suspiciously like the foundations for a future convention?

*Lord Falconer of Thoroton:* I am not sure if that is right. Look at recent history. Iraq, yes, there was a motion as to whether or not the House of Commons supported Iraq. Look at Kosovo; no such motion. Look at Sierra Leone; no such motion. Look at Iraq one; a motion on 21 January, that is after armed conflict had started, even though there could perfectly well have been a motion before. Look at the Falklands; vast numbers of statements to the House of Commons, no motion. So Parliament and the Executive appear satisfactorily to have worked out how the relationship should operate. The idea of a convention seems to me to be neither necessary nor supported by history at the moment.

**Q273 Chairman:** Of course, those precedents are relevant, but the Prime Minister's words were uttered after the unhappy experience of our entry into the war in Iraq, so people might assume that he was talking about the future, not the past.

*Lord Falconer of Thoroton:* What he said was this: "I cannot think of a set of circumstances in which a Government can go to war without the support of Parliament," which is plainly right. 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.

**Q274 Baroness Hayman:** It seems to me you are suggesting that the evidence of the support of Parliament could be manifested in different ways, and is manifested in different ways in recent history, so there may be a specific vote, there may be a general series of statements, all sorts of different circumstances, and you said that the current arrangements serve the country well. When Gordon Brown spoke he said that, "now 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." That is forward-looking and I wanted to question whether really there is nothing between the general accountability of any Government on any subject to Parliament and legislation, and I think the inflexibilities of legislation you have made clear and they have been made clear by many witnesses, but I am interested in the reasons for being so firm against any form of convention when it seems that something like a convention is being articulated by an awful lot of people.

*Lord Falconer of Thoroton:* I am not sure who that is. You say "a lot of people". I have gone through the evidence, because I think this is a very important issue, and there is some evidence supporting a convention. I may have got the sequence of events wrong, but the way it looks as if the thing starts is that there are lots of proposed bills (Clare Short has a bill, Anthony Lester has a bill, Neil Gerrard has a bill) and you start to look at the bill. The bill as an idea pretty well falls apart pretty quickly because it is too difficult for a whole variety of reasons. Lord Morris and Lord Mayhew then proposed a convention, without really going into it in detail, which gives rise pretty well to the same sorts of problems as a bill because you have got to define it. There is not a problem, it seems to me, in the way that Parliament has held the Executive to account over the last 50 or 60 years. There was a very controversial use of force in the second Iraq war. Many people disagreed with the use of force. Any convention, any bill, would have led to the vote which occurred on 18 March. What Gordon Brown is referring to in his statement is that where you have got a great controversy about whether or not you should go to war, then inevitably you will need to have a vote. You did not in relation to the Falklands, where I do not think there was a vote on any motion before armed conflict was used. So I cannot see at the moment what the vigour for prescription, convention, et cetera, is when there is absolutely no evidence that you need it; indeed, the reverse would be the feeling, namely you would be over-tying your hands.

**Q275 Chairman:** I think there is quite a lot of evidence from opinion polling and external evidence that the defence of the absolute status quo without

22 March 2006

Rt Hon Lord Falconer of Thoroton, Rt Hon Adam Ingram MP  
and Dr Kim Howells MP

giving anything would not quite reflect the state of public opinion that in a democracy in the twenty-first century there should be greater popular involvement in decisions of this magnitude expressed through their elected representatives. This Committee has certainly found that a lot of the problems you refer to are quite complex and we are wrestling with those, and I think we acknowledge that, but it is useful to know, let me put it no higher than that, that the Government's position is that everything is absolutely fine and things should carry on exactly as they are.

*Lord Falconer of Thoroton:* Well, you have put that in a slightly sneering way. I think we recognise the importance of involving Parliament as much as we can, and I do not think anybody could say that Parliament was not as involved as it could possibly have been during, for example, the build-up to the second Iraq war. What we do not think is right is that you provide artificial inflexibility because there was not enough parliamentary scrutiny of what happened in the build-up to the second Iraq war, because I think that there was. It does not mean that people do not strongly disagree with what was done and it is the disagreements which have led to this issue and not, I believe, the problems with parliamentary scrutiny.

**Q276 Chairman:** We are trying to address that.

*Mr Ingram:* I just want to say that in terms of Parliament, there is nothing the Executive does which constrains the will of Parliament to so make a decision. Parliament could determine at any point through its own procedures to call a vote on a particular developing scenario, so I am not so sure that through the public opinion polls questions have reflected all the aspects and the power of Parliament which exist. So you would need to see what the opinion poll said, what the question was, and then you would have to say, "Was this a proper explanation of Parliament's powers?" I go back to the first Gulf War and I remember the votes in Parliament at that time. There was a lot of debate in 1991. There were divisions of the house on that, and that was on the adjournment of the House. The Government, the Executive, was being held to account. So my experience, and I was in Parliament at the time, was quite specific scrutiny of the Executive's decisions and from my experience as a minister I have never for a moment felt that I was not being scrutinised, being questioned, being examined and being held to account, and on the basis of making that decision, if that decision is wrong you then have to square your own conscience and you also can be subject to the decision of Parliament in terms of votes of no confidence as well. So there are many aspects and many powerful powers laid down for Parliament to so exercise. The question is, why do they not do it?

Because I think they recognise the conventional way of doing it does serve this country well.

*Dr Howells:* Very briefly, just to remind the Committee, I am sure the Committee knows it already, but Neville Chamberlain, of course, fell on the result of an adjournment debate in 1940. I think what has got to be stressed is that the noise, the information, the controversy generated during the kind of period which Adam just described in the run-up to war, combined with the intelligence which Government receives from all sorts of sources in the run-up to war, means that there is always a very open and lively debate about these issues. I certainly cannot remember one where there was not, and indeed there were some where extraordinary controversy took place. I would have thought that that in a way is the genius of the British Parliament and we ought to be very, very careful about tinkering with it when it comes to a series of very serious decisions like this one.

**Q277 Chairman:** Thank you very much. Of course, intelligence in relation to the Iraq war is not perhaps the safest ground on which to have the debate!

*Dr Howells:* I really do not think we should denigrate, quite frankly, the people who work so hard to collect our intelligence in very dangerous places. Intelligence is certainly not a science and it is subject to all kinds of constraints and circumstances, but as somebody who has also been a minister throughout this Government, I must say that it would be very, very difficult to dismiss a great deal of what I read as somehow erroneous. It certainly is not erroneous.

**Chairman:** No, I do not think anyone on this Committee wants to denigrate the work the intelligence community do. That was not the point.

**Q278 Lord Elton:** The Committee certainly does not want to tinker, but it does want to keep in touch with an evolving society and reactions to warfare (or conflict as we now call it) vary and they are usually very heightened and politically sensitive when they take place. We have been groping towards some slightly more formal means of involving Parliament as representative, as the Lord Chancellor said, of public opinion. Parliament itself is subject to manipulation. First of all, the media manipulates public opinion, and then of course you have the whips who do their best to manipulate the outcome of votes. Do you consider that the present arrangements, which are entirely unpredictable, which have no benchmarks and which cannot, almost from what you say, be taken as precedent, are satisfactory not for the past or the present but for the future as we come further and further from being a deferential society with a limited franchise to an entirely undeferential society with a universal

22 March 2006

Rt Hon Lord Falconer of Thoroton, Rt Hon Adam Ingram MP  
and Dr Kim Howells MP

franchise, with a media subject to no restrictions? Do you feel confident that in the next ten years, if you were in opposition, you would feel content to let a Government have the reins that you have had in the past few years?

*Lord Falconer of Thoroton:* I think you have got to be extremely clear about the way our constitution works, and there are two bits to it in relation to the use of force. One, the Executive makes the decisions, but secondly it is accountable to Parliament. Looking at recent history, are the arrangements such that the Executive (of which I have been a part) has had to get parliamentary approval for the decisions which it has made about the use of force, sometimes after the event such as in relation to Sierra Leone when urgent action had to be taken? My own experience is, yes, those arrangements have worked. They have shifted depending upon the particular use of force involved, but the media makes it so much easier for Parliament to hold the Executive to account. The Executive, rightly, has got repeatedly to explain itself. The Executive repeatedly has got to face votes in both Houses of Parliament in relation to the use of force. If I ask myself the question, is there the sense that we could do it behind Parliament's back or ignore the opinion of Parliament, the answer is so obviously no. Do we improve the situation by setting up some prescriptive vote before, unless there is an emergency? No, I do not think we do, and indeed I think that would be positively detrimental. It is not a static position because the way Parliament holds the Executive to account changes all the time, and you can see it in the changing nature of the way it has been done over the last eight or nine years. There is not a perfect situation, but there is so little material to say that the situation has changed by introducing the convention as opposed to the current situation. I think we are in slightly different areas as to what we are trying to achieve, I suspect. You are seeking formality where formality, I do not think, will assist.

**Q279 Lord Elton:** I do not think "formality" is the word. We are seeking dependability and one feature of the present system is that it operates almost entirely retrospectively.

*Lord Falconer of Thoroton:* Not at all.

**Q280 Lord Elton:** Parliament reacts to policy.

*Lord Falconer of Thoroton:* I do not think that is right. If you look at the build-up to the second Iraq war, which is, I suspect, what is driving this whole debate. I cannot remember what the precise number of figures is, the numbers of statements made. Because there was such controversy about it, our system produced a motion proposed by the Prime Minister in an extremely impressive debate, in which

Parliament voted on whether to use armed force or not.

**Q281 Lord Elton:** We must not be mesmerised by Iraq. What about Sierra Leone?

*Lord Falconer of Thoroton:* Does anybody disagree with the proposition which has been advanced, that there was a very urgent situation in which hostages' lives were at risk, where the Government decided to act? I would deeply deprecate the idea that the Government could not act as a part of the Executive in an emergency situation like that, and the relevant ministers came to Parliament afterwards and explained it and had the support of Parliament.

**Lord Elton:** Thank you.

**Chairman:** I suspect, Baroness Hayman, the question you wanted to ask has been substantially covered?

**Q282 Baroness Hayman:** It has, but I am really interested in the passion with which convention becomes a bad thing when it has a capital "C", but when something is conventional, as described by Dr Howells, all is for the best in the best of all possible worlds. As parliamentarians, we have a responsibility to look to governments which are not as assiduous as this Government has been and the possibility of there being less scrutiny, less frankness, less prior debate. One of the advantages of a Convention is that it does not bring the legal system into an adjudicating role, which is one of the major disadvantages of statute which has been put to us. Is it not possible to maintain some flexibility in the context of giving slightly more structure and formality to what you accept as the appropriate situation?

*Lord Falconer of Thoroton:* On the difference between "conventional" and "convention", the reason I am reacting unfavourably to "Convention" (with a capital 'C') is because the Convention (capital 'C') proposal is basically without a statute to set up a procedure which has got to be followed save in exceptional circumstances and when I am talking about the Convention (capital 'C') the proposal being floated is that there should be a Convention (capital 'C'), a principle that if you use armed conflict involving UK 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.

**Q283 Chairman:** Would you react quite so fiercely if the lower case 'c' convention was something like the Ponsonby Rule on Treaties?

*Lord Falconer of Thoroton:* I would not know what the Ponsonby Rule on Treaties was, so I would not be able to comment on that.

22 March 2006

Rt Hon Lord Falconer of Thoroton, Rt Hon Adam Ingram MP  
and Dr Kim Howells MP

**Q284 Baroness Hayman:** You are assuming that Convention (capital 'C') is always prior—approval it might be a Convention that said you do exactly what the Government has done, that it may behave appropriately.

*Lord Falconer of Thoroton:* Yes, so why are we trying to craft this sort of not quite statute statute, that is what I am asking?

**Q285 Baroness Hayman:** Because not all human beings have equal levels of dependability and integrity about how they implement it.

*Lord Falconer of Thoroton:* But Adam's point is, assume in the future an Executive which lacked dependability. Parliament, as Adam has been saying, is perfectly able to demand answers, call ministers to account, and propose votes on the motion that the country should not go to war.

*Mr Ingram:* Could I just pose, because as a practical minister I have to live through all of this, who determines whether the convention is being applied properly? If something is developing, decisions have been taken, assessments have been made based upon what can sometimes and on many occasions be very sensitive intelligence posing an immediate threat or an early threat to the country, and the decision is we have to move on a fast track on this. We do not want to disclose it because it could actually then give succour and intent to the enemy we are trying to deal with. But someone may say, "Well, there's a convention out there. Apply the convention." Who then determines whether the convention is in breach or not? I would suggest to you that you would want your Executive to act in the interests of the country, not necessarily in terms of a fine analysis of whether the convention should be applied or not. Subsequent to that, there would then be full scrutiny of that decision and if the decision was wrong in terms of all of the examination then we are held to account, but who makes the decision at the point of decision relative to the Convention (capital 'C')? It could only be the Executive, so it is trust the Government.

**Q286 Lord Peston:** I really want to follow Baroness Hayman, because I am genuinely puzzled. She read out to you Gordon Brown's statement, and I must say when I read that statement I thought it was new and refreshing. I also thought it was extremely clear. But if you had asked me what sort of thing that statement was, I would have said, "He's stating the norm as it should be, namely he was outlining a convention. I am not disagreeing with you in terms of your view, but I am very puzzled why you are saying, "We don't need a convention." What was Gordon Brown saying here? That this should be the way we do things, and the word for the way we do things is

that that is the convention, and really all we are pressing you on is, why can you not agree with that?" *Lord Falconer of Thoroton:* Look how we have dealt with the issue of the use of armed force in the past.

**Q287 Lord Peston:** I am not interested in specifics, I am asking the general question. I am not criticising the Government or any other government. I want to know what there is about what Gordon says that is (a) not a convention, and (b) therefore why you do not want a convention, when I would have thought that anybody who knew the English language would say, "He's describing a convention."

*Dr Howells:* Surely, Gordon is describing the way the House works at the moment (if you like, convention with a small 'c'), not prescribing the way that it ought to proceed for the future?

**Q288 Lord Peston:** But it looks to anybody as if what he has done is to clarify and say in very certain terms what ought to be the case. You are saying, "Well, that was the case."

*Lord Falconer of Thoroton:* All I am saying is how you involve Parliament will depend upon the circumstances. Do not back yourself into a cul-de-sac which says there has always got to be a vote on a motion of prior approval.

**Q289 Lord Peston:** He did not say that.

*Lord Falconer of Thoroton:* If Gordon is not saying that, that is fine. I do not think he is saying that.

*Dr Howells:* Could I perhaps just very briefly give an instance which has happened in the last seven days, and that is pulling our monitors out of Jericho prison. We had intelligence that their lives were under threat, that they were in a very dangerous position and that the Palestinian authority was not providing the security that it should have provided. We had to make a decision. Should we have a debate on this first before doing anything, whether it is a committee of the House or on the floor of the House? Of course not. Our first duty was to preserve the lives of those British citizens and get them out of there. The same day the Foreign Secretary had to face a very hostile barrage of questions in the House from people who believed that this had been the wrong decision. The pro-Palestinian faction gave the Foreign Secretary a very hard time. Are you saying that we should tie ourselves down with some Convention (capital 'C') which would not have enabled us to take that action with the utmost security and secrecy in order to preserve the lives of those monitors? I think it would be madness.

**Chairman:** You make the very point which has exercised this Committee from the beginning and we have had other evidence just as compelling as what you have just said that there clearly are emergencies

22 March 2006

Rt Hon Lord Falconer of Thoroton, Rt Hon Adam Ingram MP  
and Dr Kim Howells MP

and situations where speed is of the essence and I do not think any realistic parliamentarian is going to argue with that. That is a fact of the dangerous world we live in and although the point is well made, as a Committee we are very sensitive to that. We are talking more about what Lord Peston called “norm” situations, but thank you for that.

**Q290 Lord Windlesham:** There has been no mention of the United Nations and I would like to know, for information as much as anything else, to what extent is the authorisation of the UN Security Council required before authorisation is given to deploy UK Armed Forces?

*Lord Falconer of Thoroton:* We can only use force in accordance with international law. There is a number of reasons why you can use force. One of them is authorisation by the United Nations, but it is not the only basis upon which force can be used. So, for example, if there is an immediate humanitarian disaster occurring, there are many international lawyers who think that can be a justification for the use of force as well, which would not necessarily require UN authorisation. If what you are relying on is UN authorisation, then obviously you have got to say so to Parliament. If you are relying on something else, then you should obviously say what it is. If it is not UN authorisation, then you do not rely on that. If it is something else, you say that.

**Q291 Lord Windlesham:** Have there been recent examples? What happened in Iraq, for example?

*Lord Falconer of Thoroton:* Iraq one was UN authorisation; Iraq two was the reasons given by the Attorney General in his statement to the House of Lords on 17 March. The no-fly zones, which are between Iraq one and Iraq two, that was not on specific UN authorisation because I think it was on the basis of a humanitarian disaster being imminent for the Marsh Arabs.

**Q292 Lord Carter:** We use the term “coterm” in Parliament when it is coterminous with the House of Commons. Of course, there are two Houses of Parliament. If you think of the various ways in which in fact Parliament could be involved, there has been one suggestion that a joint parliamentary committee, which obviously would involve the House of Lords, should be established on the German model, which would have a watching brief over the work of the Armed Forces and the power to trigger parliamentary debates or to recommend military action. There is also the possibility of a statute, which we have heard about, in which the House of Lords would be involved. An extension has been mentioned with a joint committee, a practice now which one could describe as the doctrine of pragmatism. In all

of that, what do you see as the role of the House of Lords? It has been suggested that if the two houses were to be involved in approving overseas deployments, both Houses should have an active role, but if the conclusions of the two Houses were to differ, the House of Commons would prevail. If you remember, in the Iraq war we had a number of excellent debates in the House of Lords, but there was never any question of us in fact having a vote on it. That was never even suggested or thought right. It was left to the House of Commons. If we were to change the parliamentary approval route by the four routes I have mentioned, what do you think should be the role of the House of Lords?

*Lord Falconer of Thoroton:* On the question of seeking the support of Parliament, I think that means the support of the House of Commons because it is the elected Chamber. That does not mean that the Lords does not have a role to scrutinise, to ask questions, to extract information. In terms of committees either of the Commons or the Lords, or joint committees, I do not believe that is an issue for the Government, I believe that is an issue for Parliament.

**Q293 Chairman:** If this House were to become substantially elected, a question which you take an interest in, Lord Chancellor, would that modify your view?

*Lord Falconer of Thoroton:* 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.

**Q294 Lord Carter:** The same question, but perhaps in a different way: in your discussions with other parties to seek a consensus on Lords reform, did those discussions include the role of a partially elected Lords in such a circumstance?

*Lord Falconer of Thoroton:* They have not so far, no.

**Q295 Chairman:** Of course, one of the difficulties of this discussion is that although you are eloquent, Lord Chancellor, on the subject of the accountability of the Executive to Parliament, we are talking here about a Prerogative power which derives from tradition and history, and indeed originally from the power of the monarch. The monarch originally had to negotiate with

22 March 2006

Rt Hon Lord Falconer of Thoroton, Rt Hon Adam Ingram MP  
and Dr Kim Howells MP

Parliament to get the supply. It was the monarch's decision to make war and Parliament either voted or did not vote the supply to make that possible. I suppose what we are thinking is, is the Prerogative a suitable basis for the exercise of these decisions in a modern democracy? Should it not rest, as you very eloquently argued, on the accountability of the Executive to Parliament, not the history and tradition of the Prerogative?

*Mr Ingram:* Can I give an example? On Monday of this week we had an estimates debate, which I spoke in, on the back of the House of Commons Defence Committee's report on the estimates for Iraq and Afghanistan. They could have had a vote on that. They could have denied the Executive the wherewithal to proceed. There was no vote. There was a good debate and it was about seeking clarity on where the money was to be spent, what it was to be spent on, holding us to account on the quality of a decision in terms of the support we had then given to the troops in the field. That type of scrutiny is unquestionably a very real one. I do not know your procedures, my Lord Chairman, but I am sure you have ways to hold the Government to account in your House as well on such matters.

**Q296 Lord Elton:** Not on supply!

*Mr Ingram:* Not on supply, but in other ways.

**Q297 Lord Smith of Clifton:** If I might ask all of you, I know it would vary with the different deployments, but can you give us one or two for instances? What were the relative inputs of the different departments in making the decision to deploy troops and what are the processes through which the views of basically the two departments, Defence and the Foreign Office, are conveyed to Number 10?

*Mr Ingram:* Let me again give you an example of the way we planned the current Afghanistan deployment. One of the areas which I think Government has needed to attend to was ensuring that all players, to ensure success in any action, had to be fully joined up. There was a very, very detailed process where all major departments, the Treasury, the FCO and the MOD sat around the table on a regular basis examining the various elements in all of that. The outcome of that was then to report to the Prime Minister. Clearly, it then becomes a decision for Cabinet and the Prime Minister. So that type of sophisticated (if that is the right word) approach to ensuring joined-up decision-making is evolving all the time. I have no experience of what happened in previous administrations. I know that you could show examples of some disjoints in my time. We have learned that lesson. That does not mean to say those individual departments do not

have their inputs or it was not a collective examination. I think that is an important element in all of this, and clearly the Treasury has a role to play in this. Can the country afford it, as well? It is not just a case of military lay-down, "Do we have the capacity? Do we have the commitment from other departments? How are they going to put civilians into a possible state of post-conflict, which could tip over into conflict at any moment? Therefore, all departments have a very key role to play in this. That then has, I would argue, to be done in such a way that it satisfies the Prime Minister and satisfies the Cabinet that it has been well thought out, well-defined and therefore giving us a better prospect of success.

*Dr Howells:* Simply to perhaps add to Adam's admirably clear description of certainly the move into Afghanistan. I recall that many, of course, deployments of United Kingdom Forces are in support of decisions of the UN Security Council. The Foreign and Commonwealth Office plays the lead role in negotiations at the Security Council on the mandate of UN-authorized Forces. So we try to bring that element into the discussion as well. Also increasingly I think, as Adam said earlier, many of our deployments of troops now are in conjunction with NATO.

*Mr Ingram:* The coalitions. Sierra Leone was perhaps the last thing we did individually, but they are used in coalitions.

**Q298 Chairman:** Thank you very much for that last point. It is one which the Committee has recognised, that the unilateral declaration of war by the UK is a very unlikely circumstance. Mostly we are enmeshed in the whole international system of treaties and obligations of one sort and another. In that context, Dr Howells, it would be extremely helpful to us if the Foreign Office could let us have details of former military assistance, commitments which this country is currently committed to and has entered into in recent years, just a schedule of them, because I think it is an important part of the public education function of this Committee to help people understand that the medieval version of it, which is, "This country is going to war with an enemy," is really not the norm; the norm is obligations of one sort or another which we have entered into with other countries. If you and your officials were able to let us have such a schedule, it would be enormously helpful.

*Dr Howells:* My Lord Chairman, call me suspicious, but I would like a very clear definition of what "recent years" means because I can see this becoming a huge research project!

22 March 2006

Rt Hon Lord Falconer of Thoroton, Rt Hon Adam Ingram MP  
and Dr Kim Howells MP

**Q299 Chairman:** If we were able to define it for you, may we do that?

*Dr Howells:* If you could define it for us, I would be very grateful.

**Q300 Chairman:** May we do that?

*Dr Howells:* Yes, please.

**Q301 Lord Goodlad:** This is a question for Mr Ingram. Would the Ministry of Defence be concerned about the legal position of individual soldiers if parliamentary procedures were established as pre-conditions for Armed Forces deployments?

*Mr Ingram:* I am sure I have some advice on this to give you. I think in terms of what the procedures were, and therefore what the legal effect of all of that would be, it is very hard to answer that in the abstract. I think you would have to examine it in the particular to be able to give the best answers. The reality is that soldiers participating in armed conflict will not commit criminal offences provided they comply with the law that regulates the conduct of warfare, and the range of unlawful conduct which would be criminal in an armed conflict is set out in Article 2 of the ICC statute. That conduct has, of course, long been prohibited by the law that applies to Armed Forces wherever in the world they serve. All I did was put a comprehensive definition to it. It does get back to the question about what the procedures were and how they were so defined. Would they be of concern? Well, they must be if it is fit for capacity to defend the interests of this country, and that must be our uppermost thoughts in all of this. We are rightly constrained by a corpus of law which is very effective. If you put new procedures in which would then be subject to further legal scrutiny, could that then inhibit our capacity to deploy, to do what was required in those emergency circumstances? Only time will tell in all of that, but I think we could find ourselves so constrained and that would not be in the interests of this country.

**Q302 Lord Goodlad:** Thank you. That is most helpful. Secondly, again please for Mr Ingram, does the Ministry of Defence consider the application of the Geneva Conventions in relation to each conflict which British troops are involved in, and if so, what form does that consideration take and could it be made available to Parliament?

*Mr Ingram:* I am not so sure it is not made available to Parliament, but UK Forces do not participate in any armed conflict unless there is a proper legal basis. That is clear. We go through a whole process. Ministers receive legal advice, whether it is for targeting or for the deployment of Forces, what the

rules of engagement are or what the restrictions in terms of the rules of engagement are, but 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 UK is also bound by a number of other conventions and protocols, such as the first additional protocol to the Geneva Conventions, which were ratified in 1998. So all of those are out there for examination. 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 in this. So when you ask could it be made available to Parliament, those laws are out there anyway. Those are not our laws. We apply them. Those have been defined elsewhere and we simply live within them, so to speak.

**Chairman:** One final question from Lord Elton.

**Q303 Lord Elton:** The Lord Chancellor has in evidence drawn our attention to the fact that we have had, and still have, allies whose governments have the same freedom of action as ours and others which are subject to conventions and legislation. Could I ask Kim Howells what difference he is aware of in the freedom of action of those who have statutory or conventional hurdles to cross, and Adam Ingram what difference there is in the military performance of their troops?

*Dr Howells:* That is a very good question. I have looked very carefully, because one has to, at the theatre of operations in Afghanistan, for example, and there are very different constraints on the large number of nations out there as part of ISAF and operation Enduring Freedom, and it can become very frustrating. We have become the lead nation in the counter-narcotics operation in Afghanistan because President Karzai has described it as the most corrosive of all of the effects upon the emerging democracy in Afghanistan. I walked past the doors of the barracks of some of our allies in Afghanistan, who would do no more than wave at a passing caravan of heroin or opium. They will not touch them, and that is partly because their governments have constrained the way in which they can operate. The variety of constraints seems to me to be infinite and it makes operations very, very difficult. NATO has just had to construct what it calls an OPlan, a kind of annex to its original plan of operations in Afghanistan, in order to try and urge some of these other countries to take a more active role in actually confronting some of these very corrosive elements. So there is no model and there is no paradigm, I think, of the perfect soldier

22 March 2006

Rt Hon Lord Falconer of Thoroton, Rt Hon Adam Ingram MP  
and Dr Kim Howells MP

out there operating under absolutely ideal rules and conditions because they simply do not exist. We have a way of operating which I think is a very good one and it is admired across the world. The Americans operate rather differently. The Germans will operate very differently again, and there will be lots of different armies in between us. So that is a roundabout way of trying to answer your question, but I hope it does illustrate that there is a great variety of ways of addressing this issue.

*Mr Ingram:* Do you want me to come in on the second part?

**Q304 Chairman:** Very quickly.

*Mr Ingram:* It may not be quickly, but I will do my best. It just seems to me that 99.9 per cent of our operations will be in coalitions. I would guess that every country which is going to be a part of that coalition wants to work alongside the British. Why? Because there will be clear lines of decision-making. We have a very highly professional army. They like what we are able to do. They like the way in which we operate. If I could give an example in Kosovo, where there were in the region of 17,500 troops. In the spring of 2005 there was a possibility of unrest in Pristina. We had to send the over the horizon force because so many of the other players had national

caveats on them. I was not best pleased. We were putting our troops' lives at risk when NATO should have been addressing it. NATO then had a look at that and much encouragement has taken place to remove some of the national caveats, the off-plan which Kim mentioned for Afghanistan. A lot of work goes in to make sure that as few caveats are there as possible. We all work with some caveats because everyone has to have their own rules of engagement. The important thing—and I make this last point—in terms of new entrants to NATO, we seek to encourage them to have quick parliamentary decision-making processes. Why? Because it facilitates the bringing together of the coalitions as early as possible. It does not mean to say you do not plan it properly, it just means you have got quick processes to deal with the threat, because the military chain of command require 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.

**Chairman:** Lord Chancellor, many thanks to you and your colleagues for being so forthcoming and forthright. We will send you transcripts and we are very grateful to you indeed for your time. I know how busy you are. Thank you.

#### Supplementary letter from Kim Howells, Foreign and Commonwealth Office

Thank you for your letter of 23 March 2006 in which you requested an indication of HMG's legal or quasi-legal obligations to provide military support to other countries.

The Foreign and Commonwealth Office (FCO) initially identified 410 treaties since 1945 of possible relevance to this enquiry (list attached). Whilst the majority of these could be quickly put to one side as not being relevant, there were 60 treaties which required more careful scrutiny.

None of these treaties create a legal requirement *automatically* to provide military support to other countries. Every deployment of UK armed forces ultimately requires a separate and independent decision by the UK Government.

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, which might arise as a result of our relationships with other States that are formalised by treaty. However, judgements on the degree of expectation created are inevitably subjective and would vary according to specific circumstances. As I explained at the Committee hearing, we do not have the resources to analyse in depth for you how much "expectation" each identified treaty might create in certain circumstances.

The Committee may wish to be aware that there are four multilateral treaties which probably create the strongest sense of general political expectation: the North Atlantic Treaty, the Treaty of the European Union, the UN Charter and the Brussels Treaty establishing the WEU (though no military operations have been launched as a result of this last treaty). Their key provisions and decision-making procedures, along with some examples where possible, are set out in the attached annex. All four preserve the fundamental principle that the UK armed forces cannot be deployed without a sovereign decision by the UK Government.

16 May 2006

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*22 March 2006*

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Index	Page
Annex 1:	
Treaty List 1 (Chart).....	133
Annex 2:	
Multilateral Treaties.....	142
UN.....	142
NATO.....	142
OSCE/CFE.....	144
Maastricht.....	145
Annex 3:	
Collective Defence.....	145
Military Cooperation.....	146
Armed Forces (including Status of Forces).....	147
Annex 4:	
Bilateral Forces.....	153
Alliance.....	153
Armed (Forces).....	154
Military Bases.....	158
Boundaries.....	161
Defence.....	163
(Armed) Forces.....	171
Friendship.....	187
Military (Service).....	189
Naval.....	196
Security.....	197



22 March 2006

<i>Treaty</i>	<i>Key Provisions</i>	<i>Decision-Making Process</i>	<i>Practical Examples</i>
	<p>Article 40</p> <p>In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.</p>		
	<p>Article 42</p> <p>Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.</p>		

22 March 2006

<i>Treaty</i>	<i>Key Provisions</i>	<i>Decision-Making Process</i>	<i>Practical Examples</i>
<p><b>NATO</b>  <b>Title:</b> (The) North Atlantic Treaty  Signed Date: 04/04/1949  Treaty Series No. TS 056 1949 :  Cmd 7789</p>	<p>Article 5  The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.</p>	<p>— Decision making process for Article 5: Consultation among Allies, consensus needed for decisions.</p> <p>— Allies obliged to consult on other security issues (eg article 4) but not obliged to deploy. Article 4 says: “The Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened”.</p>	<p>— Practical example of NATO Article 5 Operation: Operation Active Endeavour, maritime counter terrorism interdiction and surveillance operation in the Mediterranean Sea. This was set up post September 11 with the aim of disrupting illegal trafficking of terrorist material on merchant ships throughout the Mediterranean. The UK is heavily involved: HMS Nottingham is currently engaged in addition to senior personnel at the Maritime command HQ in Naples. Allies contribute Naval units to this operation on rotational basis.</p>
		<p>— Deployment of the NATO Response Force is by consultation among Allies, rather than a Treaty commitment. Force Elements assigned to either the NATO Response Force (or EU Battlegroup) are committed for rapid response after a short consultation and decision making process. Final authority to commit national assets is retained at the national (not Alliance) level although a moral obligation exists and having committed to the standby roster reticence to participate might result in the application of significant diplomatic pressure.</p>	

22 March 2006

<i>Treaty</i>	<i>Key Provisions</i>	<i>Decision-Making Process</i>	<i>Practical Examples</i>
<p><b>EU: Common Foreign and Security Policy</b>  <b>Title:</b> Consolidated Treaty on European Union            (ie the Maastricht Treaty on European Union            (Signed Date: 07/02/1992            Treaty Series No. TS 012 1994 : Cm 2485)            As amended by the Treaty of Nice            (Signed Date: 26/02/2001            Treaty Series No. TS 022 2003 Cm5879))</p>	<p>Article 11</p> <p>1. The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be:</p> <ul style="list-style-type: none"> <li>— to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter,</li> <li>— to strengthen the security of the Union in all ways,</li> <li>— to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders,</li> </ul>	<p>The European Security and Defence Policy (ESDP) underpins the CFSP. Key political decisions are taken at the highest Council level, either at the General Affairs and External Relations Council of EU foreign ministers (GAERC), which is the main decision making body for the ESDP, or the European Council itself. Any decision to deploy an EU mission must be agreed unanimously by all EU member states. The decision to deploy national forces is only taken on a national basis. This ensures that no nation can be forced unwillingly into any military action.</p> <p>The European Council defines the general guidelines for the CFSP including for matters with defence implications.</p>	<p><b>Military Operations:</b></p> <p><b>1. Operation Concordia</b>            The EU launched its first military peace-support operation, Operation Concordia, in Macedonia on 31 March 2003. This operation provided security for International Monitors in Macedonia and a visible confidence-building presence on the ground. The overall security situation in Macedonia improved over the course of 2003 and the operation ended on 15 December 2003.</p> <p><b>2. Operation Althea</b>            On 2 December 2004 the EU launched its largest ESDP mission to date, Operation ALTHEA in Bosnia and Herzegovina. Following NATO's decision that its Stabilisation Force</p>

22 March 2006

<i>Treaty</i>	<i>Key Provisions</i>	<i>Decision-Making Process</i>	<i>Practical Examples</i>
	<ul style="list-style-type: none"> <li>— to promote international cooperation,</li> <li>— to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.</li> </ul> <p>2. The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity.</p> <p>The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.</p> <p>The Council shall ensure that these principles are complied with.</p> <p>...</p>	<p>The GAERC takes the political/strategic decisions necessary for defining and implementing the CFSP on the basis of the general guidelines defined by the European Council and supervises the Political and Security Committee (PSC).</p> <p>The PSC sits at the heart of the ESDP and exercises political control and strategic direction of the EU's military response and supervises the implementation of adopted measures. It consists of 25 permanent representatives of member states.</p> <p>The EU Military Committee provides military advice/guidelines and recommendations on military matters to the PSC and provides direction to the EU Military Staff (EUMS)</p>	<p>(SFOR) had achieved its mission of ensuring stability in Bosnia-Herzegovina the EU agreed to replace SFOR with an EU Force (EUFOR). A total of 33 countries contributed approximately 7,000 strong EU Force including 11 non-EU countries. The UK was the lead nation in Multinational Task Force (Northwest), one of three such task forces in the mission.</p>

22 March 2006

<i>Treaty</i>	<i>Key Provisions</i>	<i>Decision-Making Process</i>	<i>Practical Examples</i>
	<p data-bbox="220 1407 244 1504">Article 17</p> <p data-bbox="268 1095 1011 1504">1. The common foreign and security policy shall include all questions relating to the security of the Union, including the progressive framing of a common defence policy, which might lead to a common defence, should the European Council so decide. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements. The policy of the Union in accordance with this Article shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework. The progressive framing of a common defence policy will be supported, as Member States consider appropriate, by cooperation between them in the field of armaments.</p>	<p data-bbox="220 653 379 1052">The EUMS is the source of military expertise. Its role comprises early warning, situation assessment and strategic planning and the identification of EU national and multinational forces for possible operations.</p> <p data-bbox="403 653 483 1052">The PSC also maintains dialogue with NATO, non-EU NATO members and EU candidate countries.</p> <p data-bbox="507 653 699 1052">The Secretary General and High Representative for the CFSP has a link to the PSC and contributes to the formulation, preparation and implementation of policy and, when appropriate, through conducting political dialogue with third parties.</p>	

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22 March 2006

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<i>Treaty</i>	<i>Key Provisions</i>	<i>Decision-Making Process</i>	<i>Practical Examples</i>
	<p>2. Questions referred to in this Article shall include humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking.</p> <p>3. Decisions having defence implications dealt with under this Article shall be taken without prejudice to the policies and obligations referred to in paragraph 1, second subparagraph.</p> <p>4. The provisions of this Article shall not prevent the development of closer cooperation between two or more Member States on a bilateral level, in the framework of the Western European Union (WEU) and NATO, provided such cooperation does not run counter to or impede that provided for in this title.</p> <p>5. With a view to furthering the objectives of this Article, the provisions of this Article will be reviewed in accordance with Article 48.</p>		

22 March 2006

<i>Treaty</i>	<i>Key Provisions</i>	<i>Decision-Making Process</i>	<i>Practical Examples</i>
<b>Brussels Treaty/WEU</b>	<p>Title: Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence between His Majesty in respect of the United Kingdom of Great Britain and Northern Ireland, His Royal Highness the Prince Regent of Belgium, the President of the French Republic, Her Royal Highness the Grand Duchess of Luxembourg, and Her Majesty the Queen of the Netherlands [“The Brussels Treaty”]</p> <p>Signed Date: 17/03/1948 Treaty Series No. TS 001 1949 : Cmd. 7599</p> <p>As amended by Protocol Modifying and Completing the Brussels Treaty</p> <p>Signed Date: 23/10/1954 Treaty Series No. TS 039 1955</p>	<p>Article V</p> <p>If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance in their power.</p> <p>Should the Council decide that WEU should address a crisis:</p> <ul style="list-style-type: none"> <li>— The Politico-Military Group, with the support of the Secretariat-General, the Planning Cell, the Situation Centre and the Satellite Centre, would be asked to monitor and assess the situation and report to the Council,</li> <li>— Should the Council envisage WEU involvement: <ul style="list-style-type: none"> <li>— The planning Cell would be asked to draft contingency plans to include the force mission, possible force packages and command and control arrangements.</li> <li>— The Military Committee would give its advice on the contingency plan.</li> </ul> </li> </ul>	<p>Following the development of the European Security and Defence Policy (ESDP) all of the WEU’s operational functions passed to the EU. Only the WEU Parliamentary Assembly remains active. While our commitment to Article V remains, with the establishment of NATO WEU members accepted that any action taken under Article V would be done so through NATO.</p>

22 March 2006

<i>Treaty</i>	<i>Key Provisions</i>	<i>Decision-Making Process</i>	<i>Practical Examples</i>
		<ul style="list-style-type: none"> <li>— The Politico-Military Group would present its harmonized political and military advice to the Council.</li> <li>— Should the Council then decide to take action based on one of the options set out in the Contingency plan:</li> <li>— The Council would decide on the force of the mission and composition, the Operational Headquarters and Commander and the nation to nominate the Force Commander.</li> <li>— It would also designate a Point of Contact to serve as the Operation Commander's permanent correspondent at WEU Headquarters in Brussels.</li> <li>— The Council would subsequently agree the Operation Plan formulated by the Operation Commander and exercise politico-military control of the operation.</li> </ul>	<p>An operational budget, to which all participating nations would contribute, would be established in accordance with arrangements agreed by the Council, to cover the common costs of WEU operations. There is also a permanent fund in the regular WEU budget to cover the start-up costs of WEU operations.</p>

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22 March 2006

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**Annex 2**

**MULTILATERAL TREATIES INITIALLY IDENTIFIED IN RESPONSE TO  
COMMITTEE REQUEST**

**UNITED NATIONS**

Title: Charter of the United Nations, and Statute of the International Court of Justice

Signed Date: 26/06/1945

Signed Place: San Francisco

Depositary: United States of America/United Nations

Publications: Treaty Series No TS 067 1946: Cmd 7015

Title: Amendments to Articles 23, 27 and 61 of the Charter of the United Nations signed at San Francisco on 26 June 1945 adopted by the General Assembly of the United Nations

Adopted Date: 17/12/1963

Adopted Place: New York

Depositary: United Nations

Publications: Treaty Series No TS 002 1966: Cmnd 2900

Title: Amendment to Article 109 of the Charter of the United Nations signed at San Francisco on 26 June 1945 adopted by the General Assembly of the United Nations on 20 December 1965

Adopted Date: 20/12/1965

Adopted Place: New York

Depositary: United Nations

Publications: Treaty Series No TS 005 1969: Cmnd 3869

**THE NORTH ATLANTIC TREATY (AND RELATED INSTRUMENTS)**

Title: (The) North Atlantic Treaty

Signed Date: 04/04/1949

Signed Place: Washington

Depositary: United States Government

Publications Treaty Series No TS 056 1949: Cmd 7789

Title: Protocol regarding the Accession of Greece and Turkey to the North Atlantic Treaty of 4 April 1949

Signed Date: 17/10/1951

Signed Place: London

Depositary: United States Government

Publications: Treaty Series No TS 011 1952 : Cmd. 8489

Title: Protocol to the North Atlantic Treaty

Signed Date: 27/05/1952

Publications: Miscellaneous No. 009 1952 : Cmd 8562

Title: Protocol to the North Atlantic Treaty of 4 April 1949, on the Accession of the Federal Republic of Germany

Signed Date: 23/10/1954

Publications: Treaty Series No TS 044 1955 : Cmd. 9501

Title: Agreement between the Parties to the North Atlantic Treaty for Co-operation regarding Atomic Information

Signed Date: 22/06/1955

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22 March 2006

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Signed Place: Paris  
Depositary: United States Government  
Publications: Treaty Series No TS 021 1956 : Cmd. 9799

Title: Agreement between Parties to the North Atlantic Treaty for Co-operation regarding Atomic Information (with Security Annex to the Agreement between the Parties to the North Atlantic Treaty for Co-operation regarding Atomic Information and Technical Annex to the Agreement between the Parties to the North Atlantic Treaty for Co-operation regarding Atomic Information)

Signed Date: 18/06/1964  
Signed Place: Paris  
Depositary: Government of the United States of America  
Publications: Treaty Series No TS 051 1965 : Cmnd 2679

Title: NATO Agreement on the Communication of Technical Information for Defence Purposes

Signed Date: 19/10/1970  
Signed Place: Brussels  
EIF Date: 07/02/1971  
Depositary: United States Government  
Publications: Treaty Series No TS 013 1972 : Cmnd 4869

Title: Protocol to the North Atlantic Treaty on the Accession of Spain  
Signed Date: 10/12/1981  
Publications: Treaty Series No TS 045 1982 : Cmnd 8713

Title: Protocol to the North Atlantic Treaty on the Accession of the Czech Republic

Signed Date: 16/12/1997  
Publications: Treaty Series No TS 005 2000 : Cm 4586

Title: Protocol to the North Atlantic Treaty on the Accession of the Republic of Poland

Signed Date: 16/12/1997  
Publications: Treaty Series No TS 003 2000 : Cm 4584

Title: Protocol to the North Atlantic Treaty on the Accession of the Republic of Hungary

Signed Date: 16/12/1997  
Publications: Treaty Series No TS 004 2000 : Cm 4585

Title: Protocol to the North Atlantic Treaty on the Accession of the Republic of Bulgaria

Signed Date: 26/03/2003  
Publications: Treaty Series No 049 2004 : Cm 6428

Title: Protocol to the North Atlantic Treaty on the Accession of the Republic of Estonia

Signed Date: 26/03/2003  
Publications: Treaty Series No 049 2004 : Cm 6428

Title: Protocol to the North Atlantic Treaty on the Accession of the Republic of Latvia

Signed Date: 26/03/2003  
Publications: Treaty Series No 049 2004 : Cm 6428

Title: Protocol to the North Atlantic Treaty on the Accession of the Slovak Republic

Signed Date: 26/03/2003  
Publications: Treaty Series No 049 2004 : Cm 6428

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22 March 2006

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Title: Protocol to the North Atlantic Treaty on the Accession of the Republic of Slovenia

Signed Date: 26/03/2003

Publications: Treaty Series No 049 2004 : Cm 6428

Title: Protocol to the North Atlantic Treaty on the Accession of Romania

Signed Date: 26/03/2003

Publications: Treaty Series No 049 2004: Cm 6428

Title: Protocol to the North Atlantic Treaty on the Accession of the Republic of Lithuania

Signed Date: 26/03/2003

Publications: Treaty Series No 049 2004 : Cm 6428

Title: Agreement between the Parties to the North Atlantic Treaty for the Security of Information

Adopted Date: 06/03/1997

Adopted Place: Brussels

Depositary: ?United States Government [CHECK]

Publications: Miscellaneous No. 018 2000: Cm 4787

#### **OSCE/CFE**

Title: Final Act of the Conference on Security and Co-operation in Europe (With Final Recommendations of the Helsinki Consultations agreed on 08:06:1973)

Signed Date: 01/08/1975

Publications: Various Documents and Acts published in the Miscellaneous Series of Command Papers since 1977.

Title: Treaty on Conventional Armed Forces in Europe with Declarations, including Statement by the Chairman of the Joint Consultative Group on 18 October 1991 and Final Documents of Extraordinary Conferences held at Vienna, 14 June 1991 and at Oslo, 5 June 1992 See Notes for Final Documents of Extraordinary Conferences (Vienna 14:07:1991 and Oslo 05:06:1992)

Signed Date: 19/11/1990

Signed Place: Paris

Depositary: "Government of the Kingdom of the Netherlands" Publications: Treaty Series No. TS 044 1993 : Cm 2294"

Title: Documents adopted at the Joint Extraordinary Conference relating to the Treaty on Conventional Armed Forces in Europe and the Concluding Act of the Negotiation on Personnel Strength of Conventional Armed Forces in Europe

Signed Date: 05/02/1993

Signed Place: Vienna

EIF Date: 05/02/1993

Depositary: The Netherlands Government

Publications: Treaty Series No TS 021 1994: Cm 2520

Title: Annex A to the Final Document of the First Conference to. Review the Operation of the Treaty on Conventional Armed Forces in Europe and the Concluding Act of the Negotiation on Personnel Strength

Signed Date: 15/05/1996

Signed Place: Vienna

Depositary: Government of the Kingdom of the Netherlands Publications: Treaty Series No TS 022 2001 : Cm 5132

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22 March 2006

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Title: Agreement on Adaptation of the Treaty on Conventional Armed Forces in Europe  
 Signed Date: 19/11/1999  
 Signed Place: Istanbul  
 Depositary: Government of the Kingdom of the Netherlands  
 "Publications:" "Miscellaneous No 003 2000 : Cm 4630"

### **MAASTRICHT TREATY [Third Pillar, Common Foreign and Security Policy]**

Title: Treaty on European Union together with Protocols, Final Act, Declarations and Decision [Maastricht Treaty]

Signed Date: 07/02/1992  
 Publications: Treaty Series No TS 012 1994 : Cm 2485

Title: Decision of the Heads of State and Government, meeting within the European Council, concerning problems raised by Denmark on the Treaty on European Union, with associated Conclusions of the Council and Declarations

Signed Date: 12/12/1992  
 Publications: Treaty Series No TS 002 1994 : Cm 2444

### **Annex 3**

#### **"COLLECTIVE DEFENCE"**

Title: Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence between His Majesty in respect of the United Kingdom of Great Britain and Northern Ireland, His Royal Highness the Prince Regent of Belgium, the President of the French Republic, Her Royal Highness the Grand Duchess of Luxembourg, and Her Majesty the Queen of the Netherlands ["The Brussels Treaty"]

Signed Date: 17/03/1948  
 Publications: Treaty Series No. TS 001 1949 : Cmd. 7599

Title: Treaty between the United Kingdom and Member States of the European Defence Community Extending the Guarantees of Assistance against Aggression given in Article IV of Treaty/Economic, Social & Cultural collaborations signed Brussels 17 March 1948

Signed Date: 27/05/1952  
 Publications: Miscellaneous No 009 1952 : Cmd 8562

Title: Agreement and Statement for the United Kingdom association with the European Defence Community

Signed Date: 13/04/1954  
 Publications: Miscellaneous No 010 1954 : Cmd. 9126

Title: The South-East Asia Collective Defence Treaty [With Protocol]  
 Signed Date: 08/09/1954  
 Publications: Treaty Series No. TS 063 1957 : Cmnd 265

Title: Agreement for the Mutual Safe-Guarding of Inventions relating to Defence and for which applications for Patents have been made

Signed Date: 21/09/1960  
 Signed Place: Paris  
 EIF Date: 12/01/1960  
 Depositary: United States Government  
 Publications: Treaty Series No TS 009 1962 : Cmnd 1595

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22 March 2006

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Title: Protocol for the Accession of the Portuguese Republic and the Kingdom of Spain to the Treaty of Economic, Social, and Cultural Collaboration and Collective Self-Defence, signed at Brussels on 17 March 1948, as amended by the "Protocol Modifying and Completing the Brussels Treaty", signed at Paris on 23 October 1954 (with Exchange of Letters between the UK and Spain concerning Article X)

Signed Date: 14/11/1988

Publications: Treaty Series No TS 053 1990 : Cm 1170

Title: Protocol of Accession of the Hellenic Republic to the Western European Union with Annex

Signed Date: 20/11/1992

Publications: Treaty Series No TS 074 1995 : Cm 2977

Title: Framework Agreement between the French Republic, the Federal Republic of Germany, the Italian Republic, the Kingdom of Spain, the Kingdom of Sweden, and the United Kingdom of Great Britain and Northern Ireland concerning measures to Facilitate the Restructuring and Operation of the European Defence Industry

Signed Date: 27/07/2000

Signed Place: Farnborough

EIF Date: 18/04/2001

Depositary: Government of the United Kingdom

Publications: Treaty Series No TS 033 2001 : Cm 5185

## **MILITARY CO-OPERATION**

Title: Instrument German Act of Military Surrender

Signed Date: 07/05/1945

Signed Place: Rheims

Title: Instrument, German Act of Military Surrender

Signed Date: 08/05/1945

Signed Place: Berlin

Title: Agreement regarding Determination of Details Arising out of Agreement of June 9, 19445 concerning Military Control and Civil Administration on Venezia Giulia Region

Signed Date: 20/06/1945

Signed Place: Duino

Title: Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis [ and Charter of the International Military Tribunal]

Signed Date: 08/08/1945

Signed Place: London

Depositary: Government of the United Kingdom

Publications: Treaty Series No TS 027 1946 : Cmd 6903

Title: Agreement and Appendices concerning Military Permit Offices in Zones of Occupation in Germany

Signed Date: 08/01/1948

Signed Place: Berlin

EIF Date: 01/01/1948

Publications: N/A

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22 March 2006

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Title: Agreement between the United Kingdom, the United States of America and Italy regarding Military Command in Free Territory of Trieste, of certain financial questions in the zone arising from execution of Peace Treaty with Italy and pending association of office by Governor of Free Territory

Signed Date: 09/03/1948

Signed Place: Rome

EIF Date: 15/09/1947

Publications: N/A

Title: Agreement on Most Favoured Nation Treatment for Areas of Western Germany Under Military Occupation [With Annex]

Signed Date: 14/09/1948

Signed Place: Geneva

EIF Date: 14/10/1948

Publications: Treaty Series No TS 017 1949 : Cmd 7643

Title: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the United States, United Kingdom and French Military Governors of Germany for the Regulation of Payments

Signed Date: 05/08/1949

Signed Place: Frankfurt

Publications: Treaty Series No TS 071 1949 : Cmd. 7824

Title: Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality [ETS No 43]

Signed Date: 06/05/1963

Signed Place: Strasbourg

EIF Date: 28/03/1968

Depositary: Council of Europe

Publications: Treaty Series No TS 088 1971 : Cmnd 4802

Title: Agreement regarding the Status of Personnel of Sending States attached to an International Military Headquarters of NATO in the Federal Republic of Germany

Signed Date: 07/02/1969

Signed Place: Bonn

Depositary: Federal Republic of Germany

Publications: Treaty Series No TS 034 1970 : Cmnd 4361

Title: Protocol amending the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality [ETS No 95]

Signed Date: 24/11/1977

Signed Place: Strasbourg

EIF Date: 08/09/1978

Depositary: Council of Europe

Publications: Treaty Series No TS 108 1979 : Cmnd 7756

#### **ARMED FORCES (including STATUS OF FORCES)**

Title: Agreement between the United Kingdom, Canada, Australia, New Zealand, Union of South Africa and India on the one hand and the Soviet Union on the other hand, relating to Prisoners of War and Civilians Liberated by Forces operating under Soviet Command and Forces operating under British Command

Signed Date: 11/02/1945

Signed Place: Vorontsov Crimea

Publications: Miscellaneous No 147 1049

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22 March 2006

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Title: Protocol between His Majesty's Government in the United Kingdom and the United States Government and the Government of Italy relating to the Return to Italy of the Gold captured at Fortezza by the Allied Forces

Signed Date: 10/10/1947

Signed Place: London

EIF Date: 15/09/1947

Publications: Treaty Series No TS 079 1947 : Cmd. 7244

Title: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field

Signed Date: 12/08/1949

Signed Place: Geneva

EIF Date: 21/10/1950

Depositary: Swiss Government

Publications: Treaty Series No TS 039 1958 : Cmnd 550

Title: Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea

Signed Date: 12/08/1949

Signed Place: Geneva

EIF Date: 21/10/1950

Depositary: Swiss Government

Publications: Treaty Series No TS 039 1958 : Cmnd 550

Title: Agreement on the Status of Members of the Armed Forces of the Brussels Treaty Powers

Signed Date: 21/12/1949

Signed Place: London

Publications: Miscellaneous No 001 1950: Cmd 7868

Title: Status of Members of Armed Forces of Brussels Treaty Powers

Signed Date: 28/06/1950

Signed Place: London

Publications: Miscellaneous No 013 1950 : Cmd 8055

Title: Agreement regarding the Status of Forces of Parties to the North Atlantic Treaty [with Appendix]

Signed Date: 19/06/1951

Signed Place: London

Depositary: United States Government

Publications: Treaty Series No TS 003 1955 : Cmd 9363

Title: Agreement on the Status of the North Atlantic Treaty Organisation, National Representatives and International Staff

Signed Date: 20/09/1951

Signed Place: Ottawa

Depositary: United States Government

Publications: Treaty Series No TS 011 1955 : Cmd. 9383

Title: Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany

Signed Date: 26/05/1952

Signed Place: Bonn

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22 March 2006

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Depositary: Government of the German Federal Republic

Publications: Treaty Series No TS 011 1959 : Cmnd 654

Title: Protocol on the Status of International Military Headquarters set up Pursuant to the North Atlantic Treaty

Signed Date: 28/08/1952

Signed Place: Paris

Depositary: United States Government

Publications: Treaty Series No TS 081 1965 : Cmnd 2777

Title: Protocol on the Status of International Military Headquarters set up Pursuant to the North Atlantic Treaty

Signed Date: 28/08/1952

Signed Place: Paris

EIF Date: 10/04/1954

Depositary: United States Government

Publications: Treaty Series No TS 081 1965 : Cmnd 2777

Title: Protocol on the Exercise of Criminal Jurisdiction over United Nations Forces in Japan [together with Agreed Official Minutes]

Signed Date: 26/10/1953

Signed Place: Tokyo

EIF Date: 26/10/1953

Depositary: Japan

Publications: Treaty Series No TS 014 1954 : Cmd 9071

Title: Agreement regarding the Status of the United Nations Forces in Japan

Signed Date: 19/02/1954

Signed Place: Tokyo

EIF Date: 11/06/1954

Depositary: Japanese Government

Publications: Treaty Series No TS 010 1957: Cmnd 67

Title: Protocol for the Provisional Implementation of the Agreement regarding the Status of United Nations Forces in Japan

Signed Date: 19/02/1954

Signed Place: Tokyo

Depositary: Government of Japan

Publications: Treaty Series No TS 010 1957 : Cmnd 67

Title: Convention on the Presence of Foreign Forces in the Federal Republic of Germany

Signed Date: 23/10/1954

Publications: Treaty Series No TS 077 1955 : Cmnd 9617

Title: Protocol No II on Forces of Western European Union

Signed Date: 23/10/1954

Publications: Treaty Series No TS 039 1955 : Cmnd 9498

Title: Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty (NATO) regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany (Also Known as the "Supplementary Agreement") (With Protocol of Signature)

Signed Date: 03/08/1959

Signed Place: Bonn

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22 March 2006

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Depositary: United States Government  
Publications: Treaty Series No TS 073 1963 : Cmnd 2191

Title: Agreement on the Abrogation of the Conventions and the Agreement signed at Bonn on 26 May 1952, concerning Rights and Obligations, Financing and Tax Treatment of the Foreign Forces in the Federal Republic of Germany, as amended by the Protocol on the Termination of the Occupation Regime, signed at Paris on October 23, 1954 (Known as "Abrogation Agreement")

Signed Date: 03/08/1959  
Signed Place: Bonn  
EIF Date: 01/07/1963  
Depositary: Government of the Federal Republic of Germany  
Publications: Treaty Series No TS 076 1963 : Cmnd 2199

Title: Agreement to implement paragraph 5 of Article 45 of the Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany (Known as "Implementary Agreement") (With Protocol of Signature and Annex)

Signed Date: 03/08/1959  
Signed Place: Bonn  
EIF Date: 01/07/1963  
Depositary: United States Government  
Publications: Treaty Series No TS 074 1963 : Cmnd 2192

Title: Administrative Agreement to Article 60 of the Agreement to supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany (Known as "Administrative Agreement")

Signed Date: 03/08/1959  
Signed Place: Bonn  
Depositary: Government of the Federal Republic of Germany  
Publications: Treaty Series No TS 077 1963 : Cmnd 2189

Title: Agreement regarding the Making Available by the Armed Forces of the United Kingdom of Great Britain and Northern Ireland and of the United States of America of Accommodation to International Military Headquarters of NATO in the Federal Republic of Germany

Signed Date: 07/02/1969  
Signed Place: Bonn  
EIF Date: 21/12/1969  
Depositary: Government of the Federal Republic of Germany  
Publications: Treaty Series No TS 035 1970 : Cmnd 4360

Title: Agreement to amend the Agreement of 3 August 1959 to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany

Signed Date: 21/10/1971  
Signed Place: Bonn  
Depositary: United States Government  
Publications: Treaty Series No TS 025 1975 : Cmnd 5927

Title: Agreement to amend the Protocol of Signature to the Agreement of 3 August 1959 to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany, as amended by the Agreement of 21 October 1971

Signed Date: 18/05/1981  
Signed Place: Bonn

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22 March 2006

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Depositary: United States Government  
Publications: Treaty Series No TS 052 1982 : Cmnd 8718

Title: Exchange of Notes between the Government of the Federal Republic of Germany and the Governments of the Kingdom of Belgium, Canada, the Kingdom of The Netherlands, the United Kingdom of Great Britain and Northern Ireland and the United States of America concerning the Convention on the Presence of Foreign Forces in the Federal Republic of Germany, of 23 October 1954

Signed Date: 25/09/1990  
Signed Place: Bonn  
Depositary: Government of the Federal Republic of Germany  
Publications: Treaty Series No TS 016 1991 : Cm 1443

Title: Exchange of Notes between the Government of the Federal Republic of Germany and the Governments of the French Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America concerning the presence in Berlin of armed forces of the French Republic, of the United Kingdom of Great Britain and Northern Ireland, and of the United States of America

Signed Date: 25/09/1990  
Signed Place: Bonn  
Depositary: Government of the Federal Republic of Germany  
Publications: Treaty Series No. TS 014 1991 : Cm 1442

Title: Exchange of Notes between the Government of the Federal Republic of Germany and the Governments of Belgium, Canada, France, Netherlands, United Kingdom and the United States concerning the Agreement of 19 June 1951 between the Parties to North Atlantic Treaty regarding the Status of Forces, the Agreement of 3 August 1959 to supplement that Agreement with respect to foreign forces stationed in Federal Republic of Germany and the Agreements related thereto

Signed Date: 25/09/1990  
Signed Place: Bonn  
Depositary: Government of the Federal Republic of Germany  
Publications: Treaty Series No. TS 015 1991 : Cm 1441

Title: Agreement to amend the Agreement of 3 August 1959, as amended by the Agreements of 21 October 1971 and 18 May 1981, to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany

Signed Date: 18/03/1993  
Signed Place: Bonn  
EIF Date: 29/03/1998  
Depositary: United States Government  
Publications: Treaty Series No TS 057 1999 : CM 4441

Title: Agreement to Implement Paragraph 1 of Article 45 of the Agreement of 3 August 1959, as amended by the Agreements of 21 October 1971, 18 May 1981 and 18 March 1993, to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany

Signed Date: 18/03/1993  
Signed Place: Bonn  
Depositary: United States Government  
Publications: Miscellaneous No 007 1994: Cm 2484

Title: Administrative Agreement to Implement Article 60 of the Agreement of 3 August 1959, as amended by the Agreements of 21 October 1971, 18 May 1981 and 18 March 1993, to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany

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22 March 2006

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Signed Date: 18/03/1993  
Signed Place: Bonn  
Depositary: United States Government  
Publications: Treaty Series No TS 005 1999 : Cm 4251

Title: Agreement to amend the Protocol of Signature to the Agreement of 3 August 1959, as amended by the Agreements of 21 October 1971 and 18 May 1981, to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany

Signed Date: 16/05/1994  
Signed Place: Bonn  
Depositary: Government of the United States of America  
Publications: Treaty Series No TS 078 1999 : Cm 4521

Title: Exchange of Notes between the Government of the Federal Republic of Germany and the Governments of the Kingdom of Belgium, Canada, the French Republic, the Kingdom of the Netherlands, the United Kingdom of Great Britain and Northern Ireland and the United States of America concerning the Amendment of the Agreement by Exchange of Notes of 25 September 1990 concerning the Agreement of 19 June 1951 between the Parties to the North Atlantic Treaty regarding the Status of their Forces, the Agreement of 3 August 1959 to Supplement that Agreement with respect to the Foreign Forces stationed in the Federal Republic of Germany and the Agreements related thereto

Signed Date: 12/09/1994  
Signed Place: Bonn  
Depositary: The Government of the Federal Republic of Germany  
Publications: Treaty Series No TS 004 1997 : Cm 3508

Title: Exchange of Notes between the Government of the Federal Republic of Germany and the Governments of the French Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America concerning the termination of the Agreement by Exchange of Notes of 25 September 1990 concerning the presence, for a limited period, of the forces of the French Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America in Berlin

Signed Date: 12/09/1994  
Signed Place: Bonn  
Depositary: Government of the Federal Republic of Germany  
Publications: Treaty Series No TS 009 1995 : Cm 2744

Title: Agreement on the Status of Missions and Representatives of Third States to the North Atlantic Treaty Organization

Signed Date: 14/09/1994  
Signed Place: Brussels  
Depositary: Government of the Kingdom of Belgium  
Publications: Treaty Series No TS 006 2004 : Cm 6124

Title: Agreement among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace regarding the Status of Their Forces  
Signed Date: 19/06/1995  
Publications: Treaty Series No TS 049 2000 : Cm 4701

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22 March 2006

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**Annex 4****BILATERAL TREATIES INITIALLY IDENTIFIED IN RESPONSE  
TO COMMITTEE REQUEST**

Bilateral Treaties: “**Alliance**”

Title: Treaty of Alliance between His Majesty in respect of the United Kingdom and His Highness the Amir of Trans-Jordan [With Annex and Exchange of Notes]

Signed Date: 22/03/1946

Signed Place: London

Publications: Treaty Series No TS 032 1946 : Cmd. 6916

Title: Treaty of Alliance and Mutual Assistance between His Majesty in respect of the United Kingdom of Great Britain and Northern Ireland and the President of the French Republic

Signed Date: 04/03/1947

Signed Place: Dunkirk

Publications: Treaty Series No TS 073 1947 : Cmd 7217

Title: Treaty of Alliance between the United Kingdom and Iraq

Signed Date: 15/01/1948

Signed Place: Portsmouth

Publications: Iraq No 001 1948 : Cmd 7309

Title: Treaty of Alliance between His Majesty in respect of the United Kingdom of Great Britain and Northern Ireland and His Majesty the King of the Hashemite Kingdom of Transjordan [with Exchanges of Letters]

Signed Date: 15/03/1948

Signed Place: Amman

Publications: Treaty Series No TS 026 1948 : Cmd 7404

Title: Treaty of Friendship and Alliance between Her Majesty in respect of the United Kingdom of Great Britain and Northern Ireland and His Majesty The King of the United Kingdom of Libya [with Military and Financial Agreements and Exchange of Notes]

Signed Date: 29/07/1953

Signed Place: Benghazi

Publications: Treaty Series No TS 003 1954 : Cmd 9043

Title: Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning Provision of Military Aid to Iraq by the Government of the United States with reference to the 1930 Anglo-Iraq Treaty of Alliance

Signed Date: 26/02/1954

Signed Place: Washington

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hashemite Kingdom of Jordan terminating the Treaty of Alliance of March 15, 1948 (with Joint Declaration of 13 February 1957)

Signed Date: 13/03/1957

Signed Place: Amman

Publications: Treaty Series No TS 039 1957 : Cmnd 186

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hashemite Kingdom of Jordan modifying the Annex to the Exchange of Notes of 13 March 1957, terminating the Treaty of Alliance of 15 March 1948

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22 March 2006

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Signed Date: 02/06/1960  
Signed Place: Amman  
Publications: Treaty Series No TS 057 1960 : Cmnd 1158

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hashemite Kingdom of Jordan modifying the Annex to the Exchange of Notes of 13 March 1957, terminating the Treaty of Alliance of 15 March 1948

Signed Date: 08/06/1961  
Signed Place: Amman  
Publications: Treaty Series No TS 106 1961 : Cmnd 1548

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hashemite Kingdom of Jordan modifying the Annex to the Exchange of Notes of 13 March 1957, terminating the Treaty of Alliance of 15 March 1948

Signed Date: 17/03/1963 and 19/03/1963  
Signed Place: Amman  
Publications: Treaty Series No TS 048 1963 : Cmnd 2065

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Libyan Arab Republic terminating the Treaty of Friendship and Alliance, together with the Agreements on Financial and Military Matters, signed at Benghazi on 29 July 1953

Signed Date: 25/01/1972  
Signed Place: Tripoli  
Publications: Treaty Series No TS 042 1972 : Cmnd 4950

Bilateral Treaties: “**Armed (Forces)**”

Title: Agreement regarding Jurisdiction over British Armed Forces in Chinese Territory and Chinese Forces in India and Burma

Signed Date: 07/07/1945  
Signed Place: Chungking

Title: Exchange of Notes between the Governments of the United Kingdom and the United States of America for Mutual Forbearance concerning Claims against Members and Civilian Employees of their respective Armed Forces [With Annex and Appendix]

Signed Date: 23/10/1946 and 23/01/1947  
Signed Place: Washington  
Publications: Treaty Series No TS 060 1948 : Cmd 7501

Title: [Czechoslovakia] Exchange of Notes Terminating the Armed Forces Agreement of 25 October 1940 and the Armed Forces (Expenditure) Protocol of 21 January 1943

Signed Date: 19/02/1947  
Signed Place: Prague

Title: Agreement between His Majesty's Government in the United Kingdom and the Government of the French Republic regarding Facilities, etc, for British Armed Forces pending their Final Withdrawal from French Territory [With Annex and Exchanges of Notes]

Signed Date: 19/04/1948  
Signed Place: Paris  
Publications: Treaty Series No TS 044 1948 : Cmd 7523

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22 March 2006

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Title: Agreement between the Governments of the United Kingdom of Great Britain and Northern Ireland, Canada, Australia, New Zealand, the Union of South Africa, India and Pakistan of the one part and the Government of the Kingdom of the Netherlands of the other part relative to graves in Netherlands territories of members of the Armed Forces of the British Commonwealth

Signed Date: 10/07/1951

Signed Place: The Hague

EIF Date: 10/07/1951

Publications: Treaty Series No TS 096 1951 : Cmd 8399

Title: Agreement between the Governments of the United Kingdom of Great Britain and Northern Ireland, Canada, Australia, New Zealand, the Union of South Africa, India and Pakistan of the one part and the Government of Belgium of the other part relative to graves in Belgian territory of members of the Armed Forces of the British Commonwealth

Signed Date: 20/07/1951

Signed Place: Brussels

Publications: Treaty Series No TS 098 1951 : Cmd 8402

Title: Agreement and Exchange of Notes concerning Air Navigation, Civil Air and Priority for Commonwealth Armed Forces Aircraft

Signed Date: 03/08/1954

Signed Place: Bahrain

Title: Exchange of Letters between the Sultan of Muscat and HM Consul General, Muscat on an extension of the jurisdiction exercised by the consular court to cover any member of HM Armed Forces, Levy of Police Forces under the authority of HM Government

Signed Date: 10/01/1955 and 23/03/1955

Signed Place: Muscat

Title: Exchange of Letters between the United Kingdom and the United States of America concerning Rates on Premises occupied by United States Armed Forces

Signed Date: 24/01/1955

Signed Place: London

Title: Agreed Minute. Armed Forces and Budget. Libyan Armed Forces

Signed Date: 29/06/1956

Signed Place: London

Title: Exchange of Letters between the Government of the United Kingdom of Great Britain and Northern Ireland and the Sultan of Muscat and Oman concerning the Sultan's Armed Forces, Civil Aviation, Royal Air Force facilities and Economic Development in Muscat and Oman (see Notes)

Signed Date: 25/07/1958

Signed Place: London

Publications: Treaty Series No TS 028 1958 : Cmnd 507

Title: Exchange of Letters and Memorandum. Conditions of Service of United Kingdom Personnel seconded to the Sultan's Armed Forces (See Exchange of Letters of 25/07/1958 (Muscat No 20 60-424) and Agreed Minute of 24/08/1960 (Muscat No 22. XIII-76-560)

Signed Date: 07/11/1961 and 25/11/1961

Signed Place: Salalah

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22 March 2006

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Title: Exchange of Letters concerning the provision of the United Kingdom personnel to assist in the staffing, administration and training of the Armed Forces in Kenya

Signed Date: 27/11/1964

Signed Place: Nairobi

Title: Exchange of Letters establishing a British Training Team in Kenya to assist in the training and development of the Armed Forces of Kenya (and Exchange of Letters (Understanding): para 6(b) Non payment of duty on personal effects & Exchange of Letters (Understanding): Financial Arrangements for the provision of the Training Team

Signed Date: 14/07/1967

Signed Place: Nairobi

Publications: Treaty Series No TS 033 1968 : Cmnd 3582

Title: Exchange of Letters to provide personnel to assist in the staffing, administration and training of the Armed Forces of Malaysia (with Exchange of Letters (Understanding) Jurisdiction)

Signed Date: 05/12/1967

Signed Place: Kuala Lumpur

EIF Date: 16/09/1963

Publications: Treaty Series No TS 028 1968: Cmnd 3578

Title: Agreement between the Royal Hellenic Government of the one part and the Governments of Australia, Canada, India, New Zealand, Pakistan, South Africa and the United Kingdom of Great Britain and Northern Ireland of the other part concerning the Graves of Members of the Armed Forces of the Commonwealth in Greek Territory

Signed Date: 22/10/1968

Signed Place: Athens

Publications: Treaty Series No TS 028 1970 : Cmnd 4345

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Singapore concerning the Provision of Personnel of the United Kingdom Armed Forces to assist in the Staffing, Administration and Training of the Singapore Armed Forces

Signed Date: 07/09/1970

Signed Place: Singapore

Publications: Treaty Series No TS 094 1973 : Cmnd 5425

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Canada concerning the Training of United Kingdom Armed Forces in Canada

Signed Date: 20/08/1971

Signed Place: Ottawa

Publications: Treaty Series No TS 027 1974 : Cmnd 5588

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia regarding Assistance for the Malaysian Armed Forces and the Arrangements for a United Kingdom Force in Malaysia

Signed Date: 01/12/1971

Signed Place: Kuala Lumpur

Publications: Treaty Series No TS 016 1972 : Cmnd 4890

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Singapore regarding Assistance for the Armed Forces of Singapore and the Arrangements for a United Kingdom Force in Singapore

Signed Date: 01/12/1971

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22 March 2006

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Signed Place: Singapore  
Publications: Treaty Series No TS 015 1972: Cmnd 4889

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia concerning the Provision of Personnel of the United Kingdom Armed Forces to assist in the Training and Development of the Armed Forces in Malaysia

Signed Date: 28/03/1973  
Signed Place: Kuala Lumpur  
Publications: Treaty Series No TS 068 1973 : Cmnd 5332

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya regarding the Establishment of a Joint Service Advisory Team in Kenya to assist in the Training and Development of the Armed Forces of Kenya

Signed Date: 23/10/1973  
Signed Place: Nairobi  
Publications: Treaty Series No TS 127 1973 : Cmnd 5513

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Singapore amending the Agreement regarding Assistance for the Armed Forces of Singapore and the Arrangements for a United Kingdom Force in Singapore, of 1 December 1971

Signed Date: 26/07/1978  
Signed Place: Singapore  
Publications: Treaty Series No TS 002 1979 : Cmnd 7410

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Canada amending and extending the Agreement of 20/08/1971 concerning the Training of United Kingdom Armed Forces in Canada

Signed Date: 26/11/1979  
Signed Place: Ottawa  
Publications: Treaty Series No TS 039 1980 : Cmnd 7894

“BI” “Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Canada concerning Transport Assistance by the Canadian Armed Forces to the Election Observers in Southern Rhodesia”

Signed Date: 07/03/1980 and 10/03/1980  
Signed Place: London

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Singapore further amending the Agreement regarding Assistance for the Armed Forces of Singapore and the Arrangements for a United Kingdom Force in Singapore, of 01/12/1971, as amended by the Exchange of Notes of 26/07/1978

Signed Date: 10/06/1981  
Signed Place: Singapore  
Publications: Treaty Series No TS 076 1981 : Cmnd 8391

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belize concerning the continuing presence in Belize after Independence of United Kingdom Armed Forces

Signed Date: 01/12/1981  
Signed Place: Belmopan  
Publications: Treaty Series No TS 017 1982 : Cmnd 8520

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22 March 2006

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Title: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the German Democratic Republic concerning the Treatment of War Graves of Members of the Armed Forces of the United Kingdom of Great Britain and Northern Ireland in the German Democratic Republic

Signed Date: 27/04/1987

Signed Place: Berlin

Publications: Treaty Series No TS 051 1987 : Cm 248

Title: Exchange of Letters between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Canada concerning the Training of British Armed Forces in Canada

Signed Date: 04/09/1991

Signed Place: London

Publications: Treaty Series No TS 109 1991 : Cm 1783

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Japan concerning the supply of Logistic Support to the United Kingdom Armed Forces

Signed Date: 18/01/2002

Signed Place: Tokyo

Publications: Treaty Series No TS 022 2002 : Cm 5517

#### Bilateral Treaties: “**Military Bases**”

Title: [US] Notes concerning Leased Air Bases in Caribbean Area and arrangements for temporary commercial (civil) use

Signed Date: 07/03/1946 & 30/07/1946

Signed Place: Washington

Publications:—[Not published]

Title: Agreement between His Majesty’s Government in the United Kingdom and the United States Government relating to the United States Leased Base at Argentina, Newfoundland

Signed Date: 13/08/1947 & 23/10/1947

Signed Place: London

Publications: Treaty Series No. TS 001 1948 : Cmnd 7294

Title: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning the Opening of Certain Military Air Bases in the Caribbean Area and Bermuda to use by Civil Aircraft

Signed Date: 24/02/1948

Signed Place: Washington

EIF Date: 24/02/1948

Publications: Treaty Series No. TS 022 1948 : Cmd 7389

Title: Exchange of Notes between the Government of the United Kingdom and the Government of the United States of America for the settlement of certain outstanding matters relating to the Establishment of the United States Air Force Base in Trinidad [with Agreement, Schedules, Maps and Agreed Minutes]

Signed Date: 19/09/1949

Signed Place: Washington

EIF Date: 19/09/1949

Publications: Treaty Series No. TS 003 1950 : Cmd 7864

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America modifying the Leased Bases Agreement of 27th March, 1941

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22 March 2006

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Signed Date: 19/07/1950 & 01/08/1950  
Signed Place: Washington  
EIF Date: 01/08/1950  
Publications: Treaty Series No. TS 065 1950 : Cmd 8076  
[THE 1941 AGREEMENT IS NO LONGER IN EFFECT]

Title: Agreement. Leased bases in Jamaica.

Signed Date: 19/01/1951  
Signed Place: Kingston [Not Published]

Title: Exchange of Notes between the Government of the United Kingdom and the Government of the United States of America concerning the Designation of an Appropriate Area within the Boundaries of the United States Kindley Air Force Base in Bermuda for the Provision of Civil Airport Facilities

Signed Date: 23/03/1951 & 25/04/1951  
Signed Place: Washington  
EIF Date: 25/04/1951  
Publications: Treaty Series No. TS 051 1951 : Cmd 8290  
Title: Agreement concerning the Utilization of Leased Base Areas in Saint Lucia

Signed Date: 29/07/1952  
Signed Place: Castries EIF Date: 29/07/1952 [Not Published]

Title: General Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belgium on the Establishment of a British Military Base in Belgium

Signed Date: 12/11/1952  
Signed Place: Brussels  
EIF Date: 20/10/1953  
Publications: Treaty Series No. TS 079 1953 : Cmnd 9000

Title: Detailed Agreement on the Establishment of a British Military Base in Belgium Gondola Agreement

Signed Date: 12/11/1952  
Signed Place: Brussels  
Publications: [Not published]

Title: Protocol (between United Kingdom, Canada and Belgium). Use of the British Military Base in Belgium for the maintenance of Canadian Forces

Signed Date: 30/03/1953  
Signed Place: Brussels  
Publications: [Not published]

Title: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Egyptian Government regarding the Suez Canal Base (with Annexes, Exchanges of Notes and Agreed Minute)

Signed Date: 19/10/1954  
Signed Place: Cairo  
EIF Date: 19/10/1954  
Publications: Treaty Series No. TS 067 1955 : Cmnd 9586

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Egypt governing Reserves of Petroleum Products in accordance with certain provisions of the Agreement of the 19th of October, 1954 regarding the Suez Canal Base

Signed Date: 19/10/1954  
Signed Place: Cairo

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22 March 2006

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EIF Date: 19/10/1954

Publications: Treaty Series No. TS. 014 1955 : Cmd 9390

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Egypt supplementing the Agreement of the 19 of October, 1954 regarding the Suez Canal Base (together with Agreed Minute)

Signed Date: 03/05/1955

Signed Place: Cairo

EIF Date: 03/05/1955

Publications: Treaty Series No. TS 073 1955 : Cmd 9600

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Egyptian Government extending the relevant provisions of the Suez Canal Base Agreement of October 19, 1954 to the "Contractor" and to British Civilian Technicians located at Abou Sueir Airfield and Fanara Flying Boat Station

Signed Date: 24/06/1956

Signed Place: Cairo

Publications: Treaty Series No. TS 040 1956 : Cmd 9858

Title: Exchange of Letters relating to the Territorial Waters adjacent to the United Kingdom base in Singapore.

Signed Date: 29/02/1964

Signed Place: Kuala Lumpur

Publications: [Not published]

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning the Use by Civil Aircraft of the Airfield at the Auxiliary Air Base on Grand Turk Island

Signed Date: 06/12/1966 & 08/12/1966

Signed Place: Washington

Publications: USA No. 002 1967 : Cmnd 3281

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning the Availability for Defence Purposes of the British Indian Ocean Territory

Signed Date: 30/12/1966

Signed Place: London

Publications: Treaty Series No. TS 015 1967 : Cmnd 3231

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America regarding the additional Civil Airport facilities at the United States Kindley Air Force Base, Bermuda

Signed Date: 04/06/1968

Signed Place: London

EIF Date: 04/06/1968

Publications: Treaty Series No. TS 080 1968 : Cmnd 3753

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning the use by Civil Aircraft of the Airfield at the Auxiliary Air Base on Grand Turk Island

Signed Date: 11/06/1971

Signed Place: London

EIF Date: 11/06/1971

Publications: Treaty Series No. TS 067 1971 : Cmnd 4762

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22 March 2006

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Title: Arrangement effected by Exchange of Notes. Suez Canal Clearance: Status of US Forces using British Sovereign Base Areas in Cyprus.

Signed Date: 04/07/1974  
Signed Place: London EIF Date: 04/07/1974  
Publications: [Not published]

Title: Exchange of Letters between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of South Africa terminating the Agreements signed at London on 30 June 1955 relating to the Simonstown Naval Base

Signed Date: 06/06/1975 & 16/06/1975  
Signed Place: London/Capetown  
EIF Date: 16/06/1975  
Publications: Treaty Series No. TS 120 1975 : Cmnd 6229

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America amending and supplementing the Agreement of 27 March 1941, as amended, regarding Leased Naval and Air Bases on Bermuda

Signed Date: 05/12/1978 & 06/12/1978  
Signed. Place: Washington  
EIF Date: 06/12/1978  
Publications: Treaty Series No. TS 046 1979 : Cmnd 7561  
[1941 AGREEMENT NO LONGER IN FORCE]

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America further amending and supplementing the Agreement of 27 March 1941, as amended, regarding Leased Naval and Air Bases on Bermuda

Signed Date: 07/03/1985  
Signed Place: Washington  
EIF Date: 07/03/1.985  
Publications: Treaty Series No. TS 046 1985 : Cmnd 9607

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America amending the Agreement done at London on 27 March 1941, and related lease and other arrangements regarding the establishment, use, operation and defence of the United States bases on Bermuda

Signed Date: 18/06/2002  
Signed Place: Washington  
EIF Date: 18/06/2002  
Publications: Treaty Series No. TS 049 2002

Bilateral Treaties: “**Boundaries**”

Title: Boundary Agreement between Abu Dhabi and Muscat

Signed Date: ??/??/1959  
Signed Place: Muscat  
Publications: [Not published]

Title: Boundary Agreement between Ajman and Muscat

Signed Date: ??/??/1959  
Signed Place: Muscat  
Publications: [Not published]

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22 March 2006

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Title: Boundary Agreement between Dubai and Muscat

Signed Date: ??/??/1959

Signed Place: Muscat

Publications: [Not published]

Title: Boundary Agreement between Fujaira and Muscat

Signed Date: ??/??/1960

Signed Place: Muscat

Publications: [Not published]

Title: Boundary Agreement between Abu Dhabi and Muscat

Signed Date: ??/??/1960

Signed Place: Muscat

Publications: [Not published]

Title: Exchange of Notes constituting an between the Government of the United Kingdom and the Government of Ethiopia amending the description of the Kenya/Ethiopia Boundary

Signed Date: 29/09/1947

Signed Place: Addis Ababa

Publications: Treaty Series No. TS 018 1948 : Cmd 7374

Title: Exchanges of Notes between the Government of the United Kingdom and the Government of Kenya for the appointment of a Mixed Commission to demarcate the boundary between Kenya and Ethiopia

Signed Date: 03/07/1950

Signed Place: Addis Ababa

EIF Date: 03/07/1950

Publications: Treaty Series No. TS 018 1951 : Cmd 8173

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland (acting on their own behalf and on behalf of the Government of the Federation of Rhodesia & Nyasaland) and the Government of the Portuguese Republic accepting the Report of the Nyasaland-Mozambique Boundary Commission of the 27th of August, 1956

Signed Date: 29/11/1963

Signed Place: Lisbon

Publications: Treaty Series No. TS 005 1965 : Cmnd 2501

Title: Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America on the Delimitation in the Caribbean of a Maritime Boundary Relating to the U.S. Virgin Islands and Anguilla

Signed Date: 05/11/1993

Signed Place: London

Publications: Treaty Series No. TS 071 1995 : Cm 2961

Title: Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America on the Delimitation in the Caribbean of a Maritime Boundary Relating to Puerto Rico/U.S. Virgin Islands and the British Virgin Islands

Signed Date: 05/11/1993

Signed Place: London

Publications: Treaty Series No. TS 077 1995 : Cm 2978

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22 March 2006

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Title: Agreement on Maritime Delimitation between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Dominican Republic concerning the Delimitation of the Maritime Boundary between the Dominican Republic and the Turks and Caicos Islands

Signed Date: 02/08/1996

Signed Place: Santo Domingo

Publications: Dominican Republic No. 001 1996 : Cm 3461

Title: Agreement between the United Kingdom of Great Britain and Northern Ireland and the French Republic concerning the Establishment of a Maritime Boundary between France and Jersey

Signed Date: 04/07/2000

Signed Place: St Helier

EIF Date: 01/01/2004

Publications: Treaty Series No. 008 2004 : Cm 6138

Bilateral Treaties: “**Defence**”

Title: Agreement respecting defence installations in Newfoundland (between United Kingdom, Canada and Newfoundland)

Signed Date: 08/04/1946 & 03/05/1946

Signed Place: St John's

Publications: [Unpublished]

Title: Exchange of Notes terminating the Agreement between the Government of the United Kingdom and the French National Committee on the Defence of the Island of Madagascar and its Dependencies and the Island of Reunion signed at London on 14 December 1942

Signed Date: 19/06/1946 & 21/06/1946

Signed Place: Paris

EIF Date: 21/06/1946

Publications: Treaty Series No. TS 055 1946 : Cmd 6986

Title: Agreement between United Kingdom Minister of Defence and Minister of Defence, Norway. Maintenance of Norwegian Brigade Group in the occupation of the British Zone in Germany [With Annexes]

Signed Date: 06/06/1947

Signed Place: London

Publications: [Not published]

Title: Agreement (between United Kingdom Secretary of State for War and Minister of Defence, Norway). Norwegian Brigade Group in the occupation of the British Zone in Germany. Settlement of Claims with Annex.

Signed, Date: 06/06/1947

Signed Place: London

Publications: [Not published]

Title: [Ceylon/Sri Lanka]:Agreement on Defence

Signed Date: 11/11/1947

Signed Place: Colombo

Publications: [Not published]

Title: Exchange of Letters between the Chancellor of the Exchequer and the Finance Minister of India Extending the Financial Agreement of 14:08:1947 and making certain Financial Provisions in respect of Defence Stores and Installations taken over from the United Kingdom and of the Sterling Pensions Liabilities of the Dominion and Provinces of India”

Signed Date: 09/07/1948

Signed Place: London

Publications: [Not published]

[?ANY OUTSTANDING PENSIONS LIABILITIES]

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22 March 2006

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Title: Exchange of Letters between the Chancellor of the Exchequer and the Finance Minister of Pakistan Extending the Financial Agreement of 14:08:1947 and making certain Financial Provisions in respect of Defence Stores and Installations taken over from the Government of the United Kingdom and of Sterling Pensions Liabilities of the Dominion and Provinces of Pakistan

Signed Date: 14/07/1948  
Signed Place: London  
Publications: [Not published]  
[SEE ABOVE COMMENT]

Title: Exchange of Notes constituting a Defence Agreement between the United Kingdom of Great Britain and Northern Ireland (acting on behalf of Fiji) and New Zealand

Signed Date: 28/10/1948 & 12/11/1948  
Signed Place: Wellington/Suva  
Publications: New Zealand Treaty Series No. 005 1953  
[?NO LONGER A UK RESPONSIBILITY]

Title: Mutual Defence Assistance. Agreement between the Government of the United Kingdom of Great Britain and the Government of the United States of America [with Annexes and Statement]”

Signed Date: 27/01/1950  
Signed Place: Washington  
Publications: Treaty Series No. TS 013 1950 : Cmd. 7894  
[?DEFUNCT]

Title: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Belgium for the Discharge by Deliveries of Defence Equipment of a Debt owed to the Government of Belgium by the Government of the United Kingdom

Signed Date: 30/06/1952 & 08/01/1953  
Signed Place: Paris  
Publications: Treaty Series No. TS 057 1954 : Cmd 9258

Title: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America to facilitate the interchange of patents and technical information for defence purposes

Signed Date: 19/01/1953  
Signed Place: London  
EIF Date: 19/01/1953  
Publications: Treaty Series No. TS 009 1953: Cmd 8757

Title: Exchange of Notes concerning a Special Programme of Facilities Assistance pursuant to the Mutual Defence Assistance Agreement of January 27, 1950 [United States No.259A. X-147-1096]

Signed Date: 08/06/1954 & 15/06/1954  
Signed Place: London  
Publications: [Not Published]

Title: Exchange of Notes constituting an Agreement concerning Defence arrangements for the Kingdom of Tonga

Signed Date: 24/06/1954 & 14/06/1957  
Signed Place: Suva/Wellington Publications: [Not published]

Title: Exchange of Notes constituting an Agreement modifying the Defence Agreement of 28 October and 12 November 1948 between the United Kingdom (acting on behalf of Fiji) and New Zealand [CRO No.89]

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22 March 2006

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Signed Date: 13/12/1954 & 21/03/1955

Signed Place: Wellington/Suva

Publications: [Not published]

Title: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America for Co-operation regarding Atomic Information for Mutual Defence Purposes

Signed Date: 15/06/1955

Signed Place: Washington

Publications: Treaty Series No. TS 052 1955 : Cmd 9555

Title: Exchange of Notes constituting an Agreement relating to the Extension of the Facilities Assistance Program [Extension of the Exchange of Notes constituting an Agreement relating to a Special Program of Facilities Assistance for Mutual Defence Purposes, London 8 and 15 June 1954]

Signed Date: 27/06/1955

Signed Place: London Publications: [Not published]

Title: Exchange of Notes on Defence Matters, with Annexes. SIMONSTOWN AGREEMENTS

Signed Date: 30/06/1955

Signed Place: London

Publications: N/A

Title: [France] Exchange of Notes. Military Arrangement concerning the defence of Fezzan in war time.

Signed Date: 03/08/1955

Signed Place: London

Publications: [Not published]

Status: [USA] Exchange of Notes: Defence Requirements in the Caribbean

Signed Date: 25/06/1956

Signed Place: Washington

Publications: USA No. 003 1956 : Cmd 9812

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America on the Disposal of Surplus United States Mutual Defence Assistance Programme Equipment

Signed Date: 10/05/1957 & 13/05/1957

Signed Place: London

Publications: Treaty Series No. TS 047 1957 : Cmnd 198

Title: Exchanges of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Germany concerning Local Defence Costs of United Kingdom Forces stationed in the Federal Republic and related Measures of Mutual Aid in Accordance with Article 3 of the North Atlantic Treaty

Signed Date: 07/06/1957

Signed Place: Bonn

Publications: Treaty Series No. TS 013 1961 : Cmnd 1313

Title: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America for Co-operation on the Uses of Atomic Energy for Mutual Defence Purposes

Signed Date: 03/07/1958

Signed Place: Washington

Publications: Treaty Series No. TS 041 1958 : Cmnd 537

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22 March 2006

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Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Germany concerning Local Defence Costs of United Kingdom Forces stationed in the Federal Republic

Signed Date: 03/10/1958

Signed Place: Paris

Publications: Treaty Series No. TS 014 1961 : Cmnd 1314

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America amending the Exchange of Notes of May 10-13, 1957 concerning the Disposal of Surplus United States Mutual Defence Programme Equipment

Signed Date: 17/12/1958 & 30/12/1958

Signed Place: London

Publications: Treaty Series No. TS 030 1959 : Cmnd 714

Title: Exchange of Notes constituting an Agreement between the United Kingdom of Great Britain and Northern Ireland and the United States of America amending the Exchange of Notes relating to a Special Program of Facilities Assistance for Mutual Defence Purposes, signed at London on 8 June 1954 and 15 June 1954, as extended

Signed Date: 03/02/1959 & 13/02/1959

Signed Place: London

Publications: [Not published]

Title: Amendment to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America for Co-operation on the Uses of Atomic Energy for Mutual Defence Purposes of July 3, 1958 [With Exchange of Notes]

Signed Date: 07/05/1959

Signed Place: Washington

Publications: Treaty Series No. TS 072 1959 : Cmnd 859

Title: [New Zealand]: Exchange of Notes constituting an Agreement concerning financial arrangements for the defence of Fiji

Signed Date: 21/09/1959

Signed Place: Wellington/Suva

Publications: New Zealand TS No. 002 1960

Title: Agreement concerning Defence and External Affairs

Signed Date: 29/09/1959

Signed Place: Brunei

Publications: [State Papers, Vol.164 p.38]

Title: [Nigeria]: Defence Agreement (and Annex)

Signed Date: 05/01/1961

Signed Place: Lagos

Publications: Published in Draft : Cmnd 1212(1960)

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America on the Setting up of a Missile Defence Alarm System Station in the United Kingdom

Signed Date: 18/07/1961

Signed Place: London

Publications: Treaty Series No. TS 065 1961 : Cmnd 1444

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22 March 2006

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Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America amending the Exchange of Notes of May 10/13, 1957 concerning the Disposal of Surplus United States Mutual Defence Programme Equipment

Signed Date: 07/11/1961 & 10/11/1961

Signed Place: London

Publications: Treaty Series No. TS 012 1962 : Cmnd 1612

Title: Joint Statement on the Federation of Malaysia. Annex A: Commission of Enquiry, North Borneo and Sarawak. Annex B: Defence

Signed Date: 22/11/1961

Signed Place: London Publications: N/A

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning a Weapons Production Programme in accordance with the terms and Conditions of the Mutual Defence Assistance Agreement signed at Washington on January 27, 1950

Signed Date: 29/06/1962

Signed Place: London

Publications: Treaty Series No. TS 066 1962 : Cmnd 1863

Title: [India] Exchange of Letters constituting an Agreement for the supply of arms and military equipment for defence against Chinese aggression

Signed Date: 27/11/1962

Signed Place: New Delhi Publications: [Not published]

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America amending the Exchange of Notes of May 10/13, 1957 concerning the Disposal of Surplus United States Mutual Defence Programme Equipment

Signed Date: 28/08/1963

Signed Place: London

Publications: Treaty Series No. TS 087 1963 : Cmnd 2200

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of the Netherlands concerning the Safeguarding of Secrecy of Inventions relating to Defence and for which Applications for Patents have been made

Signed Date: 30/10/1963

Signed Place: London

Publications: Treaty Series No. TS 007 1964 : Cmnd 2252

Title: Exchange of Letters constituting an Agreement amending the Agreement of 31 August and 21 September 1959 concerning Financial Arrangements for the Defence of Fiji [Agreement between United Kingdom acting on behalf of Fiji and New Zealand]

Signed Date: 04/04/1964

Signed Place: Wellington/Suva Publications: [Not published]

Title: [Malta] : Proposed Agreement on Mutual Defence and Assistance. Draft Exchange of Letters on the Civil Dockyard

Signed Date: 01/07/1964

Signed Place: Valletta Publications: [Not published]

Title: Exchange of Letters regarding financial obligations under the Malaysia Defence Agreement [CRO No.219 Agreement of 12:10:1957].

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22 March 2006

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Signed Date: 29/07/1964

Signed Place: Wellington Publications : [Not published]

Title: Exchange of Letters between the Government of the United Kingdom and Malta on Customs Procedures concerning the Agreement on Mutual Defence and Assistance (21:09:1964—CRO 346)

Signed Date: 21/09/1964

Signed Place: Valletta

Publications: [Not published]

Title: Exchange of Letters agreeing the terms and conditions of a special defence credit to the Government of India for assistance towards the Mazagon dockyard and Leander frigate project

Signed Date: 20/11/1964

Signed Place: London

Publications: [Not published]

Title: [Malta]: Exchange of Letters amending the Agreement on Mutual Defence and Assistance of 21 September 1964 [CRO No. 346].

Signed Date: 08/07/1966

Signed Place: Valetta

Publications: Treaty Series No. TS 054 1966 : Cmnd 3110

Title: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Sweden to Facilitate the Interchange of Inventions and Proprietary Technology Information for Defence Purposes

Signed Date: 26/10/1967

Signed Place: London

Publications: Treaty Series No. TS 110 1967: Cmnd 3487

Title: [Mauritius]. Agreement on Mutual Defence and Assistance

Signed Date: 12/03/1968

Signed Place: Port Louis

Publications: Treaty Series No. TS 043 1968 : Cmnd 3629

Title: Exchange of Notes concerning Financial Arrangements for the Defence of Fiji. [Exchange of Notes between United Kingdom (acting on behalf of Fiji) and New Zealand]. [See Agreement of 24 March & 4-April 1964].

Signed Date: 02/04/1968

Signed Place: Wellington/Suva

Publications: N/A

Title: Exchange of Letters (Understanding) concerning Defence Aid Arrangements 1968, and Appendices A, B, B (1), C, C (1), D, E.

Signed Date: 19/07/1968

Signed Place: Singapore

Publications: N/A

Title: 1968 Amendment to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America for Co-operation on the Uses of Atomic Energy for Mutual Defence Purposes of 3 July 1958

Signed Date: 27/09/1968

Signed Place: Washington OF Date: 28/03/1969

Publications: Treaty Series No. TS 085 1969 : Cmnd 4119

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22 March 2006

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Title: Exchange of Notes concerning the United Kingdom/Guyana Sea Defence Loan 1969 and Exchange of Letters amending the foregoing (06:05:1976—SANG 093/548/1 (19) 1976)

Signed Date: 12/07/1969

Signed Place: Georgetown OF Date: 12/07/1969

Publications: N/A

Title: Amendment to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America for Co-operation on the Uses of Atomic Energy for Mutual Defence Purposes of July 3 1958

Signed Date: 16/10/1969

Signed Place: Washington

EIF Date: 08/04/1970

Publications: Treaty Series No. TS 046 1970 : Cmnd 4383

Title: Exchange of Letters prolonging the Agreement of 22 February and 2 April 1968 concerning financial arrangements for the Defence of Fiji from 1 January to 10 October 1970 [between United Kingdom acting on behalf of Fiji and New Zealand]

Signed Date: 21/08/1970

Signed Place: Wellington/Suva

Publications: N/A

Title: Exchange of Notes concerning a Loan by the Government of the United Kingdom of Great Britain and Northern Ireland to the Government of Ceylon for the Purchase of Defence Equipment in the United Kingdom

Signed Date: 25/07/1971

Signed Place: Colombo

EIF Date: 25/07/1971

Publications: Treaty Series No. TS 080 1971 : Cmnd 4815

Title: Letters of Understanding concerning the Handover of the Trucial Oman Scouts to form the Nucleus of a Union Defence Force of the United Arab Emirates

Signed Date: 22/12/1971

Signed Place: Bahrain

Publications: N/A

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America applying the Agreement of 10 February 1961 to additional United States Defence Areas in the Turks and Caicos Islands

Signed Date: 15/06/1972

Signed Place: London

EIF Date: 15/06/1972

Publications: Treaty Series No. TS 097 1972 : Cmnd 5059

Title: Amendment to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America for Co-operation on the uses of Atomic Energy for Mutual Defence Purposes of 3 July 1958

Signed Date: 22/07/1974

Signed Place: Washington

“EIF Date:” 27/01/1975

Publications: Treaty Series No. TS 065 1975 : Cmnd 6017

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22 March 2006

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Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Mauritius terminating the Agreement on Mutual Defence and Agreement signed at Port Louis on 12 March 1968

Signed Date: 29/03/1976 & 30/03/1976

Signed Place: Port Louis

EIF Date: 30/03/1976

Publications: Treaty Series No. TS 065 1976 : Cmnd 6550

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America amending the Agreement of 30 December 1966 concerning the availability for Defence Purposes of the British Indian Ocean Territory

Signed Date: 22/06/1976

Signed Place: London

EIF Date: 28/06/1976

Publications: Treaty Series No. TS 088 1976 : Cmnd 6610

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America relating to the Use by the United States of certain Defence Areas in the Turks and Caicos Islands

Signed Date: 29/09/1978

Signed Place: Washington

EIF Date: 29/09/1978

Publications: Treaty Series No. TS 011 1979 : Cmnd 7447

Title: Amendment to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America for Cooperation on the Uses of Atomic Energy for Mutual Defence Purposes of 3 July 1958

Signed Date: 05/12/1979

Signed Place: Washington

EIF Date: 25/03/1980

Publications: Treaty Series No. TS 061 1980 : Cmnd 7976

Title: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning United States Defence Areas in the Turks and Caicos Islands ( With Memorandum of Understanding and Agreed Minute ) and Exchange of Notes

Signed Date: 12/12/1979

Signed Place: Washington

EIF Date: 12/12/1979

Publications:—Treaty Series No. TS 042 1980 : Cmnd 7915

Title: Exchange of Letters between the Prime Minister and the President of the United States and the Secretary of State for Defence and the United States Secretary of Defence concerning the British Strategic Nuclear Force

Signed Date: 10/07/1980 & 15/07/1980

Signed Place: London & Washington”

Publications: N/A

Title: Exchange of Letters between the Prime Minister and the President of the United States of America and between the Secretary of State for Defence and the United States Secretary of Defence concerning the British Strategic Nuclear Force

Signed Date: 11/03/1982

Signed Place: London & Washington

Publications: N/A

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22 March 2006

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Title: Exchange of Notes constituting an Operating Agreement on Defence and Security in the Bahamas

Signed Date: 05/04/1984  
Signed Place: Washington  
EIF Date: 26/01/1983  
Publications: N/A

Title: Amendment to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America for Co-operation on the Uses of Atomic Energy for Mutual Defence Purposes

Signed Date: 05/06/1984  
Signed Place: Washington  
EIF Date: 16/11/1984  
Publications: Treaty Series No. TS 004 1985 : Cmnd 9434

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning the United States Defence Areas in the Turks and Caicos Islands

Signed Date: 18/12/1984  
Signed Place: Washington  
EIF Date: 01/03/1984  
Publications: Treaty Series No. TS 022 1987 : Cm 142

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning Defence Co-operation Arrangements

Signed Date: 27/05/1993  
Signed Place: Washington  
EIF Date: 27/05/1993  
Publications: Treaty Series No. TS 069 1993 : Cm 2361

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America amending the Agreement done at London on 27 March 1941, and related lease and other arrangements regarding the establishment, use, operation and defence of the United States bases on Bermuda

Signed Date: 18/06/2002  
Signed Place: Washington  
EIF Date: 18/06/2002  
Publications: Treaty Series No. TS 049 2002 : Cm 5683

Title: 2004 Amendment to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America for Cooperation on the Uses of Atomic Energy for Mutual Defence Purposes

Signed Date: 14/06/2004  
Signed Place: Washington  
EIF Date: 09/12/2004  
Publications: Treaty Series No. No. 001 2005 : Cm 6471

Bilateral Treaties: “**(Armed) Forces**”

Title: Exchange of Notes and Memorandum of Agreement between the United Kingdom and Portugal concerning Jurisdictional Immunities of H.M. Forces in the Azores”

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22 March 2006

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Signed Date: 14/04/1945  
Signed Place: Lisbon  
EIF Date: 14/04/1945  
Publications: [Not published]

Title: Agreement between His Majesty's Government in the United Kingdom and the Belgian Government Regarding Claims Arising Out of Incidents Involving Members of His Majesty's Forces

Signed Date: 01/06/1945 & 25/06/1945  
Signed Place: Brussels  
EIF Date: 25/06/1945  
Publications: Treaty Series No. TS 011 1946 : Cmd 6802

Title: Agreement regarding Jurisdiction over British Armed Forces in Chinese Territory and Chinese Forces in India and Burma

Signed Date: 07/07/1945  
Signed Place: Chungking  
Publications: [Not published]

Title: Exchange of Notes [between SHAEF Mission and Netherlands Military Mission] concerning Termination by Allied Forces of First Military Phase of Operations in Netherlands  
Signed. Date: 09/07/1945 & 03/08/1945  
Signed Place: The Hague  
Publications: [Not published]

Title: Exchange of Notes and Annexes between the United Kingdom and France concerning Civil Administration and Jurisdiction in Indo-China liberated by British Forces and Currency for British Authorities

Signed Date: 08/10/1945  
Signed Place: London  
Publications: [Not published]

Title: Exchange of Notes and Memorandum of Principles concerning the Use and Disposal of United Nations Vessels captured or found by their forces in the course of Operations for the Liberation of Europe

Signed Date: 11/10/1945  
Signed Place: London  
EIF Date: 22/10/1943  
Publications: [Not published]

Title: Agreement between the United Kingdom and the Netherlands regarding the disposal of enemy war material and other property falling into the hands of Allied Forces in the Netherlands East Indies

Signed Date: 30/10/1945  
Signed Place: London  
Publications: [Not published]

Title: Exchange of Notes between the United Kingdom and France concerning pensions for Free French Forces—Termination of Agreement of 7 August 1941, with effect from 31 December 1945

Signed Date: 28/11/1945 & 29/11/1945  
Signed Place: London  
Publications: [Not published]

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22 March 2006

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Title: Exchange of Letters constituting an Agreement supplementing the Agreement of 11 October 1945 concerning the Use and Disposal of United Nations Vessels captured or found by their forces in the course of Operations for the Liberation of Europe

Signed Date: 30/11/1945  
Signed Place: London  
EIF Date: 30/11/1945  
Publications: [Not published]

Title: Exchange of Notes concerning the disposal of Enemy War Material and other property falling into the hands of Allied Forces in Indo-China

Signed Date: 28/12/1945  
Signed Place: London  
Publications: [Not published]

Title: Exchange of Notes constituting an Agreement relating to the Use and Disposal of United Nations Vessels captured or found by their forces in the course of operations for the Liberation of Europe (with Supplementary Exchange of Notes concerning extension of application of term "vessels belonging to that State" in memorandum attached to the Agreement)

Signed Date: 26/01/1946  
Signed Place: London  
EIF Date: 22/10/1943  
Publications: Treaty Series No. TS 028 1946 : Cmd 6905

Title: Treaty between His Majesty in respect of the United Kingdom and His Royal Highness the Prince Regent in the name of His Majesty The King of the Belgians regarding Privileges and Facilities for British Forces in Belgium in connection with the Occupation of Germany and Austria

Signed Date: 11/03/1946  
Signed Place: Brussels  
EIF Date: 08/05/1945  
Publications: Treaty Series No. TS 013 1949 : Cmd 7642

Title: Exchange of Notes and Annex concerning the Disposal of War Material and other Property falling into the hands of Allied Forces in Belgium

Signed Date: 02/04/1946  
Signed Place: London  
EIF Date: 16/05/1944  
Publications: [Not published]

Title: Exchange of Notes and Annex between the United Kingdom and Luxembourg concerning the Disposal of War Material and other Property falling into the hands of Allied Forces in Luxembourg

Signed Date: 15/05/1946  
Signed Place: London  
EIF Date: 16/05/1944  
Publications: [Not published]

Title: Exchange of Notes and Annex concerning the Disposal of War Material and other Property falling into the hands of the Allied Forces in the Netherlands (Supplementary to the Agreement concerning Civil Administration and Jurisdiction in Liberated Territory of May 16, 1944)

Signed Date: 19/07/1946  
Signed Place: London  
EIF Date: 16/05/1944  
Publications: [Not published]

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22 March 2006

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Title: Exchange of Notes between the Governments of the United Kingdom and the United States of America for Mutual Forbearance concerning Claims against Members and Civilian Employees of their respective Armed Forces [With Annex and Appendix]

Signed Date: 23/10/1946 & 23/01/1947

Signed Place: Washington

EIF Date: 06/06/1944

Publications: Treaty Series No. TS 060 1948 : Cmd 7501

Title: Agreement and Annex. Settlement of Compensation Claims arising from acts committed after November 8, 1945 by British Forces in Belgium

Signed Date: 18/11/1946

Signed Place: Brussels

EIF Date: 09/11/1945

Publications: [Not published]

Title: Exchange of Notes Terminating the Armed Forces Agreement of October 25, 1940 and the Armed Forces (Expenditure) Protocol of January 21, 1943

Signed Date: 19/02/1947

Signed Place: Prague

Publications: N/A

Title: Agreement between His Majesty's Government in the United Kingdom and the Italian Government regarding the Withdrawal of British Forces from Italy and the Transfer of Responsibility from the Allied Military Government to the Italian Government

Signed Date: 14/06/1947

Signed Place: Rome

Publications: Treaty Series No. TS 047 1947 : Cmd 7158

Title: Exchange of Notes constituting and Agreement between the Government of the United Kingdom and the Danish Government for the Settlement of Claims arising out of Incidents involving the British Forces in Denmark

Signed Date: 01/12/1947

Signed Place: London

EIF Date: 01/06/1944

Publications: Treaty Series No. TS 040 1948 : Cmd 7460

Title: Exchange of Letters and annexes. British Forces in Trieste. Overland and air transport facilities and leave in Italy

Signed Date: 15/12/1947 & 17/12/1947

Signed Place: Rome

Publications: [Not published]

Title: Agreement. Jurisdictional and Fiscal Immunities to be accorded to Personnel of United Kingdom Forces in Burma. With Exchange of Letters dated at Rangoon 04.01.1948 & 24.01.1948

Signed Date: 04/01/1948

Signed Place: Rangoon

EIF Date: 04/01/1948

Publications: Burma No. 001 1948 : Cmd 7355

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22 March 2006

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Title: Agreement between His Majesty's Government in the United Kingdom and the Government of the French Republic regarding Facilities, etc., for British Armed Forces pending their Final Withdrawal from French Territory [With Annex and Exchanges of Notes]

Signed Date: 19/04/1948

Signed Place: Paris

EIF Date: 19/04/1948

Publications: Treaty Series No. TS 044 1948 : Cmd 7523

Title: Exchange of Notes between the United Kingdom and Greece concerning Settlement of Accounts due to Greece in regard to Expenditure of British Military Forces in Greece from 1 April 1947 to 28 October 1947

Signed Date: 28/06/1948

Signed Place: Athens

Publications: [Not published]

Title: Exchange of Notes. Privileges and Facilities for British Forces in Belgium in connexion with the Occupation of Germany and Austria. Modification of Article 19 (a) of Treaty of 11 March 1946

Signed Date: 18/12/1948

Signed Place: Brussels

Publications: Treaty Series No. TS 013 1949 : Cmd 7624

Title: Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belgium regarding the Status of Belgian Forces in Germany [with Annex]

Signed Date: 23/12/1949

Signed Place: Brussels

Publications: Treaty Series No. TS 040 1951 : Cmd: 8257

Title: Exchange of Notes between the Government of the United Kingdom and the Italian Government regarding the allocation to Italy of a share in the proceeds of sale by the International Refugee Organisation of certain Valuables, Currencies and Securities presumed looted by the German Forces and taken from them in Italy by the Allied Forces

Signed Date: 16/05/1951

Signed Place: Rome

Publications: Treaty Series No. TS 052 1951 : Cmd 8294

Title: Agreement between the Governments of the United Kingdom of Great Britain and Northern Ireland, Canada, Australia, New Zealand, the Union of South Africa, India and Pakistan of the one part and the Government of the Kingdom of the Netherlands of the other part relative to graves in Netherlands territories of members of the Armed Forces of the British Commonwealth

Signed Date: 10/07/1951

Signed Place: The Hague

EIF Date: 10/07/1951

Publications: Treaty Series No. TS 096 1951 : Cmd 8399

Title: Agreement between the Governments of the United Kingdom of Great Britain and Northern Ireland, Canada, Australia, New Zealand, the Union of South Africa, India and Pakistan of the one part and the Government of Belgium of the other part relative to graves in Belgian territory of members of the Armed Forces of the British Commonwealth

Signed. Date: 20/07/1951

Signed Place: Brussels

EIF Date: 20/07/1951

Publications: Treaty Series No. TS 098 1951 : Cmd 8402

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22 March 2006

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Title: Exchange of Notes. Interim Military Government. British Forces in Libya.

Signed Date: 24/12/1951

Signed Place: Tripoli

Publications: [Not published]

Title: Protocol (between United Kingdom, Canada and Belgium). Use of the British Military Base in Belgium for the maintenance of Canadian Forces

Signed Date: 30/03/1953

Signed Place: Brussels

Publications: [Not published]

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Belgian Government abrogating the Treaty of the 11th March 1946, regarding Privileges and Facilities for British Forces in Belgium in connexion with the Occupation of Germany and Austria

Signed Date: 22/10/1953

Signed Place: London

EIF Date: 22/10/1953

Publications: Treaty Series No. TS 080 1953 : Cmd 9001

Title: Agreement and Exchange of Notes concerning Air Navigation, Civil Air and Priority for Commonwealth Armed Forces Aircraft

Signed Date: 03/08/1954

Signed Place: Bahrain

EIF Date: 03/08/1954

Publications: [Not published]

Title: Exchange of Notes between the Governments of the United Kingdom of Great Britain and Northern Ireland, the Commonwealth of Australia and New Zealand, of the one part and the Korean Government of the other part, constituting an Agreement for Settlement of Advances in Korean Currency made to the British Commonwealth Forces, Korea

Signed Date: 28/09/1954

Signed Place: Seoul

EIF Date: 28/09/1954

Publications: Treaty Series No. TS 016 1955 : Cmd 9393

Title: Exchange of Letters between the Sultan of Muscat and HM Consul General, Muscat on an extension of the jurisdiction exercised by the consular court to cover any member of HM Armed Forces, Levy of Police Forces under the authority of HM Government.

Signed Date: 10/01/1955 & 23/03/1955

Signed Place: Muscat

Publications: [Not published]

Title: Exchange of Letters between the United Kingdom and the United States of America concerning Rates on Premises occupied by United States Armed Forces

Signed Date: 24/01/1955

Signed Place: London

EIF Date: 24/01/1955

Publications: [Not published]

Title: Exchange of Letters (with Memorandum of Understanding & annexes thereto) constituting an Agreement regarding the application of the provisions of the Convention on the Rights & Obligations of Foreign Forces & their Members in GERMANY F R, the Finance Convention & the Agreement on the Tax Treatment of the Forces & their Members to Canadian Forces & their members in GERMANY F R.

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22 March 2006

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Signed Date: 19/04/1955 & 09/01/1956  
Signed Place: Bonn  
EIF Date: 05/05/1955  
Publications: Miscellaneous No. 026 1956

Title: Exchange of Notes constituting an Agreement with the Government of Belgium regarding the application of the Provisions of the Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany and the Finance Convention of 26 May 1955

Signed Date: 10/11/1955  
Signed Place: Bonn  
Publications: [Not published]

Title: Exchange of Letters between the Government of the United Kingdom of Great Britain and Northern Ireland and the Netherlands Government concerning the Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany signed at Bonn on May 26, 1952, as amended at Paris on October 23, 1954

Signed Date: 11/06/1956 & 13/06/1956  
Signed Place: Bonn  
EIF Date: 11/06/1956  
Publications: Treaty Series No. TS 045 1956 : Cmd 9872

Title: Agreed Minute. Armed Forces and Budget. Libyan Armed Forces

Signed Date: 29/06/1956  
Signed Place: London  
Publications: [Not published]

Title: Documents relating to the further support of the United Kingdom Forces stationed in the territory of the Federal Republic of Germany for the period 1956–57

Signed Date: 29/06/1956  
Signed Place: Bonn  
Publications: Germany No. 001 1956 : Cmd 9802

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Danish Government concerning the Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany and the Finance Convention signed at Bonn on May 26, 1952, as amended at Paris on October 23, 1954

Signed Date: 08/10/1956  
Signed Place: Bonn  
EIF Date: 05/05/1955  
Publications: Treaty Series No. TS 055 1956 : Cmnd 22

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Germany concerning the Disbandment of the Civilian Service Organisation maintained by the British Forces in Germany

Signed Date: 11/04/1957  
Signed Place: Bonn  
EIF Date: 11/04/1957  
Publications: Treaty Series No. TS 053 1957 : Cmnd 226

Title: Exchange of Letters between the Government of the United Kingdom of Great Britain and Northern Ireland and the Netherlands Government prolonging indefinitely the Agreement constituted by an Exchange of Letters of June 11, 1956 concerning the division of responsibility between the two Governments for the Rights and Obligations of the Netherlands Forces and their Members in the Federal Republic of Germany

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22 March 2006

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Signed Date: 07/06/1957  
Signed Place: Bonn  
EIF Date: 24/03/1958  
Publications: Treaty Series No. TS 017 1958 : Cmnd 413

Title: Exchanges of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Germany concerning Local Defence Costs of United Kingdom Forces stationed in the Federal Republic and related Measures of Mutual Aid in Accordance with Article 3 of the North Atlantic Treaty

Signed Date: 07/06/1957  
Signed Place: Bonn  
EIF Date: 07/06/1957  
Publications: Treaty Series No. TS 013 1961 : Cmnd 1313

Title: Exchanges of Notes. Arrangements for the Employment of Overseas Commonwealth Forces in Emergency Operations in the Federation of Malaya after Independence

Signed Date: 04/09/1957 & 12/09/1957  
Signed Place: Kuala Lumpur/London  
Publications: [Not published]

Title: Exchange of Letters between the Government of the United Kingdom of Great Britain and Northern Ireland and the Sultan of Muscat and Oman concerning the Sultan's Armed Forces, Civil Aviation, Royal Air Force facilities and Economic Development in Muscat and Oman (see Notes)

Signed Date: 25/07/1958  
Signed Place: London  
EIF Date: 25/07/1958  
Publications: Treaty Series No. TS 028 1958: Cmnd 507

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Germany concerning Local Defence Costs of United Kingdom Forces stationed in the Federal Republic

Signed Date: 03/10/1958  
Signed Place: Paris  
EIF Date: 06/06/1959  
Publications: Treaty Series No. TS 014 1961 : Cmnd 1314

Title: Exchange of Notes. Settlement of administrative and financial matters following the withdrawal of British Forces of occupation

Signed Date: 19/11/1958  
Signed Place: Amman  
EIF Date: 19/11/1958  
Publications: [Not published]

Title: Customs Clearance arrangement between the United Kingdom and the Netherlands for British forces, Civilian Components and their dependants. Implements Article II of the NATO Status of Forces Agreement

Signed Date: 23/10/1959  
Signed Place: The Hague  
EIF Date: 01/11/1959  
Publications: N/A

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22 March 2006

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Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Germany applying to any force of the Federal Republic serving in the United Kingdom the Provisions of the Agreement between the Parties to the North Atlantic Treaty Organisation regarding the Status of their Forces, signed at London on June 19, 1951

Signed Date: 12/07/1961  
Signed Place: Bonn  
EIF Date: 14/08/1961  
Publications:—Treaty Series No. TS 102 1961 : Cmnd 1543

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Germany on Logistic and Training Facilities for West German Forces in the United Kingdom

Signed Date: 26/09/1961  
Signed Place: Bonn  
EIF Date: 26/09/1961  
Publications: Treaty Series No. TS 015 1962 : Cmnd 1624

Title: Exchange of Letters and Memorandum. Conditions of Service of United Kingdom Personnel seconded to the Sultan's Armed Forces (See Exchange of Letters of 25.07.1958 (Muscat No 20 XIII-60-424) and Agreed Minute of 24.08.1960 (Muscat No 22. XIII-76-560)

Signed Date: 07/11/1961 & 25/11/1961  
Signed Place: Salalah  
EIF Date: 25/11/1961  
Publications: [Not published]

Title: Agreed Minute between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Germany concerning the Currency Difficulties arising from the Maintenance of British Forces on the Continent of Europe

Signed Date: 06/06/1962  
Signed Place: Bonn  
EIF Date: 06/06/1962  
Publications: Treaty Series No. TS 051 1962 : Cmnd 1766

Title: Exchange of Letters concerning the provision of the United Kingdom personnel to assist in the staffing, administration and training of the Armed Forces in Kenya.

Signed Date: 27/11/1964  
Signed Place: Nairobi  
Publications: [Not published]

Title: Protocol for the Extension and Modification of the Agreement of 27 July 1964 between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Germany for Off-setting the Foreign Exchange Expenditure on British Forces in the Federal Republic

Signed Date: 20/07/1965  
Signed Place: Bonn  
EIF Date: 20/07/1965  
Publications: Treaty Series No. TS 063 1965 : Cmnd 2731

Title: Agreement regarding the HM Forces in Guyana

Signed Date: 26/05/1966  
Signed Place: Georgetown  
EIF Date: 26/05/1966  
Publications: Treaty Series No. TS 075 1966 : Cmnd 3148

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22 March 2006

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Title: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Germany for Offsetting the Foreign Exchange Expenditure on British Forces in the Federal Republic of Germany

Signed Date: 05/05/1967

Signed Place: Bonn

Publications: Treaty Series No. TS 052 1967 : Cmnd 3293

Title: Exchange of Letters establishing a British Training Team in Kenya to assist in the training and development of the Armed Forces of Kenya (and Exchange of Letters (Understanding): para 6(b) Non payment of duty on personal effects & Exchange of Letters (Understanding): Financial Arrangements for the provision of the Training Team

Signed Date: 14/07/1967

Signed Place: Nairobi

EIF Date: 12/12/1964

Publications: Treaty Series No. TS 033 1968 : Cmnd 3582

Title: Exchange of Letters concerning the Status of the Forces of the United Kingdom in Kenya

Signed Date: 14/07/1967

Signed Place: Nairobi

EIF Date: 12/12/1964

Publications: Treaty Series No. TS 032 1968 : Cmnd 3581

Title: Exchange of Letters to provide personnel to assist in the staffing, administration and training of the Armed Forces of Malaysia (with Exchange of Letters (Understanding) Jurisdiction).

Signed Date: 05/12/1967

Signed Place: Kuala Lumpur

EIF Date: 16/09/1963

Publications: Treaty Series No. TS 028 1968 : Cmnd 3578

Title: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Germany for Offsetting the Foreign Exchange Expenditure on British Forces in the Federal Republic of Germany

Signed Date: 11/04/1968

Signed Place: Bonn

EIF Date: 11/04/1968

Publications: Treaty Series No. TS 065 1968 : Cmnd 3721

Title: Indemnity by the Government of the Republic of Kenya in respect of Pool Properties and the East African Land Forces Organisation (EAFLFO) Properties

Signed Date: ??/08/1968

Signed Place: Nairobi

Publications: [Not published]

Title: Agreement between the Royal Hellenic Government of the one part and the Governments of Australia, Canada, India, New Zealand, Pakistan, South Africa and the United Kingdom of Great Britain and Northern Ireland of the other part concerning the Graves of Members of the Armed Forces of the Commonwealth in Greek Territory

Signed Date: 22/10/1968

Signed Place: Athens

EIF Date: 30/06/1969

Publications: Treaty Series No. TS 028 1970 : Cmnd 4345

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22 March 2006

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Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Germany concerning interim arrangements for Offsetting the Foreign Exchange Expenditure on British Forces in the Federal Republic of Germany

Signed Date: 13/05/1969 & 19/05/1969

Signed Place: Bonn

EIF Date: 19/05/1969

Publications: Treaty Series No. TS 091 1969: Cmnd 4133

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Nigeria concerning the provision of a British Training Team to assist in the Training and Development of the Naval Forces of Nigeria

Signed Date: 26/06/1969

Signed Place: Lagos

EIF Date: 26/06/1969

Publications: Treaty Series No. TS 090 1972 : Cmnd 5048

Title: Letters of Understanding relating to Financial Arrangements concerning HM Forces who are seconded to the Forces of the Sultan of Muscat and Oman (See Exchanges of Notes of 30/31 March 1967 & 19.04.1967 Muscat No 35 NIR).

Signed Date: 21/07/1969 & 01/08/1969

Signed Place: Bahrain & Salalah

Publications: [Not published]

Title: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Germany for Offsetting the Foreign Exchange Expenditure on British Forces in the Federal Republic of Germany

Signed Date: 01/09/1969

Signed Place: Bonn

EIF Date: 01/09/1969

Publications: Treaty Series No. TS 116 1969 : Cmnd 4199

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Canada amending the Annex to the Agreement signed on 11 September 1964 on Arrangements regarding the Status of Canadian Forces in Bermuda

Signed Date: 16/12/1969 & 08/01/1970

Signed Place: London

EIF Date: 08/01/1970

Publications: Treaty Series No. TS 033 1970 : Cmnd 4359

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Singapore concerning the Provision of Personnel of the United Kingdom Armed Forces to assist in the Staffing, Administration and Training of the Singapore Armed Forces

Signed Date: 07/09/1970

Signed Place: Singapore

EIF Date: 07/09/1970

Publications: Treaty Series No. TS 094 1973 : Cmnd 5425

Title: Protocol between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Germany concerning the return of 6 Brigade to the Federal Republic of Germany and supplementing their Agreement of 1 September 1969 for Offsetting the Foreign Exchange Expenditure on British Forces in the Federal Republic of Germany

Signed Date: 25/09/1970

Signed Place: Bonn

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22 March 2006

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EIF Date: 25/09/1970  
Publications: Treaty Series No. TS 108 1970 : Cmnd 4550

Title: Exchange of Notes concerning Jurisdiction over Members of HM Forces, including the Trucial Oman Scouts, and extending the arrangements for a further period of one year to December 1971 (See Muscat No 34, 31:12:1966)

Signed Date: 23/12/1970 & 28/12/1970  
Signed Place: Muscat  
EIF Date: 23/12/1970  
Publications: [Not published]

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Germany for Offsetting the Foreign Exchange Expenditure on British Forces in the Federal Republic of Germany

Signed Date: 18/03/1971  
Signed Place: Bonn  
EIF Date: 01/04/1971  
Publications: Treaty Series No. TS 041 1971 : Cmnd 4690

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Canada concerning the Training of United Kingdom Armed Forces in Canada

Signed Date: 20/08/1971  
Signed Place: Ottawa  
EIF Date: 20/08/1971  
Publications: Treaty Series No. TS 027 1974 : Cmnd 5588

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia regarding Assistance for the Malaysian Armed Forces and the Arrangements for a United Kingdom Force in Malaysia

Signed Date: 01/12/1971 Signed Place Kuala Lumpur  
EIF Date: 01/11/1971  
“Publications:” Treaty Series No. TS 016 1972 : Cmnd 4890”

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Singapore regarding Assistance for the Armed Forces of Singapore and the Arrangements for a United Kingdom Force in Singapore

Signed Date: 01/12/1971  
Signed Place: Singapore  
EIF Date: 01/11/1971  
Publications: Treaty Series No. TS 015 1972 : Cmnd 4889

Title: Exchange of Letters recording an Understanding concerning the Status of United Kingdom Forces in Brunei with Appendix.

Signed Date: 06/07/1972  
Signed Place: London  
EIF Date: 23/11/1971  
Publications: [Not published]

Title: Letters of Understanding. Arrangements for the provision of British Service Personnel to assist in the training of the Military Forces of the Sudan.

Signed Date: 17/02/1973  
Signed Place: Khartoum  
Publications: [Not published]

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22 March 2006

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Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia concerning the Provision of Personnel of the United Kingdom Armed Forces to assist in the Training and Development of the Armed Forces in Malaysia

Signed Date: 28/03/1973

Signed Place: Kuala Lumpur

EIF Date: 28/03/1973

Publications: Treaty Series No. TS 068 1973 : Cmnd 5332

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning Facilities for United States Forces on Ascension Island

Signed Date: 30/03/1973

Signed Place: London

EIF Date: 30/03/1973

Publications: Treaty Series No. TS 055 1973 : Cmnd 5311

Title: Exchange of Notes confirming that the Arrangements set out in the Exchange of Letters dated 31:12:1966 concerning Members of the British Forces seconded to Oman should continue.

Signed Date: 14/06/1973 & 19/06/1973

Signed Place: Muscat

Publications: [Not published]

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya regarding the Establishment of a Joint Service Advisory Team in Kenya to assist in the Training and Development of the Armed Forces of Kenya

Signed Date: 23/10/1973

Signed Place: Nairobi

EIF Date: 01/05/1973

Publications: Treaty Series No. TS 127 1973 : Cmnd 5513

Title: Arrangement effected by Exchange of Notes—Suez Canal Clearance: Status of US Forces using British Sovereign Base Areas in Cyprus.

Signed Date: 04/07/1974

Signed Place: London EIF Date: 04/07/1974

Publications: [Not published]

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Germany for Offsetting the Foreign Exchange Expenditure on British Forces in the Federal Republic of Germany

Signed Date: 18/10/1977

Signed Place: Bonn

EIF Date: 01/04/1977

Publications: Treaty Series No. TS 101 1977 : Cmnd 6970

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Singapore amending the Agreement regarding Assistance for the Armed Forces of Singapore and the Arrangements for a United Kingdom Force in Singapore, of 1 December 1971

Signed Date : 26/07/1978

Signed Place: Singapore

EIF Date: 26/07/1978

Publications: Treaty Series No. TS 002 1979 : Cmnd 7410

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22 March 2006

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Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Canada amending and extending the Agreement of 20:08:1971 concerning the Training of United Kingdom Armed Forces in Canada

Signed Date: 26/11/1979

Signed Place: Ottawa

EIF Date: 26/11/1979

Publications: Treaty Series No. TS 039 1980 : Cmnd 7894

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Canada concerning Transport Assistance by the Canadian Armed Forces to the Election Observers in Southern Rhodesia

Signed Date: 07/03/1980 & 10/03/1980

Signed Place: London

EIF Date: 09/02/1980

Publications: [Not published]

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Singapore further amending the Agreement regarding Assistance for the Armed Forces of Singapore and the Arrangements for a United Kingdom Force in Singapore, of 01/12/1971, as amended by the Exchange of Notes of 26/07/1978

Signed Date: 10/06/1981

Signed Place: Singapore

EIF Date: 10/06/1981

Publications: Treaty Series No. TS 076 1981 : Cmnd 8391

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belize concerning the continuing presence in Belize after Independence of United Kingdom Armed Forces

Signed Date: 01/12/1981

Signed Place: Belmopan

EIF Date: 21/09/1981

Publications: Treaty Series No. TS 017 1982 : Cmnd 8520

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Germany constituting an Administrative Agreement under Article 71, paragraph 4, of the Agreement to supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces in the Federal Republic of Germany

Signed Date: 16/02/1982

Signed Place: Bonn

EIF Date: 16/02/1982

Publications: Treaty Series No. TS 022 1982 : Cmnd 8562

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Germany constituting a further Administrative Agreement under Article 71, paragraph 4, of the Agreement to supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany

Signed Date: 18/11/1982

Signed Place: Bonn

EIF Date: 18/11/1982

Publications: Treaty Series No. TS 018 1983 : Cmnd 8851

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22 March 2006

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Title: Exchange of Notes constituting an Agreement on the Status of H M Forces in the Bahamas

Signed Date: 05/04/1984  
Signed Place: Washington  
EIF Date: 05/04/1987  
Publications: [Not published]

Title: Exchange of Notes Constituting an Agreement on Legal Procedures for H M Forces in the Bahamas

Signed Date: 05/04/1984  
Signed Place: Washington  
EIF Date: 05/04/1987  
Publications: [Not published]

Title: Exchange of Letters between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Kenya concerning the Status of Forces of the United Kingdom in Kenya

Signed Date: 12/10/1984  
Signed Place: London / Nairobi  
EIF Date: 12/10/1984  
Publications: Treaty Series No. TS 010 1985 : Cmnd 9446

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America regarding arrangements for the use by United Kingdom Forces of Military Facilities on Ascension Island

Signed Date: 25/03/1985  
Signed Place: London  
EIF Date: 25/03/1985  
Publications: Treaty Series No. TS 039 1985 : Cmnd 9590

Title: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the German Democratic Republic concerning the Treatment of War Graves of Members of the Armed Forces of the United Kingdom of Great Britain and Northern Ireland in the German Democratic Republic

Signed Date: 27/04/1987  
Signed Place: Berlin  
EIF Date: 27/04/1987  
Publications: Treaty Series No. TS 051 1987 : Cm 248

Title: Exchange of Letters between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Canada concerning the Training of British Armed Forces in Canada

Signed Date: 04/09/1991  
Signed Place: London  
EIF Date: 04/09/1991  
Publications: Treaty Series No. TS 109 1991 : Cm 1783

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Japan concerning the supply of Logistic Support to the United Kingdom Armed Forces

Signed Date: 18/01/2002  
Signed Place: Tokyo  
Publications: Treaty Series No. TS 022 2002 : Cm 5517

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22 March 2006

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Title: Agreement between the European Union and the Czech Republic on the participation of the Czech Republic in the European Union-led forces in the Former Yugoslav Republic of Macedonia

Signed Date: 23/06/2003

Signed Place: Brussels

EIF Date: 23/06/2003

Title: Agreement between the European Union and the Republic of Estonia on the participation of the Republic of Estonia in the European Union-led forces (EUF) in the Former Yugoslav Republic of Macedonia

Signed Date: 28/07/2003

Signed Place: Brussels

Title: Agreement between the European Union and the Republic of Turkey on the participation of the Republic of Turkey in the European Union-led forces in the Former Yugoslav Republic of Macedonia

Signed Date: 04/09/2003

Signed Place: Brussels

EIF Date: 04/09/2003

Title: Agreement between the European Union and the Republic of Lithuania on the participation of the Republic of Lithuania in the European Union-led forces (EUF) in the Former Yugoslav Republic of Macedonia

Signed Date: 09/09/2003

Signed Place: Brussels

EIF Date: 09/09/2003

Title: Agreement between the European Union and the Republic of Cyprus on the participation of the Republic of Cyprus in the European Union Forces (EUF) in the Democratic Republic of Congo

Signed Date: 01/10/2003

Signed Place: Brussels

EIF Date: 01/10/2003

Title: Agreement between the European Union and the Republic of Poland on the participation of Polish armed forces in the European Union force (EUF) in the former Yugoslav Republic of Macedonia

Signed Date: 15/10/2003

Signed Place: Brussels

EIF Date: 15/10/2003

Title: Agreement between the European Union and the Government of Latvia on the participation of the Republic of Latvia in the European Union-led forces (EUF) in the former Yugoslav Republic of Macedonia

Signed Date: 17/10/2003

Signed Place: Brussels

Title: Agreement between the European Union and Romania on the participation of Romania in the European Union-led forces (EUF) in the Former Yugoslav Republic of Macedonia

Signed Date: 07/11/2003

Signed Place: Brussels

EIF Date: 07/11/2003

Title: Agreement between the Member States of the European Union concerning the status of Military and Civilian Staff Seconded to the Institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Article 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context (EU SOFIA)

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22 March 2006

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Signed Date: 17/11/2003  
Signed Place: Brussels

Title: Agreement between the European Union and the Slovak Republic on the participation of the armed forces of the Slovak Republic in the European Union-led Forces (EUF) in the Former Yugoslav Republic of Macedonia

Signed Date: 19/12/2003  
Signed Place: Brussels

Bilateral Treaties: “**Friendship (1950–)**”

Title: Treaty of Friendship, Commerce and Navigation between His Majesty in respect of the United Kingdom of Great Britain and Northern Ireland and the Sultan of Muscat and Oman

Signed Date: 20/12/1951  
Signed Place: Muscat  
EIF Date: 19/05/1952  
Publications: Treaty Series No. TS 044 1952 : Cmd 8633

Title: Exchange of Notes between the United Kingdom and Tonga amending Article 5 of the Treaty of Friendship of 18.05.1900

Signed Date: 02/05/1952 & 20/05/1952  
Signed Place: Suva/Nuku'alofa  
Publications: [Not published]

Title: Treaty of Friendship and Alliance between Her Majesty in respect of the United Kingdom of Great Britain and Northern Ireland and His Majesty The King of the United Kingdom of Libya [with Military and Financial Agreements and Exchange of Notes]

Signed Date: 29/07/1953  
Signed Place: Benghazi  
EIF Date: 07/12/1953  
Publications: Treaty Series No. TS 003 1954 : Cmd 9043

Title: Treaty of Friendship between Her Majesty the Queen in respect of the United Kingdom of Great Britain and Northern Ireland and Her Majesty the Queen of Tonga

Signed Date: 26/08/1958  
Signed Place: Nuku'alofa  
EIF Date: 25/05/1959  
Publications: Treaty Series No. TS 067 1959 : Cmnd 848

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Kingdom of Libya postponing the Review of the Treaty of Friendship and Alliance, the Military Agreement and the Financial Agreement signed at Benghazi on July 29, 1953

Signed Date: 07/02/1963  
Signed Place: Tripoli  
EIF Date: 07/02/1963  
Publications: Treaty Series No. TS 083 1963 : Cmnd 2221

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Tonga amending the Treaty of Friendship signed on August 26, 1958

Signed Date: 23/06/1964 & 16/07/1964  
Signed Place: Suva/Nuku'alofa

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22 March 2006

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EIF Date: 16/07/1964  
Publications: Treaty Series No. TS 055 1964 : Cmnd 2481

Title: Treaty of Friendship between the United Kingdom of Great Britain and Northern Ireland and the State of Bahrain and its Dependencies

Signed Date: 15/08/1971  
Signed Place: Bahrain  
EIF Date: 15/08/1971  
Publications: Treaty Series No. TS 079 1971 : Cmnd 4828

Title: Treaty of Friendship between the United Kingdom of Great Britain and Northern Ireland and the State of Qatar

Signed Date: 03/09/1971  
Signed Place: Geneva  
EIF Date: 03/09/1971  
Publications: Treaty Series No. TS 004 1972 : Cmnd 4850

Title: Treaty of Friendship between the United Kingdom of Great Britain and Northern Ireland and the United Arab Emirates

Signed Date: 02/12/1971  
Signed Place: Dubai  
EIF Date: 02/12/1971  
Publications: Treaty Series No. TS 035 1972 : Cmnd 4937

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Libyan Arab Republic terminating the Treaty of Friendship and Alliance, together with the Agreements on Financial and Military Matters, signed at Benghazi on 29 July 1953

Signed Date: 25/01/1972  
Signed Place: Tripoli  
EIF Date: 25/01/1972  
Publications: Treaty Series No. TS 042 1972 : Cmnd 4950

Title: Treaty of Friendship and Co-operation between Her Majesty the Queen of the United Kingdom of Great Britain and Northern Ireland and His Highness Paduka Seri Baginda Sultan and Yang Di-Pertuan of Brunei

Signed Date: 07/01/1979  
Signed Place: Bandar Seri Begawan  
EIF Date: 31/12/1983  
Publications: Treaty Series No. TS 025 1984: Cmnd 9193

Title: Instrument of Friendship and Co-Operation between the Associated State of Antigua and the Republic of Venezuela

Signed Date: 14/12/1979  
Signed Place: Caracas  
Publications: N/A

Title: Instrument of Friendship and Co-operation between the Colony of Montserrat and the Republic of Venezuela

Signed Date: 17/03/1980  
Signed Place: Montserrat  
Publications: N/A

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22 March 2006

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Title: Instrument of Friendship and Co-operation between the Government of Saint Kitts-Nevis-Anguilla and the Government of the Republic of Venezuela

Signed Date: 18/03/1980  
Signed Place: St Kitts  
Publications: N/A

Title: Exchange of Notes amending Article XXI of the Treaty of Friendship Commerce and Navigation between Great Britain and Colombia signed at London on 16/02/1866, as prolonged by an Exchange of Notes signed at Bogota on 30/12/1938

Signed Date: 17/11/1980  
Signed Place: Bogota  
EIF Date: 17/11/1980  
Publications: Treaty Series No. TS 034 1981 : Cmnd 8276

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Peru amending the Treaty of Friendship, Commerce and Navigation signed at London on 10:04:1850

Signed Date: 26/11/1981 & 03/12/1981  
Signed Place: Lima  
“EIF Date:” 03/12/1981  
“Publications:” Treaty Series No. TS 040 1982 : Cmnd 8655”

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Nicaragua amending the Treaty of Friendship Commerce and Navigation with Nicaragua signed at Managua on 28 July 1905

Signed Date: 09/04/1992  
Signed Place: Managua  
Publications: N/A

Bilateral Treaties: “**Military (Service)**” etc.

Title: Exchange of Notes. Disposal of British military buildings in Iceland

Signed Date: 23/05/1945  
Signed Place: Reykjavik  
Publications: [Not published]

Title: Agreement between the United Kingdom, the United States of America and Yugoslavia regarding Military Control and Civil Administration in Venezia Giulia Region

Signed Date: 09/06/1945  
Signed Place: Belgrade  
Publications: [Not published]

Title: Exchange of Notes [between SHAEF Mission and Netherlands Military Mission] concerning Termination by Allied Forces of First Military Phase of Operations in Netherlands

Signed Date: 09/07/1945 & 703/08/1945  
Signed Place: The Hague  
Publications: [Not published]

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22 March 2006

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Title: [Denmark]: Exchange of Notes regarding the Prolongation of Various Military Agreements as Amended

Signed Date: 19/07/1945 & 27/07/1945

Signed Place: Copenhagen

Publications: [Not published]

Title: Exchange of Notes. Telegraphs and Telephones. Use of Danish service by British Military Authorities.

Signed Date: 24/10/1945 & 29/10/1945

Signed Place: Copenhagen

Publications: [Not published]

Title: Memorandum of Agreement. Military Supplies. Conditions for new arrangements for the attribution of expenditure incurred in the provision of local supplies, accommodation and facilities to the British Forces in Norway

Signed Date: 31/10/1945

Signed Place: Oslo

EIF Date: 09/10/1945

Publications: [Not published]

Title: Exchange of Notes. Payment by British Military Authorities for telephone and telegraph circuits and Appendix

Signed Date: 06/01/1947 & 20/01/1947

Signed Place: Copenhagen

Publications: [Not published]

Title: Exchange of Notes. Aid to Greece (military equipment and supplies).

Signed Date: 25/07/1947 & 09/10/1947

Signed Place: Washington

Publications: [Not published]

Title: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Chile concerning Military Service

Signed Date: 27/10/1947

Signed Place: Santiago

EIF Date: 08/10/1947

Publications: Treaty Series No. TS 083 1948 : Cmd 7580

Title: Exchange of Notes regarding British Military Fixed Assets in Italy (With Memorandum of Agreement)

Signed Date: 30/12/1947 & 21/01/1948

Signed Place: Rome

Publications: Treaty Series No. TS 019 1948 : Cmd 7377

Title: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning the Opening of Certain Military Air Bases in the Caribbean Area and Bermuda to use by Civil Aircraft

Signed Date: 24/02/1948

Signed Place: Washington

EIF Date: 24/02/1948

Publications: Treaty Series No. TS 022 1948 : Cmd 7389

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22 March 2006

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Title: Agreement between His Majesty's Government in the United Kingdom and the Government of the French Republic regarding Reciprocal Military Air Transit Facilities [with Annexes and Exchanges of Notes]

Signed Date: 19/04/1948  
Signed Place: Paris  
EIF Date: 19/04/1948  
Publications: Treaty Series No. TS 045 1948 : Cmd 7524

Title: Exchange of notes constituting an Agreement between the Government of the United Kingdom and the Government of Portugal for the Extension of Transit Facilities in the Azores to British Military Aircraft

Signed Date: 25/05/1948  
Signed Place: Lisbon  
EIF Date: 25/05/1948  
Publications: Treaty Series No. TS 059 1948 : Cmd 7499

Title: Military Service Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic

Signed Date: 21/12/1949  
Signed Place: London  
EIF Date: 12/05/1956  
Publications: Treaty Series No. TS 006 1957 : Cmnd 57

Title: Technical Assistance. Note from United States Embassy to effect that U.S. Government propose to furnish assistance of \$112M in the form of machine tools for Military Equipment Programme.

Signed Date: 31/05/1951  
Signed Place: London  
Publications: [Not published]

Title: Exchange of Notes. Interim Military Government. British Forces in Libya.

Signed Date: 24/12/1951  
Signed Place: Tripoli  
Publications: [Not published]

Title: Military Service Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic

Signed Date: 06/03/1952  
Signed Place: London  
Publications: France No. 002 1952 : Cmd 8669

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ethiopia regarding the provision of facilities for Military Aircraft

Signed Date: 01/07/1952 & 03/07/1952  
Signed Place: Addis Ababa  
Publications: Treaty Series No. TS 046 1952 : Cmd 8642

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Portugal for the Extension of Transit Facilities in the Azores to British Military Aircraft

Signed Date: 21/11/1952  
Signed Place: Lisbon  
Publications: Treaty Series No. TS 048 1961 : Cmnd 1403

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22 March 2006

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Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ethiopia providing for facilities at Asmara for United Kingdom Military Aircraft

Signed Date: 11/03/1953 & 13/03/1953

Signed Place: Addis Ababa

EIF Date: 13/03/1953

Publications: Treaty Series No. TS 046 1953 : Cmd 8899

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Kingdom of Libya constituting an Interim Agreement concerning certain Financial and Military matters

Signed Date: 21/03/1953

Signed Place: Tripoli

Publications: Treaty Series No. TS 022 1953 : Cmd 8810

Title: Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning Provision of Military Aid to Iraq by the Government of the United States with reference to the 1930 Anglo-Iraq Treaty of Alliance

Signed Date: 26/02/1954

Signed Place: Washington

Publications: [Not published]

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America regarding the terms of use by the United States Government of land at Madingley, near Cambridge, as a United States Military Cemetery

Signed Date: 21/06/1954

Signed Place: London

EIF Date: 21/06/1954

Publications: Treaty Series No. TS 005 1955 : Cmd 9356

Title: Military Service Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Chile [together with Exchange of Notes]

Signed Date: 31/07/1954

Signed Place: Santiago

Publications: Treaty Series No. TS 084 1967 : Cmnd 3415

Title: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ethiopia relating to certain matters connected with the withdrawal of British Military Administration from the territories designated as the Reserved Area and the Ogaden

Signed Date: 29/11/1954

Signed Place: London

EIF Date: 29/11/1954

Publications: Treaty Series No. TS 001 1955 : Cmd 9348

Title: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Denmark regarding Military Service

Signed Date: 20/01/1955

Signed Place: London

EIF Date: 20/01/1955

Publications: Treaty Series No. TS 025 1955 : Cmd 9460

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22 March 2006

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Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Greece for the Settlement of Claims arising from the British Military Administration of the Dodecanese

Signed Date: 07/03/1955  
Signed Place: Athens  
EIF Date: 07/03/1955  
Publications: Treaty Series No. TS 035 1955 : Cmd 9481

Title: Military Service Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Brazil [with Exchange of Notes]

Signed Date: 05/04/1955  
Signed Place: Rio de Janeiro  
Publications: Treaty Series No. TS 047 1961 : Cmd 1402

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Denmark extending the provisions of the Military Service Agreement of January 20, 1955 to the Channel Islands and the Isle of Man

Signed Date: 26/09/1955 & 30/09/1955  
Signed Place: Copenhagen  
EIF Date: 30/09/1955  
Publications: Treaty Series No. TS 001 1956 : Cmd 9669

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Portugal concerning the Extension for a period of Transit Facilities in the Azores to British Military Aircraft

Signed Date: 12/06/1958  
Signed Place: Lisbon  
Publications: Portugal No. 001 1961 : Cmnd 1401

Title: [Jordan]: Exchange of Letters about the legal status of the Joint Military Training Mission

Signed Date: 30/05/1959 & 31/05/1959  
Signed Place: Amman  
EIF Date: 03/11/1958  
Publications: Not published

Title: Military Service Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Argentine Republic [with Interpretative Exchanges of Notes]

Signed Date: 12/09/1963  
Signed Place: Buenos Aires  
EIF Date: 22/03/1967  
Publications: Treaty Series No. TS 056 1967: Cmnd 3348

Title: Exchange of Notes relating to the purchase of military supplies. Jordan guarantee payment of agreed instalments.

Signed Date: 30/05/1964  
Signed Place: Amman  
EIF Date: 30/05/1964  
Publications: [Not published]

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22 March 2006

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Title: Exchange of Letters on the Military use of the Flight Information Centre in Malta

Signed Date: 21/09/1964

Signed Place: Valletta

EIF Date: 01/04/1965

Publications: Treaty Series No. TS 054 1966: Cmnd 3110

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Argentine Republic extending the Military Service Agreement of 12 September 1963 to Jersey and the Isle of Man

Signed Date: 27/11/1967

Signed Place: London

EIF Date: 27/11/1967

Publications: Treaty Series No. TS 009 1968 : Cmnd 3511”

Title: Letters of Understanding concerning Overflying Rights for the United Kingdom Military Aircraft, after the termination of the Special Treaty Relations between Qatar and the United Kingdom and Northern Ireland

Signed Date: 20/08/1971

Signed Place: Qatar

Publications: [Not published]

Title: Letters of Understanding concerning Overflying Rights for United Kingdom Military Aircraft

Signed Date: 20/08/1971

Signed Place: Qatar

Publications: [Not published]

Title: Exchange of letters (Understanding) concerning the Status of United Kingdom Military Personnel in the United Arab Emirates

Signed Date: 21/03/1972

Signed Place: Abu Dhabi

Publications: [Not published]

Title: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malta with respect to the Use of Military Facilities in Malta

Signed Date: 26/03/1972

Signed Place: London

EIF Date: 26/03/1972

Publications: Treaty Series No. TS 044 1972 : Cmnd 4943

Title: Letters of Understanding. Arrangements for the provision of British Service Personnel to assist in the training of the Military Forces of the Sudan.

Signed Date: 17/02/1973

Signed Place: Khartoum

Publications: [Not published]

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Provisional Military Government of Socialist Ethiopia for the Avoidance of Double Taxation on Profits derived from Air Transport

Signed Date: 01/02/1977

Signed Place: Addis Ababa

EIF Date: 12/07/1978

Publications: Treaty Series No. TS 097 1978 : Cmnd 7381

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22 March 2006

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Title: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Federal Military Government of the Federal Republic of Nigeria on the Placement of Nigerian Students in Colleges and Training Establishments in the United Kingdom

Signed Date: .01/09/1977

Signed Place: Lagos

EIF Date: 01/09/1977

Publications: Treaty Series No. TS 011 1978 : Cmnd 7077

Title: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Federal Military Government of the Federal Republic of Nigeria for Air Services between and beyond their respective Territories

Signed Date: 08/06/1978

Signed Place: Lagos

EIF Date: 13/07/1978

Publications: Treaty Series No. TS 004 1979 : Cmnd 7412

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the State of Israel concerning a Supplementary Arrangement in respect of the Immunities of British Military Members of the Multinational Force and Observers (MFO) while on leave in Israel

Signed Date: 28/09/1982 & 30/09/1982

Signed Place: Tel Aviv/Jerusalem

EIF Date: 30/09/1982

Publications: Treaty Series No. TS 024 1983 : Cmnd 8871

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America regarding arrangements for the use by United Kingdom Forces of Military Facilities on Ascension Island

Signed Date: 25/03/1985

Signed Place: London

EIF Date: 25/03/1985

Publications Treaty Series No. TS 039 '1985 : Cmnd 9590

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Arrangements for the Future Use of the of the Military Sites in Hong Kong

Signed Date: 11/11/1994

Signed Place: Peking

EIF Date: 11/11/1994

Publications: Treaty Series No. TS 044 1995 : Cm 2888

Title: Agreement between the European Union and the Kingdom of Morocco on the participation of the Kingdom of Morocco in the European Union military crisis management operation in Bosnia and Herzegovina (Operation Althea).

Signed Date: 01/02/2005

Signed Place: Brussels

Publications: N/A

Title: Agreement between the European Union and the Republic of Albania on the participation of the Republic of Albania in the European Union military crisis management operation in Bosnia and Herzegovina (Operation Althea)

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22 March 2006

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Signed Date: 07/03/2005  
Signed Place: Presumed Brussels  
Publications: N/A

Title: Agreement between the European Union and New Zealand on the participation of New Zealand in the European Union military crisis management operation in Bosnia and Herzegovina (Operation Althea)

Signed Date: 04/05/2005  
Signed Place: Brussels  
Publications: N/A

Title: Agreement between the European Union and the Argentine Republic on the participation of the Argentine Republic in the European Union military crisis management operation in Bosnia and Herzegovina (Operation Althea)

Signed Date: 09/06/2005  
Signed Place: Brussels  
EIF Date: 09/06/2005  
Publications: N/A

Title: Agreement between the European Union and the Republic of Chile on the participation of the Republic of Chile in the European Union military crisis management operation in Bosnia and Herzegovina (Operation Althea)

Signed Date: 25/07/2005  
Signed Place: Brussels  
Publications: N/A

Bilateral Treaties: “**Naval**”

Title: Exchange of Notes constituting an Agreement between the Government of the United Kingdom and the Government of the Republic of China for the Transfer of certain British Naval Vessels to China and the Mutual Waiver of Claims in respect of the Loss of other Vessels [with Annex]

Signed Date: 18/05/1948  
Signed Place: London  
EIF Date: 18/05/1948  
Publications: Treaty Series No. TS 039 1948 : Cmd 7457

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Nigeria concerning the provision of a British Training Team to assist in the Training and Development of the Naval Forces of Nigeria

Signed Date: 26/06/1969  
Signed Place: Lagos  
EIF Date: 26/06/1969  
Publications: Treaty Series No. TS 090 1972 : Cmnd 5048

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning a limited United States Naval Communications Facility on Diego Garcia, British Indian Ocean Territory (The Diego Garcia Agreement 1972)

Signed Date: 24/10/1972  
Signed Place: London  
EIF Date: 24/10/1972  
Publications: Treaty Series No. TS 126 1972 : Cmnd 5160

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22 March 2006

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Title: Exchange of Letters between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of South Africa terminating the Agreements signed at London on 30 June 1955 relating to the Simonstown Naval Base

Signed Date: 06/06/1975 & 16/06/1975

Signed Place: London / Capetown

EIF Date: 16/06/1975

Publications: Treaty Series No. TS 120 1975 : Cmnd 6229

Title: Agreement between HM Government and the Government of Gibraltar on the Closure of the Royal Naval Dockyard and Associated Measures.

Signed Date: 26/07/1983

Signed Place: London

Publications: [Not published]

Title: Agreement between HMG and the Government of Gibraltar on the Closure of the Royal Naval Dockyard and Associated Measures. [This is not a Registrable Treaty. Signed by Sir Joshua Hasan and Sir Geoffrey Howe. Dockyard to close 31:12:1984 unless an earlier date agreed].”

Signed Date: 26/07/1983

Signed Place: London

Publications: [Not published]

#### Bilateral Treaties “**Security**”

Title: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America regarding the effect of the United States Mutual Security Act of 1951 on the Agreement of the 15th of June, 1951 for technical assistance to Eritea

Signed Date: 07/01/1952

Signed Place: London

EIF Date: 07/01/1952

Publications: Treaty Series No. TS 066 1953 : Cmd 8957

Title: Exchange of Notes constituting an Operating Agreement on Defence and Security in the Bahamas

Signed Date: 05/04/1984

Signed Place: Washington

EIF Date: 26/01/1983

Publications: [Not published]

Title: Agreement between the European Union and the North Atlantic Treaty Organisation on the Security of Information

Signed Date: 14/03/2003

Signed Place: Athens

EIF Date: 14/03/2003

Publications: N/A

Title: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America on Cooperation in Science and Technology for Critical Infrastructure Protection and other Homeland/Civil Security Matters

Signed Date: 08/12/2004

Signed Place: London

EIF Date: 08/12/2004

Publications: [Not published]

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 WEDNESDAY 29 MARCH 2006
 

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Present	Bledisloe, V	O’Cathain, B
	Carter, L	Peston, L
	Elton, L	Rowlands, L
	Hayman, B	Sandwich, E
	Holme of Cheltenham, L	Windlesham, L
	(Chairman)	

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**Examination of Witness**

Witness: MR KENNETH CLARKE, QC, a Member of the House of Commons, Chairman, Conservative Party Democracy Task Force, examined.

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**Q305 Chairman:** Could I welcome you to the Committee and thank you very much for coming. Could I remind you this is on television. In that sense, it would be very helpful if you would, just for the purpose of the cameras, be kind enough to identify yourself.

*Mr Clarke:* I am Kenneth Clarke, Member of Parliament for Rushcliffe in Nottinghamshire.

**Q306 Chairman:** Getting straight to our business, you are now also the leader of the Democracy Task Force established by your party. I think it would help the Committee a great deal—because I know you have taken the subject on which we are engaged on board as one of your priorities—if you could give us a little bit of background on the Task Force.

*Mr Clarke:* I am not a spokesman for the Conservative Party, perhaps I could make that clear before I start. I have been asked by David Cameron to chair what we call a “Democracy Task Force”, which is a group he has asked me to put together to give advice on the process of government to the Conservative Party, on the basis of which he will be forming policy in the round for the next election. We have today announced the membership of the Task Force which includes people who are not members of the Conservative Party, two certainly: Lord Butler and Sir Christopher Foster; two Conservative MPs, Andrew Tyrie and Sir George Young. There is also Ferdinand Mount, and Laura Sandys who is a well known leader of think tanks in this area. Our remit is to cover quite a wide range of ground concerning the process of government. It has been given the title “Democracy Task Force” because it is thought to be an important part of restoring confidence in the democratic system and the openness and accountability of government. David has asked us to look, first of all, at the use of the royal prerogative, which I know he has considerable concerns about, and he wants to us to advise whether the royal prerogative, on matters such as war-making powers and treaty-making powers, should be put on a different, more modern footing.

**Q307 Chairman:** Of course, war-making powers are particularly conspicuous and, because of the Iraq War, a very topical instance of the prerogative powers. We have, in a sense, taken the opposite perspective to you: we thought we would take war-making powers and out of that possibly draw some conclusions about the prerogative in modern times. Thinking of David Cameron’s speech on 6 February, I think his words were, “giving Parliament a greater role in the exercise of [royal prerogative] powers would be an important and tangible way of making government more accountable”. I think it would be very helpful to the Committee if you could spell out this issue of Parliament’s role in so far as your thinking has developed, because, of course, that could mean a number of things. It could mean information, consultation, approval or involvement in a variety of ways and we have found that they are certainly quite complex issues on this Committee. I wondered what you thought your leader meant and how you are taking that on board as part of your remit?

*Mr Clarke:* I have read your proceedings, which confirm it is indeed a complex issue. I think the only reason David has asked me to chair this Task Force is so we can get down to the work of addressing these complex subjects as well. I know that will be very much guided by the report of this Committee, amongst other things, when you produce your report. I think the reason David has asked for this to be set up is he has not had the time to think through exactly how it could be done. I think the view, which he and I both share, is that particularly in war-making—let us take that as at first example we are looking at—Parliament’s role does need to be made clearer and there should be some constitutionally explicit role for Parliament in approving, in all possible circumstances, the deployment of troops in combat areas, which probably means setting down a process by which that should be done. We know the constitutional theory at the moment is that this is a royal prerogative exercised effectively by the Prime Minister and ministers and she exercises the

29 March 2006

Mr Kenneth Clarke QC, MP

prerogative on their advice. We also know that in practice when prime ministers commit themselves to combat they can only continue to do so if they get parliamentary support for it. The process is dealt with just as an ordinary matter of policy. Particularly given the events surrounding the Iraq War, I think what we are looking for is a more explicit and clear statement of Parliament's responsibilities, including the extent to which Parliament should be properly informed, have a proper opportunity for debating the issues, factual, political and legal, and should have a clear opportunity, perhaps rather more of Parliament's own choosing, as far as time and circumstances are concerned, where Parliament can give its approval before our troops are committed.

**Q308 Chairman:** Thank you very much for that. I thought for a moment you were going to say that you would wait till you had seen the conclusions of this Committee before you formed your own views of it, which would imply a circular relationship.

*Mr Clarke:* If my six colleagues and I all read your report and say we agree with that, we will move rapidly on to other matters. There is quite a list of other things that we have been asked to look at.

**Q309 Chairman:** If you have been following our proceedings you may have noted that, although the Chancellor of the Exchequer, Gordon Brown, has made rather similar speeches to those of David Cameron, the position of the Government, as enunciated to us in evidence last week by the Lord Chancellor, was really an argument that the status quo is perfectly satisfactory since all ministers are accountable to Parliament and therefore no formal modalities of accountability or approval need to be ascertained. But, going into your own inquiry, do you think—and it is perhaps easier to think when you are in opposition than when you are in government—that there is a gap between the theory of governments being held to account in the ordinary parliamentary way, qualified in this case by the prerogative, and the reality that needs to be institutionally bridged in some form or other?

*Mr Clarke:* I think that there is and that the Iraq War really exemplified why the present process needs to be re-addressed. It is true the Prime Minister did eventually hold a parliamentary vote and get authority for the war and he did have a majority in the House of Commons in support of that proposal, but that vote was finally brought to the House at the very last moment when a very large proportion of the British Army was already deployed on the ground in circumstances in which a vote against would have had catastrophic consequences for the diplomatic standing of the Government and where many Members of Parliament felt they were under very great pressure to support the troops on the ground. I

do not think that was an accident. Let us be clear, I am not being partisan because, going back to the Falklands War, I do not recall there was ever a substantive vote on that war; I supported it. One reason was that I think both parties supported the invasion at the time it took place; the controversy broke out afterwards when people changed their position. The Kosovo War, which I certainly supported, the legality of which probably had more doubts surrounding it than any other, was handled in a similar manner. 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. In the case of the second Iraq War, the recent one, again it was complicated by the fact that the leadership of both the main political parties were strongly in support of the policy behind the invasion. There was, however, very strong opposition on a cross-party basis and the core background was very controversial. The Government handled it in the way they would handle any other difficult political subject, an education bill or whatever, by keeping entirely in their own hands the timing of any debate, the wording of any motion, desperately trying to work to make sure that they could have the best chance possible of a majority on a policy on which they were already well set. In the case of warfare that is going to give rise to loss of life and casualties, I think a more ordered and clear process is required and I think other western European parliaments have tried to get much better systems in place.

**Q310 Viscount Bledisloe:** You have talked about approval and pointed out that seeking approval when the troops are already there is pretty meaningless. When the Government talks about accountability, I think they are talking about the ability of Parliament to criticise people after the event for the decision. Am I right in thinking that there is a vast difference between those two because if Parliament participates in the real decision, the argument in favour of that is said to be, "Well, we should not ask people go and get killed without Parliament having decided that we need to", whereas once you get to accountability, the troops are already there. It may be very jolly to kick the minister about and maybe even get him sacked, but if you vote after the troops have gone there, if you do not approve of the war, it is going to be very difficult in most circumstances to bring them back, is it not, when they are in the middle of an engagement?

29 March 2006

Mr Kenneth Clarke QC, MP

*Mr Clarke:* It certainly is. I do not think Parliament is an executive body. I would not wish to see Parliament playing an executive role; I think it would be rather bad at it. I do think Parliament's duty is to hold ministers to account, but I think we need a process whereby ministers in the Government are held to account at an appropriate stage where the policy can be challenged. Accountability means you throw out the policy at a time when there is a sensible opportunity for Parliament to indicate—I hope there are occasions in our system—that it flatly disapproves of the policy or ministers are held to account when it is still going to have an effect on events. What happens once warfare has started, amongst other things, is that there is a strong convention—it is not a constitutional one; it is a political convention—that one does restrict criticisms of the Government and military action whilst troops are on the ground, and that was followed on this occasion. Charles Kennedy, for some reason I remember, was criticised by his political rivals for changing his tone once it had started, but the same view was taken by Robin Cook, by me, by all the opponents of the war: once warfare was under way no one sought an opportunity to then have a vote deploring it. There is a change of tone that has to take place, because it would be positively damaging to morale and national interest if Parliament suddenly decided that it was going to start checking the process at every stage, so it is particularly unsuitable in the case of warfare. In the case of warfare it is more important than in most other subjects that you have the genuine consent of Parliament, I would have to say primarily and particularly the House of Commons but Parliament as a whole, on the policy, the legality and everything else that the country needs to know before it sees its military forces committing to an action on this scale.

**Q311 Lord Rowlands:** You referred to a constitutionally explicit role. Would you take that constitutional role to the point that if you wanted the House of Lords to have a part in the decision to deploy troops it should take a statutory form, that there should be a statute which eventually re-establishes Parliament's role?

*Mr Clarke:* The Democracy Task Force has not started its work, so I start with the basis that in contemporary circumstances it is going to have to be statutory if at all possible. I was a sponsor and supporter of Clare Short's bill which tried to address this argument. I would not defend the drafting of the bill; it was a noble effort to try to get the principle established and deal with some of the obvious problems, like you have to take instant action in an emergency. I think it would have to be statutory 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.

**Q312 Lord Rowlands:** You said you had read the evidence we have had to date, that it would be swamped by military practical problems. We have been told that it is very difficult and it would create inflexibility, it would jeopardise the possibility of quick action, et cetera, if it was a statutory basis. You do not find that convincing, as a sponsor of Clare Short's bill?

*Mr Clarke:* I do not. 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. At some stage clear approval of the policy, giving rise to the Government asking for consent to use military action, together with an informed judgment on the facts that led up to the warfare and the legality of that warfare, I do not think would cause undue complications. There is a certain tendency to want to stay with the status quo and to avoid the difficulties, and they are going to be difficult. This war was a classic example whereby the policy was controversial and became more controversial the longer things went on. The legality was raised in doubt and the invasion took place and, as is often the case, it is quite plain that public opinion has changed and political opinion has changed. This gives rise to great difficulties and we do not want any of this to give rise to a position where the United Kingdom cannot deploy its Armed Forces in defence of a vital national interest where there is no alternative readily available. However, you do have to have pretty wholehearted political and public consent and, when people are acting, to know that they are acting with that consent. Far from resolving these issues, I think the way in which it was handled made the whole thing more uncertain and has added to quite a lot of the bitterness that is now surrounding the decision to go to war, and our troops are still deployed out there against this background.

**Q313 Lord Peston:** It may be just a matter of language but I do not think anybody would disagree with the view that Parliament is not an executive body. For our sensitivities, we always like to remind

29 March 2006

Mr Kenneth Clarke QC, MP

our witnesses that Parliament includes our House as well as yours.

*Mr Clarke:* Sure, but I regret to say that I do not think either House should try to play an executive role.

**Q314 Lord Peston:** That does not seem to be a problem. What requires clarification is a sort of distinction between involvement and then it going beyond involvement to, if you like, underwriting the policy or something like that. I am not entirely clear how far you feel, if we think of it as the norm or the convention, one should go, starting from you are involved to the underwriting.

*Mr Clarke:* Iraq was debated quite a bit, not in a terribly organised way. I think the Government tried to minimise debate rather than encourage it until a fairly late stage, but in practice in the end Parliament did succeed in debating it quite a bit. I think the Government should be required to get explicit approval and consent before committing itself irrevocably to the action. How you draft that is a very big problem, but I do think that is what is called for. I think the Government must propose, the Government must give a clear statement of its intentions and policy which leads it to a conclusion, to Parliament. The whole question of whether the Government's own legal advice is adequate is a matter which I know you have considered, which is interesting as well, but then it should be a requirement that there should be the approval of Parliament before steps are taken which are inevitably going to lead to the deployment of troops in combat in circumstances where it is a considered course of action, where there has been an obvious build-up to it and it is not an emergency situation, not a response to some sudden outrage or hostage-taking or anything of that kind, but in the sort of case where this is major, sheer political policy, where there is a very considered judgment that Britain has to use armed force to participate with allies. That should require the explicit approval of Parliament in my opinion with enough information before Parliament so that Parliament can take an informed view. Then afterwards people can change their minds but no-one can possibly think that the Armed Forces have been deployed inappropriately.

**Q315 Lord Peston:** I think you have answered my supplementary in the last answer, but that would be the norm is what you are saying, that you could hypothesise that there would be a possible crisis some time where you had to act without any waiting at all? I am not saying that many of those occasions arise but in that case it would also be acceptable in your judgment that the Government could, and indeed in the defence of the realm obligation should, act with no delay, but that would be unusual?

*Mr Clarke:* That would be unusual but you have to recognise that it is a practical problem. It seems to me that the obvious one is hostage-taking. You suddenly get some British embassy seized somewhere by some hostile government or in some foreign state hostages are being held. The idea that you have to go for approval and say, "Do you approve of our taking military action to rescue these British citizens?" would be an obvious absurdity. That is only a simple example. Where there is an emergency unexpectedly, some vital British interest is threatened and the use of troops is suitable, the Government has to have the power to do that.

**Q316 Baroness Hayman:** I want to follow this through because you have discussed approval and talked in terms of parliamentary approval, but if we have statute you are talking in fact about action being legal or illegal under British law, not under international law, which is another issue. Am I right in thinking that that is a logical consequence of what you are saying? If so, you talked about Parliament having to have enough information. Obviously, the timing of approval is important and we have heard your description of what happened in Iraq. Are you proposing at all in the way you are thinking that there would be involvement then of the courts because there could be challenge through the courts as to the legality of military action if, for example, approval was given at what someone considered an inappropriate time or with unsatisfactory information?

*Mr Clarke:* If a government sought to use troops in action in circumstances where it should have sought approval and had not, then, as you say, such use of troops would be unlawful under British law. I do not conceive that any British Government would do that. It would have an instant crisis with the chiefs of staff who in my experience always wish to be given the clearest assurance that what they are being asked to do is legal under international law, and would be equally insistent that they had to be satisfied that what they were being asked to do was lawful under British law as well. Parliament's vote in the end, I suppose, would satisfy arguments about whether the right moment had been chosen, whether there was adequate information. Some people might argue in the debate that they still needed more information but if they were then overruled by the majority of MPs I think that would be sufficient to give it legality so long as they had gone through the process. You again would have to draft it in phrases that make clear the requirement to get approval at the time when the country was not irrevocably committed to military action, just to make sure that some government did not try to take its chance and call the vote at the last moment. If it was in statute you would be laying down conditions which would be necessary

29 March 2006

Mr Kenneth Clarke QC, MP

to be fulfilled before the action could be regarded as lawful. I do not think any British Government would ever embark on warfare in circumstances where there was going to be a plain challenge to the legality of what it was going to do.

**Q317 Earl of Sandwich:** On the other hand, we have had quite a lot of evidence from our witnesses that legislation would be unworkable, that it would be a sledgehammer, very difficult to write and very difficult to interpret. You may have read the evidence of two former Attorneys General giving their support for the convention, which I know you have just rejected. That was about prior parliamentary approval but can I give you an example of Afghanistan? What if a significant deployment, a figure of 1,500 troops, for example, was actually mentioned? Would that be an opportunity for parliamentary scrutiny, approval, a vote in the House? Do you envisage stages at which you could govern by convention but perhaps not by legislation?

*Mr Clarke:* I think if you are deliberately committing troops to a theatre of war in circumstances where you have got rules of engagement and they are going to take part in military action I do not think the size of the cohort would have much relevance. I can well imagine some incident in a Third World country where it has been decided to intervene where 1,500 people might be quite satisfactory for the whole process but I still think Parliament should approve. Had we invaded Grenada rather than the Americans it would, I think, have been desirable for the British Government to get approval for doing that. In that case it would not have compromised the policy because the very fact that the British Government was known to be going through the process of getting approval might have made the whole necessity for military intervention unnecessary because in that case you would not have been too worried if your potential enemy was warned that 1,000 British troops were coming. You would rather they assume that there was not much they could do about it and it might get them to clarify their minds about what they were doing. There are other enemies, of course. You would want to make it clear that you had got some discretion. Afghanistan I do not think the Government had any difficulty in getting approval for. Although there are great drafting difficulties and a great deal of room for academic debate and legal debate, I actually think in practice the proposition is so clear and sensible that any reasonable government, any reasonable parliamentary colleagues, would not find it in practice that difficult. In fact, I think in the last Iraq war it would not have been difficult at all. The only reason it was not done was because the Prime Minister seriously doubted he could get a majority for what he proposed to do. I think it is very doubtful whether he would have got

authority for what he did if he had tried to seek it about two months earlier and been totally candid about where we were. I realise that I am being partisan but I was an opponent of the war. It was not the convention that stopped us having a vote. The reality is that we did not have a vote because they were not sure they were going to win it. They only had a vote in circumstances where this was the best chance they were ever going to have. If they were ever going to get a vote they had to get it on the day they held it. If they had held a proper vote a month earlier it would have been much more difficult.

**Q318 Lord Rowlands:** But in the case of Iraq there were three substantive motions, not one, and they were voted upon.

*Mr Clarke:* I have even read the motion. I remember voting on Resolution 1481. It was generally supported; I think there were about three people against it, but it was not approval for an invasion. Indeed, one of the confusions in the debate and actually the concept surrounding it was that there were many people voting for the resolution thinking this was a way of avoiding war and people were voting for it thinking that they were giving authority to war if necessary, and it was pretty well sold on the basis that this was the last chance of avoiding war. The whole point of that particular resolution was that it was a great opportunity to get a very confusing vote which gave the British Government an enormous majority. I voted for that resolution, Robin Cook voted for that resolution. The idea that that was approval for an invasion is nonsense although there was a saying that grave consequences would follow. Some people did argue that the war was authorised on that, but again the fact that that was the occasion chosen for a vote was a perfectly clever piece of political tactics. It was not dictated by any military or other legal considerations. It was just a way of avoiding coming to the crunch. As I say, I can remember no votes on the Falklands War, for the sake of not revealing divisions, which at that time were then confined to the left wing of the Labour Party. We had debates on the adjournment because we did not want to have votes in which people might be voting against it.

**Q319 Earl of Sandwich:** Can I just take you back to Afghanistan again? I do not know whether you have followed the Dutch example. Would you approve of a parliamentary debate at this juncture about Afghanistan on the Dutch model?

*Mr Clarke:* I think there is a very strong case for it because we are moving 3,000 troops into a position of considerable danger. I think there is a good strong case for debate, not because I am an opponent of it. I would quite like to hear as much as one can hear sensibly in public about the military considerations

29 March 2006

Mr Kenneth Clarke QC, MP

surrounding the deployment of those people: have we got enough people to deal with the very difficult situation and so on. If we began war I would be disposed to approve of the disposition of more troops to southern Afghanistan, but we are in a democracy and it is very curious that we do not have a process whereby Parliament actually explicitly expresses an opinion on the movement of 3,000 troops into a position of very considerable danger, and these things can get into a very messy state a few years down the road when no-one ever actually approved of it.

**Lord Carter:** I wonder if you could go into a little more detail on the parliamentary process that would be involved if approval were to follow. Just in passing, we do not have adjournment debates in the House of Lords. The only adjournment debate we ever have is on the Queen's Speech, so we have to have a substantive motion. If Parliament were to be involved, obviously you would think both Houses would have an active role, but it has been put to us in the present composition of the House of Lords that if they disagreed the House of Commons should prevail. I think the Iraq War, the most recent one, is a good example where we had some excellent debates in the Lords. We have got five retired chiefs of the defence staff, we have got diplomats, et cetera. There was never any question that we wished to vote on it and there was never any question of a substantive motion. If, of course, there was a statutory process that would have to involve the House of Lords, would it not? If we had a statute it would be hard to see the House of Commons voting unless the statute and specifically excluded the House of Lords. If you had the statute telling the House of Lords its role, if the composition of the House of Lords were to change to a more substantially elected membership would you feel then that the House of Lords should still be excluded from voting on the decision, and what would happen to the morale of the troops if the two Houses disagreed?

**Q320 Chairman:** Can I just ask as a supplementary, is part of the remit of your task force to consider the future composition of the House of Lords?

**Mr Clarke:** It is indeed. We would expect to do that, although we are not thinking of going straight to it. I am not sure we are even all agreed amongst ourselves upon it. My current feeling is that events are going to move ahead of the Task Force. I do not think the Democracy Task Force will play much of a role in this. If we really are now moving on to the next stage of House of Lords reform, at least we can argue about it in the next few months. My views on Lord's approval of war are more tentative conclusions than this Committee's; some questions I have thought of, but I do not have any absolutely definite or certain views on some of them. I think the House of Lords

should obviously debate the whole issue, given that one of the key things surrounding the war is public opinion and the formation of public opinion. The House of Lords does play a very valuable role in that in dealing with the Iraq War. Indeed, because the Government has total control over our business and has less control over yours, you are more likely to contribute to it sometimes than we are. One snag in the Commons is that the Government has such complete control over most of the business, hence they can time all of these things; they lay the motions and all the rest of it. You cannot stop the House of Lords voting, but I would suspect the present House of Lords would not want to and the view of the House of Commons would have to prevail. I am in favour of a largely elected House of Lords and—this is a perfectly legitimate question—what happens then? That is one of the things I have not come to a decision on. That I think is very arguable. I put warfare in a slightly different category than most other actions. I am not remotely a pacifist; I approve of the use of warfare in support of legitimate foreign policy where you have no alternative. The fact is if you are going to engage in warfare in modern times, although the will of the House of Commons has to prevail, I cannot imagine that many governments would charge ahead if they had the support of the lower House of Parliament but were being defeated in the upper House of Parliament on the decision to go. I do not think the elected upper House of Parliament would take too well to being ignored in such circumstances. I have this bigger problem of how democracies handle warfare in modern times. My judgment is that there are only three major democracies where it is possible to get public opinion behind a war: the United States, France and the United Kingdom. They are the only ones who are really free to use their armed forces as and when they determine and have a public opinion which is persuadable that their armed force should be used in support of policies. It is very difficult for other continental countries to get their populations very happy about the deployment of troops. For modern democracies, like America, Britain and France, even then the Vietnam experience shows you need the wholehearted support of the bulk of the population if you are going to achieve any serious success in going forward. It becomes necessary actually to keep your public on side by satisfying them that every possible democratic process was gone through and that there is a broad body of support behind this to get people to commit themselves. An unresolved political debate on military action going on in the background fatally weakens the ability of a country to really conduct its foreign policy and its military activities. I think therefore that my inclination, and I put it no further, would be to say that if you have a finally reformed House of Lords with a constitution that is expected

29 March 2006

Mr Kenneth Clarke QC, MP

to be a settled upper House for this country for the foreseeable future, I would expect that upper House to express a view. I suppose you would have to write something saying that the Government should be still be legally entitled to go ahead in the teeth of a defeat in the upper House if it had the support of the lower House, but I would have to say I think it would be a pretty reckless Government that did that.

**Q321 Lord Carter:** The fact is that under all the proposals for reform of the House of Lords the Government of the day will always be in the minority in the House of Lords and that is something you have to taken into account in this calculation?

*Mr Clarke:* I think it is a very good thing. The tyranny of the majority must have its limitations. I think, for all practical purposes nowadays, engaging in warfare is one of those circumstances where you have got to be able to demonstrate a slightly broader majority than that which your Government Whip's office can produce for you in the House of Commons.

**Q322 Lord Rowlands:** Is the Task Force that you are proposing going to look at ways and means of lessening a future government's control over the House of Commons?

*Mr Clarke:* Yes. Sir George Young, one of my colleagues, is an advocate of it; a lot of people have argued for it. Robin Cook when Leader of the House was going to have a go at this. We are going to look at the idea of a business committee; we are going to have a look again at the allocation of time, at the appointments of chairmen of select committees, the powers of select committees to call for people and papers. Whether it comes from our Task Force or not, I do not know, but there is quite a big head of steam across parties in the House of Commons to start addressing some of these things and deciding how to go about it. We keep making changes. The urgent question procedure was used very well earlier this week, so the House of Commons has been given some things which do enable things to be raised and they might have been used more often than for the Iraq War if people had thought of it, but I think we need to go beyond that. The total control of business by the executive, given that the executive now timetables that business so severely, is not going to last. I think the House of Commons is going to insist that that procedure is reviewed and that the Government gives up some of its power to control proceedings.

**Q323 Chairman:** There was something, if I may pursue it, in your previous answer that I want to pick up, which is the attrition of support for long wars, and that is sometimes related to war fatigue

and sometimes to mission creep. The mission is perceived to have changed or people's attitudes change; they start ringing their bells and they end up wringing their hands. Do you see in your construct of parliamentary approval any need for—how can I put it—top-up approval or renewal of approval?

*Mr Clarke:* That would be very difficult surely without causing constant uncertainty about the policy and the military would throw their hands up with horror, I think. You cannot stop it in certain circumstances. If Parliament takes control of its proceedings there is nothing to stop Parliament deciding, like during something like the American War of Independence, "Enough is enough. We are stopping", and having a vote to say that the troops should be withdrawn. If we had more control of proceedings I know some groups of Members would start tabling motions demanding that troops be withdrawn from Iraq now, though personally I think they would be in the minority if they tried to do that. I do not see why they should not be allowed to try, but in normal circumstances where military action is under way and you are fighting against the troops of another state, I do not think Parliament should suddenly have a second go at the question. I do not think any more than a handful of Members of Parliament could be persuaded that they should do that. Once the vote was taken in favour of the Iraq War, the opponents of the Iraq War shut up for quite a long time and have not attacked the conduct of the war. Of course, what has given rise to all of the controversy is the doubts about whether we were given the right reasons, what is now happening on the ground once we are there, handling the occupation and all of this kind of thing.

**Chairman:** The issue is simply more about the conduct of the peace rather than the conduct of the war.

**Q324 Baroness O'Cathain:** Some witnesses, including the Democratic Auditor, suggested that there should be a joint committee established along the German model which would have the remit of having a watching brief over the work of the Armed Forces and the power to trigger parliamentary debates or to recommend military action. Do you have any views on that?

*Mr Clarke:* We do have a Defence Committee, and we have a security select committee. It is possibly a good case. On your last point, I think that the idea that a select committee could have the power to recommend military action, no. I do not think that the right to initiate the idea of military action should be passed to a select committee of either House. The idea that there might be a committee which could get privileged and secret information on a scale not

29 March 2006

Mr Kenneth Clarke QC, MP

available to the rest of the House is very attractive, because every time you want more information, you are quite understandably told, "It would be compromising to the national interest, forgive me". That is, of course, overplayed like crazy because on both sides of the Atlantic you get the information by way of leaks which you are being told is fatal to the national interest if it is given and the reason most of it is kept secret is because it is embarrassing and not helpful for the government trying to make its case. You could also have a select committee give approval for deployments which you could not otherwise give. We do have secret deployments of troops, I strongly suspect. We do have Special Forces who do not always wait for the official declaration of war to do things. Indeed, I think quite frequently in the last 20 years if you ever found a map on the walls with flags on showing where British Special Forces were physically present you would see some very surprising flags sometimes. It would be quite unknown to the British public that say- there were 20 SAS men who are quite actively engaged in the hills of some distant country on some perfectly legitimate national purpose. If the law made that sort of thing a bit difficult, then again a select committee might be a useful place to which you could go just to keep them informed of what was happening. There were plenty of people in Iraq before the formal invasion went on, certainly Americans, and I strongly suspect there were British as well.

**Q325 Baroness O’Cathain:** Reverting to the democracy point, I actually asked you about a joint committee of both Houses.

*Mr Clarke:* I would not mind it being a joint committee. A joint committee might be a good idea precisely because, whether it were formed or not, the nature of the upper House means you do have Members who, although they would never conceivably go through the electoral process of getting to a body like the Commons, have considerable expertise. You have military men and diplomats in this place who have first hand familiarity with the practicalities of what we are talking about.

**Q326 Chairman:** Do you think they will still be here when the Conservative Task Force—

*Mr Clarke:* I am one of those who would settle for a hybrid House. If you have an independent appointment of about 30 per cent of the Members, they are the kind of people I think who would be appointed, I would have thought, not exclusively generals but people of that sort.

**Q327 Lord Elton:** You started by referring to the fact that the conventions have been eroded steadily and that these were conventions which protected the parliamentary process. One of the conventions which has perhaps the opposite effect is the convention that the advice of the Attorney General is kept secret. Do you think that convention should now be eroded?

*Mr Clarke:* No. I think the Attorney General’s advice should be kept confidential to the Government. I think the Government, like any other person or body seeking legal advice, needs to have a lawyer who is perfectly free to give candid, frank advice and it would inhibit the relationship if all the advice you got from the Attorney General was going to go into the public domain. I take the same view of official advice but even more so with legal advice. If every time you have a meeting where all your officials know that a select committee is going to go over the transcript of what they have said the atmosphere of the meetings would be impossible and you would settle half the things in the bar afterwards to make sure you could avoid that. But going back, and to stop being flippant, I think the Government needs independent, confidential, privileged legal advice like any other body, but at the moment the only competing legal advice comes from those lawyers who decide to volunteer put their view into the public domain. I am not quite sure how Parliament would get its own legal advice but I think there is a case for saying that it should. Incidentally, one thing I have passed over is that I do think the Attorney’s advice should be available at least to the members of the Cabinet who are being asked to take a decision. One of the things the Democracy Task Force will look at is the collective nature of government. My recollection is that the Attorney attended Cabinet in the old days when something of this kind was being considered. I do not recall ever getting a written opinion as a member of the Cabinet from the Attorney about what we were doing, but I do remember the Attorney being there so that anybody could question the Attorney and press him on the legal advice. I do not think it is good enough to say that key figures have the legal advice and the Cabinet have to be content with being told that the Attorney is satisfied, not least because, even in international law, the trouble with legal advice of all kinds is that it is never black and white. I am probably not the only person here who has ever practised the law in more simple ways. I have only ever done international law as a postgraduate student, but the number of times where you could tell a client that you were absolutely certain of the legality of what they were doing is not that numerous. The best form of advice people would use was words to the effect, "There is a reasonable prospect of success in our

29 March 2006

Mr Kenneth Clarke QC, MP

view in this case”, or, “The best opinion is likely to be that”. I think every member of the Cabinet should be in a position to be at least aware of that before they go ahead and be satisfied that the argument is persuasive and a good enough basis for action.

**Q328 Lord Elton:** Does the erosion of the convention of the confidentiality or secrecy of Cabinet proceedings cause you to reflect on that at all?

*Mr Clarke:* No. John Major’s Cabinet was made unworkable by the fact that everything leaked out of it in all directions. No, we all think leaks are now a marvellous device and a great strength of our democratic institutions. I think quite the reverse. The only effect was that nobody would take their business to Cabinet. I used to be asked as Chancellor if I could think of anything I wanted to raise at Cabinet. I never thought of anything that I thought might give rise to any serious controversy because it would all be in the newspapers in a garbled account the following morning, but that is a question of the position of the Government. You have really got to control these events in warfare and, to be fair, I do not recall in modern times a government that has leaked particularly over warfare. The Cabinet in the Iraq War had two members who were fiercely opposed to the whole idea from beginning to end and they did not leak as far as I can recall.

**Q329 Baroness Hayman:** I think you have answered the question about independent legal advice for Parliament although I am not quite sure, given your description of legal advice, how much certainty would be brought to the process, so can I ask you another question? As I recall the Short Bill there was a provision for emergency action where there would not be prior approval but the Government would be expected to come to Parliament as soon as possible. Listening to you this afternoon in your responses to Lord Holme and also in what you said earlier, I got from you a sense that *ex post facto* approval was not a reality, was not a real option in Parliament when troops were on the ground, for all the reasons that you have described. Is it therefore really sensible to include that in any statute or do you need *ex post facto* approval to normal parliamentary accountability, assuming that the action was genuinely an emergency?

*Mr Clarke:* Yes. I find it difficult to conceive of a situation where Parliament would condemn action that had already been taken in an emergency, although it does not stop them doing that now if what the Government has decided to do in an emergency is regarded as completely unacceptable by a majority of the House.

**Q330 Baroness Hayman:** So they could simplify their view that they could not make it unlawful?

*Mr Clarke:* No. Whether you should make something unlawful retrospectively is a serious problem. I had not thought of that. I had just assumed that there are circumstances where obviously you cannot get prior approval; therefore, the Short Bill’s response that you get approval as soon as is reasonably practicable thereafter was the way of getting round it. I had not, I must admit, previously thought of the problem that are you therefore saying you are going to make action which was taken by troops unlawful, which was thought to be lawful when they did it, which would be a problem. You could still require that Parliament should approve it but you would probably have to spell out the fact that the action was lawful because the Government was complying with the conditions of the law in the first place. There was a genuine emergency, there was no sensible opportunity to warn Parliament and their judgment was that action had to be taken immediately in the national interest, and then that would only be unlawful if anybody could claim that it was not the Government’s genuine judgment.

**Q331 Baroness Hayman:** My question was not really so much about that but about whether it was realistic, given all the descriptions that you have made, that *ex post facto* approval would be anything other than always given and therefore you were talking about a policy debate rather than parliamentary approval.

*Mr Clarke:* In reality I suspect you are right. It is almost inconceivable; it would be an amazing political crisis if a government deployed troops in military action and then had Parliament condemning the use of those troops a month later. What would happen would be the fall of the Government.

**Q332 Chairman:** Excuse me, I did promise Kenneth Clarke we would wrap up soon after five. Can you give us another five minutes?

*Mr Clarke:* Sure.

**Q333 Lord Carter:** Just a brief question of clarification. When you refer to a statute, you are referring only to the use of prerogative for the deployment of troops or war-making powers, not all the other uses of the royal prerogative?

*Mr Clarke:* We are going to look at all the other uses. The most key one is treaty-making, which is equally fraught and gives rise to other considerations. You have the practical problems. I have seen on a lesser scale in European Councils of Ministers Danish ministers operating, where they had been authorised before a Council of Ministers

29 March 2006

Mr Kenneth Clarke QC, MP

started only to enter into particular obligations; very democratic. I did not always think it was an advantage to the state of Denmark because the unfortunate Danish minister was left there in the hopeless position where the negotiations appeared to be nil and many numbers of times an agreement was reached which went beyond the Danish minister's authority and they had to reserve the position and go racing back to Parliament to try to persuade them to give in. It would have been much better if the Danish ministers had had the same flexibility as other ministers and then went back to face the music in the same way that all the other ministers did who entered into something that was difficult to sell back home. There is a lot of sensitivity in the political world about treaty-making powers, particularly amongst some sections of my party. I think the executive has to have the power to make treaties but, although I am not as upset about some of the treaties as some of my colleagues, I think Parliament has to have the right to express approval of those treaties. We have got to be clearer about the ratification process than we are under the Ponsonby Rules and so on at the moment.

**Q334 Lord Rowlands:** Some of our witnesses have suggested that if, in fact, we put all this on a statutory basis it would bring the courts into the whole process. Is it a good idea that the courts should be brought into something which in fact are probably highly politically charged policy issues?

*Mr Clarke:* I do not think the courts would be easily persuaded to go into policy areas. If a Government had decided to deploy troops and had got a vote approving it through the House of Commons, and somebody decided they wanted to bring some legal point to challenge it, unless you have made had a complete Horlicks of drafting your legislation I cannot see a challenge of that kind getting very far. My sense is the courts would not touch that with a bargepole. If a Government decided to act illegally, did not seek approval, the troops were firing live rounds and they still had not got their parliamentary vote, that would make the action unlawful, and I think then you would have a whole kind of different action where people would start bringing actions against the use of troops. I think the Government would be absolutely bound to follow a process laid down in statute. You would not get a British Government that just refused to follow it. If the process was followed, although in theory you could have a legal challenge by the defeated minority, the practice in my judgment is that the courts would absolutely refuse, as they always do, to get involved in matters which were plainly matters of political policy and not matters for the courts.

**Q335 Lord Windlesham:** I was interested in your reference to the possibility of a joint parliamentary committee of both Houses, and I was surprised that you even considered such a suggestion. What should a joint parliamentary committee do? It could have no power of decision taking, presumably, but could it influence? Would it be of value in trying to urge the Government to take action in a moment of crisis and to feel that there was a degree of informed opinion, not simply sectarian opinion in the House of Commons but in the wider sense? Could it be of value in that way?

*Mr Clarke:* I am not hostile to the idea of a joint committee, I have chaired joint committees. It is a perfectly reasonable process. I do not think it could possibly have any executive role in deploying troops and I do not think a joint committee would be the right place to express approval or disapproval just like that of the deployment of troops. I have not thought it through, but you are working on it. It might answer some of the questions about whether it could be given more information if you had the right members of the joint committee than you could give on the floor of the House of Lords or the House of Commons in a reportable debate about what is actually going on.

**Q336 Chairman:** Like the Intelligence Committee?

*Mr Clarke:* Exactly like the Intelligence Committee and, exactly like the Intelligence Committee, it could produce some guarded report which did not make any indiscreet disclosures but which I think would be enormously influential. All the fuss about the security services has died down enormously since we have had the Intelligence Committee, and, perversely, at a time when the security services have got themselves involved in more controversy than they ever did before the Committee was set up. The most difficult times for the security services have been surrounding the Iraq War. One reason why nobody has really had a go at the security services themselves through the whole process is because people are satisfied by the Intelligence Committee's role; so something of that kind. As I say, it could cover the secret deployment of troops, the advance deployment of troops; they could be informed and in circumstances where, as with the Intelligence Committee, if they expressed deep shock and horror over what was being done I expect the Government of the day would take note of that and would probably start modifying what it was doing.

**Q337 Lord Windlesham:** Do you think it is a practical suggestion or do you think the Government's left wing supporters in the Commons would kill it?

29 March 2006

Mr Kenneth Clarke QC, MP

*Mr Clarke:* I am not sure who is more likely to kill it, the Government or the Government's left wing supporters. I do not know how far a report is going to move the Government from their distinct reluctance to weaken their executive power in this area at all. On the other hand, one reason I am very glad to give evidence is that I do not think that is going to hold. As I have been asked to chair this committee by David Cameron, he, I think again purely from a starting position, is not unsympathetic to this. William Hague, when he has not been on the Front Bench, has expressed critical views about the role of royal prerogative, and he was another supporter of Clare Short's bill. I think it is going to change. If the present Government

thinks it is going to change, the present Government might itself change the situation. If it was just the genuine left wing of the Labour Party that was objecting to these secret committees approving of military activities and so on, they are not the power in the land that they once were or in the House of Commons as a whole.

**Q338 Chairman:** I think that is a very good note. Thank you for extremely interesting and candid evidence; it is much appreciated. We will let you have a transcript of what has been said and meanwhile thank you very much.

*Mr Clarke:* I look forward to your report.

### Letter from Richard Alston the Australian High Commission

Thank you very much for your letter of 21 October regarding the inquiry into the use of the royal prerogative power by Government to deploy the UK's armed forces.

The Constitution Committee has requested advice on how Australia makes the decision to deploy its armed forces, in particular the constitution checks and balances that are in place and the respective roles of the executive and legislature.

The decision to commit the Australian Defence Force to an armed conflict is a decision for the executive government. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General (section 61 of the Australian Constitution). 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.

29 November 2005

### Memorandum by Peter C Beauchamp

May a member of the public send you his own proposals regarding the Prime Minister's use of the the Royal Prerogative over the commital of British services to warfare?

It might be that there is some point there that is worthy of your Committee's attention.

I can assure you that the way Britain became engaged against Iraq has caused my entire range of respondents extreme resentment.

### A MANDATORY PUBLIC REFERENDUM ON THE POSSIBILITY OF PARTICIPATION IN ARMED CONFLICT (This is not the same as Neil Gerrard's P.Mems Bill)

No greater loss of (millions) of lives and livelihoods have been suffered by the British people (and their adversaries), even over the last hundred years alone, than by going to war, a decision which is vested in the Prime Minister. Annual Armistice Days give us a stunning reminder. But now in 2005, the average Briton is vastly *better informed* about world affairs through travel and the media than when our existing system was set up. Several issues now emerge that make this Constitutional matter worthy of reconsideration:—

(a) MP's may not be able to obtain sufficient of their constituents views in time for an urgent vote on such a subject, so that, if called upon, they may vote along party lines, irrespective of the views of their electors. Over the Iraq war (and probably over Kosovo) it is now generally agreed that the great majority of people would have voted *against* committing our armed services did they have a chance, although they would have supported the Falklands (see several opinion polls eg Telefax). Surely this is a demonstrable mockery of a so-called democratic system?

(b) The advent of the Internet and E-Mail has enabled *instant mass voting* in UK town referendums. This may be achieved for the computerless by use of supervised public library computers. Pin-numbers would safeguard against voter fraud, such that the quickest response to a Referendum *about going to war* could be answered electronically, so expediting the urgent Government decision. Voting would address an Independent Parliamentary Ombudsman.

(c) The argument against such an exception to normal voting-procedure would be that the Prime Minister was privy to information not in the public domain, however incorrect this might be. But I believe that especially with the Freedom of Information Act, all can see that Britain no longer has an Empire warranting more than a small defence force, whereas such a decision in the recent past was palpably on grounds of supporting *foreign* power politics or even *individual ambition* and was the decision of *just one man*. But when it is clear a Prime Minister may not consult with his own career Foreign Office experts who have many years of rich field experience but instead accept flawed intelligence, isn't this an ideal case for pure democracy to be set by the Mother of Parliaments? Could we have your Private Members Bill or at least your advice?

23 September 2005

#### **Memorandum by David M Berry, University of Sussex**

1. The deployment of armed forces should be the prerogative of Parliament not the Prime Minister. The authorisation to send men and women into situations which are dangerous (ie war/peace-keeping) and which might have enormous national consequences should be taken by a sovereign democratic body. In the UK this is the Houses of Parliament. The decision to send can be made by the Prime Minister but the authorization is subsequent to the agreement of Parliament. The only exception could be that of a state of exception (ie emergency) where there is a direct and unambiguous threat to the UK by another country in an act of war. But this act under a state of exception must be subject to eventual Parliamentary approval and scrutiny and misuse of this power by the Prime Minister must be subject to censure. Troop deployments under the so-called "war-on-terror" cannot be a state of exception as they are clearly non-state and unbounded.
2. Parliament should look to other countries to discover a "democratic safeguard" in organising the way in which acts of war and troop deployments are organised and legitimised. For example, constitutionally the US President cannot declare war, that is the prerogative of Congress (although clearly in practice the system leaves a lot to be desired). A similar system should operate in the UK with stronger safeguards. Of course, no system of accountability will be perfect, but at least the final decision is subject to the scrutiny of the representatives of the people.
3. Parliament should have a major role in the final authorisation to deploy armed forces. Parliament must have the final authority for troop deployment. It should not be under royal prerogative, as this gives no possibility of a secondary check on power. Secondly Parliament should have the power to recall the troops should this decision turn out to be mistaken or they were misled. It should also have the power to offer advice to the Prime Minister on time-limitations and scope of the campaign.
4. Parliamentary agreement should be required for any extraordinary deployment into (possible) conflict situations. Training and normal stationed troops (eg on British Bases under existing international treaty etc) should not require Parliamentary approval.
5. As part of the agreement to deploy troops into likely conflict situations Parliament should agree to defensive or aggressive action as required in the context of the deployment. The only retrospective approval should be where under defensive (or supportive) deployment troops come under fire and have to defend themselves aggressively (ie to escape/save lives/protect civilians). This right must be judiciously monitored by Parliamentary scrutiny to prevent misuse and any further aggressive deployment must have Parliamentary approval.
6. All extraordinary troop deployments outside of the United Kingdom, which are not for training or normal British base deployment (eg under existing treaty conditions), should require Parliamentary approval to prevent loopholes and misuse. Clearly those actions taken unilaterally by the UK government should require a higher level of evidence before Parliament than those "police-type" actions that are authorised through UN peace-keeping action. The only exception where Parliamentary approval cannot be sought in a short time frame would be under a state of exception such as a declaration of war against the UK (see note 1).
7. The Government must provide evidence to support the deployment of troops. However, Parliament has absolute sovereignty and the legality (or not) of a deployment lies within its sovereign decision-making powers (ie Parliament decides whether the deployment is itself legal). Misleading Parliament in evidence for a deployment must be subject to censure by Parliament itself under its standing orders. It should also be illegal to do so under law, and civil servants should have a duty to supply unbiased and independent advice to ministers.

Whistleblowers should be given full protection under law for supplying evidence of any such misleading actions by government to Parliament.

8. Courts cannot and should not have jurisdiction over Parliament, which remains the pre-eminent sovereign democratic body. Government may be found to have taken an illegal act (under the law) through the courts but Parliament itself defines whether the act of war itself (or troop deployment) is legal or not. Parliament can also reconsider this deployment should misrepresentation or misleading actions on behalf of the Government be uncovered later. Jurisdiction should be limited by considerations of justiciability of any of the issues involved (see note 7).

*15 September 2005*

### **Memorandum by Charter 88**

#### **Preamble**

1. Charter 88 is the major organisation in the UK campaigning for a modern and fair democracy based on the principle of accountability. Over 80,000 people have signed the Charter.

2. We have been promoting The Armed Forces (Parliamentary Approval for Participation in Armed Conflict) Bill is a Private Members' Bill being sponsored by a cross-party team of MPs including Clare Short (Labour), the Rt Hon Kenneth Clarke MP, the Rt Hon Sir Menzies Campbell (Lib Dem), Michael Moore (Lib Dem), the Rt Hon William Hague (Conservative), Adam Price (Plaid Cymru) and Alex Salmond (SNP).

#### **Basic Constitutional Points**

3. It is the role of government to govern: or in more formal language that of the executive to execute. But in a representative democracy, the executive does not execute that which it “feels like” executing—it executes that which it has been authorised to execute by parliament acting on behalf of the people.

4. This applies in all aspects of government. Education, social services, environment, culture media and sport, health, work and pensions etc—all policies need to have their basis in laws passed by parliament and indeed even the broad policies are often sanctioned by parliament via debates on White Papers formally “laid before” parliament. Even economic and fiscal policy needs approval via the annual budget debate and votes and Finance Act.

5. “All aspects” that is bar those covered by the Royal Prerogative (and similar ancient and little known provisions) which includes probably the most important decision our country can take—going to war. In our view this must be wrong and that Parliament must, as of right, be given the opportunity to authorise the use of armed forces—even if, in cases of urgency that authorisation may be retrospective. We accept that such a provision may be necessary on occasions. Such a provision is contained in the Clare Short Bill mentioned above.

6. The fact that such provisions are “little known” is itself another argument as to why they should come under parliamentary scrutiny: they are part of the problem of the alienation of people from politics. Arcane and archaic constitutional provisions are the very opposite of the transparency that is required by a modern democracy if we are to have any chance at all of engaging people in politics.

7. It may be argued (and indeed has been) that a law would inhibit government flexibility in what is, after all, a very sensitive and secretive area. There are, we believe, three fundamental flaws in this argument:

- This is not the case in other countries.
- The “retrospective authorisation” procedure referred to above.
- The current government has specifically now assured the public that it will seek parliamentary approval for future use of armed forces. Indeed, the Prime Minister himself has told the House of Commons Liaison Committee that he can see no situation in which such approval would not be sought. If such government assurances are to be accepted then a new law would not inhibit flexibility any more than that assurance. In other words, those very assurances (if taken seriously) themselves destroy the “inhibiting flexibility” argument against a law.

8. Is those assurances sufficient? There are two fundamental reasons why they are not:

- They only apply to the current Prime Minister and the current government. What if either were to change? Suppose, in particular, there was a government of a different party?
- But that apart there is another point: the rights of Parliament should not be dependant on the will of the Prime Minister. That is constitutionally not just wrong but the wrong way round.

### Points raised by the Committee

9. As regards the Committee's particular questions, we endorse and recommend the submissions made by New Politics Network and Democratic Audit.

*October 2005*

#### Memorandum by Charles Arnett, Mark Gulley, Christian Fellowship Brethren

We submit respectfully that there are compelling reasons to maintain the status quo.

1. The House of Commons Select Committee on Public Administration 4th Report, March 2004, led to the reponse of the DCA in July 2004, which states:

“The Government notes that even those witnesses in favour of the extension of parliamentary authority in this area recognise the difficulties, both of definition (when would the requirements be triggered) and timing (in emergency situations). The Government's view is that the pragmatic approach, allowing the circumstances of parliamentary scrutiny to reflect the circumstances of the armed conflict, continues to be the more effective approach.”

Surely there is much wisdom here.

2. The evidence of the Right Hon. William Hague, while in favour of more parliamentary involvement, also alludes to the possibility that:

“an international situation will arise in the next 20 years that is entirely different from anything that we have ever experienced and we would find such an act (the “simple and flexible” measure he called for) did not cater for it.”

It would therefore be most unwise to propose any measure of parliamentary or judicial intervention which would limit the needed maximum flexibility in adopting military action which is at present possible, using the Government prerogative powers.

3. Decisions about the balance between prerogative power and parliamentary approval ought to consider not only legal and constitutional issues, but other elements of the context of 21st century armed conflict. Some are of cardinal importance. Some brief details are on the accompanying page.

4. The most important thing in war making is the quality of the leadership and highlighted by present conflict—respect for Christian principles.

*Have any senior staff in the Services requested a greater say for Parliament and the Courts?*

### APPENDIX

1. Speed is of the essence both in the initiation, and continuation, of modern military activity. Any procedure which could cause delay should be avoided; it could be disastrous.

2. The most important international conflict of today is unlike the 20th century world wars or the Cold War. It is religious (or fanatical) in origin, and characterised by a ruthless disregard for human life, and slaughter of innocent men, women and children (Muslim, Christian et al.). Its undisguised aims are the subjugation of the Christian nations and the obliteration of Israel.

Again, the speed and maximum flexibility of action must be kept open, or horrendous loss of life could result.

3. The current alliance between the UK, the USA and Australia, is crucial in opposing the spread of the fanatical Muslim minority.

Anything which could, even unwittingly, reduce or delay our capacity to act with the USA should be shunned. There are far too many EU nations which are unwilling to lend their support, or unable to.

4. Much secret intelligence cannot be communicated to Parliament. If the speed of communications, and mode of them, keeps advancing, the gap between what is known and what can be made public could widen.

5. Any delaying procedures give more scope for media influence and intervention.

The unaccountable yet huge influence of the media is a subject which cries out for parliamentary attention. The harassment of Lord Goldsmith in recent times is but one disgraceful example.

6. If there is pressure to give more powers to Parliament as to the initiation or continuation of military activity, allied with pleas for open government, should the openness also extend to consideration of:

- how many MPs pleading for such powers are in fact largely (or wholly) opposed to war making in general?

- how many have any expertise in military matters (knowledge of which concentrates in the Lords)?
- how many MPs sympathise with the development of the European Defence Force, which at worst is intended as counterweight to NATO and the influence of the USA, and at best will be crippled by inter EU rivalry of dissensions?

We therefore encourage the Government to maintain the status quo on War Making Powers.

### **Memorandum by Mr A Dakers**

#### **International Treaties and the Royal Prerogative**

Ministers of the Crown have, from time to time entered into treaties on behalf of the UK. It should be noted that the Ministers concerned must seek authority from the Crown by the Royal Prerogative before signing. Because the Monarch is constitutionally bound to respect the provisions of the common law, which were recognised in Magna Carta and declared in the Bill of Rights, such Royal Prerogative has the following restrictions. (The term “prerogative” means a right or privilege exclusive to an individual or class).

- (a) Prerogative cannot be used in an innovatory way. If this were not so, the executive could dispense with Parliament and Judiciary and become an unlimited tyranny. Any future Attorney General could claim that an edict was part of a treaty and it would become unquestionable.
- (b) The use of Prerogative power may not be subversive of the rights and liberties of the subject. (The case of *Nichols v. Nichols* stated “Prerogative is created for the benefit of the people and cannot be exercised to their prejudice”.)

Royal Prerogative may not be used to suspend or offend against Statutes in Force. This comes from the Bill of Rights and the Coronation Oath Act which specifies the following form of words; “Archbishop: Will you solemnly promise and swear to govern the peoples of the United Kingdom of Great Britain and Northern Ireland . . . according to their respective laws and usages.” Prospective Monarch: “I solemnly promise so to do.” Note the similarity to the Judicial Oath. This is because the Courts dispense justice on behalf of the Crown.

#### **The Limitations of Royal Prerogative are clear:**

“No prerogative may be recognised that is contrary to Magna Carta or any other statute, or that interferes with the liberties of the subject. The courts have jurisdiction therefore, to enquire into the existence of any prerogative, it being a maxim of the common law that the King ought to be under no man, but under God and the law, because the law makes the King. If any prerogative is disputed, the Courts must decide the question of whether or not it exists in the same way as they decide any other question of law. If a prerogative is clearly established, they must take the same judicial notice of it as they take of any other rule of law.”

*Bowles v Bank of England* (1913) confirmed that, “the Bill of Rights still remains unrepealed, and practice of custom, however prolonged, or however acquiesced in on the part of the subject can not be relied on by the Crown as justifying any infringement of its provisions”.

The Bill of Rights 1688 is a declaration of the common law. It is also an operative Statute. It contains the Oath of Allegiance, which is required by Magna Carta to be taken by all Crown servants including members of the Armed Forces, MP’s, and the Judiciary. They are required not to “take into consequence or example anything to the detriment of the subjects liberties”.

The Oath required of Crown servants includes “I will be faithful and bear **true** Allegiance . . . “The qualification “true” confirms that allegiance is not required to a Monarch whose actions are unlawful.

It can be shown that we have recently had a coup-d’etat in this country. This was accomplished when the Government took control over the armed forces to use them for political purposes.

The Bill of Rights allows the Crown a standing army in peace time and who’s members swear allegiance to defend Her “in person Crown and dignity against all enemies”. No one else (except the Duke of Argyll), is allowed an army.

The Armed Forces Act 1996 purports to allow the Crown to set aside the requirement for annual army acts. It states that the Crown may authorise the armed forces by “Order in Council”. This provision would permit the Government to use the Armed Forces even if Parliament was suspended, and is contrary to the intent of the Bill of Rights.

Various defence reviews have resulted in the Government issuing mission statements that claims that the forces role in future is to defend the Realm and “to implement Government policy, in particular foreign policy”. This is from documents published by the MOD and available from them and on the Web. It means that the

Government is now claiming that it can use the Army for its own purposes where the safety of the Realm is not threatened. Serving members of the Forces have been invited to sign new contracts agreeing to this new arrangement. Recent recruiting adverts for the Forces reflect this. A recent cinema advert for the RAF depicts a foreign “peace keeping” operation and has the slogan “Their country needs you”.

**This is a equivalent to a coup.**

*13 August 2005*

### **Supplementary memorandum by Mr A Dakers**

#### **Looming Constitutional Crisis**

*Reported by the BBC*

Canada is sending its navy back to the far northern Arctic port of Churchill after a 30-year absence. The visit by two warships to the area is the latest move to challenge rival claims in the Arctic triggered by the threat of melting ice.

The move follows a spat between **Canada** and **Denmark**, over an uninhabited rock called Hans Island in the eastern Arctic region.

#### **An Interesting Constitutional Situation Could Arise Here!**

“Article 224 (of the European Treaty) states that Member States shall consult one another with a view to taking in common the necessary steps to avoid the operation of the Common Market being affected by measures which a Member State may be called upon to take in case of serious internal disturbances affecting public policy or the maintenance of law and order (“*ordre public*”), in case of war or **serious international tension** constituting a threat of war, or in order to carry out undertakings into which it has entered for the purpose of maintaining peace and international security”.

Now if I recall correctly, In Canada, the Queen’s official title is **Elizabeth the Second, by the Grace of God, of the United Kingdom, Canada and Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith.**

UK Governments since 1972 have claimed that European Law is “supreme” in the UK . What would be the position in law if the EU attempted to impose its will on British subjects, in support of Denmark upon Canadian Citizens by force in the circumstances which are envisioned in Article 224 of the Treaty?

*Oath of Allegiance*

The oath of allegiance sworn by members of the armed forces to the Queen may turn out to be of real importance. If the Queen in Parliament passed legal notice to withdraw from the EU, and the Courts (including the European Court of Justice) tried to declare this unlawful, there would be, theoretically, a stand-off.

Would the armed forces breach their oath of loyalty to the Queen backed by Parliament?

*1 September 2005*

### **Memorandum by Ambassador Dr Theodor Winkler, Director, Geneva Centre for the Democratic Control of Armed Forces (DCAF)**

It is with pleasure that we address the House of Lords Constitution Committee in answer to their call for evidence on war-making powers. We were informed of this request through our colleague Professor Ian Leigh, Professor of Law at Durham University, and have read with great interest on your website the scope of the Committee’s inquiry. On behalf of the Geneva Centre for the Democratic Control of Armed Forces (DCAF), of which the United Kingdom is a Founding Member, we consider that our research findings on the role of parliaments and the use of military force abroad are directly related and may constitute a relevant source of evidence for the inquiry.

The particular research of relevance to the House of Lords Enquiry commences with the observation that the current threats to security arising from terrorism, “rogue” states and civil wars are highly complex and often trans-national in nature and effect. Such threats can no longer be meaningfully addressed at the national level alone but require an international response. Since the end of the Cold War, the use of force under international auspices (eg UN, NATO, EU) has increased substantially. However, such actions have not necessarily been accompanied by improvements in their democratic accountability. Pre-existing problems and inadequacies of

parliamentary oversight of armed forces and the use of force at the national level of many democratic states are mirrored, and even magnified, at the international level. The effect of imperfect democratic controls at the national level and the challenges to provide transparent and accountable multilateral responses results in the so-called “double democratic deficit” of the international use of force. In a recent publication on this subject entitled “The ‘Double Democratic Deficit’: Parliamentary Accountability and the Use of Force under International Auspices”, we have analysed the challenges of parliamentary and democratic supervision of international security structures and have put forward proposals on how to improve democratic accountability of multinational military responses to complex security challenges.

The enclosed Policy Paper “The Use of Force under International Auspices: Strengthening Parliamentary Accountability” addresses the themes which are mentioned in the Lords Constitutional Committee Call for Evidence. Parliamentary practice in various countries shows that parliament can play a substantial role in the deployment of troops abroad in peace support operations. More particularly, in the enclosed policy paper we have distinguished four models for parliamentary involvement in the decision-making involved in deploying troops:

1. Parliament has the right of prior authorisation of PSOs, including the right to discuss and influence the details of the PSO (eg as in Denmark, Germany and the Netherlands).
2. Parliament has the right of prior authorisation but not the power to influence the detailed aspects of PSOs (including rules of engagement, duration of the mission and mandate), giving government full authority once parliament has authorised the mission (eg, as in Italy and Norway).
3. The third group of parliaments does not have prior authorisation power. Government can decide to send troops abroad on peace missions without the legal obligation to consult parliament. Nevertheless, parliament is informed about the deployments. This is the case, for example, in Canada, France, Poland, Portugal, Spain, the UK and the USA.
4. A fourth type of parliament is those parliaments which have no authorisation power or right to information about future or pending PSOs.

The main research findings of our research are summarised in the enclosed DCAF policy paper which particularly addresses questions 1, 2, 3, 4b, and 6 of the Committee’s call for evidence. We have also taken the liberty to include with this letter the publisher’s order form to our recent publication on the double democratic deficit.

5 October 2005

Enclosed: H Born and H Hänggi, *The Use of Force under International Auspices: Strengthening Parliamentary Accountability*, DCAF Policy Paper No 7, August 2005. [Not printed here.]

H Born and H Hänggi, *The “Double Democratic Deficit”: Parliamentary Accountability and the Use of Force under International Auspices*, Ashgate, 2004. [Not printed here.]

#### **Memorandum by Eileen Denza, University College London**

##### **General Criteria**

1. Alternative constitutional controls on deployment of United Kingdom armed forces or on the use of military force should be assessed primarily in terms of how they might better contribute to the objectives of modern British foreign policy. The three fundamental objectives of the foreign policy of a modern State are, first, the defence of the physical and political integrity of the State; secondly, spreading more widely the political and other fundamental values of the State, and thirdly, the promotion or defence of a stable world order. There is some overlap between these objectives, particularly the second and third. More rigid domestic legal controls on the deployment or use of military resources are unlikely to contribute to the first of the three objectives. The greater degree of openness and accountability which they would entail might however be advantageous in terms of the second and third.

##### **Practice of Other States**

2. The constitutional constraints and practice of other democratic States are relevant and useful, but they must be evaluated against the wider historical, constitutional and political background within each State. Many western democracies have national constraints on deployment of their military forces abroad beyond those imposed by international law—for example Germany, Japan, Denmark, Austria, Ireland, Sweden and Finland. These constraints derive for the most part from historical experiences not shared by the United Kingdom.

3. By way of illustration both of the historical background to constitutional controls imposed in other democratic States and of the legal difficulties which they entail, I am annexing a Note on parliamentary control over the armed forces in Germany which was prepared by Aurel Sari, one of my doctoral students. German constitutional law requires the advance approval of the Lower House of Parliament (the Bundestag) for deployment of German armed forces abroad where use of military force is likely. The Federal Constitution was adopted in 1949, shortly after the end of the Second World War and at a time when there were no German armed forces so that West Germany was dependent for its military security on its foreign Allies. Given the variety of circumstances in which armed forces of a powerful Western State may nowadays be deployed abroad, the requirement for advance approval has given rise to a number of areas of legal uncertainty, some of them clarified by the Federal Constitutional Court. Although Parliamentary control is clearly perceived in Germany as reflecting the democratic nature of the State's potential use of military force, it has also been perceived abroad—particularly within the framework of the recent development of European Union defence policy—as a serious handicap to Germany's powers of independent action.

4. Under the Constitution of the United States of America Congress is given the right to declare war, to raise and support armies and to provide and maintain a navy, while the President is appointed Commander-in-Chief of the armed forces. Case law makes clear that Congress does not have an exclusive right to determine whether or not the United States will embark on armed conflict, and the form of any approval of the use of military force is left to Congress. The War Powers Resolution of 1973 (Public Law 93–148) imposes on the President a requirement to consult with Congress prior to the start of, and throughout the duration of hostilities. The Resolution was adopted over the veto of President Nixon and there are continuing doubts as to its constitutionality. On every occasion since the adoption of the Resolution the President has requested and received authorisation (either advance or retrospective) for the use of force and has made reports “consistent with the War Powers Resolution”. The original purpose of the Resolution was to check the power of the President to commit the United States to military action, but in practice deference of Congress to the Executive has made the control of limited value.

5. In the two most recent cases the congressional authority granted to the President has been very wide. One week after the attacks of September 11, 2001, Congress passed a Joint Resolution (Authorization for Use of Military Force, 115 Stat. 224) which authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks” or “harboured such organizations or persons in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons”. The President relied on this authority to embark on military action against al Qaeda and against the Taliban regime. In October 2002 Congress adopted a Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq. This set out the political, diplomatic and legal background in some detail and authorized the use of US Armed Forces for two purposes—to defend the national security of the United States and to enforce all relevant United Nations Security Council Resolutions regarding Iraq. It imposed requirements for the President to report back to Congress. A case was brought before a US federal district court arguing that Congress had unconstitutionally delegated to the President the power to use force against Iraq, but the court declined to intervene and dismissed the case in February 2003, one month before military operations against Iraq began.

#### **Advance or Immediate Approval by Parliament**

6. There are strong arguments against imposing a legal requirement for UK Parliamentary authorisation in advance of or immediately following overseas deployment of military forces or authorisation of force. The existing system of ministerial accountability permits immediacy of response by Parliament to situations which are complex, unpredictable and highly varied in their nature. Devising rules for Parliamentary control would give rise to difficulty in distinguishing between a unilateral decision to deploy or use UK military forces, the provision of support facilities such as military bases to another friendly State intending to deploy or use its own forces, deployment of force within the framework of the Common Foreign and Security Policy of the European Union or under United Nations authority, and the assumption of commitments to another States or States requiring immediate response (such as the commitment under Article 5 of the North Atlantic Charter). To give Parliament control over a decision to deploy military force or authorise the use of force abroad would raise the question of whether there should also be parliamentary control over a decision by the Government **not** to deploy or to use military force. Such decisions may also be controversial both in political and in legal terms.

7. To obtain from Parliament a meaningful consent to the deployment or use of military forces by the Government would pose immense problems in terms of the supply of information and analysis and the system of whipping of the votes of Party members. A situation which leads to a decision by Ministers to deploy or use forces will almost always have a long and complex political, diplomatic and legal background. Many of

the relevant documents will be protected from disclosure by international rules of law and practice requiring confidentiality of diplomatic negotiations and secrecy of military information—which cannot be disregarded on a unilateral basis by the United Kingdom. The practical need and the legal justification for any use of force, and the degree of force which may be regarded as necessary and proportionate will have been under continuous assessment by Ministers and by political, diplomatic, military and legal experts within Government for some time against a changing factual background. It would not normally be possible to provide sufficient information as well as legal and military analysis to allow individual Members of Parliament to exercise independent critical judgment within the sort of time-frame which is suggested. If the Government of the day did not provide a free vote on the question, any resolution adopted by Parliament would fail to provide additional political or moral authority.

8. The decision to authorise the deployment of military forces authorised to use force abroad is essentially an executive one. It must be taken in a broad context of national constraints and objectives and in a long-term perspective of the national interest. 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. As in other areas of foreign policy there may be a need to educate and sometimes to resist popular feelings.

### **Provision of Legal Justification to Parliament**

9. A much stronger case can be made for requiring the Government formally to explain the legal justification (including questions of necessity and proportionality) for deployment of armed forces authorised to use force outside the United Kingdom. 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* contain the totality of the advice tendered by the Law Officers which should remain confidential. The Government already supplies under short time constraints memoranda to Parliament on European Union documents and on treaties subject to United Kingdom ratification, as well as oral and written statements involving questions of international law, so such a framework would merely extend and formalise what has already become established practice. Following the decision to use force in Iraq in March 2003, the Government explained its position publicly through the answer of the Attorney-General to a question on the legality of that decision in the House of Lords, together with a Paper by the Foreign and Commonwealth Office setting out the justification for the use of force in greater detail which was sent to the Chairman of the House of Commons Foreign Affairs Committee.

10. The provision of a formal legal justification for any decision to authorise the use of military force abroad would offer a number of advantages in the longer term. It would ensure that the Government as a whole were clear about the legal basis for the decision. It would help to ensure consistency in the deployment of legal doctrines of international law. It would of course open the justification to political debate and perhaps to legal challenge, but it should help to ensure that assessment of international legality took place against the situation as known and explained at the time of the original decision rather than against the background of later discoveries and of later events. Much of the public discussion relating to the use of force in controversial circumstances is carried out against the background of facts and consequences which were not and could not have been known when the original decision was taken. It is also coloured by perception of whether the military operation was successful in achieving its objective and by whether it was carried out in a proportionate manner and in accordance with the rules of international law relating to the conduct of armed conflict. All of these are of course legitimate subjects for public and parliamentary scrutiny, but they should be separated from the issue of the justification for the original authorisation by the Government to use military force.

11. Such a framework if implemented in good faith would help to persuade the British public and international opinion that the decision to use military force abroad had been taken in good faith and with the greatest attention to international law, that the use of force was necessary and proportionate and that the operation would be explained and defended with the greatest possible degree of transparency. Such confidence would not only assist the actual conduct of any operation but would in the longer term be advantageous in terms of the spread of fundamental British values and in terms of promotion of a more stable world order.

### **Judicial Review**

12. If a duty for the Government to make a formal declaration of legal justification were accepted, careful thought would have to be given to the role of United Kingdom courts. Any declaration would consist of a mixture of facts (some of them peculiarly within the knowledge of the Secretaries of State for Foreign and Commonwealth Affairs and for Defence), analysis and law. While it has been usual, and is set out in many

statutes relevant to the conduct of foreign affairs, that the Secretary of State may issue certificates on specific matters of fact peculiarly within his knowledge, and such certificates are conclusive in legal proceedings, the declaration would not be limited to questions of fact and it would not be appropriate for its terms to be conclusive. In the United Kingdom questions of law are not addressed in any certificate issued to a court or to parties to legal proceedings, and the court must decide questions of law—whether UK law or international law—for itself.

13. One precedent which could be useful in considering whether the courts would be entitled to review the opinion of the Secretary of State on material questions of international law is section 2 of the Diplomatic and Consular Premises Act 1987 which provides that the Secretary of State may exercise the power to terminate acceptance of land as diplomatic or consular premises only “if he is satisfied that to do so is permissible under international law.” A specific exercise of this power was challenged in the courts in the case *R. v. Secretary of State for Foreign and Commonwealth Affairs ex parte Samuel*.<sup>1</sup> The Court of Appeal held that the decision of the Secretary of State would be reviewed only if it was unreasonable or taken in bad faith. The grounds for the decision were fully explained in a statement to the Court on behalf of the Foreign and Commonwealth Office, and the Court concluded that the decision was lawful and effective.

14. For wider constitutional reasons it would be inappropriate for any statutory rules to displace the doctrine of non-justiciability or judicial restraint whereby in rare cases United Kingdom courts decline to adjudicate on an issue within their jurisdiction on the grounds that they would be “in a judicial no-man’s land”,<sup>2</sup> or “entering a field in which we are simply not competent to adjudicate”.<sup>3</sup> United Kingdom courts will determine an issue of customary international law in many cases where it is relevant to a question of domestic law before them.<sup>4</sup> But they are clear that they are not an international court. The doctrine has been very sparingly applied and attempts to extend it have been resisted. It rests less on deference to the executive on matters of foreign policy and the need for the State to speak on international questions with a single voice than on the view that issues which are the subject of international dispute between sovereign States—some or all of whom may not be before the court—should be resolved at an international level and not by a national court.

15. The way in which United Kingdom courts are prepared to scrutinise the lawfulness of the possible or actual use of force by the United Kingdom Government under the limits of the doctrine of non-justiciability is well illustrated by the CND Case.<sup>5</sup> The Campaign for Nuclear Disarmament asked the Court for a Declaration that action against Iraq would, in the absence of a further UN Resolution, be unlawful under customary international law. The Court held for a variety of reasons that they could not address the merits of the arguments under international law, but of particular relevance to the present context is the view expressed by Simon Brown LJ (as he then was) that an assumption of competence by a UK court to determine this issue would be regarded in other States as “an exorbitant arrogation of adjudicative power”.

16. It is submitted that to disapply by statute the doctrine of judicial restraint so as in effect to confer on UK courts a power to determine what are likely to be controversial and difficult questions of international law would be to disregard the question of what is the most appropriate forum for such questions. While there are strong arguments for questions of the legality of the use of force being determined more widely by the International Court of Justice (and indeed for a wider jurisdiction by the European Court of Justice over the Common Foreign and Security Policy of the European Union, which increasingly forms the basis for military operations), the discretion exercised by UK courts should be left unaltered by any possible rules to control the exercise of prerogative powers regarding the use of military force.

## Summary

Any parliamentary controls on deployment of UK military forces abroad or on the use of military force should be assessed in terms of their contribution to the objectives of British foreign policy.

The constraints imposed in other democratic States are relevant and instructive, but must be evaluated against the constitutional background in each State.

A requirement for advance or immediate approval by the UK Parliament would give rise to major problems of determining when it applied, of supplying Parliament with adequate information and of deciding whether there should be a free vote. The decision to deploy forces abroad or to authorise the use of force is an executive one to be taken in a long-term perspective of the national interest.

<sup>1</sup> Times Law Reports 17 August 1989, 83 ILR 231.

<sup>2</sup> *Buttes Gas and Oil Co v Hammer* [1982] AC 888; 64 ILR 273 and 331.

<sup>3</sup> *Pinochet (No 1)* [1998] 3 WLR 1456 per Lord Lloyd at p 1495.

<sup>4</sup> See, for example, *Sadiqa Ahmed Amin v. Irving Brown* [2005] EWHC 1670 (Ch).

<sup>5</sup> *The Campaign for Nuclear Disarmament v The Prime Minister of the United Kingdom and Others* [2002] EWHC 2759 (QB).

A requirement on the Government formally to explain the background, objectives and legal justification for any deployment of forces authorised to use force would on the other hand offer longer term advantages in terms of consistency and transparency.

If provision were made for a formal declaration by the Government of legal justification, judicial review should not be excluded, but the courts should be left to apply the common law doctrine of non-justiciability or judicial restraint. Whether a particular use of military force is justified will normally be a question which should be determined in an international forum and not in UK courts.

25 October 2005

## PARLIAMENTARY CONTROL OVER THE ARMED FORCES IN GERMANY

1. The rules governing the deployment of the German Armed Forces (*Bundeswehr*), as well as the rules concerning Parliamentary control over such deployments, derive from three principal sources: the German Basic Law (*Grundgesetz*), the case-law of the German Constitutional Court (*Bundesverfassungsgericht*), and, since 18 March 2005, the Bundestag Participation Act (*Parlamentsbeteiligungsgesetz*). In addition, the practice of the German Parliament (*Bundestag*) over the past decade or so in applying the pertinent rules is also relevant.

### I. The Basic Law

2. Several provisions of the Basic Law deal with or refer to the Armed Forces. The central provision is Article 87a, which reads as follows (unofficial translation):

*Article 87a [Establishment and powers of the Armed Forces]*

(1) The Federation shall establish Armed Forces for the purposes of defence. Their numerical strength and general organisational structure must be shown in the budget.

(2) Apart from defence, the Armed Forces may be employed only to the extent expressly permitted by this Basic Law.

(3) During a state of defence or a state of tension the Armed Forces shall have the power to protect civilian property and to perform traffic control functions to the extent necessary to accomplish their defence mission. Moreover, during a state of defence or a state of tension, the Armed Forces may also be authorised to support police measures for the protection of civilian property; in this event the Armed Forces shall cooperate with the competent authorities.

(4) In order to avert an imminent danger to the existence or free democratic basic order of the Federation or of a Land, the Federal Government, if the conditions referred to in paragraph (2) of Article 91 obtain and the police forces and the Federal Border Police prove inadequate, may employ the Armed Forces to support the police and the Federal Border Police in protecting civilian property and in combating organised armed insurgents. Any such employment of the Armed Forces shall be discontinued if the Bundestag or the Bundesrat so demands.

3. Apart from the third and fourth paragraph of Article 87a, only Article 35 of the Basic Law does expressly permit the use of the Armed Forces for purposes other than defence. However, Article 35 sanctions only the domestic employment of the Armed Forces: it allows a *Land* to request the assistance of the Armed Forces in cases of natural disasters or emergencies in order to support the police in combating the disaster or emergency, and permits the Federal Government to deploy the Armed Forces in order to support the police where natural disasters or emergencies affect the territory of more than one *Land*.

4. No provision exists in the Basic Law which regulates in express terms the deployment of the Armed Forces abroad for purposes other than defence. However, the Armed Forces have traditionally carried out purely humanitarian activities both domestically and abroad on the basis that such activities do not involve the exercise of governmental authority, and therefore do not constitute an “employment” or “deployment” (*Einsatz*) within the meaning of Article 87a(2). In addition, the German Constitutional Court has interpreted Article 24 of the Basic Law to permit the deployment of the Armed Forces abroad in the context of a “system of mutual collective security”. The relevant part of Article 24 provides as follows (unofficial translation):

*Article 24 [International organisations]*

(1) The Federation may by a law transfer sovereign powers to international organisations. [. . .]

(2) With a view to maintaining peace, the Federation may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world. [. . .]

## II. The Case-law of the Constitutional Court

5. On 12 July 1994, the German Constitutional Court delivered a judgement (*Bundeswehreinsatz*, 90 *BVerfGE* 286, 106 *ILR* 320) in a case brought by two Bundestag parties against the German Government, alleging that the latter violated the Basic Law by committing German troops to military operations abroad under the auspices of NATO and the UN. Building on its earlier case-law, the Constitutional Court interpreted Article 24 of the Basic Law in the light of the legislator's intent and subsequent developments in state practice. First, it found, on the one hand, that the expression "system of mutual collective security" referred to in Article 24(2) of the Basic Law covers Germany's participation in the collective security systems established under the UN Charter, the North Atlantic Treaty and the Modified Brussels Treaty of 1954, and, on the other hand, that the authorisation granted by Article 24(2) to participate in a "system of mutual collective security" necessarily implies an authorisation to deploy the Armed Forces within the framework of such collective security systems, including their integration into multinational contingents as well as their use in military operations abroad. Second, the Constitutional Court also found that, notwithstanding the general authorisation granted in Article 24(2) to deploy the Armed Forces in the framework of collective security systems, "the deployment of armed military forces in principle requires the prior constitutive consent of the Bundestag" (*bedarf. . . der Einsatz bewaffneter Streitkräfte grundsätzlich der vorherigen konstitutiven Zustimmung des Bundestages*).

6. In the absence of an express rule in the Basic Law to this effect, the Constitutional Court based this second finding on the general principle of German constitutional law whereby the "deployment of armed military forces" requires the Bundestag's approval. The Court deduced this general principle (also expressed in the maxim "the German Armed Forces are a Parliamentary force") from the legislator's intent in drafting the Basic Law, German constitutional traditions since 1918, and the system of Parliamentary control over the Armed Forces and military matters set up under the Basic Law, including Parliament's role in proclaiming a "state of defence". Some commentators have strongly criticised this aspect of the *Bundeswehreinsatz* judgement, arguing that the Constitutional Court has ventured far into the field of law-making.

7. The *Bundeswehreinsatz* case left unanswered a number of key questions. In particular, the Constitutional Court did not specify the exact scope of the principle of Parliamentary consent, nor did it sufficiently clarify the meaning of the expression "deployment of armed military forces" coined in its judgement. Consequently, differences arose in academic circles and elsewhere whether, for example, the Bundestag's consent is required for every single deployment of the Armed Forces even where that deployment takes place on the basis of treaty obligations already approved by Parliament. According to some commentators, purely humanitarian operations not using military force are not caught by the principle of Parliamentary consent. A different view holds that the objectives and nature of the deployment are altogether irrelevant: as long as the military force is in fact "armed", the Bundestag's consent to its deployment is necessary. Another view suggests that the Bundestag's consent is required only where it is likely that the troops will actually make use of armed force.

8. The Constitutional Court has attempted to clarify some of these questions in its judgement of 25 March 2003 (*AWACS*, 108 *BVerfGE* 34). In that case, a Bundestag party petitioned the Court to issue a preliminary injunction to the effect that the deployment in Turkey of German crews manning AWACS aircraft pursuant to a decision of the North Atlantic Council was unconstitutional without the Bundestag's consent to the deployment. The Constitutional Court stated that it had to balance the principle of Parliamentary control over the Armed Forces against the executive's responsibility for the conduct of foreign and security policy. Since it could not be established that the Bundestag's rights clearly outweighed those of the Government under the present circumstances, the Court denied the petition. In doing so the Court declared, referring to its 1994 judgement in the *Bundeswehreinsatz* case, that the principle of Parliamentary consent to the "deployment of armed military forces" is premised on the historical concept of a state of war. However, in the light of the current political conditions where wars are no longer formally declared, the progressive entanglement in an armed confrontation must be deemed to be identical with a formal entry into war. Therefore, according to the Court, every deployment of armed German military forces is, in principle, subject to Parliamentary approval.

9. The Constitutional Court's judgement in the *AWACS* case has been understood to mean 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, or where it can be anticipated that they may be so involved during a particular operation. In its judgement, the Constitutional Court held that since it could not be anticipated from the facts known at the time that the German AWACS crews deployed to Turkey were likely to be directly involved in hostile activities, the petition for a preliminary injunction was not manifestly well-founded. Clearly, the abstract possibility that German soldiers could be the subject of an armed attack does not, as such, turn an operation into one which requires the consent of the Bundestag: the possibility of an armed attack against the State's military may be said to exist at all times. However, exactly what factors should be taken into account in anticipating whether a given operation may be involved in hostile engagements abroad is an open question. For some commentators the nature of the operation and its geographical

proximity to ongoing hostilities is decisive, while for others only a decision by the competent German authorities to participate in military confrontation triggers the need for the consent of the Bundestag.

10. Leaving aside these questions, it is generally accepted that, in line with the case-law of the Constitutional Court, the guarding of foreign military installations by armed German troops, the participation in manoeuvres and military exercises, the regular contribution of seconded German staff to the work of multinational military contingents and bodies within NATO, including participation in AWACS missions, are not subject to the principle of Parliamentary consent. It has been suggested that military liaison activities, humanitarian assistance missions armed for self-defence but lacking a robust mandate, and participation in fact-finding missions or military exchange programmes likewise do not require the consent of the Bundestag.

### III. Parliamentary Practice

11. Between 1994 and 2003, the Bundestag approved the deployment of the German Armed Forces in 29 instances. More than half of these deployments took place in the period after 1999. In accordance with the Constitutional Court's decision in the *Bundeswehreinsatz* case, the Bundestag's control over the decision to deploy armed military forces is limited to the approval or rejection of a Government request. The Bundestag cannot introduce modifications to such requests. However, in recent practice the Bundestag has tied its consent to the insertion of a time-limit in its authorisation to deploy German forces abroad. Thus, its consent had to be renewed, where appropriate, at least every 12 months.

### IV. The Bundestag Participation Act of 2005

12. As early as 1994, the Constitutional Court declared in the *Bundeswehreinsatz* case that it was the legislator's task to determine the manner and extent of the Bundestag's participation in decisions to deploy armed German military forces abroad. This task was eventually taken up by the main political parties in 2003. Although the parties were agreed on the need to regulate the Bundestag's participation in these matters by way of legislation, considerable differences arose as to how the principle of Parliamentary consent could best be reconciled with the principle of swift military action. The opposition parties, fearing that public discussions in the Bundestag could jeopardise the security and feasibility of planned military operations, proposed the establishment of a special Bundestag committee to consider Government requests to deploy German troops. Moreover, they suggested that operations undertaken within the framework of the EU and NATO should be approved by the Bundestag on a general, rather than a case-by-case, basis. Critics of this approach argued that it undermined the very principle of Parliamentary consent. Ultimately, the solution adopted in the final legislation, that is the Bundestag Participation Act of 18 March 2005 (BGBl. I, 775; for an unofficial translation into English, see the ANNEX), was to introduce an expedited procedure for obtaining the Bundestag's consent in certain circumstances.

13. The Bundestag Participation Act consist of nine articles. *Article 1* defines the purpose of the Act, and states the basic principle whereby the deployment of armed German military forces abroad requires the consent of the Bundestag. *Article 2* defines the expression "deployment of armed military forces" as a deployment where soldiers of the German Armed Forces are involved in armed engagements, or their involvement in an armed engagement is to be expected. Preparatory measures preceding such deployments and certain activities, such as humanitarian assistance, are excluded from this definition, and therefore do not normally require the Bundestag's consent. *Article 3* sets out when the Government shall submit its request for the consent of the Bundestag and what elements that request must contain; in addition, it affirms that the Bundestag may only approve or reject, but not modify, the request. *Article 4* creates a simplified procedure for obtaining the Bundestag's consent in the case of deployments of limited intensity and range. In essence, the Bundestag is deemed to have granted its consent to a Government request to deploy troops abroad unless within seven days of the distribution of the request as an official Bundestag document a plenary discussion of the Bundestag is called for. *Article 5* provides that deployments demanding immediate action do not need the prior consent of the Bundestag; however, the Bundestag shall be informed about the deployment in due course and its consent must be obtained subsequently. *Article 6* obliges the Federal Government to regularly inform the Bundestag about ongoing deployments. *Article 7* deals with the extension of the Bundestag's consent to deployments that have remained unchanged in substance since the Bundestag last authorised the deployment in question. The procedure formulated in the second paragraph of Article 7 applies at times when the Bundestag is not in session. *Article 8* declares that the Bundestag may recall its consent. *Article 9* is of a procedural nature.

14. The Bundestag Participation Act of 2005 has generally been welcomed by commentators. As the Act is largely based on the pertinent case-law of the Constitutional Court, its adoption has not fundamentally altered the existing legal position. Certain aspects of the Act have nevertheless been criticised. For some commentators, the definition of 'deployment of armed military forces' in Article 2, which is central to the

operation of the entire Act, represents a missed opportunity to clarify the case-law of the Constitutional Court. It is still unclear what considerations govern the anticipation of the involvement of German troops in an armed engagement abroad, and thus what level of military risk the Government may take before it is required to obtain the Bundestag's consent. Moreover, the exceptions to the definition of "deployment of armed military forces" are essentially indeterminate, and therefore potentially too broad. The simplified consent procedure under Article 4, which requires the Bundestag to take action within a relatively short period of time to rebut the presumption of Parliamentary consent, has been denounced by some as the Bundestag disfranchising itself, while the definition in Article 4 of a "deployment of limited intensity and range" has been considered too vague. These criticisms suggest that the adoption of the Bundestag Participation Act has not answered all of the questions surrounding the deployment of German troops abroad, and that the Act will have to be applied in the light of the Constitutional Court's case-law and the Bundestag's practice.

## V. Literature

15. For further details, see D Wiefelspütz, 'Der Einsatz deutscher Streitkräfte und die konstitutive Beteiligung des Deutschen Bundestages', *Neue Zeitschrift für Wehrrecht* (2003) 133; W Weiß, 'Die Beteiligung des Bundestags bei Einsätzen der Bundeswehr im Ausland—eine kritische Würdigung des Parlamentsbeteiligungsgesetzes', *Neue Zeitschrift für Wehrrecht* (2005) 100. Both of these articles have been relied on in preparing the present note. For a treatment of the subject in English, see G Nolte and H Krieger, "Military Law in Germany", in G Nolte (ed), *European Military Law Systems* (De Gruyter, 2003) 337.

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## ANNEX

### [UNOFFICIAL TRANSLATION]

#### ACT CONCERNING THE PARTICIPATION OF THE BUNDESTAG IN THE DECISION ON THE DEPLOYMENT OF ARMED MILITARY FORCES ABROAD (BUNDESTAG PARTICIPATION ACT)

18 March 2005

(BGBl. I 775)

#### Article 1 (Principle)

- (1) This Act regulates the manner and extent of the participation of the Bundestag in the deployment of armed German military forces abroad. It is without prejudice to Article 115a of the Basic Law.
- (2) The deployment of armed German military forces outside the area of application of the Basic Law requires the consent of the Bundestag.

#### Article 2 (Definitions)

- (1) A deployment of armed military forces takes place when soldiers of the German Federal Armed Forces are involved in armed engagements, or their involvement in an armed engagement is to be anticipated.
- (2) Preparatory measures and planning do not constitute a deployment within the meaning of this Act. They do not require the consent of the Bundestag. The same applies to humanitarian aid services and assistance undertaken by the armed forces where weapons are carried merely for the purposes of self-defence, provided it is not to be expected that the soldiers will be involved in armed engagements.

#### Article 3 (Request)

- (1) The Federal Government shall submit the request for the consent of the Bundestag to the deployment of the armed forces in a timely manner before the start of the deployment.
- (2) The request of the Federal Government shall contain information, in particular, concerning:
  - the mandate of the deployment,
  - the operational area,
  - the legal bases of the deployment,
  - the maximum number of soldiers to be deployed,

- the capabilities of the armed forces to be deployed,
- the planned duration of the deployment, and
- the envisaged costs and financing.

(3) The Bundestag may consent to the request or reject it. Modifications to the request are not permissible.

#### **Article 4 (Simplified consent procedure)**

(1) In the case of deployments of limited intensity and range, consent may be given by simplified procedure. The Federal Government shall set out, giving reasons, the grounds as to why the impending deployment is one of limited intensity and range. The President of the Bundestag shall transmit the request to the Chairmen of the Parliamentary parties and to the Chairmen of the Foreign Affairs Committee and the Defence Committee, as well as to a representative (*Obleute*) designated by each of the Parliamentary parties represented in these Committees, and have the request distributed to all members of the Bundestag in the form of an official Bundestag document. Consent is deemed to have been granted unless within seven days following the distribution of the request a Parliamentary party or five per cent of the members of the Bundestag call for a plenary discussion by the Bundestag. Should a plenary discussion by the Bundestag be called for, the Bundestag shall decide.

(2) A deployment is of limited intensity and range when the number of the deployed soldiers is limited, the circumstances clearly indicate that the deployment is of limited significance and it does not entail participation in a war.

(3) In principle, a deployment is of limited intensity and range, where

- it constitutes a reconnaissance mission which carries weapons merely for the purposes of self-defence,
- it concerns individual soldiers who carry out their duties in allied armed forces on the basis of exchange arrangements, or
- individual soldiers are deployed in the framework of the UN, NATO, the EU, or another organisation implementing a UN mandate.

#### **Article 5 (Subsequent consent)**

(1) Deployments in cases requiring immediate action, which admit of no delay, do not require the prior consent of the Bundestag. The same applies to deployments aimed at rescuing persons from situations of special danger, provided that a public discussion by the Bundestag would endanger the life of the persons to be rescued.

(2) The Bundestag shall be informed, in an appropriate manner, before the start and during the course of the deployment.

(3) The request for consent to the deployment shall be submitted subsequently without delay. If the Bundestag rejects the request, the deployment shall be terminated.

#### **Article 6 (Duty to inform)**

(1) The Federal Government shall inform the Bundestag regularly about the course of the deployments and about developments in the operational area.

(2) In cases referred to in Article 4, paragraph 1 (simplified consent procedure), the Federal Government shall immediately inform the competent Committees and the *Obleute*.

#### **Article 7 (Extension of employments)**

(1) The procedure under Article 4 shall also apply to the extension of a decision granting consent where there are no changes to its substance.

(2) Where the Federal Government requests the extension of a deployment, the deployment shall be deemed authorised until two days, during which the Bundestag is in session, have passed following the distribution of the request as an official document. Should the request be submitted by simplified procedure under Article 4, it shall be deemed authorised until the expiry of the deadline defined in Article 4, paragraph 1, fourth sentence; should a plenary discussion by the Bundestag be called for before the expiry of the deadline, then it shall be deemed authorised until the end of the week, during which the Bundestag is in session, that follows the discussion by the Bundestag. The period of validity of the original authorisation remains unaffected by the regulations set out in sentences 1 and 2.

**Article 8 (Right to recall)**

The Bundestag may recall its consent to the deployment of armed military forces.

**Article 9 (Entry into force)**

This Act comes into force on the day following its announcement.

**Memorandum by Humphry Crum Ewing<sup>6</sup>****Credentials**

1. The views set out in this submission are derived primarily from my practical experience in recent years as an adviser to Opposition defence spokesmen in Parliament and, for a period, as Special Adviser to the House of Commons Defence Committee on Defence Related Information for Parliament.<sup>7</sup> The views also reflect my academic studies over many years—back to my time as an undergraduate student at Oxford in the later 1950s—and my active participation in recent years in the international Defence Studies community.

2. In advising successive Opposition Defence Spokesmen in the House of Lords.<sup>8</sup> I have been regularly confronted with the issue of how to advise, from the point of view of an Opposition which is also an alternative government, on the question of how far Governments should properly be expected to take Parliament into their confidence in relation to military operations and, in particular, how far Governments should be expected to seek explicit Parliamentary support in respect of specific actions rather than simply accounting generally to Parliament for those actions.

**Summary of Views Expressed<sup>9</sup>**

3. Based on both my practical observations and my studies I am clear in my own mind that the engagement of United Kingdom Armed Forces in military operations should remain absolutely an exercise of Prerogative powers and should not be subject to statutory restrictions involving the approval of Parliament. I develop my reasoning for this conclusion at #11 below.

4. I am equally clear in my judgement that there is no place for intervention by the Courts in this process. I explain my reasons for this further conclusion at #23. At #12 to #22 I give a very brief view on the other points on which the Committee has invited submissions.

**Need for Scrupulous Accuracy in Information Provided to Parliament**

5. But at the same time as I am against procedural steps to restrict, by Parliamentary process, the power of the executive to deploy the UK's Armed Forces I believe that it would be in accordance with general concepts of democratic accountability if greater care were to be taken to adhere as far as possible to scrupulous accuracy in what is said to Parliament and to the public about the likely necessity for military operations and about their conduct.

6. In Kosovo, for instance, the gross exaggerations of battle damage claims by NATO air attacks was a matter of particular embarrassment, as much to the Minister answering Questions as it was to the Opposition spokesman asking them.

7. I will not repeat the observations of the Foreign Affairs Committee and of Lord Butler of Brockwell and his panel on the information provided to Parliament and the public in advance of the invasion of Iraq. Having carefully considered those observations and knowing much about the (unpublished) evidence that the Butler Inquiry received I entirely endorse the criticisms the Committee and the Inquiry have reported.

8. I wholeheartedly endorse the recommendation of the House of Commons Foreign Affairs Committee that papers presented to Parliament explaining and/or justifying decisions to take military action should be signed off by a Minister,<sup>10</sup> who would, by Parliamentary convention, be responsible and accountable for the accuracy,

<sup>6</sup> Humphry Crum Ewing is an Associate Fellow of the Royal United Services Institute for Defence & Security Studies, Whitehall (RUSI) and was previously a Research Fellow at the Centre for Defence & International Security Studies, then at Lancaster University (CDISS). He served in the political office at 10 Downing Street of (Sir) John Major as Prime Minister.

<sup>7</sup> It was during this period that pressure from the Defence Committee led to the Inquiry and Report by the Procedure Committee on Parliamentary Scrutiny of Treaties (HC 210 of 1999–2000).

<sup>8</sup> The late Lords Burnham and Vivian and most recently and currently Lord Astor of Hever.

<sup>9</sup> The views expressed in this memorandum are the writer's own and do not represent those of RUSI, the Conservative Party or any other organisation with which he is connected.

<sup>10</sup> Recommendation 24 on p.5 and Para 141 of the Ninth Report 2002-03 of the House of Commons Foreign Affairs Committee The Decision to go to War in Iraq HC 813-I.

to the best of his knowledge, information and belief, of the statements made therein, in the form and context in which they appear.<sup>11</sup>

9. Part at least of the public pressure for greater accountability about “going to war”—to which the Committee may be seen as responding by its decision to undertake this Inquiry—follows from a sense that what “we” are told about what happens in war is not necessarily true and is distorted, often deliberately.

#### 10. A note on sources

In preparing this submission I have considered directly and carefully the 2004 Report of the Public Administration Select Committee,<sup>12</sup> the Government’s response to this; Bill 16 of 2005–06<sup>13</sup> and the House of Commons Library Note on this last. These taken together are usefully, indeed comprehensively, informative. By and large however I am unconvinced by the arguments in favour of Parliamentary control which they adduce, notwithstanding some of the distinguished names that back the Bill. These documents do, however, serve to bring out the practical difficulties of drafting and interpreting such a measure, a factor which weighs very strongly with me in bringing my judgement down against Parliamentary control. In this I agree (admittedly somewhat selectively) with the view of Lord Hurd as to the difficulty of defining “a major conflict” in unambiguous statutory terms.<sup>14</sup> My observations also reflect very extensive background reading in both the academic and defence studies fields which, in the interests of brevity, I do not cite.

#### Arguments in relation to the use of Prerogative powers

11.1 Where crises and potential conflict situations arise it is better to resolve them if possible without the use of force. Frequently however the coercion needed to achieve such a result will involve the threat to use force. For that threat to be effective it must be plausible. If the actual use of force is perceived by those threatened with it to be unlikely, because of procedural difficulties, then it becomes ineffective. Her Majesty’s Government (HMG) must have at its disposal, as a diplomatic and negotiating instrument, a power to use force which is untrammelled and seen to be so.

11.2 If the United Kingdom or its direct interests are attacked (as, for instance, in the case of the Falklands, or by missiles or by terrorists,) HMG must be free to respond immediately with the armed force it judges necessary without further Parliamentary formalities.

11.3 There is the military argument that a drawn out process of Parliamentary endorsement could diminish or deprive our armed forces of the value of surprise and diminish the valuable ‘effect’ of uncertainty on the part of our prospective opponents.

11.4 If Parliamentary consent to use force is required it is inevitable that a propaganda campaign in this sense will be undertaken in order to achieve that consent. This will have a momentum of its own and may result in applying military force to justify the propaganda campaign whereas if tempers had not been raised it might have been possible to stop short of war.

11.5 To introduce Parliamentary restrictions would not be to return to Parliament powers which it once had—it never had them<sup>15</sup>—but rather to extend the powers of the Assembly at the expense of the Executive, this latter being something which is nowadays effectively an Executive Committee of the Assembly.

11.6 Power over the Armed Forces in general terms is vested by Parliament in the Executive, as provided by the Bill of Rights 1688, as developed by succeeding Armed Forces legislation<sup>16</sup> and the terms of Warrants of Appointment. Taken with International Law (*jus gentium*) and the Laws of War (*jus ad bellum*) these form a sufficient and wholly workable set of checks and balances. There is no good case for changing this further.

11.7 Parliamentary control over deployment would, logically, carry with it Parliamentary control over withdrawal, requiring it or preventing it.

<sup>11</sup> A recommendation in similar terms was made earlier by the writer to the Rt Hon Michael Howard QC MP, then Leader of the Opposition.

<sup>12</sup> Taming the Prerogative: Strengthening Ministerial Accountability to Parliament HC 422 of 2003–04.

<sup>13</sup> Armed Forces (Parliamentary Approval for Participation in Armed Conflict).

<sup>14</sup> Taming the Prerogative Para 20.

<sup>15</sup> It would be possible to offer many pages of historical disputation on the issue of whether or not, and if so to what extent, Parliament had such powers in the past—starting with the Anglo-Saxon *fyrd*—but the only two points in this that are material to the Committee’s present inquiry relate to 1914 and 1939, both of which conclusively support the view that in the past Parliament has not seen itself possessed of War Powers.

<sup>16</sup> The Armed Forces legislation is set to be put on a fresh footing by the Tri-Service Bill promised for the present session. This observation is made before seeing the terms of that Bill, about which there may be some important reservations.

**12. The possibilities of other appropriate authority**

It is essential that decisions to send in the Armed Forces should be put to and endorsed, on a recorded vote, by the full Cabinet, properly informed, and not just made by the Prime Minister plus a small inner group.<sup>17</sup>

**13. Examples from elsewhere**

The decision of the Spanish Cortes following a General Election to force the withdrawal of Spanish troops from Iraq. The US War Powers Act.

**14. Any role for Parliament in decision to deploy armed forces?**

A right to be informed promptly and in reasonable detail by an Oral Statement, followed by regular updating Statements which may usually be Written.

**15. For deployment abroad, whether or not into conflict situations**

Certainly not. This is a management, not a policy, decision. Should be dealt with by Written Answers to Questions on a regular cycle.

**16. For actual use of force**

Certainly not. This must be a matter of military judgement by the Commander on the ground subject to his Rules of Engagement.

**17. Retrospective**

Governments should document and explain their actions promptly, clearly and accurately. These Reports should be made to Parliament, by a Minister<sup>18</sup> and should be made on a substantive Resolution. See also #22 below *Legal Justification and evidence*.

**18. Under existing international treaties**

To be reported at once but not requiring further Parliamentary sanction under any new arrangements.

**19. UN security council resolutions**

An absolute and unquestionable authority for action. To be reported at once but not requiring further Parliamentary sanction under any new arrangements.

**20. UN Peace-keeping action**

To be reported at once but not requiring further Parliamentary sanction under any new arrangements.

**21. Operational control of UN or a third state**

A much more difficult question on which to lay down a single rule of practice. I would suggest that the instructions given to the Commander should be disclosed in confidence to the House of Commons Defence Committee and to Opposition leaders and spokesmen on the equivalent of Privy Council terms.

**22. Legal justification + evidence**

As in #17 (*Retrospective Reporting*).

**23. Any role of courts?**

Absolutely not. In accordance with the doctrine of the Separation of the Powers this is a matter for Executive decision monitored by the Legislature/Assembly and is not a matter suitable for Judicial review. The rule *salus populi suprema lex* (the public safety is the over-riding law) must apply. The intrusion of Human Rights Doctrines into Military Law is already responsible for considerable and damaging difficulties.

10 October 2005

### **Memorandum by the German Embassy**

#### PARLIAMENTARY APPROVAL OF ARMED OPERATIONS OF GERMANY'S ARMED FORCES

1. In 1994, the Federal Constitutional Court declared that the use of GER armed forces in cases other than national self-defence was only to be constitutional if conducted within a framework of mutual, collective security.

<sup>17</sup> While the decision to go to war in Iraq in 2003 is an immediately pertinent example of wrong practice a similar situation also applied in the cases, for instance, of Neville Chamberlain and his inner Cabinet of three others (Halifax, Simon and Hoare, advised by Sir Horace Wilson) in the sequence of Munich, the Polish Guarantee and War in 1938-39 and of Sir Anthony Eden in respect of Suez in 1956.

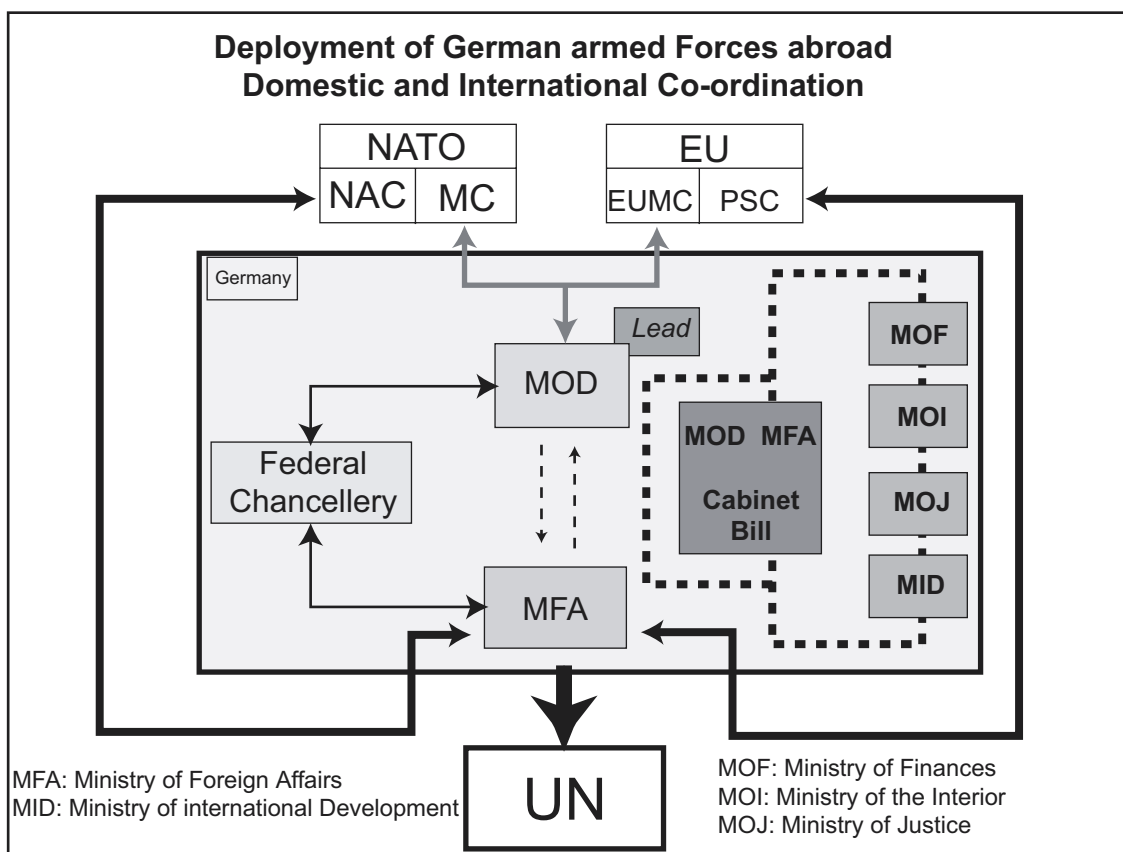
<sup>18</sup> As at #8 above.

Simultaneously, it was reaffirmed that every armed employment of GER military abroad necessitates prior parliamentary approval (that is, such employment necessitates prior parliamentary approval if GER forces may thereby become involved in armed conflict).

This procedure is a product of GER history and conforms to the concept of a “parliamentary military”. Consequently, it remains outside the Executive’s exclusive purview and the constant flux of short-term politics.

2. The responsibility for the external security of GER rests mainly with the Ministers of Foreign Affairs and Defence. Consequently, a close and early coordination between the latter resulting in a common position is essential to the effective planning of military operations.

As mentioned previously, the federal government (in form of the cabinet) has to approve of any military mission before the final request can be brought before parliament. For the above reasons, this request is formulated by both, the Ministry of Foreign Affairs and the Ministry of Defence and is subject to extensive examination by the judicial experts of both ministries. Before it can be discussed by parliament, the request must also be assessed by the Ministry of Justice, the Ministry of the Interior and the Ministry of International Development. Naturally, this entire process involves consultation with GER coalition and alliance partners through the respective channels.



3. Procedures have been optimised over time (so far 40 parliamentary approvals) and subsequently do not hinder a timely participation of GER armed forces in armed deployments.

Normally, crises and the resulting willingness of the international community to act militarily are, to some extent, foreseeable. The necessary national decision-making process can already be initiated, while the consultations of the international community are still ongoing and in this way guarantee a timely parliamentary decision—even in the case of short-term deployments (eg EU-Operation ARTEMIS).

Ad hoc deployments (that is, deployment within days) have been, and will presumably remain, the exception. However, precautions have nonetheless been taken: the law (§5 Parlaments-Beteiligungs-Gesetz (ParlBGes) allows the subsequent parliamentary approval to the armed employment of GER military in cases of extreme urgency and immediate danger. This is no novelty: The emergency evacuation of GER and foreign nationals from Albania (Operation Libelle 1997), for example, was mandated by the parliament only after its successful conclusion.

Timely military action, however, often depends more on swift coordination within the international community than on the Member States' national decision-making processes.

4. The law (ParlBGes) having entered into force on March 23rd (2005) has already found mentioning. Recent important additions and changes include:

- the “simplified procedure for approval” which governs the political decision-making process in cases of military operations of low intensity and equally low bearing (eg scouting missions or deployments of few individuals); Approval to a request by the federal government is granted if there is no objection to the mission by a parliamentary faction or more than five (5) percent of the members of parliament (MdBs) within seven (7) days of the notification of that request.
- The right to retraction. The parliament retains the authority to retract its approval of armed military deployments.
- The “simplified procedure for approval” may also be used in the case of prolonging an ongoing military operations (eg ISAF or KFOR) as long as there are no conceptual changes to these operations and the parliament approves of its use.

Consequently, the ParlBGes conforms to the concept of a “parliamentary military”. Its established procedures ensure timely parliamentary decisions regarding the use of armed military forces.

*14 December 2005*

#### **Memorandum by Masafumi Ishii, Minister (Political) Japanese Embassy**

I am writing in response to your letter of 21 October 2005 to Ambassador Yoshiji Nogami concerning your Committee's “Inquiry into War-Making Powers.” I hereby enclose a copy of written evidence from the Government of Japan, summarizing constitutional checks and balances and the respective roles of the executive and legislature in making the decision to dispatch its Self-Defense Forces.

Article 9 of the Constitution of Japan stipulates that 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. It is understood, however, that the Constitution does not deny the inherent right of individual self-defence that Japan as a sovereign state is entitled to enjoy. On this understanding, the Self-Defense Forces (SDF) is maintained to defend the nation against direct and indirect aggression with the purpose of protecting the peace and independence of the nation, and preserving public order when necessary.

In this context, it is understood that the Constitution prohibits “overseas deployment of armed forces”; in this case, “overseas deployment of armed forces” means dispatch of armed troops to foreign territory with the purpose of using force. On the other hand, the dispatch of troops abroad without the purpose of using force is not prohibited, although missions and mandates need to be explicitly stipulated by statutory law.

The following laws provide the legal basis for the dispatch of SDF troops abroad. The degrees of the involvement of the National Diet (legislature) vary from one law to another.

#### **Self-Defense Forces Law**

The law stipulates the missions, troop organization, activities, mandates, etc of the SDF. Under the law, SDF troops can be dispatched abroad for (a) evacuation of Japanese nationals abroad, and (b) minesweeping. Approval by the National Diet is not required in either case.

#### **International Peace Cooperation Law**

The law authorizes the Government to cooperate with UN peacekeeping operations, international humanitarian relief activities and election monitoring activities. The law requires the Cabinet to decide on an implementation plan. As to certain activities involving SDF troops such as ceasefire observation, a prior approval by the National Diet is required.

### **Law concerning Dispatch of Japan Disaster Relief Team**

The law stipulates the procedures to dispatch Japan Disaster Relief Teams which will be engaged in international disaster relief activities in response to a large-scale disaster abroad. The Minister for Foreign Affairs consults the Director-General of the Japan Defense Agency if the former deems cooperation by SDF troops particularly necessary for relief activities. Approval by the National Diet is not required.

### **Laws concerning Measures to Ensure the Peace and Security of Japan in Situations in Areas Surrounding Japan**

The laws authorize the Government to implement response measures (rear-area logistic support, rear-area search and rescue activities, ship inspection operations, etc) in case of a situation in the areas surrounding Japan. The laws require the Cabinet to decide on a basic plan, which must be approved by the National Diet before its implementation. *Post factum* approval can be sought in case of emergency.

### **Anti-Terrorism Special Measures Law**

Enacted in response to the terrorist attacks on 11 September 2001, the law authorizes the Government to implement response measures (cooperation and support activities, search and rescue activities, relief activities) in order to contribute to the efforts of international society in deterring and eradicating threats of international terrorism. Approval of the National Diet for activities of SDF troops must be sought within 20 days from the commencement of such activities. The law requires the Cabinet to decide on a basic plan, which must be reported to the National Diet.

### **Law Concerning the Special Measures on Humanitarian and Reconstruction Assistance in Iraq**

The law authorizes the Government to dispatch SDF troops to implement activities such as humanitarian and reconstruction assistance in Iraq. Approval of the National Diet for activities of SDF must be sought within 20 days from the commencement of such activities. The law requires the Cabinet to decide on a basic plan, which must be reported to the National Diet.

28 November 2005

## **Memorandum by Professor John McEldowney**

### **Introduction**

The early history of medieval kingship provides the background for an understanding of prerogative powers. The King's authority rested on feudal rights and at the apex of power the King could not be sued in his own courts and might exercise residual powers to protect the realm and for the public good. Setting limits on royal powers has taken several centuries. First, the courts after the execution of Charles I began to reject some of the more extreme examples of the Crown's claims for unfettered powers. Taxation, if levied without the sanction of Parliament was declared illegal in *Darnel's case*<sup>19</sup> in 1627, earlier cases included the restriction that the King must act through the courts of law and could not undertake his own judicial process alone and that Parliament was the supreme law maker.<sup>20</sup> The Bill of Rights 1689 further settled the illegal use of certain specific abuses of the prerogative and through the Petition of Right 1628 and 1640 the subject's right to *habeas corpus* was protected by Parliament and guaranteed by statute.

In the 19th century, it became accepted that prerogative powers were undertaken under ministerial advice, responsible to parliament. While this settles how prerogative powers must be exercised, it remains a wide discretion on ministers when to rely on prerogative powers and how best such powers may be made accountable in an effective way.

### **The Prerogative of Declaring War in a Statutory Context**

The absence of a codified constitution with written definitions and explanations gives rise to doubts about how to define the prerogative<sup>21</sup> and explain its application. It is clear that under prerogative powers the Prime Minister may declare war and engage in military operations in the defence of the realm. It is also clear that Parliament has the authority over the supply vote. The formal declaration of war is less common in recent times than in the past. The law has been recently examined<sup>22</sup> by the courts including the question of what constitutes a state of war. Collins J held that war was a technical question which was begun either by a

<sup>19</sup> (1627) s St Tr 1 or otherwise known as *The Five Knights Case*.

<sup>20</sup> *Prohibitions del Roy* (1607) 12 Co Rep 63, *The Case of Proclamations* (1611) 12 Co Rep 74.

<sup>21</sup> See Public Administration, Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* HC 422 Session 2003-4. The report includes a draft bill setting out proposed codified powers over the Military.

<sup>22</sup> *Amin v Brown* [2005] EWHC 1670, [2005] All ER D 380.

declaration of war or by an act of force which the attacked state treated as creating a state of war. The Government's contention was that there was not a state of war and that the use of force in Iraq was the result of the motion agreed by the House of Commons on 18 March 2003 and UN Security Council Resolutions 678 and 1441.<sup>23</sup> Similarly it was also contended that in the cases of Korea and the Falklands, successive British governments did not consider that in each case a state of war existed. Article 51 of the UN Charter was invoked in terms of the self defence exception to the prohibition against the use of force. In 1999 the use of troops in Yugoslavia was considered to be undertaken without the declaration of war. It is clear that in the absence of a formal declaration of war, the courts would determine this question on the basis of international law, but in cases of doubt this would be determined by the executive. Judicial acceptance of the executive's view, is therefore an implicit acceptance of executive discretion. The question arises as to whether this is appropriate when states do not appear to declare war on each other. The declaration of war also carries ramifications in terms of liabilities, property rights and international treaty obligations over state neutrality.

While it is ambiguous as to the current use of the formal act of declaring war, it is clear that it would be difficult for the Prime Minister to declare war if there was uncertainty over Parliament's willingness to vote supply. Parliament's authority over supply is unambiguous. The anomaly is that Parliament, as matters stand, does not have to be given formal warning of the decision to go to war and has no apparent control over the formal power of declaring war. While the Sovereign remains by virtue of the prerogative and also statutory powers the commander in chief of the armed forces, the armed forces are regulated by statute and by the vote of Parliament to maintain the defence budget and their maintenance. However, their control, organisation and day to day operational decisions are excluded from oversight by courts and stem from prerogative powers.

Recent trends are discernible. The prerogative in general is subject to judicial review and increasingly the Ministry of Defence is accountable in the civil courts for its actions. Thus as the Crown has moved with more modern times, for example since 1993 the Queen pays tax on her private income, their still remains vestiges of prerogative immunities.

The legislative arrangements applicable to the armed forces are indicative of the trend in favour of adopting statutory codification and regulations. The Armed Forces Act 1966–2001 provides a detailed code of discipline and procedures. In contrast, the convention remains that the prior consent of Parliament is not required before the armed forces are committed. This includes the use of the armed forces in aid of the United Nations or when involved in humanitarian purposes. There is however, the need for legislation to introduce conscription.<sup>24</sup> In times of emergency and if Parliament is not sitting then reserve forces may be called up. This is a conditional power as it is subject to Parliamentary control and Parliament must be called within five days under the Reserve Forces Act 1996.<sup>25</sup> In the past few years limited use of the call up power was undertaken in the Gulf war, Afghanistan, and more recently Iraq. This is consistent with the trend in favour of detailed statutory regulation.<sup>26</sup>

There is also a marked trend in terms of integrating human rights into the basics of military law. This is part of a gradual transition in favour of the codification and integration of human rights into domestic law. This involves the interpretation of the decisions of the European Court of Human Rights,<sup>27</sup> reflecting the realities of the Human Rights Act 1998. It also involves integrating EC law in terms of the application of EC law in employment matters such as the Sex Discrimination Act 1975.

Is this trend in favour of statutory codifications reversible? It is unlikely that there will be a retreat away from replacing historic prerogatives powers with a more visible use of statutory authority. This leaves unresolved the question of whether to maintain the discretion of the Prime Minister to act on behalf of the Crown and declare war while retaining the convention that Parliament should be informed and kept up to date with developments.

In recent years the opportunity for debate and discussion after the decision to go to war has been taken. There are many examples which reveal how Parliament in the final analysis relies on the Government to provide sufficient information and allow debate.<sup>28</sup> The lessons of the Iraq war are clear that the Government is largely able to set the agenda, identify the issues and provide its own publicity on the need for military action and its subsequent outcome. This leaves Parliament relatively weakened. The situation may change, if Parliament had the task of prior approval.

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<sup>23</sup> House of Commons, Standard Note, SN/1A/1218 *Parliament and the participation of British Forces in armed conflict*.

<sup>24</sup> See the National Service Act 1948.

<sup>25</sup> Sections 52-4 under the Reserve Forces Act 1996.

<sup>26</sup> The Reserve Forces (Safeguarding of Employment) Act 1985.

<sup>27</sup> *R. v Ministry of Defence ex p Smith* [1996] QB 517 *Lustig-Prean v UK* (1999) 29 EHRR 548.

<sup>28</sup> Claire Taylor, *The Armed Forces (Parliamentary Approval for Participation in Armed Conflict) Bill 16 of 2005-6* House of Commons Research Paper 05/56 (8th August 2005)pps. 8-12.

There are also situations where the deployment of military force is confined to peace time operations such as in aid of the civil authorities. This may include times of national emergency where the safety of life and health of the nation required military assistance.<sup>29</sup> This may include instances where the application of military aid is on peacekeeping duties associated with the United Nations or in disaster relief. Common to any military deployment is the requirements of supply and this must be approved by Parliament.<sup>30</sup> It is instructive to follow Treasury Guidance on circumstances where resources need to be committed before the relevant legislation comes into force and safeguards are required. In particular there are strict rules for the use of the Contingencies Fund to provide urgent finance. It is noteworthy that:

Use of the Contingencies Fund to finance expenditure which, either as a matter of law or constitutional propriety, requires specific legislation is, however, highly exceptional.<sup>31</sup>

The general rule is that the Contingencies Fund cannot be drawn upon for any purpose for which the statutory authority of Parliament is required until legislation has been given a second reading. There is explicit assumption that parliament should be informed and that covering expenditure is the approval of Parliament. Consistent with the use of public funds is the need for Parliamentary approval. The example of the Contingencies Fund provides a good model of a workable arrangement that fits the requirements of emergency powers while maintaining the cover of parliamentary approval. This includes circumstances where there is the need for prior approval and other instances where retrospective approval is needed. The two circumstances apply to the question of parliamentary approval for the use of military force. Thus, if the Contingencies model was used, the use of military force would either be given prior parliamentary approval, or in exceptional circumstances, retrospective approval, provided that at the time of use of force, it was confidently expected that eventual Parliamentary approval would be given. This would place executive powers under a statutory regime that is likely to be much stricter than current arrangements. It is important that if there is to be a statutory scheme replacing the existing prerogative that its scope is not narrowly defined to only the declaration of war. As noted above the declaration of war is rarely used today, that placing it on a legislative basis would have little practical effect as successive governments have followed the trend of not declaring war.

### **The Overseas Experience<sup>32</sup>**

There are some useful points of comparison that emerge from the experience of other countries, not least, is the ability for government's to wage undeclared wars. There are a limited number of countries, whose Parliament's have oversight powers concerning military operations, including peace operations.<sup>33</sup> Even when a declaration of war is to be formally authorised by Parliament, it appears that in many instances the practical effect is limited. France is a good example of this point. Article 35 of the Constitution 1958 provides that a declaration of war is authorised by Parliament. However, in cases of peace keeping activities, and in line with multi-national agreements, the deployment of the military is engaged outside the formal requirements of Parliamentary authority. This leaves the Head of State in many circumstances with overarching authority.

The United States Constitution has divided powers between the Congress the power to declare war and the President, as Commander in Chief to take action in self-defence and lead the armed forces. The United States appears to follow the current trend of waging undeclared wars. Examples are from the period of the war in Korea, later the war in Vietnam and more recently, wars are waged but not declared. The War Powers Resolution<sup>34</sup> was initiated during the Nixon period and passed both houses of Congress after much controversy. The Resolution stipulates that Congress must be consulted and written notification given within 48 hours of action. This is subject to formal approval of up to 60 days, and if approval is not forthcoming then troops are supposed to be withdrawn within a further 30 days. The aim is to provide a link between President, as Commander in Chief and Congress who has constitutional authority to wage war. The ability of the President to wage war successfully without first declaring war seems not to have been limited in practice by the War Powers Resolution, a Resolution that is claimed by some to be unconstitutional.<sup>35</sup> This leaves the law in an unsatisfactory state.

<sup>29</sup> Examples in recent years include the foot and mouth outbreak, fire coverage during the fireman's strike, the use of troops at Heathrow airport.

<sup>30</sup> See HM Treasury, *Government Accounting 2000* with amendments to 2004-5, London, 2000.

<sup>31</sup> *Ibid*; para 2.310-11, 16.

<sup>32</sup> There is a useful survey and analysis in: Standard Note SN/PC/3776 Richard Kelly, *Parliamentary approval for participation in armed conflict- some international comparisons*. House of Commons, Library, 13 October 2005, hereinafter Kelly's paper.

<sup>33</sup> The countries that have such powers include the Czech Republic, Denmark, Germany, Hungary, Italy, the Netherlands, Norway and Sweden. Countries which do not have such powers include the United Kingdom, USA, Belgium, France, Canada, Poland, Portugal, and Spain (see Kelly's paper *op. cit.*)

<sup>34</sup> First vetoed by President Nixon in 1973, but its constitutionality has been questioned by successive Presidents. The War Powers Resolution 50 USC 1541-1548 (1994).

<sup>35</sup> Eugene V Rostow, "Great Cases Make Bad Law: The War Powers Act" 50 Tex LRe. 833. I am very grateful for the advice of my colleague Dan Joyner on the US situation.

In Germany there is no explicit requirement that the *Bundestag* should authorise the deployment of troops, and there is considerable support for legislation requiring that this should be the case. It would appear that the problems faced in bringing in such legislation are similar to the United Kingdom's situation. These are, the difficulty of providing adequate parliamentary oversight, the problem of ensuring that urgent deployment of military force is met while maintaining the authority of Parliament to give approval and the difficulty of monitoring military operations consistent with security. In Italy there is no constitutional provision requiring Parliamentary authorisation. The Executive has responsibility for military action and international policy making. However, in January 2001 there was a resolution of the Chamber of Deputies concerning parliamentary procedure for taking decisions. This is in the context of Italy's Article 11, a repudiation of war clause in the Constitution similar to Article 9 of the Constitution of Japan 1946.

It may be concluded that any proposal to bring prerogative powers to declare and wage war under a statutory framework should be designed to be realistic so that Parliament's accountability, role and function is practical and effective.

The position of Spain is interesting because Article 63 of the Spanish Constitution (1978) gives authority to the king to declare war and make peace. In practical terms this is a decision which is taken by the Prime Minister without the prior approval of Parliament. This was used to allow Spanish troops to be used to support the US in Iraq. Since then the Government has agreed that through a resolution that in future prior approval will be sought for the use of troops abroad. It remains to be seen to what extent future Government's will honour this commitment.

## Conclusions

Placing the prerogative powers associated with declaring war and using military force under statutory control is an important step in the direction of improved accountability and improving the role and standing of Parliament. There are different levels of parliamentary participation including general debate and oversight through select committees. The formal constitutional position that the government can go to war without specific parliamentary authority remains anomalous when technically the supply necessary requires parliamentary approval. Linking the principle of parliamentary authority over supply to the declaration of war suggests that in terms of consistency there should be parliamentary approval of the use of the military in connection with armed conflict. It is opportune to settle arrangements that assert Parliament's authority over the prerogative. It is also important that the declaration of war is itself subject to clarification as to when it may be used and when not. The commitment of military force, whether for peace-keeping or in self defence should require prior parliamentary approval. Using the model of the Contingencies Fund, it would be possible to include prior approval and in certain circumstances retrospective approval. This would cover those circumstances where there is the need to deploy rapid response forces. The government would be entitled to take proactive action provided they are assured that parliamentary approval is likely at the earliest possible opportunity.

24 October 2005

## Memorandum by Claire Wren, One World Trust

### Summary

The One World Trust welcomes the decision by the Constitution Committee to conduct an inquiry into the use of the Royal Prerogative power by Government to deploy UK armed forces.

Recent research by the One World Trust, in conjunction with Democratic Audit and the Federal Trust,<sup>36</sup> has found that the continued existence of the Royal Prerogative in a wide range of areas limits the ability of Parliament to hold the Government to account for decisions that it makes in many areas of foreign policy, including the deployment of troops.

The One World Trust believes that there should be a legislative requirement that parliamentary approval be sought prior to the deployment of UK armed forces. The issue of Government compliance with this legislation should be subject to judicial review.

<sup>36</sup> Burrall, Simon, Brendan Donnelly and Stuart Weir, *Not in our Name: Democracy and foreign Policy in the UK*, London: Methuen, 2006 (forthcoming).

## 1. What alternatives are there to the use of royal prerogative powers in the deployment of armed forces

1.1 The powers granted by the Royal Prerogative should be limited and codified so that the Government must seek the approval of Parliament prior to the deployment of armed forces. Although some have argued that the House of Commons vote on UK involvement in the invasion of Iraq created a constitutional convention whether or not this is the case is superfluous. Just as it is possible to create a constitutional convention so it is possible to remove one, therefore the role of Parliament should be enshrined in primary legislation. This would not only rebalance the relationship between the Government and Parliament in the area of armed conflict, but also firmly establish the principle of parliamentary control in the area of international affairs. This is a matter of democratic oversight.

## 2. Can models, drawn from the practice of other democratic States, provide useful comparisons?

2.1 The example of the War Powers Resolution in the United States provides an interesting comparison. The US President is obliged to consult Congress in every possible instance, and Congress also has the power to require troops to be withdrawn.<sup>37</sup> However, the language in the resolution is weak and open to various interpretations, including who represents Congress for the purpose of consultation. Congress has also been reluctant to enforce the requirements of the resolution, limiting further its usefulness.

2.2 From this example it is clear that any legislation requiring parliamentary approval in the deployment of troops must be clear as to the practical exercise of the requirements including what is meant by parliamentary approval. Any legislation should also allow for the courts to adjudicate on the Government's compliance with the requirements of the legislation where appropriate.

## 3. Should Parliament have a role in the decision to deploy armed forces?

3.1 Yes—the role of Parliament should be defined by primary legislation ensuring that the principles of democracy are upheld and that the Government is held to account for decisions it makes.

## 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?

4.1 Any troop deployment is a significant act of foreign policy, and any act of such significance should be overseen by Parliament. The regimen recommended by Democratic Audit in their submission to the Committee provides a framework which accounts for the varying levels of troop deployments and maintains the role of Parliament at the appropriate level.

4.2 Any such parliamentary approval should be time limited and require regular reports to Parliament on the in country situation. The provision of information is an important part of any oversight structure and as such Parliament would need to receive regular reports, which could be in written form placed in the library, to ensure that the oversight was effective.

### (b) Should parliamentary approval be required before British forces engage in actual use of force? Is retrospective approval ever sufficient?

4.3 There are clearly cases when issues of time or secrecy exclude the possibility of *ex ante* approval; these are mostly a matter of common sense but would include invasion of the UK and hostage-rescue situations. However, these situations are the very rare exception, not the norm, and the presumption would be that of requiring parliamentary approval. In the very limited set of circumstances that would exclude the possibility of *ex ante* approval such parliamentary approval should be sought as soon as is practicable after the event. The issue of correct use of procedure should be justiciable by the UK courts thus creating the accountability structure to ensure that the Government does not exceed its authority under any primary legislation.

4.4 That Parliament is on recess is not a reason for acting without parliamentary approval Parliament should be recalled to discuss and vote on the issue.

## 5. Is there a need for different approaches regarding deployment of UK armed forces:

### (a) Required under existing international treaties?

5.1 No—parliamentary approval should still be sought. Obligations under the North Atlantic Treaty do not preclude national procedures requiring parliamentary approval, just as they do not exclude the right of the Prime Minister to act under the Royal Prerogative.

<sup>37</sup> Grimmett, Richard F, "War Powers Resolution: Presidential Compliance", Congressional Research Service Issue Brief for Congress, 2004.

**(b) Taken in pursuance of UN Security Council authorisation**

5.2 Although a Security Council resolution has implications under international law these are facilitating implications and do not oblige the UK to participate in any deployment of troops.

**(c) As part of UN peace-keeping action?**

5.3 Such peace-keeping missions may have a degree of urgency if they are an intervention to prevent genocide or similar atrocity. It would be possible to make provision for a limited deployment of troops in such situations. The recent declaration from the Millennium Review summit of the United Nations included reference to the need of the United Nations to react under Chapter VII of the United Nations Charter to prevent genocide, war crimes, ethnic cleansing and crimes against humanity under the principles of the "Responsibility to Protect". Peace-keeping actions taken under such provisions authorised by the Security Council may be an example of a case where *ex ante* approval is not possible as urgent intervention is required. However, if at all possible prior parliamentary approval should be sought and will normally be possible as troop deployments are not instant. Neither are United Nations peace-keeping actions; it will normally be possible to seek parliamentary approval, possibly in advance, but conditional on, the final confirmation of the peace-keeping action.

**(d) Placed under the operational control of the UN or a third State?**

5.4 Such transfer of control should always be subject to parliamentary approval and be made conditional on adherence to obligations under international law.

**6. Should the Government be required, or expected, to explain the legal justification for any decision to deploy UK armed forces to use force outside the UK, including providing evidence upon which the legal justification is based?**

6.1 Access to information is an important part of any system of oversight and thus it is essential that full legal justification under UK and international law is provided to Parliament including evidence. Parliament should also have an independent legal counsel who would provide an opinion on the evidence and justification given for Parliament and be available to answer specific queries.

**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 the issues involved?**

7.1 The courts have a long established role in ensuring that the law is upheld, including ruling on the legality of activities of the executive. Primary legislation on the processes governing military deployment would provide the basis for judicial review, thus providing an additional mechanism for ensuring that the Government complies with its legal requirements. There is no *prima facie* case for concerns about the justiciability of any matters that might arise and in any event the courts are more than competent to deal with any difficulties.

*October 2005*

**Memorandum by Anne Palmer JP (Retired)****Explanation Notes. To be Read with the Question and Answer Consultation Paper**

1. As the subject above affects each and every one of us, not only in this Kingdom, but also in other parts of the world, I feel it is my duty to respond. MPs should be aware that some ordinary people have very little faith left in our Parliamentary system or Members of Parliament at this moment in time, and especially on this particular subject.

2. I can do no better than quote from the late Lord Williams of Mostyn on the Iraq war (18 March 2003) "The Government are facing their most serious test. Their majority is at risk. We have had the first Cabinet resignation on an issue of principle. The main parties stand divided. The country and this Parliament each reflect the other. I think your Lordships will agree that as time has gone by the debate has become less bitter but not less grave. Why does it matter? It matters because the outcome of these issues which we are facing with such imminence will determine more than the fate of the present regime in Iraq and more than the future of the unfortunate people of Iraq. It will actually determine the way that Britain and the world confront the central security threat of the 21st century. It will affect the development of the United Nations. It will affect profoundly the relationship between Europe and the United States of America. It will affect the way the United States is minded to engage with the rest of the world and it will affect the internal dynamic of the European Union".

3. *First of all there is a need to set down what is meant by "The Royal Prerogative".* Contrary to popular belief, it is Her Majesty's Government Ministers that sign treaties and makes decisions on going to war. Queen Anne in 1707 became the last Monarch to reject a Bill, while Queen Victoria became the last Monarch to give the Royal Assent in person.

4. Here I refer to the reply given to Lord Jenkins of Putney by The Lord Privy Seal (Viscount Cranborne) on 1st December 1994, "The Royal Prerogative may be defined as those residual powers, rights, immunities and privileges of the Sovereign and of the Crown which **continue to have their legal source in the common law** and which the common law recognises as differing from those of private persons" . . . "Examples of areas where the Royal Prerogative remains important include the conduct of foreign affairs, the defence of the realm and the regulation of the Civil Service." "With the exception of powers personal to the Sovereign under the Royal Prerogative are, by convention, exercised by Ministers. The manner in which they are exercised will depend on the power in question. **Ministers are accountable to Parliament for the use of powers under the Royal Prerogative, as they are powers derived from statute**".

5. Having read the above reply, I interpret that statement as follows. Because the Monarch is constitutionally bound to respect the provisions of the common law which are recognised in Magna Carta and declared in the Bill of Rights, such Royal Prerogative has the following restrictions;

**The use of Prerogative power may not be subversive of the rights and liberties of the subject (See case of Nichols v Nichols, "Prerogative is created for the benefit of the people and cannot be exercised to their prejudice")**

**The Bill of Rights 1688 is a declaration of Common law. It is also an operative statute and it contains the Oath of Allegiance which is required by Magna Carta to be taken by all Crown servants including members of the Armed Forces, MP's and the Judiciary. They are required also to "take into consequence anything to the detriment of the subjects liberties.**

**The Monarch is constitutionally bound to respect the Common Law which were recognised in Magna Carta and declared in the Bill of Rights and so bound by Her Majesty's Coronation Oath. The Royal Prerogatives of the Crown and Parliament were set by common law and cannot be lawfully infringed by them.**

**Each British Subject from the moment they are born is bound by an Oath of Allegiance to the Crown and this country, just as if that person has declared so out loud.**

6. The Queen's constitutional prerogatives are the personal discretionary powers which remain in the Sovereign's hands. They include 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. In ordinary circumstances The Queen, as a constitutional Monarch accepts Ministerial advice about the use of these powers if it is available, whether she personally agrees with that advice or not. That constitutional position ensures that Ministers take responsibility for the use of the powers. (From Public Administration Select Committee "Taming the Prerogative")

7. From the very recent performances of the Executive, there is a great need to tame THEM, for the ordinary person sees the abuse of power and never more so than at this present time.

8. For those that may say we have no Constitution, I would point to the flurry of Private Member's Bills, put forward by those that would repeal certain common laws or article from them. Most common laws are listed in the Civil Contingencies Bill.

9. We are told that European Union law is "supreme" and have read for ourselves that the European Court of Justice may overrule our Government. What would be the position of the United Kingdom Government if the EU attempted to impose its will on British citizens (Her majesty's subjects) by force in the circumstances as described in Article 224 of the Treaty establishing the European Community Rome 25 March 1975? Especially **"in case of war or serious international tension constituting a threat of war, or in order to carry out undertakings into which it has entered for the purpose of maintaining peace and international security"**?

10. Under no circumstances should any Government of this Country transfer to others, even through "Treaties", the Royal Prerogative of Treaty Making or War Making Powers, or sending our Forces into battle. (I say this for I am mindful of the requirement by the European Union for complete Legal Personality in Clause 1-7 "The Union shall have Legal Personality" in the Treaty Establishing a Constitution for Europe. Even if we had derogation from this Clause, we have found, through experience, that the position would soon change, and we would never have the ability to control our own forces again.

11. There are different types of war, and after considerable thought, I believe a separation of these different types should at least be considered.

12. (A) An unexpected attack from another State requires immediate action. This should be the only time when the Royal Prerogative should come into action similar to activation as at present. However, the Crown should also be presented with the same information, from the known source, and the Attorney Generals legal advice to the Prime Minister. Guidance should be forthcoming from the Crown or Heir to the Throne in Her Majesty's absence. Parliament should be informed but because of the possible need for immediate action, debates in Parliament should be retrospective.

13. (B) An incident simmering for a while, yet has not attacked our Country (such as the situation in Iraq) should be debated fully by both Houses before any action is taken. The legality issue must be clear and precise. The Crown must be well informed and particular note must be made available to Parliament. It should also be recognised that it is preferable to bring the people with Government.

14. (C) A war or action involving more than one Country such as through the United Nations or Nato. As above. If Parliament is against action, this should be stated clearly to the Crown and the people, more so and especially if the Government is determined to go ahead.

15. (D) War on Terrorism. War can only be against another State or Country; war on terrorism is dealt with under other legislation. If British nationals are involved in acts of Terrorism, treason laws must be used, and should have been used in the past. Where the Act of Treason 1795 was repealed in the Crime And Disorder Act 1998 (in error I understand-for the whole was repealed when it was only the death penalty that should have been replaced with life imprisonment?) this act should be re-instated. **There is no such person as a good terrorist.**

16. Many people now believe that entry into the European Community was, right from the beginning, illegal/unlawful, particularly as they feel they were, (to put it politely) also deliberately misled during the only referendum on the European Community they have ever had. Anything that prevents the people from enjoying their rights as laid down in Magna Carta and Bill of Rights is illegal/unlawful.

17. Would the proposed "Supreme Court" have jurisdiction? Even that sadly would/could be overruled by the European Court of Justice.

18. I have mentioned the Oath of Allegiance more than once in this report because it is important and there appears to be a sense that MP's have lost sight of that solemn oath, some openly dislike saying that oath. The people have a duty to protect the Crown, their laws that the Monarch solemnly declared in Her Coronation Oath. It is time that the Crown was brought closer to the people. It is time that she is seen to take part more often. The Crown is the glue that holds this country together. They are Her Majesty's forces that governments of the day send here there and everywhere.

19. Having more or less completed this paper, I have just come across others that spell out just how much this Government want these powers. What price loyalty? What price the RESPECT they wanted. I have decided therefore to include one more paragraph.

20. I have watched over recent years the humiliation metered out to our Queen, even when debating ID cards the message went out that Her Majesty would not need to have fingerprints, etc taken etc other Members of the Royal Family would have to. This would mean that the next KING's intimate details could be flashed round the world for anyone to read. We have watched while the Royal Yacht was removed, etc. I have read the words that they (Royals) have managed through birth to be where they are and is this right in a democratic society? Do you really think we have a "democratic" society? In this politically correct world where the people are beginning to be afraid of saying the 'wrong thing' for fear of being prosecuted is a democratic society? Where English people that declare themselves so, are ridiculed, denigrated as Little Englanders, yet Scots, Welsh and Irish can rejoice at being so, is that democratic? Why do I want to include the Queen more? Or to ensure Parliament too has a role? The answer is because I have lost trust in this Government. The Removal of the Royal Prerogative for signing Treaties, sending our troops into battle, bringing what it contained ALL under the control of Government? And what will the Government do with that power? The Prime Minister's signature is already on the EU Constitution. That signature signalled that he is ready to hand the legal authority for all those duties that are under the Royal Prerogative, to the European Union, Article 1-7 (1-6) "The Union shall have legal authority". Will the Committee endorse the proposals? Will both Houses? I hope the Committee understand that the people will not have any loyalty to the European Union and they never will have.

21. My final type of war, not placed above or mentioned as yet, not even thought about until I had completed this paper, is of course, Civil War.

I do not belong to any Political Party or Organisation. This is submitted on an individual basis.

**Consultation paper. See enclosed “Explanation Notes”**

**(1) What alternatives are there to the use of royal prerogative powers in the deployment of armed forces?**

1. There are no alternatives to the Royal Prerogative for it is embedded in our Constitution. No one Minister should have the sole use of “The Royal Prerogative” any more. Her Majesty Queen Elizabeth II (the Crown) should be advised/kept informed before announcement and she should give advice and consent or rejection. It is up to the Minister to put his/her case effectively to convince the Crown that the only course of action to take is sending Her Majesty’s troops into battle. The Ministers should only action the Royal Prerogative when sure they have the Country with them. She may take advice from her ministers, but that advice must be within the constraints of our Constitution. Members of Her Majesty’s Forces must be recruited as per Act of Settlement and their allegiance must be without doubt to the Crown and this Country.

**(2) Can models, drawn from the practice of other democratic States, provide useful comparisons?**

2. Other “Democratic States” have looked to us, (this Country) and, had we been guided by our own role model, its rules and guidance from our unique history, we would have still been a ‘role model’ for other states. We must look to our own history once more, and the short answer is “look and learn” but do not copy others, just simply use the guidelines of those that have gone before and learn from our own history. It is this country that has won the battles aided and abetted by our true friends. Why draw from second best? Why would we want to draw from other states that have lost wars? If the Government have to start looking to other States for guidance, if they feel so undecided, insecure or unable to make decisions for themselves, they should resign forthwith. There is no place in Government for the weak and undecided. These are not leaders, they are ‘followers’.

**(3) Should Parliament have a role in the decision to deploy armed forces?**

3. The decision to send our troops into war must be the most serious action any Government can contemplate. I accept that the more people that are involved in the decision-making, the more difficult the decision-making can become. We see this happening in the European Union at this time. It also happens in the United Nations. More people may die when there is delay in matters of this nature. Our forces are bound by their Oaths of Allegiance as are our Government and MP’s, and this is how it must remain for all time coming. I am mindful that Parliament ‘had its say’ on sending our troops into war with Iraq, and I believe that it is right for them to continue to ‘have a say’, and as they have already ‘set a precedent’ on the decision making on ‘going to war’ they believe this should continue’. I hope it does, **although I see no point at all in asking Members of Parliament, if they have to be ‘whipped’ or pressured into voting a way that their own heart or conscience tells them otherwise.**

4. I ask the Members of the Committee a question at this point, and I ask it with the greatest of respect, “In hindsight”, do you think that Members of Parliament gave the right answer as far as going to battle with Iraq was concerned? That leads me on to the next point which is, in order to make a decision, the person (people, MP’s) have to be given the true facts of the matter. The question then has to be, “where do the MP’s get their facts from”? Direct from the Attorney General? The Prime Minister? The Foreign Secretary? Our Security or Secret Service? This has to be the most important issue. How can we rely on ‘facts’, if we (or Government Ministers) no longer ‘trust’ the source, from where the alleged ‘facts’ came?

5. We listened in horror when the Prime Minister told the House of Commons that Saddam had weapons of mass destruction and that he could use them within 45 minutes and that it was a threat to us in the West. Those words spoken by the Prime Minister sent a chill down the spines of many of the people watching that programme.

6. Britain however, should always be ‘at the ready’ for battle. Unfortunately, we are allowing ourselves to be left “at grave risk” by following the European Defence Policy. **It is like a re-run of the 1930’s. It is this Government’s duty to ensure that this Country is able to protect itself at all times.** It is no use relying on other states. We see the Government ordering defence equipment that is incompatible with the US tried and tested systems. Will they be compatible with NATO? Will they be compatible with The United Nations?

**(4) If Parliament should have a role, what form should this take?**

7. I do believe that Parliament should have a role, but as above. Parliament cannot have a “true” role however, if it does not have access to the full Legal Advice of the Attorney General, and the full advice from the security service that CAN come into the public’s domain. Many people are aware and accept the need for secrecy and confidentiality. However I am also aware that the countries of the EU know our financial position, armaments and manpower, most if not all the statistics of our military position and the availability of our

Army, Navy and Air-force, they know also of our oil and gas reserves, economy, strength of our forces and equipment. I therefore find it difficult to accept that certain secrets should be kept from the people of THIS country.

**(5) Is there a need for different approaches regarding deployment of UK armed forces**

8. Even in today's world our approaches regarding deployment of UK armed forces have been tried and tested again and again. Our UK Armed forces do however, need the backing of the Members of Parliament, they need equipment that they can rely on, now, today, not in 2009 or 2012 or 2020. Shoes that melt? Sharing protective clothing? I despair at equipment being alienated to the European Union's Future Rapid Reaction System (FRES) and ask is it compatible with NATO? The United Nations? Or the United States of America? (See the EU's Green paper on Defence Procurement and it soon becomes obvious that we, as an independent and sovereign nation, are no longer compatible with the EU at all). We do indeed need different approaches; we need independence and complete authority (sovereignty) over our defence and its equipment for the true defence of our Realm.

**(a) Required under existing international treaties;**

9. No Treaty should be entered into or even contemplated that removes or restricts the movement of our Forces, equipment, or decision-making powers away from this Country. Full backing be given in particular to Nato and to the United Nations. However, I do see problems arising because the latter as with the EU is getting far too big to work, as it should. There has been the suggestion of the need (urgency) to "modernise" the United Nations. Experience has shown that "modernisation" in modern terms means "to make things easier for the ones with the loudest voices and the most votes". (The 'modernisation' of the House of Lords as an example)

10. I am greatly concerned, in view of the European Union's desire to have a European Union Army of which the Rapid Reaction Force is the beginning, that we are slipping into a situation that we cannot get out of. This present Government wants to be at the heart of "Europe" but the next Prime Minister, or **the people may not want to be**. I refer to "Whereas it was established in 1932 that "No Parliament may bind its successors" (Vauxhall Estates v Liverpool Corporation 1, KB 733). I refer to the words in "Aspects of the EU's Constitutional Treaty dated 23 March page 19, "However, if Parliament were to pass legislation which was clearly expressed to be inconsistent with EU laws, it would amount to a constitutional and legal revolution for any court in the UK to assert that the principle that Parliament cannot bind its successors no longer applied, **and we consider it inconceivable that any court in the UK would in the foreseeable circumstances, behave that way**". The Committee's conclusion believed that the constitutional treaty would maintain the existing situation; **I maintain emphatically that it would not**. I place here in this consultation paper, that no one should take risks with this great country of **ours in guessing whose interpretation is right**.

11. **On page 7 of the Quarter 4 Report to HM Treasury, as at 31 March 2004, and things have moved on at a pace since then, "an EU operation with recourse to NATO assets under Berlin Plus arrangements, or an autonomous EU operation.**

12. The decision in sending our troops to war is constitutionally bound and has to abide by the common laws of this country, and it must remain our Government and Parliament's decision including and embracing the Crown. We cannot put the defence of our Country at risk. We cannot, **or should not** put too much trust in other countries, and we must be accountable and responsible for ourselves as a sovereign independent Country. Some friends are false friends; we lose them when business profit gets in the way, when contracts with other bodies take preference to friendship. Warnings however, go unheeded and caution is thrown to the wind and history will then repeat itself over and over again. Nation States are dead, say it loud and long enough and some might even believe it. Nation States can work together, they do not have to give up sovereignty over national laws, economy, defence, airspace, ports, fishing, sea, agriculture, trade etc at all. To meld into a one State of Europe would be a disaster for this Country and the people.

**(b) Taken in pursuance of UN Security Council authorisation;**

13. Full backing should be authorised by the United Nations Security Council before committing our troops into battle, and especially when attacking a sovereign nation state that has not attacked our (or any other) country. There should be no question as to the legality of the action to be taken. To place our troops, Officers, Generals and Commanders under the fear of being charged under International Criminal Court or, as we have incorporated the ICC's rules into our Law, expect our Forces to go into battle and fear, that on their return they may find that they could be charged under criminal law for alleged criminal actions by the service

personnel under them. This to me, places them in an impossible position, it may also affect their decision making at a critical time on the 'war scene' which might even result in losing a battle or the un-necessary deaths of men under their command.

(c) As part of UN peace-keeping action;

14. I see no reason to change our role in the United Nations as regards part of the UN Peace keeping action or particularly our role in UN Security Council. No one must speak "for" us, we must speak for ourselves. Should our Government be inclined to give up its role on the Security Council (particularly as our PM has said that he would not) I would see it as a betrayal of trust. I am aware that he will have a role this year in any case as (Temporary) President of European Union.

(d) Placed under the operational control of the UN or a third State?

15. This question intrigues me. Do you mean the coming third State of the European Union? **NATO is a "body" of different States as is the United Nations. When one mission is finished our troops return home and back under the control of our Army Commanders, our Navy Commanders etc.** Our army is the "British" Army made up of four elements in what used to be four Countries and four nations, but now bound together by treaties and have been since 1707. The position has not changed from that time until 1997 and devolution. The European Union continues (in spite of the rejection of the EU Constitution) to work its way through to becoming a state and it wants its own Army, but we know from the United Kingdom's union, that a country without an army is no longer a free country. It can no longer defend itself. **Our Troops should only be used in those already tested organisations. We cannot keep spreading them around as we are doing at the moment.**

16. **We do not (to the best of my knowledge) hire out our Army to "third states". They are not mercenaries. Their loyalty is to our Country only.**

(6) Should the Government be required, or expected, to explain the legal justification for any decision to deploy UK armed forces to use force outside the UK, including providing the evidence upon which the legal justification is based?

17. Without doubt, every time. WE are not yet under a dictatorship. If there is no evidence there is no legal base for committing our forces. It is far better to give that evidence openly rather than having it "leaked" out, as in today's world, as seems to happen. I also believe (rightly or wrongly) that it is only through lack of trust in the government of the day, that evidence is leaked. I also realise that certain evidence can be deliberately leaked to the government's advantage as well as against. There are certain rules of engagement that have to be followed before any "attack" on another sovereign Country. All the requirements thus laid down should be followed.

(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?

18. As the Attorney General is the most important senior person to give the legal basis, or his interpretation of the required legal base, I doubt very much that it would be deemed 'correct' for the Courts to have jurisdiction to rule upon or over the decision to use force. However, I have to question, which "Courts" are you suggesting? Our British Courts, the European Union Court of Justice? The European Court of Human Rights or the International Courts?

19. It is the unique separation of powers that makes our Country great and that separation of powers must be protected at all costs. Government (Parliament consisting of both Houses) make the laws. The Courts apply (interpret) the laws.

20. The question is however, which "Rule of Law" would the judges, whose oath of allegiance is to the Crown and this Country, look to? Will it be to this Country's Constitution or to the **European Treaties this country has entered into?**

22 August 2005

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**Memorandum by Richard Ramsey, Oxford Brookes University****1. WHAT ALTERNATIVES ARE THERE TO THE USE OF ROYAL PREROGATIVE POWERS IN THE DEPLOYMENT OF ARMED FORCES?**

i. As the Queen is Commander-in-Chief of the Armed Forces, it must follow that their deployment is effectively at the behest of the Government of the day. Those in the Armed Forces take an oath of allegiance to the Queen personally as well as promising to obey those in authority over them, but in this sense the Crown is the Government and it seems that no difference would exist were that allegiance to be given to “The State”. The Crown Prosecution Service may be renamed the State Prosecution Service. It is difficult to see what real advantage is derived from such a change in rhetoric, although the dissociation of monarch from state might be perceived as democratically increasing the transparency of the actual apparatus. No one seriously expects the monarch personally to command troops in battle any more than, strictly speaking, attacking a judge in court would now be tried as treason.

ii. Presumably an Act of Parliament or perhaps an Order in Council would enable authority to be transferred ostensibly to the Prime Minister but whilst executive command may reasonably be left to the senior officers of the Armed Forces, it cannot be imagined that they would be left in absolute control of on what occasions such forces should be used. In practice, it is inconceivable how hostilities could be commenced or directed save by a ‘War Cabinet’.

**2. CAN MODELS, DRAWN FROM THE PRACTICE OF OTHER DEMOCRATIC STATES, PROVIDE USEFUL COMPARISONS?**

i. I am unaware of the practice of other states.

**3. SHOULD PARLIAMENT HAVE A ROLE IN THE DECISION TO DEPLOY ARMED FORCES?**

i. Parliament’s present role seems to be more a subsequent check, derived from its power to vote or withhold supply, as well as providing necessary legislative support for the government’s actions and possibly, if such action were seen as ill-advised by a majority in Parliament, passing a vote of no confidence. Parliament’s approval of the United Kingdom’s entry into hostilities with another state might be as well controlled by ex post facto checks such as those already mentioned. It is hard to conceive of a situation where the government would entertain clandestine pre-emptive action but there might be situations where a government would need to react swiftly in defence. One imagines that a sense of the country’s mood would already have been assessed in such a position. Joseph Chitty’s *A Treatise on the Law of the Prerogatives of the Crown* (1820) says (chapter IV, section IV) that the right to make war or peace may be exercise partially or absolutely, but this relates more to the sovereign’s right to wage war against a country and yet except some of its inhabitants. Chitty, albeit almost 200 years ago, says that the king alone has the discretion to make war, even where another state has behaved contumaciously. Citing Brooke’s *Abridgement*, he adds that even were all the people of England wishing to make war against Denmark, there is no war unless the King consents to it.

ii. It appears from Chitty that a war should be publicly declared (citing Grotius and Blackstone) but he concludes that no formal declaration is needed for the King’s subjects to be bound to treat as enemies those that the King has decided so to denominate and has commenced war. I cannot see how an act of war can be other than an act of state rather than the private aggression of individuals and they cannot, as citizens, effectively dissociate themselves from it, once commenced.

iii. This is especially awkward where politicians have repeatedly said that there is a war against terrorism. This seems as much a metaphor as the phrase “war on want”. It follows that, whilst special emergency powers may be justified in the face of severe terrorist activity, we should not allow ourselves to be obfuscated by the implementation of excessive powers arrogated to the state as if it (and we as its citizens) were truly at war with another nation-state. It is extremely difficult to determine accurately what the population as a whole wants its Government to do and, aspects of totalitarian democracy aside, a Government must follow not mere populist fancy but a form of “right reason” in the pursuit of its policies, Parliament’s function should be a cautious weighing up of the demands of the entire state and the countervailing expression of any large number of its citizens. Parliament should call on Government to account for its decisions and even make a particular administration withdraw from a course of action, but if this were to precede Government’s exercise of power, this might lead to mere obstruction and produce inertia.

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?*

i. The deployment of troops abroad is of the highest political significance. Express authority might be required where this occurs in peace-time, for instance to assist a civil government suffering a natural disaster. Swift reaction might well be needed but must often not be so urgent as to side-step parliamentary debate. It is hard to envisage situations where British troops would be sent to undertake covert operations either in pursuit of our own policies or to aid our allies with overt parliamentary approval preceding it.

(b) *Should Parliamentary approval be required before British forces engage in actual use of force? Is retrospective approval ever sufficient?*

i. In many situations hostilities must develop slowly and the mood of Parliament might then be tested and be a pre-requisite to action, politically if not legally necessary. The seriousness of a threat might not be known of or understood by the public (one appreciates that Government would not wish to cause unnecessary alarm) but despite the naïveté of one's childish fears of the "four-minute warning" of the 50s and early 60s, the invasion of the Falklands seems to have come as a surprise to most of the public and even to have taken the Government relatively unawares. It can hardly have been a popular decision (except among a jingoistic few) to take to arms to re-conquer the islands, but it would not have added a sense of resolve if Parliament had merely discussed the issue inconclusively. Retrospective approval must be sufficient in such cases. No problem can arise unless the ratification seeks to render a past illegal act legal.

5. IS THERE A NEED FOR DIFFERENT APPROACHES REGARDING DEPLOYMENT OF UK 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?*

i. I am not qualified to comment on this and lack time to consider it fully.

6. SHOULD THE GOVERNMENT BE REQUIRED, OR EXPECTED, TO EXPLAIN THE LEGAL JUSTIFICATION FOR ANY DECISION TO DEPLOY UK ARMED FORCES TO USE FORCE OUTSIDE THE UK, INCLUDING PROVIDING THE EVIDENCE UPON WHICH THE LEGAL JUSTIFICATION IS BASED?

i. Briefly, yes. The legal advice received by Government from the Attorney-General is unlike other ministerial papers. "By convention, written opinions of the Law Officers, unlike other Ministerial papers, are generally made available to succeeding Administrations." (Ministerial Code of Conduct, paragraph 22). It is hard to comprehend why the present Government should have been so keen to keep secret Lord Goldsmith's advice on the legality of the Iraq War. A more historical view might have been appreciated, along with more frankness, especially in the light of the Freedom of Information Act and the general trend towards open government.

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?

i. Emphatically, no. The decision in *CCSU v Minister for the Civil Service (GCHQ)* [1985] AC 374 expressly excludes matters of national security from consideration of the prerogative by the courts (per Lord Diplock). Lord Roskill said the courts "have also been obliged to recognise that in some fields that barrier [against inordinate claims by the executive] must be lowered and that on occasions, albeit with reluctance, the courts must accept that the claims of executive power must take precedence over those of the individual. One such field is that of national security."

ii. It may be different with matters concerning a single individual but general policy, despite affecting the lives of thousands of individuals, must be left in the hands of Government which alone has the information (as Lord Diplock said) to enable it to know how to proceed. This view may be complacent but it is better than having the judiciary entering upon a collision course with the executive. The Belmarsh detainees case may well be rightly decided by the Law Lords, but the subsequent refusal of Government to uphold its spirit shows that there is no doubt who would be the winner. The judiciary might be more trustworthy than politicians, but

dependence upon judicial activism would lead to the flouting of any check through the doctrine of the separation of powers.

iii. In conclusion, the apparent establishment of a constitutional convention that Parliamentary approval be sought prior to engaging in hostilities is desirable and seems to have happened after the Iraq War debate. It may be better left at that. I am more concerned about the apparent convention that MPs do not criticise the Government's handling of a conflict while it subsists, for fear of undermining the morale of the troops in action. In the light of the amount of general media criticism that must have been evident to all engaged in the present conflict: such self-denial is unnecessary. Self-interest and stupidity are not necessarily vices abandoned by those in government and pusillanimous and dishonest motives cannot be left for historians to discover. I commend the statement of Sir Thomas Smith in *De Republica Anglorum* (1583) who wrote:

“But as such absolute administration in time of warre when all is in armes, and when lawes hold their peace because they cannot be heard, is most necessarie: so in time of peace, the same is verie dangerous, aswell to him that doth use it, and much more to the people upon whom it is used: whereof the cause is the frailtie of mans nature, which (as Plato saith) cannot abide or beare long that absolute and uncontrold authorities, without swelling into too much pride and insolencie.” (Lib 1, chap 8).

31 October 2005

### Memorandum by General Sir Michael Rose

1. Armed conflict becomes legitimate only when it is supported by the majority of the people of a country and there is a clear moral basis for engaging in conflict. The two elements are not necessarily conditional upon each other.
2. Winning wars needs total and concerted commitment by all parties. Disharmony between the people, the government and the armed forces is likely to result in a lack of commitment by one party or another,—something that inevitably will make success more difficult to achieve.
3. A full and clear justification for engaging in conflict,—an undertaking that will necessarily put people's lives at risk,—is part of the social and contract between the people, the government and the armed forces. Without a full, credible and clear justification, trust will be destroyed, and this will adversely affect the level of commitment and morale. There is therefore great benefit to be gained by a government a full and proper justification of its actions prior to engaging in armed conflict.
4. 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.
5. A formal requirement for prior parliamentary authorisation for entering into conflict situations can therefore only be of benefit to members of the armed forces. They would have the reassurance that they would not be asked to sacrifice their lives in a cause that was not fully supported by Parliament and the people of this country. There will, however, be cases when for security reasons such prior authorisation may not be sensible or indeed possible. There should therefore be some blanket authority to the government given for special cases,—but these should always be brought before Parliament *post facto* for scrutiny. There is already, I believe, such a mechanism in place for scrutinising the work of the Security Services.
6. “Mission creep” is not only inevitable but it is also in some cases necessary to cope with changing strategic circumstances. However, each major shift in the rules of engagement and troops levels should be formally justified, if only *post facto*.
7. 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. If time was short and a deployment had to take place without such Parliamentary authorisation, then there would have to be an immediate assurance given that this would be obtained *post facto* as soon as possible.
8. If use of force has already been authorised by the UN, further national consent should only be needed if a major change in the UN rules of engagement or nature of the deployment was being considered. For example, a peacekeeping force could not be ordered to engage in war fighting (other than for reasons of self defence) without authorisation of a national parliament.

9. One final caveat: too much micro management by Parliament would certainly reduce the effectiveness of our armed forces when deployed on operations. Therefore the requirement for prior legal authorisation must not be translated into the tactical management of an operation.

6 March 2006

### **Memorandum by Ingemar Dolfe, Minister, Swedish Embassy**

#### **CONSTITUTIONAL PREREQUISITES CONCERNING DEPLOYMENT OF SWEDISH ARMED FORCES ABROAD**

##### **INTRODUCTION**

The government represents Sweden in interstate relations and the government has been given far reaching competencies through the Swedish constitution.

However, agreements with other governments and unilateral international obligations need parliamentary approval if they

- (1) presuppose legislative action,
- (2) concern areas within parliamentary competencies (such as budgetary dispositions),
- (3) are of greater importance.

The government should consult the Advisory Council on Foreign Affairs on all foreign policy issues of greater importance, if possible.

A foreign policy issue is an issue concerning Sweden's relations to other states or international organisations. Whether a foreign policy issue is of greater importance or not is decided by the government under constitutional responsibility, and "if possible" should be read "if it is not impossible due to particular circumstances".

Deploying Swedish armed forces abroad normally needs to be approved by the Parliament. But as outlined below, the Parliament has adopted two laws through which the decision making power has been delegated to the government under certain preconditions.

##### **DEPLOYING ARMED FORCES TO ANOTHER COUNTRY**

According to the Swedish Constitution, the government can use the armed forces to meet an armed attack against the country.

In addition, Swedish armed forces may be used in battle or deployed in another country only if

- (1) the Parliament approves it,
- (2) it is approved by law through which the preconditions for such use or deployment are identified, or
- (3) the obligation to act follows from international agreement or duty previously approved by the Parliament. (This refers to article 43 of the UN Charter, in which member states are obliged to provide necessary troops for maintaining international peace and security to the Security Council's disposal upon its request).

Thus, deploying a Swedish armed forces contingent abroad normally needs to be approved by the Parliament, as stated under (1) above.

But as is indicated under (2) above, the Parliament can delegate to the Government the decision making power to deploy Swedish troops abroad. The Parliament has adopted two such laws:

- (i) The Law Concerning Armed Forces Service Abroad
- (ii) The Law Concerning Training for Peacekeeping Operations

Below some comments about the use of these laws:

- (i) **The Law Concerning Armed Forces Service Abroad** stipulates that the government may decide to deploy Swedish troops abroad for peacekeeping purposes, if asked to do so by the UN or in accordance with a decision taken by the OSCE.

On the basis of this law, the Government decided to deploy Swedish armed forces to traditional UN Peacekeeping Operations in the Middle East area.

However, all the latest operations abroad (for example in Afghanistan (ISAF), DR Congo (MONUC, Artemis), Liberia (UNMIL), Kosovo (KFOR) and Bosnia-Herzegovina (IFOR, SFOR and Althea), have been approved by a special decision in Parliament. The reason being that these operations were not considered as strictly peacekeeping in character, ie the mandates of the operations were not entirely founded on chapter VI of the UN Charter.

- (ii) **The Law concerning Training for Peacekeeping Operations** allows sending Swedish troops to participate in peacekeeping training abroad. This law mainly aims at providing the possibility to partake in PfP-exercises without having to ask for parliamentary approval each time.

*25 November 2005*

#### **Memorandum by Anthony Tuffin**

1. The power of modern Prime Ministers to use the royal prerogative to make war is paradoxically less democratic than when the Sovereign exercised the power personally.
2. This is because the Sovereign's power to make war was balanced by Parliament's power to levy or withhold taxes but, now, the Prime Minister not only exercises the royal prerogative but also in effect controls the House of Commons which has the power to levy or withhold taxes.
3. Nevertheless, I do not advocate returning the royal prerogative to the sovereign.
4. The most obvious solution would be to transfer war-making powers to the Commons, which is the body that is supposed to represent the electorate.
5. However, as mentioned in paragraph 2 above, the Prime Minister in effect controls the Commons so that alone would not be enough. At the same time, the Commons should be made more independent of the Government generally and of the Prime Minister in particular. For example:
  - 5.1. The Prime Minister's powers of patronage would be reduced if there was a wholly elected House of Lords or there was a change to a unicameral system (with appropriate safeguards to prevent dictatorship by the Commons).
  - 5.2. The powers of the Government and the Opposition leadership would be restricted if MPs could freely elect members of their committees and the committees could freely elect their own chairpersons.
  - 5.3. The powers of MPs and their electors would be increased and the powers of the Government and the Opposition leadership would be reduced if MPs were elected by Single Transferable Vote because they would then be more accountable to their electors than to their party machines.

*11 October 2005*