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Parliamentary Approval for Deploying the Armed Forces: An Introduction to the Issues

In March 2008 the Government published its White Paper on the *Governance of Britain*. As part of the wider proposals for constitutional reform contained in that paper, the Government has proposed that Parliament be given a formal role in approving the deployment of the Armed Forces in situations of armed conflict. The Government proposed that that role would be established by a Resolution of the House of Commons.

This paper examines the debate on the Royal prerogative and parliamentary approval thus far, what the Government has proposed in its White Paper and some of the issues that may be considered in any debate determining the final text of the Resolution. For comparative purposes it also examines the legislative procedures for deployment of the Armed Forces in a selection of other countries.

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Summary

Discussion of the Royal Prerogative and the lack of a formal role for Parliament in approving the deployment of the Armed Forces in situations of conflict has gained prominence, largely in response to the conflict in Iraq since 2003 and subsequent arguments over the legality of military intervention in that country. Several attempts have been made in the last few years to introduce private Members' legislation that would place upon the Government an obligation to seek the approval of Parliament in the event of deploying the Armed Forces in a situation of conflict. The Lords Constitution Select Committee has also conducted a wide-ranging investigation into the 'war making' power of the Royal Prerogative.

On 3 July 2007 the Government announced a package of constitutional reforms that would involve, among other things, limiting the Royal Prerogative with respect to the deployment of the Armed Forces into armed conflict overseas. A consultation paper on war making powers was subsequently published on 25 October 2007 and in March 2008 the Government presented its proposals in the White Paper *The Governance of Britain.* Despite widespread support for legislation, the Government concluded that the requirement for parliamentary approval for deploying the Armed Forces in a situation of armed conflict should be set out in a Resolution of the House of Commons. The Government also proposed that any debate in the House of Commons should be preceded by a debate in the House of Lords, although not a formal vote in that Chamber. It also recommended that some practical aspects of the current regime should be retained, including the ability of the government to take swift action to protect national security; that operations involving Special Forces should not require approval; that there should be no requirement to obtain retrospective approval for current operations; and that the Prime Minister should determine the scope and nature of any information provided to Parliament as part of the approvals process. The paper also concluded that there was no argument for making special arrangements for the recall of parliament if a deployment was necessary when the House was either adjourned or dissolved and no need for a new committee to be established in order to oversee Parliament's decision making in this respect. The exact form of any Resolution will, however, be for the House of Commons to determine.

While the Government may desire any procedure backed by a Resolution to be binding, there is no guarantee however that this would be the case. There is always the possibility that, whatever mechanism one Parliament adopted to approve the deployment of troops, a future Parliament could adopt a different procedure or decide not to have a formal role in the deployment of forces at all. Indeed in its summary of the consultation responses, the Government acknowledged that "Legislation was favoured because it would provide certainty and protect the proposed mechanism from being ignored or circumvented". The exceptions to parliamentary approval that have been proposed by the Government also raise the question of whether they will undermine any future Parliamentary approval process.

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I Background

A. The Royal Prerogative

It is widely accepted that the Royal Prerogative is a concept which is both difficult to explain and to define. In his book *Introduction to the Study of the Law of the Constitution,* A. V. Dicey described it thus:

> The remaining portion of the Crown's original authority, and it is therefore… the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his Ministers.[1]

The Treasury Solicitor's Department, in a Memorandum to the Public Administration Select Committee's inquiry into the Royal Prerogative in 2004,[2] stated:

> There is no single accepted definition of the prerogative. It is sometimes defined to mean all the common law, ie non-statutory powers, of the Crown. An alternative definition is that the prerogative consists of those common law powers and immunities which are peculiar to the Crown and go beyond the powers of a private individual eg the power to declare war as opposed to the normal common law power to enter a contract.[3]

Although the Treasury Solicitor's Department suggested that "there is no exhaustive list of prerogative powers" the Public Administration Select Committee (PASC) identified three main areas of prerogative powers: the Crown's constitutional prerogatives such as the assent of legislation; the legal prerogatives of the Crown; and prerogative executive powers.[4]

It is under this latter category of powers that are exercisable by Ministers on behalf of the Crown that the legal authority for conducting defence of the realm rests. The *Letters Patent Constituting the Defence Council* set down this relationship. They state:

> Whereas We did by Our Letters Patent under the Great Seal of Our Realm bearing date the fourth day of May in the forty-second year of Our Reign constitute and appoint the persons therein mentioned to be Our Defence Council to exercise on Our behalf the functions of Our Prerogative as therein mentioned […] and in particular to administer such matters pertaining to Our Naval Military and Air Forces as We shall through Our Principal Secretary of State for Defence

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1 A. V. Dicey, *Introduction to the Study of the Law of the Constitution,* 10th Edition, 1959, p.424

2 The Public Administration Select Committee enquiry was established to examine the prerogative powers of Ministers and whether they should be subject to more systematic Parliamentary oversight. The committee concluded that a different approach was required and as such appropriate legislation should be introduced. The Committee's final report included the proposed text of a draft Bill. Clauses 5-7 of that Bill dealt with the prerogative powers relating to the Armed Forces. A copy of the report is available online at: http://www.publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/422/422.pdf

3 Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament,* HC 422, Session 2003-04, Ev13

4 Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament,* HC 422, Session 2003-04, p.5-6

> direct them to execute And to have command under Us of all Officers and Ratings Soldiers and Airmen of Our Naval Military and Air Forces…[5]

However, in the event of a declaration of war or committing British forces to military action, constitutional convention requires that authorisation is given by the Prime Minister on behalf of the Crown, rather than by the Defence Council. This latter body, through the Secretary of State for Defence, would advise the Cabinet of its requests and recommendations.

In constitutional terms, therefore, the Government currently has liberty of action in this field and Parliament has no formal role in approving such action. However, successive Governments have undertaken to keep Parliament informed, both of the decision to use force and of the progress of military campaigns. This has been achieved primarily through statements to the House, questions and debates.

B. The Role of Parliament in Previous Conflicts

During military campaigns in the 1990s concern was expressed by some Members of Parliament over the Government's reluctance to hold debates on substantive motions that would have allowed Parliament to either support or oppose a particular course of action. For instance, during the Kosovo conflict the debates that took place were on Government introduced motions for the adjournment of the House.[6] Such motions allow for discussion of a named topic, but if there is a vote, it would be on the procedural point "that this House do now adjourn" rather than a vote in support of, or opposition to, the Government's policies. Tony Benn and others argued, however, that the House should have the opportunity to record its view on the Government's policy over Kosovo. This could have been achieved by the Government holding a debate on a substantive motion lending approval to its policy. In the event that such a motion had been introduced and defeated, the Government would not have been under a constitutional obligation to change its policy. The defeat would have indicated the view of the House without prejudice to the exercise of the prerogative powers, although there would have been great political pressure on the Government to take it into account.

1. Examples

The following are illustrative examples of selected cases when military force has been used, indicating the opportunities for debate. This discussion confines itself to statements and debates in Government time in the House of Commons.[7]

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5 *Letters Patent Constituting the Defence Council, Queens Regulations (Army),* 1975, Annex A (J) to Chapter 1.

6 These are not the same as the daily half hour Adjournment Debates.

7 The House of Commons Library also maintains a Parliamentary Information List outlining the Commons debates on the deployment of the Armed Forces dating back to 1982.

a. World War Two

When the UK declared war against Germany in 1939 this was reported to the House in what Hansard of the day termed a "Prime Minister's Announcement." A motion was made prior to Neville Chamberlain's announcement, but this was procedural and related to the manner in which certain emergency legislation was to be considered.[8] Other Members responded to the Prime Minister's speech in a short debate, before the motion was put and carried. Around this time the House did vote on a great many substantive motions pertaining to the war, but these were for the passage of related emergency legislation, and not for the onset of hostilities against Germany.

There were a great many statements and debates throughout the war, and the bulk of the debates were on motions to adjourn. However, there were a number of debates on substantive motions, including one which was moved on 6 May 1941 (the debate concluded the next day) approving the Government's policy in sending assistance to Greece and expressing confidence that operations in the Middle East and other theatres of the war would be pursued "with the utmost vigour."[9] This followed the fall of Greece despite British assistance, and it was designed to demonstrate confidence in the Government's war strategy.

b. Korean War

Prime Minister Clement Attlee made a number of statements following the North Korean invasion of South Korea in June 1950. These were often in response to Private Notice Questions from Winston Churchill, then leader of the Opposition, and they included two statements on one day.[10] Attlee gave an account of the reaction to the invasion and the development of policy within the United Nations Security Council. He then made a statement on 28 June 1950 announcing the decision to make British forces available to the United States, which led the multinational force acting in support of South Korea. These forces were in action shortly thereafter.

A debate was held on 5 July 1950, and this was on a substantive motion:

> that this House fully supports the action taken by His Majesty's Government in conformity with their obligations under the United Nations Charter, in helping to resist the unprovoked aggression against the Republic of Korea.[11]

The Korean War was addressed in further statements and debates until the cessation of hostilities in July 1953.

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8 HC Deb 3 September 1939, c291
9 HC Deb 6 May 1941, c727
10 HC Deb 27 June 1950, c2102-3 & 2159-61
11 HC Deb 5 July 1950, c485

c. Suez Crisis

A debate was held in the House of Commons on 2 August 1956 during which Prime Minister Anthony Eden announced that "Her Majesty's Government have thought it necessary … to take certain precautionary measures of a military nature. Their object is to strengthen our position in the Eastern Mediterranean and our ability to deal with any situation that may arise".[12] That debate was not followed by a vote.

A subsequent vote did take place when the House was recalled on 12-13 September 1956 to debate the Suez situation. However, it was on a motion endorsing the Government's approach to resolving the crisis and was not specifically for approval in deploying British forces to the region. Therefore it has never been considered a precedent in this matter. The debate was on the motion:

> That this House condemns the arbitrary action of the Egyptian Government in seizing control of the Suez canal; endorses the proposals adopted by the 18 powers at the London conference which would ensure that an international waterway so essential to the economic life, standard of living and employment of this and other countries would not remain in the unrestricted control of any single Government; Welcomes the sustained and continuing efforts of Her Majesty's Government to achieve a peaceful settlement; and affirms its support for the statement of policy made by the Prime Minister to this House on 12th September.

An opposition amendment to the Motion was tabled which sought to express criticism of the government's refusal to refer the matter to the authority of the UN. That amendment stated:

> That this House while condemning the arbitrary methods employed by the Egyptian Government in respect of the Suez Canal Company and resolved to support the legitimate rights of the users of the Canal, deplores the refusal of Her Majesty's Government to involve the authority of the United Nations over the dispute, and calls upon Her Majesty's Government to refer the dispute immediately to the United Nations, to declare that they will not use force except in conformity with our obligations under the Charter of the United Nations and to refrain meanwhile from any form of provocative action.

That amendment was negatived on division by 321 to 251;[13] while the Main Question was passed on division by 319 to 248 votes.[14]

d. Falklands Conflict

Following the Argentine invasion of the Falkland Islands in April 1982 the House was recalled, on a Saturday, and a debate was held on a motion to adjourn.[15] There were 14 statements and another five debates, all on motions to adjourn, before the Argentine surrender in June 1982. The Falkland Islands had been the subject of parliamentary

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12 HC Deb 2 August 1956, c1606
13 Division No. 278, 13 September 1956
14 Division No. 279, 13 September 1956
15 HC Deb 3 April 1982, c633-68

interest for many years before this, and there were other statements in the period just before the invasion.

e. Gulf War – 1991

During the Gulf War of 1991 there were seven statements and one debate, which was on a substantive motion.[16] The commencement of hostilities was announced in a statement by then Prime Minister John Major on 17 January 1991 and a debate took place on 21 January. The Government's motion was:

> that this House expresses its full support for British forces in the Gulf and their contribution to the implementation of United Nations resolutions by the multinational force, as authorised by United Nations Security Council Resolution 678.[17]

The Government accepted an Opposition amendment, which was put and agreed to on division. This amended the motion by adding at the end:

> commends the instructions to minimise civilian casualties wherever possible; and expresses its determination that, once the aggression in Kuwait is reversed, the United Nations and the international community must return with renewed vigour to resolving the wider problems in the Middle East.[18]

In the period between Iraq's invasion of Kuwait and the onset of the Allied action there were five statements on the crisis, plus two Prime Ministerial statements following European Council meetings in which mention was made of the situation, and three debates, all on motions to adjourn.[19]

f. Kosovo

Throughout the late 1990s concern over events in Kosovo and the lack of adequate debate was raised in Parliament. A turning point came with the killings at Racak in January 1999, following which NATO threatened the use of force. There were five statements on Kosovo after the Racak killings and before the onset of NATO military action.[20] The commencement of hostilities was announced by then Deputy Prime Minister John Prescott in a statement on 24 March 1999, after which there were another eight statements on Kosovo before the suspension of the action on 10 June 1999.[21] There were three debates on motions to adjourn in the course of the conflict.[22] Other

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16 HC Deb 17 January 1991, c979; 18 January 1991, c1113; 21 January 1991, c23; 28 January 1991, c655; 31 January 1991, c1107; 18 February 1991, c19; 25 February 1991, c645; 28 February 1991, c1117.

17 HC Deb 21 January 1991, c24.

18 HC Deb 21 January 1991, c113.

19 HC Deb 6-7 September 1990, c734; 24 October 1990, c335; 30 October 1990, c869; 22 November 1990, c425; 28 November 1990, c867; 3 December 1990, c27; 6 December 1990, c468; 11 December 1990, c822; 18 December 1990, c157; 15 January 1991, c734

20 HC Deb 18 January 1999, c565; 1 February 1999, c597; 11 February 1999, c565; 24 February 1999, c404; 23 March 1999, c161

21 HC Deb 24 March 1999, c483; 29 March 1999, c731; 31 March 1999, c1089 & 1204; 13 April 1999, c19; 10 May 1999, c21; 26 May 1999, c355; 8 June 1999, c463; 9 June 1999, c744

22 HC Deb 25 March 1999, c536; 19 April 1999, c573; 18 May 1999, c882

statements included reference to the campaign (eg the Prime Minister's statements on the NATO summit and the Berlin European Council).

g. Iraq 2002-03

Parliament was recalled on 24 September 2002 to debate the situation in Iraq and the possible recourse to military action. Prior to the commencement of military operations on 20 March 2003[23] there were three further debates on Iraq on substantive motions, and eleven statements, plus two debates on defence in the world, during which much mention was made of the ongoing situation.[24]

The debate on 25 November 2002 was on the motion:

> That this House supports UNSCR 1441 as unanimously adopted by the UN Security Council; agrees that the Government of Iraq must comply fully with all provisions of the Resolution; and agrees that, if it fails to do so, the Security Council should meet in order to consider the situation and the need for full compliance.

An amendment was negatived on division by 452 to 85, while the Main Question was agreed.[25]

The debate on 26 February 2003 was on the motion:

> That this House takes note of Command Paper Cm 5769 on Iraq; reaffirms its endorsement of United Nations Security Council Resolution 1441, as expressed in its Resolution of 25th November 2002; supports the Government's continuing efforts in the United Nations to disarm Iraq of its weapons of mass destruction; and calls upon Iraq to recognise this as its final opportunity to comply with its disarmament obligations.

An amendment was negatived on division by 393 to 199, and the Main Question was agreed on division by 434 to 124.

The debate on 18 March 2003 was on the motion:

> That this House notes its decisions of 25th November 2002 and 26th February 2003 to endorse UN Security Council Resolution 1441; recognises that Iraq's weapons of mass destruction and long range missiles, and its continuing non-compliance with Security Council Resolutions, pose a threat to international peace and security; notes that in the 130 days since Resolution 1441 was adopted Iraq has not co-operated actively, unconditionally and immediately with the weapons inspectors, and has rejected the final opportunity to comply and is in

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23 Military operations officially began at 0234 GMT on 20 March 2003, although some preparatory air operations had been undertaken in the southern no-fly zone on 19 March 2003.

24 HC Deb 24 September 2002, c26; 7 November 2002, c431; 25 November 2002, c47; 18 December 2002, c845; 7 January 2003, c23; 20 January 2003, c34; 21 January 2003, c167; 22 January 2003, c326-406; 3 February 2003, c21; 6 February 2003, c455; 13 February 2003, c1056; 25 February 2003, c123; 26 February 2003, c265; 10 March 2003, c21; 17 March 2003, c703; 18 March 2003, c760

25 HC Deb 25 November 2002, c133

> further material breach of its obligations under successive mandatory UN Security Council Resolutions; regrets that despite sustained diplomatic effort by Her Majesty's Government it has not proved possible to secure a second Resolution in the UN because one Permanent Member of the Security Council made plain in public its intention to use its veto whatever the circumstances; notes the opinion of the Attorney General that, Iraq having failed to comply and Iraq being at the time of Resolution 1441 and continuing to be in material breach, the authority to use force under Resolution 678 has revived and so continues today; believes that the United Kingdom must uphold the authority of the United Nations as set out in Resolution 1441 and many Resolutions preceding it, and therefore supports the decision of Her Majesty's Government that the United Kingdom should use all means necessary to ensure the disarmament of Iraq's weapons of mass destruction; offers wholehearted support to the men and women of Her Majesty's Armed Forces now on duty in the Middle East; in the event of military operations requires that, on an urgent basis, the United Kingdom should seek a new Security Council Resolution that would affirm Iraq's territorial integrity, ensure rapid delivery of humanitarian relief, allow for the earliest possible lifting of UN sanctions, an international reconstruction programme, and the use of all oil revenues for the benefit of the Iraqi people and endorse an appropriate post-conflict administration for Iraq, leading to a representative government which upholds human rights and the rule of law for all Iraqis; and also welcomes the imminent publication of the Quartet's roadmap as a significant step to bringing a just and lasting peace settlement between Israelis and Palestinians and for the wider Middle East region, and endorses the role of Her Majesty's Government in actively working for peace between Israel and Palestine.

An amendment was negatived on division by 396 to 217, and the Main Question was agreed on division by 412 to 149.

By the end of major combat operations on 1 May 2003 a further nine ministerial statements and three written ministerial statements had been made.[26] A timeline and summary of events, both in the lead up to the conflict and during major combat operations, is available in Library Research Paper RP03/50 *The Conflict in Iraq,* 23 May 2003.[27]

Details of the debates that have taken place since the end of major combat operations is set out in Parliamentary Information List SN/PC/3254, *House of Commons Debates on Deployment of Armed Forces.*[28]

h. Afghanistan

Following the events of 11 September 2001, Parliament was recalled on 14 September, 4 October and for a third time on 8 October 2001 to debate the issue. On 16 October, after returning from the summer recess, the Commons again debated a motion on the coalition against international terrorism.

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[26] HC Deb 20 March 2003, c1087; 21 March 2003, c1211; 24 March 2003, c21; 26 March 2003, c291; 3 April 2003, c1069; 3 April 2003, c70WS; 7 April 2003, c21; 10 April 2003, c405-22; 11 April 2003, c38WS; 14 April 2003, c615; 28 April 2003, c21 and 30 April 2003, c15WS

[27] This is available online at: http://www.parliament.uk/commons/lib/research/rp2003/rp03-050.pdf

[28] Discussion of the deployment of British forces in Iraq is available in Library Standard Note SN/IA/4845, *Coalition Forces in Iraq: Towards a Drawdown?*

In the 4 October debate on the terrorist attacks, the Prime Minister had stated that there should be no "moral ambiguity" concerning the events in the US. He said that nothing could excuse or condone the terrorist attacks. Military action undertaken by the coalition would be on clearly stated moral grounds, not for revenge but "for the protection of our people and our way of life, including confidence in our economy" and "for justice".[29]

British forces were deployed shortly afterwards as part of the Coalition force. Despite the extent of the debate in Parliament, a vote on the deployment of British forces was not held. Consequently several Members sought to pursue the matter of a parliamentary vote on UK involvement in military action through parliamentary questions and a series of Early Day Motions.[30]

Further discussion of the debate is outlined in Research Paper RP01/81, *Operation Enduring Freedom and the Conflict in Afghanistan: An Update*, 31 October 2001

Subsequent deployments of British troops to the International Security Assistance Force, since December 2001, including the more significant deployments to the southern province of Helmand since 2006, have also been announced to Parliament through Ministerial Statements. There has been no vote in Parliament on the deployment of British forces in Afghanistan.[31]

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29 HC Deb 4 October 2001, c675

30 See HC Deb 8 October 2001, c829 and c823; EDMs 219 and 220, Session 2000-01

31 The current deployment of British forces in Afghanistan is discussed in Library Standard Note SN/IA/4854, *The International Security Assistance Force in Afghanistan*.

II Previous Debate on Democratic Accountability and the Royal Prerogative

The Royal Prerogative and Parliament's lack of involvement in approving the deployment of the Armed Forces has long been criticised for what many perceive to be an absence of democratic accountability over one of the most fundamental decisions a government can make. The conflict in Iraq and subsequent arguments over the legality of military intervention are regarded as having contributed significantly to raising the political profile of this issue.

In the last few years there have been several attempts, through private Members' legislation, to establish an obligation on the Government to obtain parliamentary approval for the deployment of the Armed Forces in situations of armed conflict. Neil Gerrard introduced a private Member's bill (Bill 31) in the 2004-05 Session, although it was subsequently dropped before its second reading because of the general election. In 2005-06 an almost identical bill was sponsored by Clare Short. Although the *Armed Forces (Parliamentary Approval for Participation in Armed Conflict) Bill* (Bill 16) was debated, on division the House did not agree to it being given a second reading[32] and the bill was subsequently dropped. In the 2006-07 session a similar bill entitled *Waging War (Parliament's Role and Responsibility) Bill* (Bill 34), was adopted by Michael Meacher. However it did not proceed to second reading and the bill was subsequently dropped.[33]

Among those in favour of greater Parliamentary approval, however, there are differing views on whether the House should have an opportunity to express an opinion on the Government's policy, or be given a constitutional role in approving military action. In evidence to the Public Administration Select Committee (PASC) in March 2004, several witnesses advocated support for increasing Parliamentary involvement in the deployment of the Armed Forces, although that support varied. In evidence to the Committee Lord Hurd of Westwell commented that "we should only go into major conflict with a very strong measure of authority behind the government's decision", while Tony Benn called for a statutory requirement for Ministers to consult Parliament in cases of conflict and expressed his support for a measure along the lines of the *United States War Powers Act*.[34]

The Committee itself concluded that there was a need to review the current Royal Prerogative arrangements:

> The Government should initiate before the end of the current session [2003-04] a public consultation exercise on Ministerial prerogative powers. This should contain proposals for legislation to provide greater parliamentary control over all

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32 HC Deb 21 October 2005 c1085-1162 (Division No. 64, Session 2005-06)

33 A link to the text of that bill is available at: http://www.publications.parliament.uk/pa/pabills/200607/waging_war_parliaments_role.htm

34 Public Administration Select Committee, *Taming the prerogative: strengthening ministerial accountability to parliament,* HC422, Session 2003-04, p.9. The US model of congressional involvement through the 1973 War Powers Act is discussed in Library Research Paper 02/53, *Iraq: the debate on policy options*, 20 September 2002, at pp69-70, which is available online at: http://www.parliament.uk/commons/lib/research/rp2002/rp02-053.pdf.

> the executive powers enjoyed by Ministers under the royal prerogative. This exercise should also include specific proposals for ensuring full parliamentary scrutiny of the following Ministerial prerogative actions: decisions on armed conflict; the conclusion and ratification of treaties; the issue and revocation of passports.
>
> This is unfinished constitutional business. The prerogative has allowed powers to move from Monarch to Ministers without Parliament having a say in how they are exercised. This should no longer be acceptable to Parliament or the people.[35]

The group Charter 88 has campaigned for greater parliamentary involvement in approving the deployment of the Armed Forces for several years:

> Going to war is one of the most important decisions a country can take, but our democratically elected Parliament has no formal right to debate the issue, as the Prime Minister uses the Royal Prerogative to make the decision. This is not compatible with 21st century democracy, there is massive support both within the House and the public for change.[36]

Indeed in making its argument, Charter 88 highlighted the extent to which this issue had support among the Labour party, including from Gordon Brown when Chancellor of the Exchequer. In an interview with the *Daily Telegraph* in April 2005 Mr Brown reportedly expressed the opinion that "the precedent set two years ago in allowing MPs to vote before the Iraq war should become a permanent feature of government life".[37] In a subsequent speech in January 2006 at the Fabian New Year Conference Mr Brown reiterated those views:

> Just as on the first day I was Chancellor I limited the power of the executive by giving up government power over interest rates to the Bank of England, I suggested during the General Election there was a case for a further restriction of executive power and a detailed consideration of the role of parliament in the declaration of peace and war.[38]

The former Cabinet Minister, Stephen Byers, also supported this view. Writing in *The Times* in May 2005 he stated:

> I have no doubt that the majority of Labour MPs would welcome fresh consideration to be given to the role that Parliament plays in deciding whether troops should be deployed into an overseas conflict.[39]

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35 Public Administration Select Committee, *Taming the prerogative: strengthening ministerial accountability to parliament,* HC422, Session 2003-04, p.17

36 "Charter 88 welcome Clare Short's adoption of Armed Forces Bill", 27 May 2005

37 "Brown: I would give MPs last word on war", *The Daily Telegraph,* 30 April 2005

38 Speech by the then Chancellor of the Exchequer, Rt Hon Gordon Brown, at the Fabian New Year Conference, 14 January 2006

39 Stephen Byers MP, "The madness of regicide", *The Times,* 11 May 2005

The PASC in its March 2004 report also highlighted the extent to which this issue received support from the Labour party, and specifically from the then Foreign Secretary Jack Straw, when in opposition. The report stated:

> 15. In reviewing Ministerial powers in 1993 the party said:
>
> "It is where power is exercised by government under cover of royal prerogative that our concerns are greatest… Here massive power is exercised by executive decree without accountability to Parliament and sometimes even without its knowledge".
>
> 16. The Labour Party highlighted the ratification of treaties and going to war as two key areas which raised special concerns. In 1994 Jack Straw MP went further, writing separately that:
>
> "[t]he royal prerogative has no place in a modern western democracy… [The prerogative] has been used as a smoke-screen by Ministers to obfuscate the use of power for which they are insufficiently accountable".[40]

The Conservative Party have also expressed their support for a review of the powers conferred under the Royal Prerogative and the power to deploy the Armed Forces into armed conflict without Parliamentary approval more specifically. In February 2006 the Conservative Leader, David Cameron, launched a Democracy Task Force to review whether amendments to the scope of the Royal Prerogative should be made. In a speech on 6 February 2006 Mr Cameron stated:

> I believe the time has come to look at those powers exercised by Ministers under the Royal Prerogative.
>
> Giving Parliament a greater role in the exercise of these powers would be an important and tangible way of making government more accountable.
>
> Just last week, we first heard about the Government's decision to send 4,000 troops to Afghanistan in the pages of the Sun newspaper […]
>
> Restoring trust in politics means restoring trust in Parliament – and one way to do that is to enhance the role of Parliament in scrutinising the Government's decisions.[41]

The report of that task force was published on 6 June 2007. The report concluded that the decision to commit British forces should require parliamentary approval, including retrospective approval where necessary:

> We believe that it is no longer acceptable for decisions of war and peace to be a matter solely for the Royal Prerogative. The Democracy Task Force therefore recommends that a Parliamentary convention should be established that

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40 Quotes taken from The Labour Party, *A new agenda for democracy,* 1993 and Jack Straw MP "Abolish the Royal Prerogative" in A. Barnett, *Power and the throne: the monarchy debate,* London, 1994

41 "Modernisation with a Purpose", 6 February 2006: (http://www.conservatives.com/tile.do?def=news.story.page&obj_id=127681&speeches=1)

> Parliamentary assent – for example, the laying of a resolution in the House of Commons – should be required in timely fashion before any commitment of troops. Under conditions of dire emergency, this requirement could be waived with the proviso that the Prime Minister must secure retrospective Parliamentary approval.[42]

The Liberal Democrats have also supported giving Parliament a greater role in deploying the Armed Forces. Successive private Members' bills have been supported by the party, including the most recent sponsored by Michael Meacher during the 2006-07 session.

In contrast, and despite the reported support of some Cabinet members, the Blair Government consistently argued that existing practice, based on the Royal Prerogative, was sufficient. In a Written Answer on 15 June 2005 the then Prime Minister, Tony Blair, stated:

> The Government recognise the desire for parliamentary scrutiny of decisions to deploy our armed forces, and has shown that it will provide opportunities for debate when this arises. A formal requirement to consult Parliament is, therefore, unnecessary and could prejudice the Government's ability to take swift action to defend our national security where the circumstances so require.[43]

Giving evidence to the Liaison Committee in February 2006, however, Mr Blair acknowledged that in practice it would be difficult for a government to engage in armed conflict without Parliamentary support:

> I think, with great respect to other political parties, you can overdo all this stuff about the Royal Prerogative. The fact of the matter is that I cannot conceive of a situation in which a government (and I think I have said this before, even here) is going to go to war—except in circumstances where militarily for the security of the country it needs to act immediately—without a full Parliamentary debate. Actually, as I say, the irony is, although people keep talking about this as a result of the Iraq conflict, I think the one thing you could not say is that we did not have a full Parliamentary debate or that we did not have a vote—because we did. I think the reality is that that is the way it will happen in practice, unless you have a circumstance where you need to act urgently.[44]

In its response to the Lords Constitution Committee inquiry on the role of Parliament in deploying the Armed Forces (the main conclusions of which are examined below), the then Government commented:

> The Government is not presently persuaded of the case for […] establishing a new convention determining the role of Parliament in the deployment of the armed forces. The existing legal and constitutional convention is that it must be the Government which takes the decision in accordance with its own assessment of the position. That is one of the key responsibilities for which it has been elected. But the matter needs to be kept under review.

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42 Conservative Democracy Task Force, *Power to the People,* June 2007. A copy of that report is available online at: http://www.conservatives.com/pdf/dtfpaper.pdf

43 HC Deb 15 June 2005, c384W

44 Evidence to the Liaison Committee, 6 February 2006, Q303

> The ability of the executive to take decisions flexibly and quickly using prerogative powers remains an important cornerstone of our democracy. However, it is important to note that when exercising these powers, Ministers remain accountable to Parliament.[45]

A. Lords Constitution Committee Report on Waging War

In the 2005-06 parliamentary session the House of Lords Constitution Committee conducted a comprehensive inquiry into the prerogative power of "waging war". The purpose of the inquiry was to consider:

> what alternatives there are to the use of the Royal prerogative power in the deployment of armed force, whether there should be a more direct role for Parliament and in particular whether Parliamentary approval should be required for any deployment of British forces outside the United Kingdom (whether or not into areas of conflict), or if there is a need for different approaches in different situations, for example in honouring commitments under international treaties or in pursuance of UN Security Council resolutions. Other important issues for consideration have been whether the Government should be required, or expected, to explain the legal justification for any decision to use force outside the United Kingdom, and whether the courts have jurisdiction to rule upon the decision to use force.[46]

In considering this issue, the Committee made clear that it would conduct its inquiry within certain parameters:

1. The inquiry would focus upon military activities outside the UK and would not examine the use of the Armed Forces in operations conducted under the auspices of military aid to the civil power in the UK.
2. The principle that the conduct of military operations – as opposed to the decision to mount them – should remain the exclusive responsibility of military commanders was not questioned by the Committee, but was in fact endorsed by them.

The Committee's report was published in July 2006 and concluded:

> Our conclusion is that the exercise of the Royal Prerogative by the Government to deploy armed force overseas is outdated and should not be allowed to continue as the basis for legitimate war-making in our 21st century democracy. Parliament's ability to challenge the executive must be protected and strengthened. There is a need to set out more precisely the extent of the Government's deployment powers, and the role Parliament can— and should— play in their exercise.[47]

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45 Government Response to the House of Lords Constitution Committee's Report, Fifteenth report of Session 2005-06, Cm 6923, November 2006

46 ibid

47 ibid

After consideration of several options the Committee made the following recommendations:

> we recommend that there should be a parliamentary convention determining the role Parliament should play in making decisions to deploy force or forces outside the United Kingdom to war, intervention in an existing conflict or to environments where there is a risk that the forces will be engaged in conflict.
>
> While not seeking to be prescriptive, we recommend that the convention should encompass the following characteristics:
>
> (1) Government should seek Parliamentary approval (for example, in the House of Commons, by the laying of a resolution) if it is proposing the deployment of British forces outside the United Kingdom into actual or potential armed conflict;
>
> (2) In seeking approval, the Government should indicate the deployment's objectives, its legal basis, likely duration and, in general terms, an estimate of its size;
>
> (3) If, for reasons of emergency and security, such prior application is impossible, the Government should provide retrospective information within 7 days of its commencement or as soon as it is feasible, at which point the process in (1) should be followed;
>
> (4) The Government, as a matter of course, should keep Parliament informed of the progress of such deployments and, if their nature or objectives alter significantly should seek a renewal of the approval.[48]

In February 2007 the Committee published a further short report as a follow-up to the Government's response to the Committee's initial report. Expressing concern at the inadequacy of the Government's response, the Committee reiterated in its second report:

> Irrespective of the response we received, we consider that a cross-party political consensus appears to be emerging that the current arrangements are unsustainable. Accordingly, we are optimistic that our recommendations will be revisited in the very near future. We hope that this vitally important constitutional issue will then be address in a more satisfactory manner and we look forward to playing our part in that debate.[49]

On 1 May 2007 the House of Lords debated the Committee's reports. In introducing the report the Chairman of the Committee, Lord Holme, said:

> This is not, in the end, an arcane constitutional issue, although there are certainly some interesting constitutional aspects to it. It is not primarily a matter of military command and control, although there are some important practicalities that were and need to be discussed. It is, at root, a question of democratic legitimacy. The

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48 House of Lords Select Committee on the Constitution, *Waging War: Parliament's Role and Responsibility*, HL Paper 236-I, Session 2005-06.

49 House of Lords Select Committee on the Constitution, *Waging War: Parliament's Role and Responsibility: Follow-up*, HL Paper 51, Session 2006-07

question is: in a modern democracy, not a 15th century monarchy, on whose authority should the young men and women of our armed services be sent overseas to fight for their country? […]

[This] led the committee to prefer the flexibility of a new convention that the Government should seek parliamentary approval if they propose the deployment of British forces outside the UK into actual or potential armed conflict to, as some have suggested, a comprehensive statutory abolition of this prerogative power. Such a convention would continue to allow executive emergency action under prerogative powers but with the important proviso that, within seven days of its enactment, retrospective parliamentary approval should be sought.

Another consideration which weighed with the committee in recommending the convention route was the view that it would be unacceptable for there to be a possibility, however remote, of, for example, subjecting forces of the Crown to criminal procedures for action taken in good faith in protecting the national interest. However, the compromise preference for convention should not obscure the unanimous clarity of a cross-party committee that the exercise of the royal prerogative as the authority for the Government, in the person of the Prime Minister, to deploy armed forces is outdated and should not be allowed to continue as the basis for legitimate war-making in our 21st-century democracy […]

A change would not be too painful, particularly given the compromise constitutional convention we suggested. Indeed, some constitutionalists maintain that the foundations for such a convention have already been laid by the vote on the second Iraq war—what Jack Straw, the Leader of another place, has called a clear precedent for the future […]

For those who believe in more open, rational decision-making on big issues—I cannot think of a bigger issue than war and peace—it seems to me that the recommended reform puts the onus on the Government to place clearly before Parliament the objectives of any deployment together with its legal basis, its likely duration and an estimate of its size. That clarity would be welcomed by the military, who, whatever their reservations about the dangers of micromanagement by politicians, hunger for clear definitions of the macro-task to be undertaken on overseas operations and are becoming increasingly vocal when it has not been forthcoming, as we have seen in the cases of Afghanistan and Iraq. The discipline of full accountability to Parliament would help to ensure clearer ends and therefore a better match of means and ends.

Ultimately, the issue is not efficiency or even legality but, as I said at the beginning, legitimacy itself. Let me conclude on the prerogative. There are noble Lords speaking in this debate who have worked for the abolition of this whole set of pre-democratic principles or what the Government call “historical anachronisms”. They may feel that this report does not go far enough. I simply say this: whether it is our convention or a total or larger measure of abolition of prerogative powers, the shrinking of the prerogative is and always has been a question of parliamentary determination. As we have seen yet again, the Executive on the whole will not want to let go of unfettered power; that is the way they are. The judiciary will tend to defer to them. I believe that it is squarely a

matter for Parliament to find its voice and its confidence, and I hope that this report will help in achieving that.[50]

[50] HL Deb 1 May 2007. A copy of that debate is available online.

III Proposals for Constitutional Reform

A. The *Governance of Britain* Green/ White Papers

On 3 July 2007 the new Prime Minister Gordon Brown announced a package of constitutional reforms intended to strengthen democracy and accountability and establish a new relationship between the Government and the people.

Among suggested reforms, the Green Paper entitled *The Governance of Britain*,[51] proposed that the Government should seek the approval of the House of Commons for significant non-routine deployments of the Armed Forces into armed conflict, to the greatest extent possible and without prejudicing the Government's ability to act to protect national security, or undermining operational security or effectiveness:

> 25. There are few political decisions more important than the deployment of the Armed Forces into armed conflict. The Government can currently exercise the prerogative power to deploy the Armed Forces for armed conflict overseas without requiring any formal parliamentary agreement.
>
> 26. The Government believes that this is now an outdated state of affairs in a modern democracy. On an issue of such fundamental importance to the nation, the Government should seek the approval of the representatives of the people in the House of Commons for significant, non-routine deployments of the Armed Forces into armed conflict, to the greatest extent possible. This needs to be done without prejudicing the Government's ability to take swift action to protect our national security, or undermining operational security or effectiveness. The Government will therefore consult Parliament and the public on how best to achieve this.[52]

In order to determine the most effective means of enhancing Parliament's role in this regard, the Government subsequently published a consultation paper on 25 October 2007 on *War Making Powers and Treaties: Limiting Executive Powers*.[53] Essentially, this paper posed one overarching question: should any role for Parliament in approving the deployment of the Armed Forces be established by Parliamentary convention, and possibly embodied in a Resolution of the House of Commons, should it be set down on a statutory basis, or should it be a combination of both?

In asking this question the paper made it clear that any Parliamentary role must not compromise national security, the morale and operational effectiveness of the Armed Forces, or the UK's ability to work with its allies. The consultation paper stated:

> The Government believes that national security remains the most important responsibility of any government and that it is time for the role of Parliament, and in particular the House of Commons, to be made more explicit in approving, or otherwise, decisions by the executive on substantial deployments of armed forces

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51 Ministry of Justice, The Governance of Britain, Cm 7170, July 2007

52 ibid, para 25-26

53 Ministry of Justice, *The Governance of Britain, War Powers and Treaties: Limiting Executive Powers*, Consultation Paper CP26/07, Cm 7239, October 2007, http://www.justice.gov.uk/docs/cp2607a.pdf

> into potential or actual armed conflict. However, this needs to be done in a way which does not compromise the ability of the Government of the day to take necessary steps for the defence of UK interests and does not compromise security and effectiveness of operations including the discretion of military commanders, particularly in emergency situations.[54]

The paper highlighted a number of key questions which would have to be addressed if any role afforded to Parliament, either by convention or by statute, were to be effective. For example:

- What types of deployment should fall within the scope of any new mechanism? Is a definition of 'armed conflict' required? If so, should it be tied to the Geneva Conventions?
- Is it necessary to define the 'Armed Forces'?
- What should the consequences of a decision by the Executive to deploy forces without prior parliamentary approval be? Should there be an obligation to seek retrospective approval or should Parliament merely be informed? Should Parliament be recalled in such instances? What should happen were retrospective approval to be denied?
- What information/intelligence should be provided to Parliament and how?
- At what point during deployment preparations should approval be sought and how often should Parliament be consulted on the continued conduct of a deployment?
- What should the role of the House of Lords be?

The Government set out its favoured option with respect to some of these questions, although not in all cases. That consultation ended on 17 January 2008.

B. The Way Forward – A Resolution of the House

On 25 March 2008, the Government published a three volume white paper on its proposals for constitutional reform:

The Governance of Britain – Constitutional Renewal (the White Paper)
The Governance of Britain – Draft Constitutional Renewal Bill
The Governance of Britain – Analysis of Consultations

The Government proposed that, rather than introducing a statutory approach to seeking parliamentary approval for committing troops, the House of Commons should set out in a Resolution the procedures that it would employ in approving future troop deployments:

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[54] Ministry of Justice, *The Governance of Britain, War Powers and Treaties: Limiting Executive Powers*, Consultation Paper CP26/07, Cm 7239, October 2007, http://www.justice.gov.uk/docs/cp2607a.pdf

> While not ruling out legislation in the future, the Government believes that a detailed resolution is the best way forward. This will take the form of a House of Commons resolution which sets out in detail the processes Parliament should follow in order to approve any commitment of Armed Forces into armed conflict. The resolution could be underpinned by a specific standing order, but that is ultimately a matter for each House and not the Government.[55]

The Government published a draft Resolution, for illustrative purposes, in its White Paper. The Government proposed that in future the Prime Minister would lay a report before Parliament detailing the need for an armed deployment and that the House of Commons would be asked to approve that report. The Government also proposed that any debate in the House of Commons to approve a proposal to commit troops should be preceded by a debate in the House of Lords (although not a formal vote), which would inform Members:

> In common with the consensus of the consultation responses and the opinion expressed in the House of Lords debate, the Government believes that the House of Lords should hold a debate to inform the deliberations of the House of Commons but they should not hold a vote. Whilst the Government recognises the expertise that resides in the House of Lords, the responsibility to make the final decision is for the House of Commons as the representatives of the people.[56]

However, the paper acknowledged that:

> The uncertain nature of military deployments and likelihood that the lead up to each conflict or potential conflict situation would not necessarily conform to any pattern would require a high degree of flexibility from the proposed mechanism.[57]

It therefore argued that some practical aspects of the current regime should be retained, including: the Government should be able to take swift action to protect national security; operations involving the Special Forces should not require approval; there should be no requirement to obtain retrospective approval for those operations of a secret or urgent nature; there should be no regular re-approval process; and the Prime Minister should determine the scope and nature of any information provided to Parliament as part of the approvals process. The paper also concluded that there was no argument for making special arrangements for the recall of parliament if a deployment was necessary when the House was either adjourned or dissolved, or the need for a new committee to be established in order to oversee Parliament's decision making in this respect.

The Government proposed that the Resolution should take the form of a humble Address to Her Majesty. The Resolution would confirm that in future the approval of the House of Commons would be required before conflict decisions could be made; would set out the approval process; and would detail a number of exceptions when the approval process

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55 Ministry of Justice, *The Governance of Britain – Constitutional Renewal*, Cm 7342-I, Session 2007-08, para 215

56 ibid, para 225

57 ibid, para 215

would not be required.[58] A copy of the draft Resolution that the Government published for illustrative purposes is set out in Appendix One. The Government stated that "The exact form of any Resolution will be for House of Commons to determine".[59] The Government will table a motion which sets out its preferred form for the resolution but, in accordance with House procedures, the motion will be amendable. If the House agrees to such a Resolution it would provide the procedure to be followed to secure parliamentary approval for troop deployments.

1. The Joint Committee on the Draft Constitutional Renewal Bill

Because the Government proposed that Parliamentary approval should be sought on the basis of a Resolution rather than statutorily, there is no mention of war making powers in the *Draft Constitutional Renewal Bill*. However, a Joint Committee on the *Draft Constitutional Renewal Bill* was established to undertake pre-legislative scrutiny of the draft Bill and to consider other issues that had been raised in the White Paper. Within that wider context the Committee subsequently sought evidence on the question of war-making powers. In a press notice issued on 12 May 2008, the Joint Committee noted:

> War Powers - Is the Government right to adopt a resolution route rather than a legislative route for decisions to send armed forces into conflict? Does the resolution set out in the White Paper give Parliament sufficient control over conflict decisions?[60]

The Joint Committee heard oral evidence between 13 May and 1 July and published its report on 31 July 2008. It began with an abstract which included the following summary of the Committee's views on war making powers:

> **War powers**: We agree with the Government's case for strengthening Parliamentary involvement in armed conflict decisions, and that a detailed resolution approach is a well balanced and effective way of proceeding. But we are concerned about the definition of "conflict decision" in the White Paper and we recommend that the Government take steps to ensure that ongoing deployments are subject to effective Parliamentary scrutiny.[61]

Whilst broadly supporting the Government's proposals the Joint Committee did, however, recommend some specific changes to the draft Resolution and to the process that should be followed once the House of Commons had agreed the War Powers Resolution. The Joint Committee acknowledged the difficulty in defining 'a conflict decision' and recommended that "the Government, in consultation with key stakeholders, take more time to come up with an effective definition of 'a conflict decision' before bringing any proposals forward".[62] It also noted the opinion of the Clerks of both Houses

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58 Ministry of Justice, *The Governance of Britain – Constitutional Renewal*, Cm 7342-I, Session 2007-08

59 ibid, para 226

60 Joint Draft Constitutional Renewal Bill Committee press notice, Constitutional Renewal Bill Committee Announce Scope of its Inquiry, 12 May 2008, http://www.parliament.uk/parliamentary_committees/lords_press_notices/pn120508jcdcr.cfm

61 Joint committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill – Volume 1: Report*, HC 551-I Session 2007-08, Abstract

62 ibid, para 321

that the procedure to be followed in securing the approval of the House of Commons should be set out in Standing Orders rather than in a humble Address.[63] The Joint Committee also agreed that the Executive should have discretion over the information provided to Parliament, and over the timing of the Parliamentary process; that retrospective approval was "not desirable"; and that there should be no requirement for Parliamentary approval of the deployment of special forces.[64]

The Committee did, however, ask the Government to give an undertaking that "it will always arrange for a recall of Parliament in order to allow for Parliamentary approval of a deployment",[65] and that ongoing deployments would be subject to effective scrutiny.[66] The Joint Committee also agreed that the House of Lords should hold a debate "to inform the deliberations of the House of Commons, but not have a vote, at least so long as the current composition of the Lords is retained". But it disagreed with the Government's intention of enshrining the procedure for the Lords' informing the Commons in a Commons Resolution. It recommended that both Houses develop their procedures in parallel.[67]

2. Reaching a Resolution on a process for approving troop deployment

The Government's illustrative Resolution includes the procedure that would subsequently be followed when troop deployments were being considered by the House. The Clerks of the two Houses advised that the procedures to be followed should be set out in Standing Orders, rather than in a Resolution. Standing Orders provide a framework of rules for the House and unlike individual resolutions of the House are gathered together for easy reference.

In order to reach a resolution, the Government would table a motion (or motions) setting out the process and ask the House to approve it. Any motion that the Government tabled to achieve this objective would be amendable.

3. The effect of a Resolution establishing a process for approving troop deployment

If the House of Commons agreed to a motion like that set out in the Government's illustrative Resolution or adopted a new Standing Order, it would have a procedure that should be followed when the Government proposes deploying troops. Under the illustrative Resolution procedure, the House would receive a report from the Prime Minister which set out (a) the terms of the proposed approval and (b) the information about objectives, locations and legal matters that the Prime Minister thought appropriate in the circumstances. It would then be asked to "approve the terms set out in the Prime Minister's report".[68]

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63 Joint committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill – Volume 1: Report*, HC 551-I Session 2007-08, para 312

64 ibid, paras 332, 335

65 ibid, para 338

66 ibid, para 341

67 ibid, para 344

68 Ministry of Justice, *The Governance of Britain – Constitutional Renewal*, March 2008, Cm 7342-I (Part 1 of 3), Annex A, paras 2(3) and 2(4)

There is nothing in the illustrative resolution that indicates what would happen if the Prime Minister did not lay a report before Parliament; or if the Government did not table a motion for approval, when the circumstances suggested that they should. Nor is there any information about what would happen should the House not approve a motion under the procedure.

4. The stability of the procedure

The impression given by the Government's intention to ask the House of Commons to agree a Resolution, which "sets out in detail the processes Parliament should follow in order to approve any commitment of Armed Forces into Armed Conflict",[69] is that the procedure should be binding on the executive.

However, there is no guarantee that a process set out in a Resolution of the House would be binding. Indeed in its summary of the consultation responses, the Government acknowledged that "Legislation was favoured because it would provide certainty and protect the proposed mechanism from being ignored or circumvented".[70] Should political circumstances change, the procedure could fall into disuse.

There is always the possibility that whatever mechanism was adopted by one Parliament to approve any commitment of troops, a future Parliament could adopt a different procedure or decide not to have a procedure to approve the commitment of troops. Erskine May, the authoritative guide to parliamentary procedure, notes that "There is nothing in the practice of the House to prevent the recission or discharge of an order of a previous session, where such is held to be of continuing force and validity, or of a standing order. Technically, the rescinding of a vote is a new question, the form being to read the resolution of the House and to move that it be rescinded".[71] Alternatively, resolutions can be amended or overturned in other ways, by decisions of the House.

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69 ibid, para 215
70 ibid, para 210
71 Erskine May, *Parliamentary Practice*, 23rd edition, 2004, p.420

IV Issues/Analysis

As outlined above the Government proposes a number of caveats to any approvals process. Of note are the recommendations that there should be no requirement for retrospective approval or approval in situations of emergency, that the Prime Minister should determine the scope of information supplied to Parliament and that there is no requirement for an additional body to be established in order to inform Parliament.

All of these caveats raise their own issues, but collectively they also raise the question of whether a Resolution that provides for a number of exceptions will undermine the effective functioning of the Parliamentary approval process. There are also other issues for the House to consider in debating the final text of any Resolution, including its scope and whether the definition of 'armed conflict' as set out in the Government' proposed draft is adequate.

A. The Scope of the Resolution

1. A Declaration of War

It is less common today for states formally to declare war. Aside from the questionable legality of such a move,[72] there are other legal implications. For instance, in a time of war obligations arise in respect of diplomats, property and neutral states. There may be treaty obligations towards or from third states, and there may be implications for trade and for insurance policies.

Most states have, therefore, moved away from the use of declared states of war, or from recognising that a relationship of war exists, and have relied instead on the notions of "hostilities" and "armed conflict". This does not prevent the use of the term in colloquial descriptions, and a number of conflicts are referred to as wars for the sake of convenience.[73]

As the Attorney General, Lord Goldsmith, pointed out during questions in the House of Lords in February 2003:

> It is not necessary to make a declaration of war these days […] The existence or not of a legal state of war is nowadays irrelevant for most purposes of international law. The application of what used to be called "the law of war" and the status of prisoners of war depends upon the existence of an armed conflict, which is a factual situation and not a question of a declaration of a state of war. Whether there is a state of war might still be relevant for certain purposes of domestic law; for example, as regards the application of certain private contracts

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[72] There is a distinction between a (*de jure*) state of war and the (*de facto*) use of force, and there is debate as to whether a declaration of war can be lawful, regardless of the slightly clearer position on the use of force.

[73] Useful discussions of the term 'war' may be found in Y Dinstein, *War, Aggression and Self-Defence*, 3rd edition, 2001, and I Detter, *The Law of War*, 2nd edition, 2000.

> referring to war. Apart from that, the noble and gallant Lord is right: a formal declaration of war is not necessary.[74]

In a paper to the PASC Professor Brazier also concurred that "the existence or otherwise of a legal state of war is nowadays irrelevant for most international law purposes. What is important… is the existence of an "armed conflict" which is a question of fact".[75]

Consequently, the need to include any reference to the power to declare war in any Resolution determining Parliament's role in deploying the Armed Forces is not considered necessary. The inclusion of this provision in Clare Short's Private Members bill of the 2005-06 session was, Professor Brazier argued, "for the sake of completeness".[76] Indeed, the Government indicated in the October 2007 consultation paper that:

> A formal declaration of war is not a condition precedent for the application of international humanitarian law. The Government does not propose that any of the canvassed options should be predicated in any way on a formal declaration of war.[77]

2. The Definition of Armed Conflict

The Government's consultation paper did however acknowledge that:

> a clear understanding will be needed about the circumstances triggering the need in which the approval of parliament … is to be required. If Parliament's approval is to be required where armed forces are deployed into actual or potential armed conflict, then it will be essential to have an understanding of what the meaning of the term 'armed conflict' is.[78]

Achieving such a task is not straightforward. In *Prosecutor v Tadic* the International Criminal Tribunal for the former Yugoslavia gave the following guidance: "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups within a State".[79] Even this carefully crafted definition is open to various interpretations. Another approach has been to define it as a situation to which the Geneva Conventions of 1949 apply.[80] Indeed in his paper to the PASC inquiry, Professor Brazier stated that this

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74 HL Deb 19 February 2003, c1140

75 Public Administration Select Committee, *Taming the Royal prerogative: strengthening ministerial accountability to Parliament,* HC 422, Session 2003-04, p.25

76 ibid

77 *The Governance of Britain, War Powers and Treaties: Limiting Executive Powers,* Consultation Paper CP26/07, Cm 7239, Session 2006-07, p.24-25

78 *The Governance of Britain, War Powers and Treaties: Limiting Executive Powers,* Consultation Paper CP26/07, Cm 7239, Session 2006-07, p.25

79 *Prosecutor v Tadic* (1996) 105 ILR 419, 488

80 As used in the Armed Forces (Parliamentary Approval for Participation in Armed Conflict) Bill in 2005 http://www.publications.parliament.uk/pa/cm200506/cmbills/016/06016.i-i.html and in the Private Member's bill sponsored by Michael Meacher, *Waging War (Parliament's Role and Responsibility) Bill,* Bill 34 of Session 2006-07.

definition of armed conflict is intended to subsume all those cases of action which will attract the international laws of war.[81] Specifically he highlighted the following situations:

> i. declared war or any other armed conflict which may arise between two or more signatories to the Conventions or Protocols (1949, article 2);
>
> ii. partial or total occupation of a signatory's territory (ibid.);
>
> iii. armed conflicts which are fought against colonial domination or alien occupation (1977, Protocol I, article 4);
>
> iv. a conflict between the armed forces of a signatory and dissident armed forces or other organised groups in its territory (1977, Protocol II, article 1).[82]

In the war powers consultation paper the Government highlighted a definition of armed conflict that is tied to the Geneva Conventions as its favoured option. Although the White Paper itself didn't express any conclusions on the definition of armed conflict, the Government's draft Resolution (see Appendix One) suggests that a conflict decision should be regarded as one in which the use of force is undertaken "outside the United Kingdom" and "would be regulated by the law of armed conflict", i.e. the Geneva Conventions.

However, the Geneva Conventions do not define armed conflict[83] and they have been criticised on the basis that they: "lack clarity and are out of date".[84] It has been argued that modern-day operational scenarios such as peacekeeping,[85] humanitarian intervention/ peace enforcement operations[86] (part of what the MOD have referred to as 'Operations Other Than War')[87] and the campaign against international terrorism undermine the relevance of rules which were last amended in 1977.

The Ministry of Defence publication *The Application of Force: An Introduction to Army Doctrine and the Conduct of Military Operations* defines peacekeeping and peace enforcement as follows:

> **Peacekeeping**
>
> Peacekeeping consists of operations carried out with the general consent of the disputing parties, as part of the peace process agreed by those parties, in support of efforts to promote security and confidence, in order to bring about a long term

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81 Professor Brazier's paper also included the proposed text for a Bill formally setting out the executive powers of Ministers of the Crown. Clauses 5-7 of that Bill dealt with the prerogative powers relating to the Armed Forces. Clauses 5 and 6 are incorporated into this Bill.

82 Public Administration Select Committee, *Taming the prerogative: strengthening ministerial accountability to Parliament,* HC 422, Session 2003-04, p.41

83 Ministry of Defence, *Manual of the Law of Armed Conflict,* Oxford University Press, p.29

84 Foreign Affairs Committee, *Visit to Guantánamo Bay*, HC44, Session 2006-07, p.27 http://www.publications.parliament.uk/pa/cm200607/cmselect/cmfaff/44/44.pdf

85 For example the British contribution to the UN peacekeeping force in Cyprus.

86 For example the US-led UN Operation *United Task Force* (UNITAF) in Somalia which was later subsumed into the expanded UNOSOM II (United Nations Operations in Somalia) (1992-94).

87 Ministry of Defence, *The application of force: an introduction to army doctrine and the conduct of military operations,* 2002

> peace settlement. They are based on the common attributes of consent, legitimacy and the minimum necessary use of force […]
>
> In general terms force may be used only in self defence. In practice, this need not preclude the robust use of force provided it is legitimately applied, proportional and allows for some form of consent to be maintained or rebuilt taking full account of the implications for all the civil and military agencies involved […]
>
> Designated peacekeeping forces operating by consent will normally be relatively small and dispersed, with only sufficient combat capability for use in self defence.
>
> **Peace Enforcement**
>
> Peace enforcement operations are generally carried out under the authority of the United Nations Security Council to maintain or restore peace between belligerent parties who may not all consent to any intervention […]
>
> Peace enforcement operations are coercive in nature, using force or its threat against any party to enforce norms, sanctions, or agreements reached by the parties themselves […]
>
> Peace enforcement tasks could include the restoration of peace by impartial actions, such as the application of military deterrence within the theatre, conflict containment by the interposition of military forces and the forcible separation of belligerent factions […] A peace enforcement force may not necessarily be large but should be equipped, organised, deployed and sustained to enable it to achieve its operational objectives in the face of real or potential threats. It should also have the capability to conduct full scale military operations and to increase the intensity and scale of its military activities if necessary.[88]

While the level and use of force implicit in a peace enforcement operation would likely invoke the international laws of war and specifically the Geneva Conventions, the applicability of peacekeeping operations to a definition of armed conflict that was so closely tied up with the Geneva Conventions is less clear. Peacekeeping implies consensus and the use of force only in self defence. Indeed neither can the definitions of peacekeeping and peace support provided by the MOD be considered as absolutes, but rather two points on a broad spectrum of peace support operations. Every operational situation is unique and therefore peacekeeping and peace enforcement operations will not necessarily be typical to the distinct definitions provided above. Recent military operations in Bosnia (IFOR and SFOR), Kosovo (KFOR) and Sierra Leone, for example, have all arguably contained elements that define both peacekeeping and peace enforcement operations.[89]

In addition, all military operations carry the inherent risk that the dynamics of the security situation will change, therefore requiring a shift in the tempo and intensity of operations.

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88 Ministry of Defence, *The application of force: an introduction to army doctrine and the conduct of military operations,* 2002, p.53-57

89 More information on IFOR, SFOR and KFOR is available in Library Research Papers RP99/66, *Kosovo: KFOR and Reconstruction,* 18 June 1999 and RP97/110, *Bosnia: the Dayton Agreement – Two Years On,* 31 October 1997.

A peacekeeping operation has the potential, therefore, to quickly shift into peace enforcement as occurred in Somalia in 1993-94. Or as the publication *British Defence Doctrine* highlights:

> Given past experience, one real possibility is that the same forces may be required to employ warfighting techniques, to conduct PSOs [peace support operations] and to provide humanitarian assistance all in the same area at the same time.[90]

In his discussion of the *Rules of Conduct during Humanitarian Interventions,* Professor Ivan Shearer examined this concept of "mission creep" in the context of UN operations and the subsequent applicability of the Geneva Conventions. He argued:

> [there are] a number of actions that constitute (for the most part) non-forcible and thus uncontroversial forms of intervention. These […] include disaster relief, humanitarian assistance [and] peace operations […] the law applicable to such operations consists principally of the norms of human rights, as recognised in the major international Covenants and conventions, and established as general international law […]
>
> Some of these examples, may, of course, in the circumstances involve the use of armed force or grow through "mission creep" to require the use of armed force […] Lengthier presences, such as the operation in Somalia, may come to pose questions of the applicability of the laws of armed conflict as the situation escalates from a peaceable and unopposed intervention to armed conflict […]
>
> The problem is the threshold of the Conventions. There are situations in peacekeeping, especially those that require – or come to require – "robust" measures, that may cross the threshold, but it may be undesirable for the operation to "change gears" notionally from a peacekeeping mission into an armed conflict. This could well have an escalation effect […]
>
> It has rightly been suggested that the threshold of armed conflict must be set higher than that set by the Geneva Conventions and Protocols where United Nations peacekeeping operations are concerned.[91]

The Government's draft 'war powers resolution' does not provide for this dynamic of mission creep and the potential for a peacekeeping operation to change, in theatre, into a peace enforcement operation or a multi-faceted operation involving peace enforcement, peacekeeping and humanitarian assistance/post conflict reconstruction.

Dr Rachel Kerr, a Lecturer in War Studies at King's College London, agrees that the line between war and military operations other than war is blurred and that "it is a serious difficulty for the armed forces and something that contributes to the uncertainty

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90 Ministry of Defence, *British Defence Doctrine,* JWP 0-01 (2nd edition), October 2001

91 Ivan Shearer, "Rules of Conduct during Humanitarian Interventions", *American Diplomacy,* April 2001. The applicability of international law to peace support operations is also examined in greater detail in Durham and McCormack, *The Changing Face of Conflict and the Efficacy of International Humanitarian Law,* 1999

surrounding questions of legitimacy, both of the action itself, and what can, or cannot be done in the course of that action".[92]

Professor Brazier also accepted this dilemma in his memorandum to the PASC. Yet, he concluded:

> It would, however, be possible to dispense with a definition and to leave the interpretation of the phrase 'armed conflict' to common sense. It is unlikely that there would be any significant disagreement about whether in fact a given situation amounted, or would amount, to a state of armed conflict.[93]

However, Dr Kerr disagrees with this particular assessment:

> I don't agree […] that it is unlikely that there would be significant disagreement about whether a given situation amounted to an armed conflict; on the contrary, I think that this issue would be extremely contentious if you had a situation where the Government wanted to deploy the armed forces, but was reluctant to seek authorisation.[94]

Former Chief of the Defence Staff, Lord Guthrie, has also expressed concerns over this issue. In an interview with Professor Peter Hennessy on the *Today* programme and reported in *The Guardian* in December 2007, Lord Guthrie reportedly asked "what do you mean by armed conflict?", and suggested that "what we do is slide into war, you cannot avoid that. An apparently benign peacekeeping mission could turn into fighting. That happened in Bosnia. It could happen in Darfur too".[95]

B. Prior v. Retrospective Approval

Abandoning the Royal Prerogative in favour of prior Parliamentary approval is regarded as having some drawbacks. In particular it has been suggested that the flexibility of rapid response and the element of surprise in launching operations would be lost or undermined were parliamentary approval a legal necessity. The whole purpose of the newly created NATO Response Force (NRF), the EU Rapid Reaction Force (EU RRF) and the EU Battlegroups[96] is, for example, to be able to deploy troops within a matter of days to trouble spots around the world. Although the then Foreign Secretary Jack Straw expressed his support in November 2002 for a debate on a substantive motion if military action were undertaken against Iraq, he also stressed that this might not be possible in advance of action, if the consequent loss of the element of surprise were to put service personnel in danger.[97] Concerns have also been expressed that the level of detail required in any report to be submitted to Parliament for approval would advertise any

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92 Personal correspondence with the author, 5 August 2005
93 ibid
94 Personal correspondence with the author, 5 August 2005
95 "Former defence chiefs oppose role for MPs in war decisions", *The Guardian,* 28 December 2007
96 These are examined in greater detail in Library Research Paper RP04/60, *NATO: The Istanbul Summit*, 26 July 2004 and RP06/32, *European Security and Defence Policy: Developments since 2003*, 8 June 2006
97 HC Deb 25 November 2002, c56.

military intentions to the enemy and thereby compromise operational freedom of action and the safety of British forces.

In its July 2006 report the Lords Constitution Committee noted:

> Several witnesses regarded operational efficiency to be the key benefit of the present deployment arrangements, and one which could be undermined by greater parliamentary involvement in the process. Field Marshal Lord Vincent of Coleshill said that the success of many military operations relies on the need to maintain "secrecy, security and surprise". Admiral Lord Boyce summarised his concern:
>
> "... all my experience over conducting or being involved with the conduct of several wars over the last five or six years or so is that those allies who go through the parliamentary process are frankly in my view not as operationally effective as those who do not ... I cannot see any advantage whatsoever in shedding the current practice of going to war from an operator's point of view. I believe it would make us operationally far less effective and we would probably start to lose."
>
> 50. General Sir Rupert Smith also considered that an open debate about whether or not to deploy Armed Forces could risk compromising their effectiveness, which he considered to be greatly enhanced by the opponent's current expectation that "we will fight to win and that the popular will at home is more or less disaster-proof". Lord Boyce told us that an open debate in Parliament on deployments could undermine six key aspects of Armed Forces operations:
>
> • escalating the conflict through rhetoric;
> • skewing decisions through access to only limited information (since a great deal of intelligence cannot be revealed in public);
> • compromising operational security by publicly discussing too much detail prior to action;
> • impairing flexibility of operational response if parliamentary approval is required for every change of the situation on the ground;
> • undermining clarity about the timetable for preparation, if it is contingent on a parliamentary debate or vote;
> • removing the ability of United Kingdom Forces to have "strategic poise" by giving the opponent early notice of intent.[98]

Indeed the operational caveats placed on some Coalition forces operating within the International Security Assistance Force in Afghanistan, by virtue of their Parliamentary mandates, have been criticised by NATO Commanders and the NATO Secretary General as a major hindrance to the operational effectiveness of forces and the potential for them to undermine the objectives of the operation more generally.[99]

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98 House of Lords Select Committee on the Constitution, *Waging War: Parliament's Role and Responsibility,* HL Paper 236-I, Session 2005-06

99 This is examined in greater detail in Library Standard Note SN/IA/4143, *International Security Assistance Force in Afghanistan: Recent Developments,* May 2008 and SN/IA/4854, *The International Security Assistance Force,* October 2008

Advocates of change have however pointed that the rapid deployment of troops such as the NRF or the EU RRF and the capacity to launch operations where the element of surprise is a priority, could be provided for through the ability to gain retrospective approval from Parliament after a deployment had commenced. Yet, Dr Kerr argues:

> even if there is the possibility of retrospective approval where an element of surprise is necessary, this would create a situation of some uncertainty at the onset of armed conflict, where the armed forces would be unsure of whether or not what they are doing is lawful, which might have a detrimental impact on morale, combat effectiveness and force cohesion.[100]

The Lords Constitution Committee pointed out in its report that "the need to provide for 'emergency' exceptions would create loopholes that could be readily exploited by a future administration".[101] This was also one of the main concerns expressed about the private Members' bill introduced by Clare Short.[102]

Another question raised by that bill was whether retrospective approval should be required on the basis of the international legal parameters on which action was initially undertaken or the situation which existed at the time that it was subsequently considered. Military intervention in Iraq in March 2003, for example, clearly fell within the parameters of the Geneva Conventions. However, there has been some discussion as to the applicability of the Geneva Conventions and the Additional Protocols to the situation in Iraq since the handover of sovereignty in June 2004. This has largely been because of the ongoing instability in the country since the end of major combat operations and the type of operations the Multinational Force (MNF) has undertaken.

In a Written Answer on 1 July 2004, for example, the then Secretary of State for Defence, Geoff Hoon, stated:

> **Sir Menzies Campbell:** To ask the Secretary of State for Defence whether the Geneva conventions will apply in full to all foreign forces in Iraq after 30 June; and if he will make a statement.
>
> **Mr. Hoon** *[holding answer 16 June 2004]:* The first, second and third Geneva conventions apply only during times of armed conflict. As at 28 June there is no ongoing armed conflict in Iraq so those conventions will have no application unless and until this situation changes. The fourth Geneva Convention applies during an armed conflict or a belligerent occupation. Since the occupation of Iraq ceased with the handover of authority to the Iraqi Interim Government on 28 June, that convention has no further application. The conduct of British forces in Iraq after 28 June is governed by domestic Iraqi law (including CPA regulations, orders and memoranda carried forward in accordance with article 26*(c)* of the Law of Administration for the State of Iraq for the Transitional Period and CPA Order No. 100); by the terms of the UN Resolutions setting out its mandate and

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[100] Personal correspondence with the author, 5 August 2005

[101] House of Lords Select Committee on the Constitution, *Waging War: Parliament's Role and Responsibility,* HL Paper 236-I, Session 2005-06

[102] Discussion of this Bill is available in Library Research Paper RP05/56, *Armed Forces (Parliamentary Approval for Participation in Armed Conflict) Bill,* 8 August 2005

> by English criminal law which applies to the Her Majesty's Armed Forces wherever they are in the world.[103]

However, in his letter annexed to United Nations Security Council Resolution 1546 outlining the status and role of the MNF, the then US Secretary of State, Colin Powell, stated that the MNF in Iraq was committed "at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions",[104] although he did not clarify which parts of the Conventions would apply.

In a Written Answer in January 2005 the then Minister for the Armed Forces, Adam Ingram, stated with respect to Iraq that:

> We take great care to ensure that civilians are protected and that our obligations under the Geneva Conventions are met. All personnel serving in Iraq are fully briefed on the Law of Armed Conflict and appropriate measures are taken to avoid loss of civilian life or property. We always evaluate planned operations to ensure that they do not carry an unacceptable risk of causing unintended civilian casualties.[105]

In June 2005 he reiterated the application of Geneva Convention IV to the current internment of security internees in the British sector in Iraq:

> The United Kingdom does not hold any Prisoners of War in Iraq. The UK holds a number of security internees at the Divisional Temporary Detention Facility (DTDF) in Southern Iraq. The conditions of internment of security internees are governed by Geneva Convention IV. Article 101 of Geneva Convention IV covers the rights of internees to express complaints about their conditions of internment.[106]

The implications for the morale and operational security of UK personnel already deployed, and indeed the UK's relations with Coalition partners, were retrospective approval subsequently to be withheld have also been highlighted as a potential problem.

Given the fact that there will be circumstances in which securing prior approval for the deployment of forces may be unrealistic, and the subsequent difficulties with retrospective approval, the Government's consultation paper adopted the view that any measure setting out Parliament's role should include an obligation on the Prime Minister to inform Parliament when forces had been committed under 'exceptional circumstances'. However, the Government has suggested that there should be no requirement in such circumstances to then seek retrospective approval.

In pursuing this option the question then arises as to what should be defined as an exceptional circumstance, which in turn comes back to the definition of what constitutes 'armed conflict'.

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[103] HC Deb 1 July 2004, c419W
[104] A copy of this letter is available online via the following link: http://www.un.org/Docs/sc/unsc_resolutions05.htm
[105] HC Deb 27 January 2005, c541W
[106] HC Deb 30 June 2005, c1690W

C. Access to Intelligence

Another issue is that, were the House to decide on military action, it would require sufficient knowledge of issues such as the legal basis, likely duration and size of the intended deployment in order to make an informed decision. It is considered likely that there would also be pressure for Members to be given access to intelligence briefings. In its *Governance of Britain* White Paper the Government acknowledges that:

> The Government proposes that specific information provided to Parliament should generally be codified to the objectives and location of the proposed conflict. In common with standard practice the Government does not propose that the actual advice of the Attorney General should be made available to Parliament, although Parliament would be informed about the legal basis of the proposed conflict.[107]

This issue has proven contentious in the past.[108] National security considerations aside, it is also unclear how useful access to intelligence information would be as Members would be unlikely to be able to use any of this information during a debate in the House that was on the public record. For such information to be useful the House would have to sit in private. This procedure was occasionally used during World War Two.

However, there are considered to be two possible mechanisms through which the House could be provided with intelligence information prior to making an informed decision on a proposal to deploy the Armed Forces:

- **The Intelligence and Security Committee** - The most appropriate mechanism has been considered to be through the existing Intelligence and Security Committee. The ISC is cross-party; its members are drawn from both Houses, and, at present, are appointed by the Prime Minister after consultation with the other party leaders. Although the statutory remit of the ISC is to examine the expenditure, administration and policy of the MI6, MI5 and GCHQ the committee has in the past also examined the work of the Joint Intelligence Committee and the Defence Intelligence Staff within the MOD. The committee operates on a "ring of secrecy" basis and reports annually to the Prime Minister on its work. Those annual reports, after any deletions of sensitive material, are then laid before both Houses of Parliament, together with the Government's response. The reports are only debated in the House of Commons, however. On occasion the committee has also produced ad hoc reports such as their report into the 7 July bombings in London.

  Consequently, the remit of the ISC could be expanded to analyse any intelligence relating to issues that may result in the deployment of the Armed Forces and then make a recommendation to Parliament which could then be used to inform any debate. However, a change to the remit of the ISC that would require the

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[107] Ministry of Justice, *The Governance of Britain – Constitutional Renewal*, Cm 7342-I, Session 2007-08

[108] Foreign Affairs Committee, *The Decision to go to War in Iraq,* HC813-I, Session 2002-03 examines this issue on p.48-49

committee to make a report to Parliament, rather than the Prime Minister, would undoubtedly require a change to the *Intelligence Services Act 1994* which established the ISC.

It is worth noting that in its 2003 report *The decision to go to war in Iraq* the Foreign Affairs Select Committee recommended that the ISC be reconstituted as a Select Committee of the House of Commons. In its report the Committee concluded:

> 165. We note that the Foreign Secretary has now gone on the record as supporting the recasting of the ISC as a select committee of Parliament. This option would offer a number of advantages: the possibility of joint hearings, joint inquiries and joint reports; established structures for the management of overlap; a more open way of working; and a seat for the ISC Chairman on the Liaison Committee. **We recommend that the Intelligence and Security Committee be reconstituted as a select committee of the House of Commons.**[109]

Indeed, reform of the ISC with respect to the way in which it is appointed, operates and reports has been discussed as part of the *Governance of Britain* White Paper. As part of that paper's proposals the Government concluded that members of the ISC should be nominated by Parliament with the Prime Minister, in consultation with the leader of the opposition, making the final appointments. Where national security or the safety of individuals is not compromised, the Government will also work with the Committee to provide public hearings where possible; while debates on the ISC annual reports will be extended to the House of Lords, timetable considerations permitting. In line with the practice of Select Committee's, the White Paper also proposed that Commons debates on ISC reports should be opened by the Chair of the Committee, rather than a Government Minister. In the House of Lords the opening statement would be made by the senior Lords Committee member. Following consultation with the ISC on these proposals, the House of Commons endorsed the proposals for reform on 17 July 2008.[110]

- **Establish a new Joint Committee or Commons Select Committee** - Alternatively, a Joint Committee of the House or a Commons Select Committee could be established precisely for the purpose of providing this advisory role, along similar lines to the existing Joint Committee on Human Rights. In order to make the committee effective its rights of access to classified information and personnel would have to be set down in the Standing Order establishing the Committee. It would also be useful for any legislation, if this were the method adopted, to contain a clause referring to the establishment and role of such a Committee.

This latter option was considered in some detail during the Lords Constitution Committee enquiry:

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[109] Foreign Affairs Committee, *The Decision to go to War in Iraq,* HC 813-I, Session 2002-03
[110] HC Deb 17 July 2008, c499-501

> The proposal of a joint committee was generally well received by witnesses in oral evidence. Tony Benn regarded a joint committee to be "a perfectly sensible thing to do and it could be done without infringing in any way on the prerogative", but said that "it would be purely advisory". Lord Lester and Clare Short regarded a joint committee as a useful complement to legislation requiring prior parliamentary approval. Clare Short also considered that getting the two Houses working together on such an issue would be a desirable thing. Professor Loveland considered that "there is a great deal to be said for a statutory regime which imposes ex post facto or continuing scrutiny". Kenneth Clarke considered "very attractive" the proposal that a joint committee could receive privileged and secret information on a scale not available to the rest of the House, because much information was kept secret unnecessarily and "the reason most of it is kept secret is because it is embarrassing and not helpful for the government trying to make its case". He did not agree with the idea that a select committee should recommend the initiation of military action. In evidence the Lord Chancellor told us that he considered the issue to be a matter for Parliament.[111]

In its conclusion the Committee recommended:

> the creation of such a committee would not, of itself, resolve the underlying issue of parliamentary sovereignty over the deployment power. Furthermore, it would duplicate the work of the existing House of Commons Defence and Foreign Affairs Select Committees.
>
> While we conclude that there is no benefit in pursuing this proposal, we do believe that if our recommendation [for a parliamentary convention] is accepted, and Parliament is to play a more significant role in future decision-making, these two Committees will represent the Parliamentary vanguard of the process. They will consequently need to be even more vigilant and proactive than they already are in informing Parliament of international developments with the potential to require deployment decisions, providing relevant and timely information to help ensure that Parliament is able to exercise this important new responsibility effectively. Similarly, in the case of on-going deployments, they would be expected to provide early warning of potential changes in those deployments of sufficient significance to require renewed Parliamentary authority.[112]

Indeed in the White Paper the Government stated its opposition to the establishment of a new committee of the House to oversee Parliament's decision making. Instead it expressed the view that the involvement of existing committees in the approval process would be for the House of Commons to determine.[113]

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[111] House of Lords Select Committee on the Constitution, *Waging War: Parliament's Role and Responsibility,* HL Paper 236-I, Session 2005-06

[112] ibid

[113] *The Governance of Britain: Constitutional Renewal*, Part 1 of 3, Cm 7342-I, Session 2007-08

V International Comparisons

Making comparisons with other countries is complicated by the fact that each has its own unique political history and level of military sophistication. As Ann Wittman pointed out in an article in *The World Today* in May 2007*:*

> Although it may be dangerous to draw broad conclusions from the experiences of different countries, each with its own political dynamic and unique constitutional framework, it does seem executives in democratic nations are becoming wary of sending troops overseas without consulting their legislatures.
>
> There is an obvious reason for this. With foreign affairs now squarely in the public eye, governments are being held to account for the activities of their troops on the ground. Whether it is television cameras recording Bosnian Muslims being abandoned to their fate by Dutch peacekeepers at Srebrenica, or soldiers sending home photos of the abuses at Abu Ghraib prison in Iraq, modern communications technology ensures a high degree of public awareness in military endeavours.[114]

Indeed in an earlier report in 2001 the member states of the Assembly of the Western European Union unanimously called for greater scrutiny and democratic accountability over the deployment of the Armed Forces. Entitled *National parliamentary scrutiny of intervention abroad by armed forces engaged in international missions: the current position in law*, the report proposed the following resolution:

> The Assembly,
>
> (i) Noting the increased frequency with which national military contingents are deployed abroad in the context of international missions;
>
> (ii) Noting that often the most important information is broadcast in the media and the fact that the pressure of public opinion makes itself felt directly rather than through political intermediaries means that parliaments are being sidelined;
>
> (iii) Recalling that the European Union has taken over responsibility for the Petersberg missions without the Community institutions having developed suitable plans for democratic scrutiny;
>
> (iv) Recalling that national defence, including management of the armed forces, falls within each European country's national area of responsibility;
>
> (v) Aware of the debate going on in several parliamentary assemblies on the search for a procedure, compatible with the principle of the separation of powers, that will allow parliaments to formulate political guidelines for government decisions regarding the deployment of armed forces abroad,
>
> INVITES PARLIAMENTS OF MEMBER COUNTRIES

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[114] Anne Wittman, "Voting for and against war", *The World Today,* May 2007

1. To reflect on the fact that the democratic scrutiny they are supposed to exercise over government decisions on the use of armed forces for international missions is not being adequately provided;

2. To compare the current initiatives and debates going on in several parliaments in Europe and the legislative and procedural solutions being put forward;

3. As necessary, to draft legislation or statutory amendments that make it possible to institute regular procedures for consulting and informing Parliament that cannot be circumvented by the executive under pressure of political events;

4. Support initiatives of international assemblies calculated to strengthen the dissemination of information among parliamentarians from a number of countries and a comparison of ideas, in order to create a common basis for democratic scrutiny attuned to the new reality of the European Security and Defence Policy.[115]

This push for greater accountability and oversight by the legislature over the power to deploy forces and engage in military action has been noted more recently in both the United States over its role in Iraq and in the Netherlands over the deployment of its forces in Afghanistan.

The detail on legislative procedure provided in the examples below is based on information that is readily available. Information on both the formal declaration of war and troop deployment is provided in some, but not in all cases. It is important to note, as outlined above, that formal declarations of war are rarely made today within international law. Consequently, a fundamental distinction exists in some countries between the parliament's role in declaring war and its role in deploying troops. Appendix Four of the Lords Constitution Select Committee report also provides some useful information in this regard.

France[116]

Article 35 of the 1958 Constitution provides that a declaration of war is authorised by Parliament.[117] However, most deployments of the armed forces nowadays are effected outside this formal procedure, whether it is a question of peace keeping operations carried out and agreed within a multinational framework (UN, EU or NATO), or operations carried out following a national decision (*Licorne* intervention in the Côte d'Ivoire, *Epervier* in Chad). The head of the executive (the Head of State, with the consent of the Head of Government in a period of cohabitation) has the final word in all cases.

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[115] Committee for Parliamentary and Public Relations, *National parliamentary scrutiny of intervention abroad by armed forces engaged in international missions: the current position in law*, WEU Document A/1762, 4 December 2001, http://www.assemblee-ueo.org/en/documents/sessions_ordinaires/rpt/2001/1762.html#P73_2059

[116] Information provided by Laurent Saunier, director of the Defence and Armed Forces Committee, French Assembly

[117] Article 35 of the Constitution actually states: "A declaration of war shall be authorised by Parliament"

Parliament is, however, likely to be involved in the financing of such operations. Until the initial finance law for 2005, credits were endorsed *a posteriori*, which reduced the role of the Assemblies, confining them to a recording role. Since 2005, following a demand from Deputies a proportion of the finances for military operations is voted in the initial budget.

In 2000, the French Parliamentary Defence Committee published a report on parliamentary control of external operations. This document remains the reference with regard to procedures in place in France.[118]

Germany

In a conference paper on parliamentary accountability of armed forces in the context of NATO in 2002, Dr Roman Schmidt-Radefeldt noted that:

> Although the German Basic Law does not contain an explicit requirement that the *Bundestag* authorise every deployment of troops, the Constitutional Court has spoken out in favour of the introduction of legislation to this effect. While this has not been done, the requirement of parliamentary approval has instead been pronounced to be a new and unwritten constitutional principle. This principle can be regarded as having derived from several different sources.
>
> Firstly, the Court considered the Basic Law as a whole and in doing so referred to specific constitutional provisions concerning the constitutional regime for the armed forces (*Wehrverfassung*). The *Bundestag* decides about "War and Peace" (the State of Defence); a Member of the Government possesses the supreme command over the armed forces; parliamentary control over the armed forces may be exercised by means of a special *Committee of Defence* ("*Verteidigungsausschuß*") and Parliament is assisted by a *Parliamentary Commissioner (Ombudsman) for the Armed Forces* ("*Wehrbeauftragter*"). Furthermore, the Court invoked historical and systematic considerations to reach a requirement of a constitutive parliamentary approval ("*Parlamentsvorbehalt*") that extends to every "armed operation".
>
> The Court reasoned that the Basic Law *in toto* conceives the armed forces not as a tool of power for the executive, but rather as a "parliamentary army" (*Parlamentsheer*). The Federal Parliament has the task of securing the integration of the *Bundeswehr* into the democratic order under the rule of law by controlling both the establishment and the use of the armed forces. In other words, the Basic Law has the role of preserving for Parliament a legally relevant influence on the establishment and use of the armed forces.[119]

Schmidt-Radefeldt went on to note that parliamentary decisions could be taken on the basis of motions to approve deployment, rather than through the legislative process.

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[118] Assemblée Nationale, *Le contrôle parlementaire des operations extérieures*, Rapport d'information, 8 March 2000, http://www.assemblee-nationale.fr/rap-info/i2237.asp

[119] Roman Schmidt-Radefeldt, "Ensuring the parliamentary accountability of armed forces in the context of NATO, stationing – deployment – multinational integration", Paper presented at the 4th Workshop on "Strengthening Parliamentary Oversight of International Military Cooperation and Institutions", Brussels, July 2002

However, he identified limits to the need for parliamentary approval and limits to the scope for parliamentary approval. He demonstrated that:

- Parliament had no role beyond "an initial legitimising function since it cannot make meaningful determinations concerning the scope, methods or tactics of the operation involved".

- In the case of urgent deployments, "the executive is permitted to make provisional decisions on the deployment of armed forces without the prior consent of Parliament. Nevertheless, the Government is required to address Parliament immediately and to seek its approval as soon as possible".

- In the case of secret deployments: parliamentary approval can be delegated to parliamentary committees for reasons of security.

- In the case of recalling troops: "in reality this right to recall troops is actually more accurately described as a right to refuse approval of continued deployment".[120]

The WEU report on parliamentary scrutiny of armed forces' activity abroad provided the following overview of the German position:

> For the time being then, Germany – together with the Netherlands – is the only country in the European Union where Parliament is virtually in a position to take decisions, jointly with the executive, as regards the use of the armed forces beyond the country's borders. This power has meant that Germany, where memories of both the Third Reich and the cold war serve to fuel strong pacifist tendencies, is rent by highly charged disputes over Atlantic Alliance operations, a situation which, paradoxically, has led the leadership to adopt a more realistic solution, in order to dispel the uncertainties that invariably surround German involvement alongside the Allies. The leadership is in fact influenced both by the fact that it is bound to comply with its undertakings by virtue of the treaties it has entered into and by the feeling, common to all political factions, that the country should preferably maintain a non-aligned stance towards missions which to an extent smack of Western imperialism.[121]

Italy

Under the Constitution the Government has the responsibility for international policy and military action, and can take relevant decisions. There is no constitutional provision that necessitates Parliamentary approval for the deployment of troops, although the Government is obliged to consult Parliament. There are no specific rules about this, but

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[120] Roman Schmidt-Radefeldt, "Ensuring the parliamentary accountability of armed forces in the context of NATO, stationing – deployment – multinational integration", Paper presented at the 4th Workshop on "Strengthening Parliamentary Oversight of International Military Cooperation and Institutions", Brussels, July 2002

[121] Committee for Parliamentary and Public Relations, *National parliamentary scrutiny of intervention abroad by armed forces engaged in international missions: the current position in law*, WEU Document A/1762, 4 December 2001, para 25
http://www.assemblee-ueo.org/en/documents/sessions_ordinaires/rpt/2001/1762.html#P73_2059

various ways of acting, according to the level of seriousness of the political or military situation. Generally the Government has made communications to Parliament or its committees. Such communications are usually followed by a debate and the adoption of a resolution by simple majority. In cases of major political issue the government could ask the Parliament to express its confidence by a vote.

The Government also generally submits a bill to the Parliament, with the aim of authorising the expenses for the participation in military operations abroad. This can be done retrospectively. The Italian Parliament has frequently been involved in decisions concerning the country's participation in international military operations under the UN or other international organizations such as NATO.

In January 2001 the Foreign Affairs Committee of the Chamber of Deputies adopted a resolution concerning the procedures relating to Parliament's role in taking decisions about Italian military engagement in international military operations. The resolution provides that the Government should first of all inform Parliament about the subject. Parliament then expresses its opinions in a debate followed by a vote, or the adoption of a resolution, or some other political act. A bill should be submitted for the financial aspects of the matter. The WEU report, however, noted that, "Notwithstanding the explicit intention underlying this Resolution, the way things work is somewhat less clear and well-defined, especially in regard to the juncture at which the first communication is delivered to Parliament".[122]

The Constitution states that the Chambers can declare war but have no competence to deploy troops:

> Article 78 [State of War]
> Chambers are competent to declare war and assign the necessary powers to government.[123]

However, its underlying position is:

> Article 11 [Repudiation of War]
> Italy repudiates war as an instrument offending the liberty of the peoples and as a means for settling international disputes; it agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed; it promotes and encourages international organizations furthering such ends.

Spain

Section 63 of the Spanish Constitution of 1978 includes the following clause:

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[122] Committee for Parliamentary and Public Relations, *National parliamentary scrutiny of intervention abroad by armed forces engaged in international missions: the current position in law*, WEU Document A/1762, 4 December 2001, paras 58-61
http://www.assemblee-ueo.org/en/documents/sessions_ordinaires/rpt/2001/1762.html#P73_2059

[123] Hleplinelaw.com, *Italian Constitution,* http://www.helplinelaw.com/law/italy/constitution/italy01.php

> 3. It is incumbent upon the King, following authorization by the Cortes Generales, to declare war and to make peace.

However, this position was changed in 2004. The WEU report contains the following paragraphs on the pre-2004 position:

> 40. Article 63 of the Constitution reads as follows: "It is incumbent on the King, after authorisation by the Parliament, to declare war and make peace". As Article 64 provides that all acts by the King shall be countersigned by the Prime Minister, it can fairly be stated that this responsibility rests with the Head of Government who "directs domestic and foreign policy, civil and military administration, and the defence of the State" (Article 97). In the event of war the consent of the Cortes Generales would therefore be required but there is still a legislative vacuum since the internal rules of the two Chambers sitting together as the Cortes Generales have not yet been drawn up and the procedure is still to be defined.
>
> 41. The case of military operations in the framework of an international mission is not explicitly provided for by law but forms part of the foreign policy responsibilities of Government. First of all, the Council of Ministers must take the formal decision (acuerdo) authorising the participation of Spanish military units in humanitarian and peacekeeping missions. Those decisions are normally taken on the basis of a proposal from the defence and foreign affairs ministries. They specify the number of troops and types of equipment to be mobilised, as well as the initial duration of Spain's involvement. The Defence Ministry then has the task of defining precisely which units and equipment are to be deployed.
>
> 42. In fact the Government has always acted on its own initiative, but its decisions are invariably accompanied by a parliamentary debate, almost always after the event, without the adoption of instruments binding on the Government in regard to the measures adopted. Ministers have frequently addressed the foreign affairs and defence committees and several plenary sittings, in the form of information briefings and general policy debates, have been held during all the crises that have occurred in recent years.[124]

Under the previous *Partido Popular* (PP) Government of José María Aznar, the decision to involve Spanish troops in the US-led invasion of Iraq was taken by the Prime Minister, without the approval of the Spanish Parliament or *Cortes*, which was simply 'informed' of the decision.

When José Luis Zapatero (Socialist Workers Party of Spain – PSOE) became Prime Minister in 2004, he pledged to change Spanish law to make it necessary for the government to seek the approval of parliament before deciding to participate in military and peace keeping missions. On 2 July 2004 the Spanish Government concluded an agreement on the participation of Spanish troops in missions abroad. The Prime Minister presented a motion to the Congress of Deputies on 6 July 2004 to approve the new provision. There was a lengthy debate and the motion was supported by all parties

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[124] Committee for Parliamentary and Public Relations, *National parliamentary scrutiny of intervention abroad by armed forces engaged in international missions: the current position in law*, WEU Document A/1762, 4 December 2001, paras 40-42
http://www.assemblee-ueo.org/en/documents/sessions_ordinaires/rpt/2001/1762.html#P73_2059

except the PP.[125] The Congress approved the Government's decision on 6 July. It applies to all missions abroad, including peace-keeping ones.

In July 2004, the Spanish Government obtained parliamentary approval to increase the number of its soldiers in Afghanistan, in order to help maintain public order during the elections in September 2004.[126]

Poland

Within the Polish Constitution a distinction is made between the authority to declare war and the authority to deploy troops either overseas or in defence of Polish territory.[127]

Under Article 116 the authority to declare war, either in the event of armed aggression against Poland or when an obligation of common defence arises by virtue of international agreements such as NATO's Article V, lies in the first instance with the Polish Sejm (Assembly). If the Sejm is unable to assemble for a sitting the President is then entitled to declare a state of war.

Article 116 states:

> 1. The Sejm shall declare, in the name of the Republic of Poland, a state of war and the conclusion of peace.
> 2. The Sejm may adopt a resolution on a state of war only in the event of armed aggression against the territory of the Republic of Poland or when an obligation of common defence against aggression arises by virtue of international agreements. If the Sejm cannot assemble for a sitting, the President of the Republic may declare a state of war.[128]

However, the Polish Parliament has no direct role in the deployment of troops. Authority to deploy troops lies with the President, who is the Supreme Commander of the Armed Forces, and the Prime Minister. Article 136 states:

> In the event of a direct external threat to the State, the President of the republic shall, on request of the Prime Minister, order a general or partial mobilisation and deployment of the Armed Forces in defence of the Republic of Poland.[129]

Article 117 of the Constitution requires the principles for the deployment of the armed forces and the presence of foreign troops on Polish soil to be specified. It states:

> The principles for deployment of the Armed Forces beyond the borders of the Republic of Poland shall be specified by a ratified international agreement or by

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[125] Mr Zapatero's statement and the subsequent debate can be accessed on the Spanish Parliament website at http://www.congreso.es/, (follow links to *Diarios de Sesiones del Pleno Año 2004*, then to 6 July 2004)

[126] World Socialist Web Site, "Spain: Socialist Party government to legislate to send troops to Afghanistan and Haiti", http://www.wsws.org/articles/2004/jul2004/spai-j24.shtml

[127] A copy of the Polish Constitution is available online at: http://www.poland.pl/info/information_about_poland/constitution.htm

[128] http://www.poland.pl/info/information_about_poland/constitution/ch4.htm

[129] http://www.poland.pl/info/information_about_poland/constitution/ch5.htm

> statute. The principles for the presence of foreign troops on the territory of the Republic of Poland and the principles for their movement within that territory shall be specified by ratified agreements or statutes.

The Statute of 17 December 1998 on *Principles for deployment/commitment/ or sojourn of the Armed Forces beyond the state borders* set out the framework required in the Constitution. According to this statute, the deployment/commitment of the armed forces beyond the state borders means the presence of the troops beyond the state borders in order to take part in:

> a) an armed conflict or in order to reinforce the forces of an allied state or allied states;
>
> b) a peacekeeping mission;
>
> c) an action of preventing terrorist acts or the consequences thereof.

The decision on a deployment (commitment) of troops beyond the state borders in the cases a) and b) is taken by the President of the Republic at the request of the Council of Ministers and in the case c) by the by the President of the Republic at the request of the Prime Minister.

The President is obliged by the Statute to inform without delay the speakers of the Sejm and Senate on his/her decision.

The sojourn of the armed forces beyond the state borders means the presence of the troops beyond the state borders in order to take part in:

> a) military courses or trainings;
>
> b) rescue operations or humanitarian operations;
>
> c) ceremonial events.

The decision on the sojourn of troops beyond the state borders is taken normally by the Minister of Defence or Minister of Internal Affairs in relation to the troops subordinated respectively to each of them. When the cost of a course or training is not included in the budget of the respective ministry, the decision is taken by the Council of Ministers.[130]

Sweden

According to the Swedish Constitution and research supplied by the Riksdag Research Service, it would appear that the Swedish Parliament would have to pass a bill for a declaration of war to be made but that the Government does not need parliamentary approval to commit troops to protect the realm.

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[130] Information on the Statute of 17 December 1998 was provided by Marcin Mróz, Bureau of Research, Polish Sejm

Article 9, Chapter 10 of the Swedish Constitution states that:

> The Government may commit the Realm's armed forces, or any part of them, to battle in order to repel an armed attack upon the realm. Swedish armed forces may otherwise be committed to battle or despatched abroad only provided
>
> 1. The Riksdag consents thereto;
> 2. such commitment is permitted under an act of law which sets out the prerequisites of such action
> 3. a commitment to take such action follows from an international agreement or obligation which has been approved by the Riksdag.
>
> A state of war may not be declared without the consent of the Riksdag, other than in the event of an armed attack upon the Realm.
>
> The Government may authorise the armed forces to use force in accordance with international law and custom to prevent violation of Swedish territory in time of peace or during a war between foreign states.[131]

War has never been declared under the new Constitution and so the provisions have not been put to the test. The Research Service's statement expanding on this Article of the Constitution is as follows:

> According to Chapter 10, Article 9 of the Swedish constitution, consent from the Riksdag is necessary when the government declares war. The Swedish constitution dates from 1974 and Sweden has never declared war under the new constitution. Procedures for consent from the Riksdag have therefore never been adopted. *However, it is reasonable to assume that the government would present a bill to the chamber*. This would then be treated rapidly and consent would be given by a single vote.[132]

United States

Under the US Constitution, war powers are divided. Congress has the power to declare war and raise and support the armed forces, while the President is Commander in Chief. It is generally agreed that the Commander in Chief role gives the President power to repel attacks against the United States and makes him responsible for leading the armed forces. However, US involvement in extended undeclared wars in Korea and Vietnam led to concern in Congress about the erosion of its authority to decide when the US should become involved in a war or in the use of armed forces that might lead to war. On 7 November 1973, Congress passed the *War Powers Resolution* (or *War Powers Act*),[133] overriding the veto of President Nixon. Successive Presidents have disputed its constitutionality, but the US Supreme Court has never ruled on it.[134] The administration of George W. Bush has, for example, consistently argued that as Commander in Chief, the

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131 Swedish Riksdag, *The Constitution*, http://www.riksdagen.se/templates/R_Page____6307.aspx
132 Advice from Roger Petersson, Advisor, Department of Justice and Ulf Christofersson, Deputy Clerk of the Chamber
133 Public Law PL 93-148
134 Congressional Research Service Issue Brief IB81050, updated 10 September 2002

president has ultimate control over the military and does not need congressional approval for military operations.[135]

The *War Powers Resolution* requires regular consultation with Congress in contemplating military action, written notification within 48 hours of such action, with its "estimated scope or duration", and Congressional consent through either a declaration of war or "specific statutory authorization". If such approval is not granted within 60 days, the President is supposed to withdraw US forces within a further 30 days. The purpose of the Act, as explained by the US Congressional Research Service, is:

> to ensure that Congress and the President share in making decisions that may get the US involved in hostilities. […] Criteria for compliance include prior consultation with Congress, fulfilment of the reporting requirements, and congressional authorization. If the President has not complied fully, the issue becomes what action Congress should take to bring about compliance or to influence US policy.[136]

Relations between President and Congress over committing the US to military action take place against this background.

However, given the strength of domestic opposition in the US to military action in Iraq, in 2007 a National War Powers Commission was convened by the Miller Center of Public Affairs at the University of Virginia in order to examine this issue. Chaired by former US Secretaries of State, James Baker and Warren Christopher, the Commission, which reported in July 2008, has called upon the next US president and Congress to repeal the 1973 War Powers Resolution and replace it with the *War Powers Consultation Act 2009*.[137] The Commission report stated:

> The act we propose places its focus on ensuring that Congress has an opportunity to consult meaningfully with the president about significant armed conflicts and that Congress expresses its views.

To promote consultation the Commission recommended the creation of a new congressional committee – the Joint Congressional Consultation Committee - which would include the majority and minority leaders of the House and Senate and the chairmen and ranking members of the relevant committees. Under the proposed act the president would be required to consult with the committee before deploying forces into combat operations that were expected to last longer than one week. In situations which require the immediate deployment of forces, the president would then be required to consult with the committee within three days. Once the committee has been consulted, Congress would have 30 days within which to vote on a resolution authorising the use of military force. In the event that Congress voted against authorization, a resolution of disapproval would have to be passed which the president would have the power to veto.

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[135] See for example "Power struggle: who should declare war – the president or Congress", *Armed Forces Journal,* September 2008

[136] Congressional Research Service Issue Brief IB81050, updated 10 September 2002

[137] A copy of that report is available online at: http://millercenter.org/policy/commissions/warpowers

Congressional override of that veto would require a two thirds majority in both the House and the Senate.

However, the report of the Commission has been criticised by a number of commentators who have suggested that the proposed legislation provides a number of exceptions to consulting Congress and that it risks undermining the US Constitution's checks and balances "by asking Congress to serve as the president's consultant, rather than the other way around".[138]

Australia

The *Commonwealth of Australia Constitution Act 1900* vests command of naval and military force in the Governor-General:

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

When exercising the executive power of the Commonwealth, in accordance with long established constitutional practice, the Governor-General acts on the advice of Ministers. In effect Ministers, who are ultimately responsible to the Parliament, take the decisions (as in Westminster).

However in 1991, when Australia gave both diplomatic and military support to the international coalition in the Gulf War, a motion was put down by the Government for debate.

The motion stated:

> That this House:
>
> (1) reaffirms its support for an on-going role for the United Nations in promoting world peace and the self-determination of nations and in particular the resolutions of the Security Council directed to end the aggression of Iraq against Kuwait;
>
> (2) affirms its support for Australia's positive response to the request made by the United Nations Security Council in Resolution 678 for support in implementing that Resolution;
>
> (3) expresses its full confidence in, and support for, Australian forces serving with the UN-sanctioned multi-national forces in the Gulf;
>
> (4) deplores Iraq's widening of the conflict by its unprovoked attack upon Israel; and
>
> (5) recognises, as those with whom we are acting now in the Gulf have recognised, the need to intensify efforts to establish peace and stability in the

[138] "Power struggle: who should declare war – the president or Congress", *Armed Forces Journal,* September 2008

> Middle East, including a just resolution of the Palestinian issue and the continuing security of Israel, once the crisis in the Gulf is resolved.

On Wednesday 23 January 1991 the Question was put and passed (with no dissention).

On 18 March 2003, the House of Representatives debated the following motion with regard to Iraq:

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

> 8. notes that the Government is committed to helping the Iraqi people, including through humanitarian assistance, to build a new Iraq at peace with itself and its neighbours.

After introducing the motion, John Howard, the Australian Prime Minister, began his speech by stating:

> This morning I announced that Australia had joined a coalition, led by the United States, which intends to disarm Iraq of its prohibited weapons of mass destruction.[139]

Largely as a response to the Iraq conflict on 15 February 2005, the Australian Senate held a second reading debate on the *Defence Amendment (Parliamentary Approval for Australian Involvement in Overseas Conflicts) Bill 2003 [2004]*. The Bill had been introduced initially in 2003 but in introducing the Bill in February 2005, one of its sponsors, Senator Allison, summarised why the Bill was being introduced:

> Many Australians have found it very hard to believe that an important issue like sending our troops overseas to engage in war against another sovereign nation is actually excluded from our democratic decision-making processes. That a Prime Minister can commit Australian men and women to war without parliamentary consent goes against the basic principles that parliaments should be the providers of democratic legitimacy. It is contrary to democracy that Australia does not have the constitutional or legal powers to hold the executive of government accountable for such decisions. Parliamentary oversight in relation to war must be strengthened. That deficit must be addressed, and that is what this bill does.[140]

The Bill was opposed by the main opposition party.[141] No Government Minister spoke in the debate. However, following the Australian Government's decision to deploy troops in October 2001, John Howard, the Prime Minister, told journalists:

> We don't need any Parliamentary approval to deploy people overseas. Bear in mind that there was a resolution carried by both houses of Parliament which authorised the invocation of ANZUS. I see this as a deployment within the broad rubric of the ANZUS Treaty therefore I would not think any additional constitutional procedural benediction were needed for that to happen.[142]

Speakers in the Senate debate rehearsed similar arguments to those that were made in the United Kingdom at the time in connection with Clare Short's Private Members' Bill.[143]

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139 House of Representatives (Australia), *Parliamentary Debates*, 18 March 2003, p.12505 http://www.aph.gov.au/hansard/reps/dailys/dr180303.pdf

140 Senate (Australia), *Parliamentary Debates*, 10 February 2005, p106 (the debate continues – pp106-134), http://www.aph.gov.au/hansard/senate/dailys/ds100205.pdf

141 ibid ; c133

142 Prime Minister of Australia, News Room, 17 October 2001, http://www.pm.gov.au/news/interviews/2001/interview1390.htm

143 The arguments were summarised in the House of Commons Library Research Paper 05/56, *Armed Forces (Parliamentary Approval for Conflict) Bill [Bill 16 of 2005-06]*, http://www.parliament.uk/commons/lib/research/rp2005/rp05-056.pdf

Canada

Although the Canadian Constitution vests control of the military in the Queen,[144] following the Westminster model of government, the Royal Prerogative is exercised by the Government, with the Governor-General exercising the personal prerogatives.

A. Summary tables

1. Geneva Centre for the Democratic Control of the Armed Forces

In October 2006 the Geneva Centre for the Democratic Control of the Armed Forces (DCAF) conducted an exercise which charted the status of a select number of Parliaments in relation to their role in the deployment of the Armed Forces. The outcome of that survey is set down in the following table:[145]

Country	Prior approval of sending troops	Mandate of the mission	Approval of the budget of the mission	Duration of the mission	Operational issues[a]	Parliament has the right to visit the troops on missions abroad
Canada	0	0	0	0	0	X
Czech Rep.	X	X	X	X	0	X
Denmark	X	X	X	X	X	X
France	0	0	0[1]	0	0	X
Germany	X	X	X	X	X	X
Hungary	X	–	X	–	–	–
Macedonia	X	X	X	X	0	X
Netherlands	X	X	X	X	X	X
Poland	0	0	0	0	0	X
Romania	X	X	X	X	0	X
Spain	X	0	X[2]	X	0	X
Sweden	X	X	X	X	0	X
Switzerland	X	0	X	X	0	X
Turkey	X	0	0	0	0	0
UK	0	0	0	0	0	X
USA	0	0	X	X	X	X

X: parliament posseses the power; 0: parliament does not possess the power; –: information not available or not applicable;
a: operational issues include rules of engagement, command and control, and risk assessment;
1: only after the fact; 2: only for supplementary budgets.

2. Stockholm International Peace Research Institute

In its 2005 Yearbook, the Stockholm International Peace Research Institute (SIPRI) conducted a similar survey, examining the extent of parliamentary oversight in relation to governmental decisions to deploy troops in peace support operations. In a chapter on

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144 The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen (*Constitution Act 1867*, s15, http://www.uni.ca/constitution.html)

145 Geneva Centre for the Democratic Control of Armed Forces, *Sending Troops Abroad,* October 2006

governing the use of force, Hans Born and Heiner Hänggi described the subject as "under-researched".[146] In summarising the position of a number of European Union and NATO countries they commented:

> … Research in a selection of 16 'old' and 'new' EU or NATO member states taking part in PSOs shows that wide variation exists between countries regarding the constitutional and legal powers of parliament to oversee [peace support organisations].[147]

Much of that research echoes the conclusions of the 2006 DCAF study. The following table, therefore, covers those countries surveyed by SIPRI which were not included in the subsequent DCAF study:

Parliamentary oversight powers concerning peace support operations

Country	Prior approval to send troops abroad	Approval of a mission's mandate	Approval of operational issues	Right to visit troops abroad	Decision on the duration of the mission
Belgium	O	O	O	X	O
Italy	X			X	
Norway	X	O	O	X	O
Portugal	O	O	O	O	O

X – yes
O – no
Source: Hans Born and Heiner Hänggi, *SIPRI Yearbook 2005*, p.206

[146] Hans Born and Heiner Hänggi, "Governing the use of force under international auspices: deficits in parliamentary accountability", in Stockholm International Peace Research Institute, *SIPRI Yearbook 2005*, p.200
[147] ibid, p.204

VI Appendix One – Draft Detailed War Powers Resolution

ANNEX A
DRAFT DETAILED WAR POWERS RESOLUTION

That an humble Address be presented to Her Majesty praying that decisions of Her Majesty's Government relating to the use of force by Her forces outside the United Kingdom be made subject to the following provisions.

1. Approval required

(1) The approval of this House should be obtained for a conflict decision made after [insert appropriate date]

(2) A conflict decision is a decision of Her Majesty's Government to authorise the use of force by UK forces if the use of force:-

(a) would be outside the United Kingdom, and

(b) would be regulated by the law of armed conflict.

(3) Approval for a conflict decision has been given if the decision is covered by an approval given in the way set out in paragraph 2 below.

(4) In these provisions "UK forces" means forces from the regular forces or the reserve forces as defined in section 374 of the Armed Forces Act 2006.

2. Process for approvals

(1) Sub-paragraphs (2) to (7) below are about the process by which this House will give approvals covering conflict decisions.

(2) It is for the Prime Minister to start the process in relation to a proposed approval.

(3) The Prime Minister does that by laying before this House a report setting out:-

(a) the terms of the proposed approval, and

(b) the information about objectives, locations and legal matters that the Prime Minister thinks appropriate in the circumstances.

(4) This House gives the approval by resolving to approve the terms set out in the Prime Minister's report.

(5) This House may send a message to the Lords asking for its opinion on whether this House should resolve to approve those terms.

(6) If a message is sent, no approval will be given less than [ ] sitting days after the day on which the Lords receives the message.

(7) "Sitting day" means a day on which the Lords sits.

3. *Exceptions to requirement for approval: emergencies and security issues*

(1) Approval is not required for a conflict decision if the emergency condition or the security condition is met.

(2) The emergency condition is that:-

(a) the conflict decision is necessary for dealing with an emergency, and

(b) for that reason, there is not sufficient time for an approval covering the decision to be given before the decision is made.

(3) The security condition is that:-

(a) the public disclosure of information about the conflict decision could prejudice [one or both] of the matters mentioned in sub-paragraph (4) below, and

(b) for that reason, it is not appropriate for an approval covering the decision to be sought before the decision is made.

(4) The matters are:-

(a) the effectiveness of [activities which result from the decision or with which the decision is otherwise connected];

(b) the [security/safety] of:-

(i) members of UK forces;

(ii) members of other forces assisting (directly or indirectly) UK forces;

(iii) other persons assisting (directly or indirectly) UK forces or other forces within sub-paragraph (ii).

(5) It is for the Prime Minister to determine if the emergency condition or the security condition is met.

(6) In coming to a determination, the Prime Minister should, if feasible, consult the chair of any committee the Prime Minister thinks appropriate.

(7) Sub-paragraphs (8) to (11) below apply if the Prime Minister determines that the emergency condition or the security condition is met.

(8) The Prime Minister should, as soon as feasible, inform the chair of any committee the Prime Minister thinks appropriate.

(9) The Prime Minister should lay before this House a report:-

(a) giving reasons why the Prime Minister made the determination about the emergency condition or the security condition, and

(b) setting out, in relation to the conflict decision in question, the information about objectives, locations and legal matters that the Prime Minister thinks appropriate in the circumstances.

(10) The report should be laid within [ ] days after the day on which the conflict decision is made.

(11) But, in a case involving the security condition, the report does not have to be laid so long as the Prime Minister is satisfied:-

(a) that the circumstances set out in sub-paragraph (3)(a) above continue to exist or that the laying of the report could prejudice national security or the United Kingdom's international relations, and

(b) that for that reason, it is not appropriate to lay the report.

4. Exceptions to requirement for approval: special forces

(1) Approval is not required for a conflict decision if the decision covers one or both of the following only:-

(a) members of special forces;

(b) other members of UK forces for the purpose only of their assisting (directly or indirectly) activities of special forces.

(2) "Special forces" means any forces the maintenance of whose capabilities is the responsibility of the Director of Special Forces or which are for the time being subject to the operational command of that Director.