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Armed Forces (Parliamentary Approval for Participation in Armed Conflict) Bill

Bill 16 of 2005-06

The *Armed Forces (Parliamentary Approval for Participation in Armed Conflict) Bill* is sponsored by Clare Short, the former Secretary of State for International Development. She came third in the ballot for Private Members' Bills. It is due for its second reading on 21 October 2005.

The Bill seeks to establish a requirement for the Government to obtain the approval of both Houses of Parliament, for the deployment of the Armed Forces in armed conflict and/or for a declaration of war to be made.

Claire Taylor

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Summary of main points

Under the Royal Prerogative the power to declare war and/or commit British forces to military operations is vested in the Prime Minister. Parliament has no formal role in approving such deployments although the Government does undertake to keep Parliament informed, both of the decision to use force and the progress of military campaigns.

The *Armed Forces (Parliamentary Approval for Participation in Armed Conflict) Bill* seeks to establish a requirement on the Government to obtain Parliamentary approval, by means of a resolution in both Houses of Parliament, for the deployment of the Armed Forces in conflict and/or for a declaration of war to be made.

For the purposes of the Bill, 'armed conflict' is defined as "any use of force which gives rise, or may give rise, to a situation of armed conflict to which the Geneva Conventions of 1949 or the Additional Protocols of 1977 apply". However, a definition based solely on the application of the Geneva Conventions and Additional Protocols raises the question of whether operational deployments such as peacekeeping and peace enforcement missions would be covered under this legislation. Military Aid to the Civil Authorities (MACA) would not, by implication, be covered by the Bill.

Advocates of the proposed legislation argue it would increase democratic accountability in this area. However, requiring Parliamentary approval for the deployment of the Armed Forces is considered to have several drawbacks, including undermining the ability of the Government to act quickly and flexibly and losing the element of surprise in launching operations, therefore potentially jeopardising Service personnel. Advocates contend, however, that the inclusion of a clause providing for retrospective approval of military deployments should adequately address this criticism.

Yet, the ability to approve operations retrospectively itself raises questions. What has been regarded as a potential loophole in the legislation is the ability of the Prime Minister to retain troops in an operation that has not received retrospective Parliamentary approval, where he/she deems it to be necessary as a precursor to withdrawal (Clause 6 (2)). There is no time frame stated within the Bill for retaining troops in theatre under this exception and there is no definition of what constitutes necessity.

In addition, Clause 4 (1) allows for retrospective approval of deployments that had already begun by the time this proposed legislation enters into force. The definition of what constitutes an 'armed conflict' would be important in determining to which cases of action retrospective approval should apply. The Bill also does not make clear whether retrospective approval is required on the basis of the international legal parameters on which action was initially undertaken or the situation which currently exists. The deployment of British troops in Iraq is considered one such example of where this ambiguity may arise.

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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

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/cmpublicadm/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. The Defence Council, through the Secretary of State for Defence, would advise the Cabinet of its requests and recommendations.

In constitutional terms, therefore, the Government 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. Debates/Substantive Motions on Past Conflicts⁶

During military campaigns in the 1990s concern was expressed by some Members over the Government's reluctance to hold debates on substantive motions. For instance, during the Kosovo conflict the debates that took place were on Government introduced motions for the adjournment of the House.⁷ 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." Tony Benn and others argued 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 to take it into account.

1. Examples

The following are illustrative examples of 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.⁸

⁵ *Letters Patent Constituting the Defence Council, Queens Regulations (Army)*, 1975, Annex A (J) to Chapter 1. The Queens Regulations are available online at:

http://www.army.mod.uk/linked_files/ag/servingsoldier/termsofserv/discmillaw/files/Queens_Regulations_Incl_A27.doc

⁶ Extract is based on Library Standard Note, *Parliament and the participation of British forces in armed conflict*, SN/IA/1218 by Paul Bowers. Last updated 3 March 2005.

⁷ These are not the same as the daily half hour Adjournment Debates.

⁸ For future reference 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. This is available from the Parliament and Constitution Centre.

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.⁹ 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 legislation, 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 substantive motions as well: for instance one 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.”¹⁰ This followed the fall of Greece despite British assistance, and it was designed to demonstrate confidence in the Government’s war strategy.

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.¹¹ Attlee gave an account in this manner 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 USA, 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.¹²

Korea was addressed in further statements and debates until the cessation of hostilities in July 1953.

⁹ HC Deb 3 September 1939, c291.

¹⁰ HC Deb 6 May 1941, c727.

¹¹ HC Deb 27 June 1950, c2102-3 & 2159-61.

¹² HC Deb 5 July 1950, c485.

Falklands War

Following the Argentine invasion of the Falkland Islands in April 1982 the House was recalled, on a Saturday, and a debate was held on the motion to adjourn.¹³ 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 interest for many years before this, and there were other statements in the period just before the invasion.

Gulf War, 1991

During the Gulf War of 1991 there were seven statements and one debate, which was on a substantive motion.¹⁴ The commencement of hostilities was announced in a statement by 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 678.¹⁵

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.¹⁶

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.¹⁷

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

¹³ HC Deb 3 April 1982, c633-68.

¹⁴ 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.

¹⁵ HC Deb 21 January 1991, c24.

¹⁶ HC Deb 21 January 1991, c113.

¹⁷ 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

action.¹⁸ The commencement of hostilities was announced by Deputy Prime Minister John Prescott in a statement on 24 March 1999, and there were another eight statements on Kosovo before the suspension of the action on 10 June 1999.¹⁹ There were three debates on motions to adjourn in the course of the conflict.²⁰ Other statements included reference to the campaign (eg the Prime Minister's statements on the NATO summit and the Berlin European Council).

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 2003²¹ there were three further debates on Iraq on substantive motions, and eleven statements, plus two debates on defence in the world, in which much mention was made of Iraq.²²

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, and the main question was agreed on question.

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.

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

¹⁹ 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

²⁰ HC Deb 25 March 1999, c536; 19 April 1999, c573; 18 May 1999, c882

²¹ 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.

²² 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

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 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 9 ministerial statements and three written ministerial statements had been made.²³

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 2003.²⁴

²³ 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

²⁴ This is available online at: <http://www.parliament.uk/commons/lib/research/rp2003/rp03-050.pdf>

II Clauses of the Bill

The *Armed Forces (Parliamentary Approval for Participation in Armed Conflict) Bill* seeks to establish a requirement on the Government to obtain Parliamentary approval, by means of a resolution in both Houses of Parliament, for the deployment of the Armed Forces in conflict and/or for a declaration of war to be made.²⁵

The Bill is almost identical to the Private Member's Bill (Bill 31) introduced in the 2004-05 session by Neil Gerrard which was dropped before its second reading because of the General Election.

A. Definition of Armed Conflict

For the purposes of the Bill, 'armed conflict' is defined as "any use of force which gives rise, or may give rise, to a situation of armed conflict to which the Geneva Conventions of 1949 or the Additional Protocols of 1977 apply".²⁶

In a paper to the Public Administration Select Committee enquiry,²⁷ Specialist Adviser to the Committee Professor Rodney Brazier states that this definition of armed conflict is intended to subsume all those cases of action which will attract the international laws of war. Specifically he highlights 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).²⁸

However, a definition based solely on the application of the Geneva Conventions and Additional Protocols raises the question of whether operational deployments such as peacekeeping²⁹ and peace enforcement³⁰ missions (part of what the MOD have referred

²⁵ The text of the Bill is available online at:

<http://www.publications.parliament.uk/pa/cm200506/cmbills/016/2006016.pdf>

²⁶ A reference guide to the Geneva Conventions is available online at: <http://www.genevaconventions.org/>

²⁷ 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.

²⁸ Public Administration Select Committee, *Taming the prerogative: strengthening ministerial accountability to Parliament*, HC 422, Session 2003-04, p.41

²⁹ For example the British contribution to the UN peacekeeping force in Cyprus.

³⁰ 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). Further

to as 'Operations Other Than War')³¹ would be covered under this legislation. The Geneva Conventions and the Additional Protocols in any case do not apply solely to the conduct of armed conflict but also set down international legal norms with regard to the protection of civilians, the treatment of prisoners of war, and so on.

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 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.³²

While the level and use of force implicit in a peace enforcement operation is regarded as interventionist and as such likely to invoke the international laws of war and specifically the Geneva Conventions, therefore falling under the definition of 'armed conflict'

information is available in "The peace enforcement dilemma" by Frank Crigler, *JFQ Forum*, Autumn 1993, available online at: http://www.dtic.mil/doctrine/jel/jfq_pubs/jfq1002.pdf

³¹ Ministry of Defence, *The application of force: an introduction to army doctrine and the conduct of military operations*, 2002

³² Ministry of Defence, *The application of force: an introduction to army doctrine and the conduct of military operations*, 2002, p.53-57

proffered in this Bill, the inclusion of peacekeeping operations within this legislation is less clear.

Peacekeeping infers consensus and the use of force only in self defence. However, neither of the definitions outlined above can 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.³³

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. 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.³⁴

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 [...]

³³ 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. The KFOR paper is available online at:

<http://www.parliament.uk/commons/lib/research/rp99/rp99-066.pdf>

³⁴ Ministry of Defence, *British Defence Doctrine*, JWP 0-01 (2nd edition), October 2001

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.³⁵

It could be argued that the definition of 'armed conflict' in this Bill does not adequately provide for this dynamic. If, for example, a peacekeeping operation changed in theatre into a peace enforcement operation, or into a multi-faceted operation involving peace enforcement, peacekeeping and humanitarian assistance, would Parliament be required to give retrospective approval and what would be the consequence if that approval were denied?

Dr Rachel Kerr, a Lecturer in War Studies at King's College London, agrees that the definition of armed conflict in the Bill is ambiguous in this respect. She argues that the line between war and military operations other than war is blurred and that "the Bill as it stands does not offer any guidance on this issue" and that "it is a serious difficulty for the armed forces and something that contributes to the uncertainty surrounding questions of legitimacy, both of the action itself, and what can, or cannot be done in the course of that action".³⁶

Professor Brazier also accepts this dilemma. Although he suggests that the Bill's definition of 'armed conflict' does not provide for peacekeeping operations, he states:

It is a matter of judgement whether the deployment of the forces in any international peacekeeping role should be covered by these new statutory rules. Such operations (which would normally fall outside a definition of armed conflict) would generally involve much less overall danger for the forces than would an armed conflict.³⁷

Yet, he also concludes:

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.³⁸

Dr Kerr disagrees with this particular assessment however:

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

³⁵ 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

³⁶ Personal correspondence with the author, 5 August 2005

³⁷ Public Administration Select Committee, *Taming the prerogative: strengthening ministerial accountability to Parliament*, HC 422, Session 2003-04, p.26

³⁸ *ibid*

the Government wanted to deploy the armed forces, but was reluctant to seek authorisation.³⁹

Exclusions

Whilst the inclusion of peacekeeping under the definitions of this Bill could be open to question, there are some operational deployments that would be excluded from this legislation on the basis of the definition of 'armed conflict' provided. The benign use of the Armed Forces in disaster relief operations, for example, would be one such exception. Similarly, Military Aid to the Civil Authorities (MACA), which the PASC identified as a specified prerogative power in its 2004 report, also implicitly falls outside of the parameters of this Bill as it does not invoke any aspects of the Geneva Conventions.

The aim of MACA is to support the civil authorities in the fulfilment of civil objectives, principally in peace time. It is subdivided into three categories:

- **Military Aid to other Government Departments** – assistance provided by the Armed Forces on urgent work of national importance or in maintaining supplies and services essential to the life, health and safety of the community.
- **Military Aid to the Civil Power** – provision of military assistance to the Civil Power in its maintenance of law, order and public safety using specialist capabilities or equipment in situations beyond the capability of the Civil Power. This includes capabilities such as Explosive Ordnance Disposal (EOD).
- **Military Aid to the Civil Community** – provision of unarmed military assistance to prevent or deal with the aftermath of a natural disaster or a major incident or, to assist civil sponsors either by carrying out special projects of significant social value to the community or by attaching individual volunteers to specific projects.⁴⁰

Examples of MACA operations in recent years include the deployment of troops during the foot and mouth crisis in 2000-01, the fire strikes in 2002-03 (Operation *Fresco*), and at Heathrow Airport in February 2003 in support of counter-terrorism operations. On 28 July 2005 Ministry of Defence Police were also deployed in London to assist with policing in the capital following the terrorist attacks earlier that month.⁴¹

B. Approval for Deployment

The Bill proposes two ways in which approval could be given:

³⁹ Personal correspondence with the author, 5 August 2005

⁴⁰ Taken from Ministry of Defence, *Operations in the UK: the defence contribution to resilience*, JDP02, December 2004, Section 1-5

⁴¹ MOD press release, 4 August 2005. Military Aid to the Civil Authorities is examined in greater detail in Library Standard Note SN/SC/2047, *Civil Defence Contingencies IV: Armed Forces Reserves*, 17 November 2004

1. Prior Approval

Clauses 1-3 set down the requirement for Parliamentary approval to be sought prior to the deployment or involvement of British forces in any military action. The Prime Minister would lay before each House a report setting out the reasons for proposed participation; the legal authority for doing so; and any information he/she thinks is appropriate to make public on the geographical extent and expected duration of that participation, and which elements of the Armed Forces could expect to be deployed. A resolution of both Houses would be expressed in the form of approval of the report. In the House of Commons a motion for a resolution would be made by the Prime Minister.

2. Retrospective Approval

Under **Clause 4** of the Bill, retrospective Parliamentary approval could be sought in the event that “the Prime Minister has decided that participation by her Majesty’s armed forces in an armed conflict is a matter of urgency” and consequently should begin before a report could be laid before both Houses, and a subsequent resolution passed.

Under this clause retrospective approval would also have to be granted for the participation of British forces in armed conflicts that had begun prior to the legislation coming into force. Subsection 1 of Clause 4 states:

This subsection applies when –

- a) participation by Her Majesty’s armed forces in an armed conflict has begun before the commencement of this Act...

In either of these circumstances, the Prime Minister would be obliged to lay a report⁴² before each House “as soon as is reasonably practicable after making the announcement”. Under **Clause 5** the Prime Minister in the House of Commons and a Minister of the Crown in the House of Lords would then be obliged to make a motion for a resolution in each House “as soon as is reasonably practicable”. Retrospective approval would be given in the same way as prior approval with the adoption of a resolution approving the report.

Subsections 2-5 of Clause 4 provide for the recall of Parliament in the event that either House is prorogued or adjourned within five days of the decision being made.

Should retrospective approval be withheld by either House within 10 days of the report being laid, **Clause 6** of the Bill states that “the continued participation of Her Majesty’s armed forces in the armed conflict to which the report relates shall cease to be lawful after a period of thirty days”. However, there are two exceptions to this Clause. Under subsection 2, participation may continue for a period longer than 30 days where “in the opinion of the Prime Minister” it is considered necessary as a precursor to withdrawal. Under subsection 3, the Prime Minister has the opportunity to lay a further report before

⁴² The report would contain the same information as envisaged under Clause 2.

each House within 20 days of the first report being laid. Each House would then be able to pass a resolution on that report.

C. A Declaration of War

Clause 7 states that no declaration of war can be made by, or on behalf of, the UK unless that declaration is specifically contained in the reports laid before each House, and which have subsequently been approved by each House under the provisions set out in the clauses outlined above.

D. Miscellaneous Provisions

Under **Clause 8** members of the Armed Forces are not prevented by this legislation from taking action to defend themselves where that action is the consequence of a lawful command, is in accordance with the lawful rules of engagement, and is taken in “the immediate defence of Her Majesty’s armed forces”.

Where the Prime Minister is unable to act, his/her functions may be undertaken by the Secretary of State for Defence (**Clause 9**).

III Comments/ Analysis

1. Democratic Accountability and the Royal Prerogative

The Royal Prerogative and Parliament's lack of involvement in 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 considered to have contributed significantly to raising the political profile of this issue.

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 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 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*.⁴³

The Committee itself concluded that there is 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 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.⁴⁴

The group Charter 88 has campaigned for greater Parliamentary involvement in the use of the Armed Forces for several years and has expressed its strong support for the Bill:

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

⁴³ 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>.

⁴⁴ *ibid*, p.17

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.⁴⁵

Indeed, within that press release they highlight the extent to which this issue has support among the Labour party, including from the Chancellor of the Exchequer, Gordon Brown. 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”.⁴⁶ The former Cabinet Minister, Stephen Byers, appears to support this view. Writing in *The Times*, 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.⁴⁷

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 current 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”.⁴⁸

As in the previous session, the Bill is being supported by, among others, the Leader of the SNP Alex Salmond, the Liberal Democrat Foreign Affairs Spokesman Menzies Campbell and the former Conservative leader William Hague.

An Early Day Motion on this issue (EDM 85, Session 2005-06), tabled by Neil Gerrard in May 2005, has also received 181 signatures.⁴⁹

⁴⁵ “Charter 88 welcome Clare Short’s adoption of Armed Forces Bill”, 27 May 2005

⁴⁶ “Brown: I would give MPs last word on war”, *The Daily Telegraph*, 30 April 2005

⁴⁷ Stephen Byers MP, “The madness of regicide”, *The Times*, 11 May 2005

⁴⁸ 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*, 1994

⁴⁹ Correct as of 5 August 2005. The text of this EDM is available online at:

<http://edmi.parliament.uk/EDMi/EDMDetails.aspx?EDMID=28273&SESSION=875>

The Government argues however that existing practice, based on the Royal Prerogative, is sufficient. In its response to the PASC report the Government commented:

The Government notes that even those witnesses in favour of the extension of parliamentary authority in this area recognise the difficulties, both of definition (when would the requirements be triggered) and timing (in emergency situations). The Government's view is that the pragmatic approach, allowing the circumstances of Parliamentary scrutiny to reflect the circumstances of the armed conflict, continues to be the more effective approach.⁵⁰

In a Written Answer on 15 June 2005 the Prime Minister 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.⁵¹

Giving evidence to the Liaison Committee in January 2003, however, the Prime Minister acknowledged that in practice it would be difficult for a government to engage in armed conflict without Parliamentary support:

I cannot think of a set of circumstances in which a Government can go to war without the support of Parliament ... I think you can get into a great constitutional argument about this, but the reality is that Governments are in the end accountable to Parliament, ... and they are accountable for any war that they engage in, as they are for anything else.⁵²

He went on to state:

There is a right to vote. The question is, do you take that one step further and get rid of the Royal Prerogative? I do not see any reason to change it, but I do really think that in the end it is more theoretical than real, this issue, because the truth is, if Parliament were to say to any Government ----- Supposing in relation to any conflict Parliament voted down the Government over the conflict, as I say, it is just not thinkable that the Government would then continue the conflict. That has been the case all the way through. So I think that even though it may be strictly true to say that the Royal Prerogative means you do it and in strict theory Parliament is not the authority, in the end Parliament is the authority for any Government, and I cannot ----- I mean, can you honestly imagine a set of circumstances in which the Government is defeated by Parliament over a conflict and says, "Well, I'm just ignoring that"?⁵³

⁵⁰ Government Response to the Public Administration Select Committee's Fourth Report of the 2003-04 Session, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*, HC422, July 2004.

⁵¹ HC Deb 15 June 2005, c384W

⁵² Prime Minister's examination by the Liaison Committee, 21 January 2003, q125, at : <http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmliaisn/uc334-i/uc33402.htm>

⁵³ *ibid*

2. Prior 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 Battlegroups⁵⁴ is, for example, to be able to deploy troops within a matter of days to trouble spots around the world. Although 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.⁵⁵ There is also some concern that the level of detail required in the report to be submitted to Parliament for approval would advertise any military intentions to the enemy and thereby compromise operational freedom of action and the safety of British forces.

Advocates of the Bill argue, however, that it already provides for 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, through the ability to gain retrospective approval from Parliament (Clause 4). Yet, Dr Kerr raises concerns over this provision. She suggests that:

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.⁵⁶

Another point of issue is that, were the House to decide on the recourse to military action, it is likely there would be pressure for Members to be given access to intelligence briefings, in order that an informed decision could be reached. This has proven contentious in the past.⁵⁷

3. Retrospective Approval

With regard to retrospective approval, further questions also arise. What has been regarded as a potential loophole in the legislation is the ability of the Prime Minister to retain troops in an operation that has not received retrospective Parliamentary approval,

⁵⁴ These are examined in greater detail in Library Research Paper RP04/60, *NATO: The Istanbul Summit*, 26 July 2004 and Standard Note SN/IA/3246, *Developments in European Security and Defence Policy: An Update*, 23 June 2005

⁵⁵ HC Deb 25 November 2002, c56.

⁵⁶ Personal correspondence with the author, 5 August 2005.

⁵⁷ The Foreign Affairs Committee report *The Decision to go to war in Iraq*, HC813-I, Session 2002-03 examines this issue on p.48-49.

where he/she deems it to be necessary as a precursor to withdrawal (Clause 6 (2)). There is no time frame stated within the Bill for retaining troops in theatre under this exception and there is no definition of what constitutes necessity. The Government's justification for retaining British troops in Iraq, for example, has consistently been the need to maintain security and stability in the country.

In a Written Answer on 27 June 2005 the Minister for the Armed Forces, Adam Ingram, stated:

The United Kingdom is committed to remaining in Iraq for as long as the Iraqi Government judge that the coalition is required to provide security and assist the Iraqi Security Forces (ISF). The prevailing security situation, progress on the political process and development of the ISF will be factors in determining the timeline for eventual UK force level reductions.⁵⁸

4. Retrospective Approval of Pre-Existing Deployments

The provision in the Bill for retrospective approval of deployments that had already begun, if and when this legislation enters into force (Clause 4 (1)) is also perceived as potentially problematic. The definition of what constitutes an 'armed conflict' will be important in determining to which cases of action retrospective approval should apply.

The bill also does not make clear whether retrospective approval is required on the basis of the international legal parameters on which action was initially undertaken or the situation which currently exists. 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 had to undertake.

In a Written Answer on 1 July 2004 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

⁵⁸ HC Deb 27 June 2005, c1206W

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 by English criminal law which applies to the Her Majesty's Armed Forces wherever they are in the world.⁵⁹

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",⁶⁰ although he did not clarify which parts of the Conventions would apply.

In a Written Answer in January 2005 the 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.⁶¹

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.⁶²

5. A Declaration of War⁶³

It is less common today for states formally to declare war. Aside from the questionable legality of such a move,⁶⁴ 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

⁵⁹ HC Deb 1 July 2004, c419W

⁶⁰ A copy of this letter is available online via the following link:
http://www.un.org/Docs/sc/unsc_resolutions05.htm

⁶¹ HC Deb 27 January 2005, c541W

⁶² HC Deb 30 June 2005, c1690W

⁶³ Largely drawn from Library Standard Note *Parliament and the participation of British forces in armed conflict*, SN/IA/1218 by Paul Bowers. Last updated 3 March 2005

⁶⁴ 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.

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.⁶⁵

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 referring to war. Apart from that, the noble and gallant Lord is right: a formal declaration of war is not necessary.⁶⁶

In his 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”.⁶⁷

Consequently, the inclusion of Clause 7 in this Bill is, Professor Brazier argues, “for the sake of completeness”.⁶⁸

⁶⁵ 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.

⁶⁶ HL Deb 19 February 2003, c1140

⁶⁷ Public Administration Select Committee, *Taming the Royal prerogative: strengthening ministerial accountability to Parliament*, HC 422, Session 2003-04, p.25

⁶⁸ *ibid*