Democracy, Accountability, and Military Action

1. Introduction

Accountability is a central element of a democracy. In simple terms it means that those in power and making decisions should have to account for those decisions to their peers, to the electorate, and, if a crime or violation of law has occurred, to the courts. Given the huge consequences for soldiers and their families, as well as for Britain and the countries and region being subjected to military intervention, decisions to go to war should be subject to scrutiny and review. This chapter considers the breadth of accountability in the British political and legal system, and makes references to other democracies as well as to the international mechanisms of accountability, bearing in mind that decisions to go to war bring the UK into these wider contexts. Indeed, breaches of wider legal orders may have consequences in terms of accountability for the decision-makers as well as soldiers within the British legal and political system.

Rather than running through the different types and forms of domestic then international accountability, the chapter considers political forms of accountability at all levels. It assesses their effectiveness in challenging government decisions that seem to breach the international legal order. It considers the current reform debate over the role of parliament in the decision-making process. It then goes on to discuss the limited judicial forms of review that exist, and considers the arguments for greater judicial scrutiny of decisions to go to war at both national and international levels. Recent conflicts, especially those over Kosovo in 1999 and in Iraq in 2003, have given rise to a number of cases before British Courts, the European Court of Human Rights and the International Court of Justice. These and other judicial forms of accountability, including the International Criminal Court, are considered in this final chapter, which ends with recommendations for reform.

2. Accountability and Democracy

In a straightforward sense the concept of ‘accountability’ signifies ‘the process of being called “to account” to some authority for one’s actions’.¹ But the term


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has been deployed in a broader fashion over the past quarter of a century.² This is reflected in a widely cited definition of accountability proffered within the context of the UK:

[A] framework for the exercise of state power in a liberal-democratic system, within which public bodies are forced to seek to promote the public interest and compelled to justify their actions in those terms or in other constitutionally acceptable terms (justice, humanity, equity); to modify policies if they should turn out to have been ill-conceived; and to make amends if mistakes and errors of judgment have been made.³

While accountability is fundamental to the exercise of power in a liberal-democratic system, it is also becoming increasingly important for the exercise of power by public bodies in the wider international framework. As the International Law Association’s Committee on the Accountability of International Organizations makes clear ‘as a matter of principle, accountability is linked to the authority and power of an [organization]. Power entails accountability, that is the duty to account for its exercise’.⁴ However, while accountability is at the heart of the liberal-democratic state, it is not inherent in the construction of many international organizations. For example in relation to the EU Carol Harlow has written:

The architecture of the EU was not originally constructed with openness or accountability in mind, nor was the EU modelled on parliamentary democracy. Its embryonic assembly was purely consultative, and the short history of the European Parliament has been one of clawing power back from other institutions.⁵

Nevertheless, the European legal order (including the European Convention and Court on Human Rights, as well as EU law and institutions) is becoming increasingly influential, especially in establishing judicial mechanisms and avenues of accountability where individuals can seek justice when national legal orders have failed.

Accountability takes many forms, financial, administrative, political (democratic) and legal, though the latter two will form the fulcrum of this chapter. Underpinning it all though is the concept of democratic accountability:

Democratic accountability is a term familiar in political science, and one with considerable resonance in western society. This is a simple definition of accountability in terms of suffrage: the principle according to which it is possible to replace the holders of

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In this chapter, a wider approach to democratic accountability is taken to include not only electoral mechanisms but also political or public mechanisms whereby holders of political office may be held to account, either by elected representatives or by other means. As summarized by Christopher Lord:

Effective democratic accountability requires all of the following: administrative accountability of bureaucracies to political leaders; continuous parliamentary accountability of political leaders to democratic actors; electoral accountability based on a radical simplification of voter choice by democratic intermediaries, such as political parties, and on opportunities for the public to sanction their political leaders, notably by removing them from office; and a system of judicial accountability that any citizen can access with a complaint that power-holders are seeking to evade or distort the rules by which they are themselves brought to account.

In the first section of this chapter we will consider those mechanisms of parliamentary and international institutional accountability as regards decisions to go to war; while in the second section the analysis will turn to consider the possibility of independent review of the legality of those decisions by judicial bodies.

3. Political Accountability

Democracy is not just about the regular holding of elections. In fact, that is quite a crude method of holding the government of the day to account for its past decisions, since the electorate has to judge many issues, but is concerned about the next few years rather than the past. So individual decisions to go to war will not generally be the issue upon which the electorate decides the fate of the incumbent government. The re-election of the Labour government in 2005 shows this all too well. Furthermore, in the UK the opposition may not be strong enough or numerous enough (or both) to be able to offer a real challenge to the government of the day. Though executive accountability to the elected representatives of the people is a very important element in ensuring the health of the democracy between elections, there have developed a number of other methods of political or democratic accountability, especially the system of Select Committees in the UK. Though they consist of MPs and therefore reflect the politics of the day, they do serve an essential purpose of questioning the government’s action in detail, something that parliament as a whole does not have time for. Occasionally too the Select Committees can produce reports that truly hold the government to

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6 Harlow, Accountability, 8.
account, albeit retrospectively, as did the Foreign Affairs Committee’s Report of 2000 on Kosovo.

It must be borne in mind too that there are avenues of political accountability at the international level, by international organizations scrutinizing the actions of their member states for compliance with the rules of the organization and international law. While the British government’s actions on human rights are regularly scrutinized by UN Committees created under a number of human rights treaties, there is very little such expert quasi-judicial review in the field of use of force. For this we have to rely on the political judgment of the international community on the uses of force by member states.

The international historian Paul Kennedy has written that:

It is quite possible to argue that the [UN General] Assembly, whose size has risen from the original 50 members in 1945 to 191 as we entered the twenty-first century, is the closest we are ever going to get to the parliament of man; and that it is an entirely representative body since ambassadors who are partaking in General Assembly debates and decisions have been appointed on behalf of their own sovereign nations (regardless, alas, of whether their governments were elected democratically).

Kennedy could have strengthened his case by examining the increasing support for democratization within states coming from the General Assembly since 1989, and the growing trend towards democratic governance in member states. It is true that the UN is open to all states, whether democratic or not, but there is an undeniable upward trend in countries establishing democratic government often with UN assistance. If most governments in the UN are democratically elected then, at least in theory, there should be democratic accountability for their international policies within each of their domestic constitutional structures.

Indeed, during the Cold War the General Assembly did call the superpowers to account for a number of interventions when the Security Council was inevitably deadlocked by the veto. The main instances of this can be given. In 1956 the Assembly called upon the Soviet Union ‘to desist forthwith from all armed attack on the people of Hungary and from any form of intervention, in particular armed intervention, in the internal affairs of Hungary’; further it condemned Soviet actions as a ‘violation of the accepted standards and principles of international law, justice and morality’.

The Assembly condemned the 1979 Soviet intervention in Afghanistan. In 1983 it deeply deplored the American armed intervention in Grenada, which constituted ‘a flagrant violation of

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10 Art 4(1) of the UN Charter.
11 GA Res. 1004 (ES-II), 4 Nov. 1956; GA Res. 1006, 9 Nov. 1956.
international law’.¹³ In 1986, it condemned the US bombings of Libya (when some of the US planes had been sent from bases in Britain) as a ‘violation of the Charter of the United Nations and international law’.¹⁴ Though not comprehensive in its condemnations (there was for example no condemnation of the Soviet intervention in Czechoslovakia in 1968), and with the majority in favour not always overwhelming, the Assembly’s record during the Cold War was still creditable given the pressures on small and developing states to join one of the opposing camps.

In the case of interventions by Britain during the Cold War the General Assembly offered support for the operation in Korea. The fact that the operation had support from both the Security Council and the General Assembly is a reflection of the fact that the UN was western dominated at the time. The development of a coalition of the willing under UN authority was controversial at the time, but as we have seen in chapter four, has become accepted in practice. Indeed, the General Assembly’s resolution supported strongly by Britain supplemented the Security Council’s authority by recommending that ‘all appropriate steps be taken to ensure conditions of stability throughout Korea’, thus giving the green light to the UN forces to enter North Korea.¹⁵ In the case of the disastrous intervention in Suez in 1956, the Assembly’s criticism came in the form of recommending the sending of a UN peacekeeping force to ensure British and French withdrawal from the conflict zone. In the Assembly’s resolutions it had to be careful not to cause offence to the UK and France in order to seek their withdrawal, but it did note that ‘the armed forces’ of the two states were ‘conducting military operations against Egyptian territory’.¹⁶ Britain was part of the UN force in Cyprus in the 1960s and in Bosnia in the 1990s, and therefore had the support of the Assembly, though that body was critical of the maintenance of the arms embargo (strongly argued for by the UK) against the whole of Yugoslavia, which seriously hampered Bosnia’s right of self-defence.¹⁷ In the Falklands dispute of 1982 the Assembly was silent during the conflict (the Security Council having condemned the Argentinian invasion) though soon after it was critical of the unwillingness of the UK to negotiate on the issue of sovereignty.¹⁸

With the end of the Cold War, political and economic pressures on the majority of states in the Assembly have, if anything, increased, so that criticism has been much more muted. No direct support was given to the Security Council authorized action to push Iraq out of Kuwait in 1991; though the Assembly condemned the invasion and the violation of the human rights of the Kuwaitis and third state nationals.¹⁹ Indeed, the Assembly in the post-Cold War period has returned to one of its primary concerns under the UN Charter—the promotion

¹³ GA Res. 38/7, 2 Nov. 1983.
¹⁴ GA Res. 41/38, 20 Nov. 1986.
¹⁵ GA Res. 376, 7 Oct. 1950.
¹⁶ GA Res. 997 (ES-I), 2 Nov. 1956.
¹⁸ GA Res. 37/9, 4 Nov. 1982.
and protection of human rights,²⁰ and has stayed clear of security issues. In 1998 during the period in the Kosovo crisis leading up to the NATO bombing of Serbia, the Assembly was very critical of Serbia’s ‘persistent and grave violations and abuse of human rights and humanitarian law in Kosovo’.²¹ Like the resolution on Iraq in 1990 it did not mention any use of force against Serbia, but unlike Iraq in 1990 there was no enabling resolution from the Security Council. The majority of states condemned the practice of humanitarian intervention at a meeting of the G77 group of over 120 developing countries at its First South Summit held in Cuba on 10–14 April 2000 in no uncertain terms: ‘We reject the so-called “right” of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law’.²² There has, however, been a lack of clear consensus on the invasions of Afghanistan in 2001 and Iraq in 2003. Though the Assembly did strongly condemn the ‘heinous acts of terrorism, which have caused enormous loss of human life’ in New York, Washington and Pennsylvania on 11 September 2001, it confined itself to calling for co-operation to bring the perpetrators to justice, and those that supported them to be held to account.²³ This resolution could not be said to support full-scale invasion of the country, but rather was suggestive of a criminal justice approach. But neither did it condemn the invasion when it occurred. The G77 too was silent on the matter at its annual ministerial meeting of 16 November 2001 held in New York,²⁴ as it was over the invasion of Iraq at its equivalent meeting on 25 September 2003.²⁵ However, the General Assembly did manage in 2004 to adopt a resolution introduced by the Non Aligned Movement ‘reaffirming the central role of the United Nations in the maintenance of international peace and security’. Israel and the United States voted against the resolution and the UK along with forty-six other states abstained, though ninety-three countries voted in favour. The debate made it clear that those voting against and some of those abstaining were unhappy about the elements of the resolution that were clearly directed at the invasion and occupation of Iraq. Though the resolution did not mention Iraq by name it did express concern ‘over any act or threat of foreign intervention or occupation of any State or territory in contravention of the Charter’, and it called for measures ‘to prevent the use of threat of force and the exercise of political pressure and coercion as a means for obtaining certain political objectives’.²⁶ This was sufficient to make the point that the majority of the world’s states viewed the invasion as illegal.

Thus there is political accountability at the international level—it is not systematic nor necessarily impartial but the General Assembly does serve as the

²⁰ Art 55 of the UN Charter.
²² UN Doc. A/55/74, 12 May 2000, para 54.
²³ GA Res. 56/1, 12 Sept. 2001.
conscience of those powerful states wishing to use force on the international stage. In the short-term it does not change the behaviour of the powerful states, whose desire to secure national goals outweighs any international criticism, but disapproval by the General Assembly does undermine the legitimacy of their actions in the long-term, as well as serving to uphold the fundamental principles of international law governing the use of force. It is a pity that the Assembly has lost that voice to some extent with the end of the Cold War, but its more abstract resolutions do still reinforce the basic rules on the use of force, though they do not directly hold individual states to account.

4. The Role of Parliament

Throughout the course of this book we have included an account of the role of parliament in scrutinizing, questioning, but in practice invariably supporting government decisions to go to war. If we consider the widely supported British deployment to the Gulf in 1990–1 in response to Iraq’s invasion of Kuwait, we saw a very healthy series of debates (and votes) on the matter prior to the actual conflict, though after the troops had been sent. A similar scenario occurred in the much more controversial invasion of Iraq in 2003, with a substantive vote being taken before the invasion though after forces had been deployed. The questioning and discussions on both occasions were fair but critical, though there was no question of the House attempting to undermine or reject the government’s decision to go to war. It is very questionable indeed whether the government would have been politically wise to have prosecuted a war in the face of a negative vote, though constitutionally that was possible since the decision to go to war was based solely upon prerogative powers. As Prime Minister Tony Blair stated in January 2003 in questioning before Parliament’s Liaison Committee in the lead up to the invasion of Iraq, but before the substantive vote in the House of Commons:

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 they engage in…. The question is, do you take 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… Supposing in relation to any conflict Parliament voted down the Government over the conflict… it is just not thinkable that the Government would then continue the conflict.28

27 But see the Prime Minister’s statement that ‘I decided to commit UK forces after securing the approval of the House on 18 March’: Hansard HC vol 424, col 1769w, 16 Sept. 2004 (Blair). The invasion of Iraq was launched on 20 March 2003.

However, the increasing deployment of troops to conflicts and post-conflict zones during the Labour governments of 1997 onwards, not all of them (neither Kosovo nor Afghanistan) approved by substantive votes in parliament, has led to pressure to reform the prerogative powers, with the suggestion that parliament be made part of the decision-making process.

This raises many issues: whether it would improve the accountability of the government since by making parliament part of the decision there is still the issue of a review of that decision, as well as problems of when such joint decision-making is to be invoked. An early proposal in this debate put forward in February 2003 was that ‘Parliament shall have the opportunity to consider and approve the exercise of duties vested in . . . Ministers to commit the United Kingdom’s armed forces to hostilities abroad, or to a situation abroad where hostilities are likely’, before such a commitment (where circumstances permit), otherwise within 20 days of deployment.²⁹ It can be seen how any proposal will create difficulties of application with endless debates over meanings of ‘hostilities’ (in the case of peace operations in particular); ‘abroad’ (in the case of the Falklands for instance); as well as the government not wishing to curtail the efficiency of deployment by seeking prior approval from parliament. Although the proposal would require the Prime Minister to report to parliament on the reasons for the deployment, there was no requirement that there must be a clear international legal basis for the military action; this would just be one of many factors that parliament might weigh up, and then it would be based upon the legal evidence presented by the government. While such proposals would strengthen domestic constitutional procedures, they do not ensure that the government respects the substance of international law.

Nevertheless, in March 2004 the Select Committee on Public Administration produced a report entitled Taming the Prerogative: Strengthening Ministerial Accountability to Parliament, which ‘while recognising that such powers are necessary for effective administration, especially in times of national emergency, the report considers that they should be subject to more systematic parliamentary oversight’.³⁰ Some of the evidence given to the Committee suggested legislation along the lines of the US War Powers Act passed after the Vietnam War, which tried to ensure that the ‘collective judgement of both Congress and the President would apply to future exercises of the war-making power’.³¹ The Committee’s principal reason for wanting to reform the prerogative on the issue of troop deployment was that ‘the decision whether or not to consult Parliament’ was dependent ‘on the generosity or good will of government’, so that a mere convention that

³⁰ HC 422, 16 March 2004, 3.
³¹ Ibid., 9 (Benn); but see 10 (Hague). For analysis of different democratic countries’ constitutional processes on war powers see C. Ku and H.K. Jacobson (eds), Democratic Accountability and the Use of Force in International Law (Cambridge: Cambridge University Press, 2003).
parliament be consulted was ‘not enough when lives are at stake’. Further, the ‘increasing frequency of conflict in recent years is proof of the importance of ensuring that, when the country takes military action, Parliament supported the government in its decision’.³² In a more general attack on prerogative powers the Committee stated:

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. We have shown how these powers can begin to be constitutionalised, and in particular how certain key powers can be anchored in the consent of Parliament for their exercise.³³

The Draft Bill attached to the report would have required that ‘Her Majesty’s armed forces shall take part in armed conflict only if participation in it is approved by resolution of each House of Parliament’, using the concept of ‘armed conflict’, found in the Geneva Conventions of 1949. Resolutions must be obtained before ‘those armed forces participate in armed conflict’ or if the government ‘is of the opinion that such participation is necessary as a matter of urgency before such resolutions could be obtained, within seven days of the beginning of that participation’.³⁴

Similar difficulties emerge from this proposal in that the concept of ‘armed conflict’ is perhaps no clearer that that of ‘hostilities’ with no clear definition in the Geneva Conventions or more generally in international humanitarian law.³⁵ There remains the problem of the government deploying troops and then seeking parliamentary approval, which would be difficult for parliament to refuse without causing a serious crisis. In resisting the recommendation to put prerogative powers under a statutory framework, the government pointed to the difficulties in definition and timing, saying on the latter that the existing arrangements which allow for British involvement in ‘armed conflict to be debated and scrutinised by Parliament after the event are by no means unique to the UK’.³⁶

Clare Short, MP for Birmingham Ladywood, who resigned from the Labour government in May 2003 over the invasion of Iraq, introduced a Private Members’ Bill in 2005, which was based on the Public Administration Select Committee’s Bill. The proposed norm was approval of both Houses before any participation in an armed conflict, with the exception being retrospective approval in matters of urgency. The Bill would also have required that in seeking approval from Parliament the Prime Minister present the reasons for the proposed participation, any legal authority, as well as the geographical extent, duration and the

³² HC 422, 16. ³³ Ibid., 17.
In introducing the Bill Clare Short spoke about the problems with the current system where the ‘power to make war belongs to the Prime Minister and requires no approval from Parliament’, so that in the case of the invasion of Iraq, ‘he was entitled to do what he thought was right and then set out to persuade, in the way that he found best, the Cabinet, Parliament and country to support the decision that he had already made’, with troops already committed. Sir Menzies Campbell MP of the Liberal Democrats supported the Bill and stated that on the issue of the legal case for war the House would have to see a full legal opinion rather than an abbreviated one that presented the government’s case in the best light. Some of the discussion centred on the difference between the Gulf War of 1991 where a clear case was made based on international law and the 2003 invasion of Iraq when there was no clear legal basis, which suggests that a clear international legal basis should be a prerequisite for approval.

The constitutional difficulty in making parliament co-responsible for decisions to go to war was pointed to by James Gray, Conservative MP for North Wiltshire:

The Prime Minister and the Government are of course accountable to the House. If they took us into some absurd war that did not have popular support, or did not have the support of this House, the Government would without question fall. That is the point about parliamentary scrutiny of the Executive: it is not about telling the Executive in advance what we want them to do but about examining what they have done and if it was unreasonable…it would result in the resignation of a Minister, or ultimately the fall of the Government. That is the nature of Parliamentary democracy. The whole reason for having an Executive is that the Executive carry things out. They do things and this place scrutinises what they have done. The Bill would remove the ability to be an Executive from the Government and makes it this place that made decisions about what the Government should do.

Despite the possible constitutional weaknesses of the proposals being put forward, the House of Lords’ Select Committee on the Constitution also produced a report in July 2006 urging reform. In Waging War: Parliament’s Role and Responsibility the Committee considered the ‘alternatives there are to the use of the Royal prerogative power in the deployment of armed force’, in particular whether parliamentary approval should be required for any deployment of British forces outside the UK. It also considered whether the government should be required to explain the legal basis for any use of force, and so whether

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37 Armed Force (Parliamentary Approval for Participation in Armed Conflict) Bill, 22 June 2005.
39 Ibid., col 1090 (Menzies-Campbell).
40 Ibid., cols 1104–5 (Flynn, Menzies-Campbell, Short).
41 Ibid., col 1108 (Gray). Though the Bill received 91 votes in its favour to 12 against, this was an insufficient number for it to proceed.
the courts would then have competence to rule upon the government’s decision to use force.⁴² It concluded that the prerogative ‘is outdated and should not be allowed to continue as the basis for legitimate war-making in our 21st century democracy’.⁴³ According to the Committee, parliament’s role in decision-making should be established by convention rather than statute, and that convention should include parliamentary approval for any proposed deployment of British troops outside the UK into actual or potential armed conflict. In seeking approval the government would have to indicate the objectives and legal basis of the deployment, and approval for any significant change in these should be sought. It also recommended that retrospective approval should be sought only ‘for reasons of emergency and security’, within seven days of deployment.⁴⁴

Interestingly the House of Lords’ Committee made the point that in the ‘absence of legal restraint on the deployment power under domestic law, the rules of international law on the use of force take on an enhanced significance as the only apparent limitation on the prerogative’.⁴⁵ This book has shown though, that while international law has an influence on debates, it is not sufficiently determinate in the final decision to go to war. Serious doubts about the legality of war have not deterred the government from making such decisions in Suez in 1956 or Iraq in 2003, nor have they prevented parliament from supporting, or at least not undermining those decisions. However, if the government was required to obtain and publish clear, independent legal advice, and that advice was to the effect that any proposed war was unlawful under international law, it would be more difficult for parliament to agree with a decision to use force.

Simply insisting that the government bring its decision before parliament before troops are deployed, and requiring the government to clearly state the legal basis for the war on the basis of independent and impartial advice, would be compatible with a view that the executive must be properly accountable to parliament, without making the latter part of the decision-making process. Votes may be taken, including ones on censure as with the current parliamentary process, but such an approach would remedy the problems caused by coming to the House too late in the day when troops are already deployed or committed even though they might not be fighting yet, and would also prevent the misleading of the House on the legal basis of the operation.

The analysis in this book has shown that in the cases of self-defence, when the life of the nation is at stake, the executive must make rapid decisions and so should not be hampered by additional processes. But if it is a true case of self-defence as a result of an armed attack on the UK then parliamentary scrutiny is not going to question the decision to resist aggression, even if the attack is not against mainland Britain. The Falklands War of 1982 shows this. In the

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⁴³ Ibid., para 103.  
⁴⁴ Ibid., paras 108–10.  
⁴⁵ Ibid., para 30.
case of coming to the aid of another state that is under attack then the Korean War in 1950 and the Gulf War of 1991 show that parliamentary scrutiny is not going to undermine the decisions of the Executive when, as in those situations, they have authority from the UN for such actions. Even in the case of the action in Afghanistan in 2001, which was taken under an expanded version of collective self-defence of the US after it suffered the attacks of 9/11, and which did not have Security Council authority but did have endorsement from that body, parliamentary scrutiny did not undermine the government’s decision.

It is mainly in those cases where there was a clear lack of international legal basis—Suez in 1956, Bosnia in 1994, Kosovo in 1999, and Iraq in 2003—that parliament should have taken a stronger role, not simply in terms of voting on the matter but in terms of questioning the decisions to go to war. Parliamentary scrutiny did occur but it was not strong enough to challenge the case for war. The votes in 2002–3 on Iraq supporting the government show that the problem of prosecuting unlawful wars is not going to be tackled by introducing votes alone, since in those instances the government won those votes and historically it always has done so, but rather by parliament adopting a far more critical response to decisions to go to war, using international law as a key reference point. It is true that the Attorney General’s full advice was not before parliament in March 2003, but there was plenty of advice in the public domain that the war was not justified under international law, and politicians simply chose to ignore this. The tendency is for any criticism to be outweighed by the need to support British troops and not to be seen as appeasing aggressors or brutal dictators. Crudely put, criticism of decisions to go to war is portrayed as unpatriotic and most members of parliament are not prepared to risk their positions and challenge the government, particularly if they are part of the majority from which the government is drawn. Parliament is simply not independent enough nor, it seems, strong enough, to scrutinize the actions of the executive in matters of such importance as decisions to go to war.

Nevertheless, the main parties seem to be moving towards a consensus that parliament must approve of any decision to deploy troops, as found in other countries such as the Netherlands and Germany, but not in others where the decision lies with the executive (for example Australia, France, Italy, and Spain). The Conservative Party’s Democracy Task Force produced a report (An End to Sofa Government) in 2006 in which a belief was expressed that a parliamentary convention should be adopted requiring the laying of a resolution in the House of Commons in order to commit British troops to any ‘war, international armed conflict or peace-keeping activity’ with retrospective approval reserved for situations of ‘dire emergency’.⁴⁶ Before becoming Prime Minister in 2007, Gordon

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Brown had stated in January 2006 that a ‘case now exists for a further restriction of executive power and a detailed consideration of the role of Parliament in the declaration of peace and war’. This was in the context of the new Prime Minister’s desire, in the words of the Commons Select Committee on Public Administration, ‘to hold power more accountable’, both to parliament and the people. This would include a government proposal on the deployment of armed forces abroad that would balance accountability against the needs to be flexible and to maintain operational security.

A consultation paper was drawn up by the Ministry of Justice in October 2007 summarizing the debate and putting forward different options for a ‘more formal way of regularizing Parliament’s involvement in decisions on the deployment of armed forces in armed conflict overseas’. These had common features of requiring the ‘Government to seek authorisation from the House of Commons before participating in armed conflict overseas, or before committing armed forces to a situation where there is a real likelihood that they might become engaged in armed conflict’. In March 2008 a draft House of Commons resolution was published in the Constitutional Renewal White Paper. By this the government has made it clear that ‘while not ruling out legislation in the future’, it ‘believes that a detailed resolution is the best way forward’. In fact the proposed resolution, as explained in the government’s White Paper, is a watered-down affair giving maximum flexibility to the Prime Minister as to timing in seeking prior approval, and requiring no retrospective approval when the operation is secret or urgent. On the timing for seeking prior approval the Prime Minister ‘will have to consider the time required to give Parliament a real say in the decision’. Approval need only be sought from the House of Commons ‘as the representatives of the people’, and not from the House of Lords. Further, the proposal does not require that the advice of the Attorney General should be made available to Parliament, although it would be informed of the legal basis of the operation.

The salient parts of the proposed Commons resolution would require that ‘the approval of this House should be obtained for a conflict decision’, which is a decision by the government ‘to authorise the use of force by UK forces’ outside the UK, the operation being regulated by the law of armed conflict. Further, ‘it is for the Prime Minister to start the process in relation to approval’, by setting out in a report both ‘the terms of the proposed approval’ and ‘information about the objectives, locations and legal matters that the Prime Minister thinks appropriate in the circumstances’. The House of Commons must then ‘give the approval

by resolving to approve the terms set out in the Prime Minister’s report’, for a
decision to be made.⁵¹

The two Houses of Parliament then established a Joint Committee to examine
the government’s Draft Constitutional Renewal Bill, which covers not only war
powers but also other matters including treaty-making powers. In its report of
July 2008 the Committee largely agreed with the government’s proposal for a
detailed resolution, the content of which it was satisfied with except for a clearer
definition of ‘conflict decision’. It concluded that ‘it is appropriate that the
Executive should retain discretionary powers over such issues as the informa-
tion provided to Parliament’ and ‘the timing of a vote’, with the Prime Minister
being in the ‘best position to make an informed decision on such matters’. The
Committee also agreed with the government ‘that a retrospective approval pro-
cess for conflict decisions is not desirable’,⁵² so that in emergency situations the
government could deploy troops, then inform parliament without having to
seek approval.

With neither of the main parties actively or at least consistently pursu-
ing policies of non-intervention—evidenced in the survey in this book where
a Conservative government launched military campaigns in Suez in 1956, the
Falklands in 1982, the Gulf in 1991 and in Bosnia in 1994; while a Labour
government deployed forces to Korea in 1950, Kosovo in 1991, Afghanistan in
1991 and Iraq in 2003—there is generally no overall opposition to any war, only
individual MPs voicing concern and criticism. Following from this the current
desire for reform of the decision-making process is unlikely to change govern-
ment policy by making it less willing to commit troops, though greater clarity on
the legal basis for war might make it more difficult to persuade parliament and
the country that war is justified. However, the current proposal which seems to
have sufficient support to be adopted, places the role of legal advice essentially
under the control of the Prime Minister, with the prospect of re-runs of the con-
troversies that surrounded the invasion of Iraq in 2003.

Furthermore, one of the objections to Clare Short’s Bill was that the require-
ment of published legal advice would ‘lead to court cases about the legitimacy or
otherwise of political decisions’. In issues of war ‘we cannot be governed by our
judges; we must be governed by our sovereign Parliament—by the democrati-
cally elected representatives of the nation. I have a significant reservation about
laying on the table legal justification and legal opinion, using that as a reference
point and opening ourselves up to court cases that challenge the sovereignty of
Parliament’.⁵³ One of the reasons why the government’s reform proposal is in the
form of a resolution rather than legislation is that a statute might give grounds for

Annex A (Cm 7342-I).
⁵² House of Lords, House of Commons Joint Committee on the Draft Constitutional Renewal
judicial review. As Sir Michael Wood, former Foreign Office Legal Adviser wrote in evidence to the Joint Committee on the Draft Constitutional Renewal Bill:

Unless the aim is to reduce the ability of the United Kingdom’s armed forces to participate in overseas operations to the level of, say, those of Germany or Japan, great care should be taken not to judicialise the decision-making process. If matters of war and peace were to become justiciable in the courts of the United Kingdom, this would risk putting serious obstacles in the way of United Kingdom participation in United Nations, NATO, EU peace-keeping and other operations overseas, with the consequent diminution of our standing in the world. And it would risk involving the judiciary in highly political questions. Judges could find themselves having to second guess the Government, not only as regards the original decision to use armed force, but also as regards decisions to continue to use armed force, to use armed force in a certain way, and so on. . . . Ministers and military commanders would continually need to have regard to the judge over the shoulder. The distraction of court proceedings (which might well take place in the lead up to or during a conflict) . . . would be considerable . . . and there would be the prospect of legal proceedings dragging on for years thereafter.⁵⁴

The objection to having independent scrutiny of the legality of decisions to go to war is due to the fact that the government of the day has to make rapid decisions and must weigh up a number of factors including, but not only, the legality of the proposed military action. However, most modern conflicts since the end of the Cold War in which Britain has been involved have had a relatively long lead-in period in which legal opinion could be given and tested before a court. Clearly in cases where a more rapid response is necessary, such as actions in self-defence, this cannot be the case, but then the issue may be one of true national defence during which the normal requirements of the rule of law may be suspended while the life of the country is in danger. Further, if the military action has a clear legal basis in either self-defence or by dint of Security Council authority, the government should have little to fear from the courts. The courts though are inherently reluctant to intervene in such decisions as the following analysis will show.

5. Accountability before the Courts

As related in chapter two, individuals have had little success in challenging the conflict decisions of the government before domestic courts. When in 2002 CND sought a declaration on the meaning of Security Council Resolution 1441 (2002) in relation to any decision by the government to go to war in Iraq on the basis of the Resolution, the Court, following a long line of precedents, refused to review the supremacy of the executive in the exercise of prerogative powers. The Divisional Court declined ‘to embark upon a determination of an issue if to do so

would be damaging to the public interests in the field of international relations, national security or defence’. It is somewhat ironic though that in its reasoning the Court was dismissive of CND’s claim that the government might go to war ‘under a mistake of law’. Lord Justice Brown asked ‘How real a risk is that?’ He answers ‘I am bound to say for my part that I think it no more than fanciful. Plainly the government has access to the best advice not only from law officers but also from a number of distinguished specialists in the field’. As we have seen in the previous chapter, the legal advice given for the invasion of Iraq was far from convincing.

With direct access to judicial review of government decisions to go to war currently denied, it is necessary to look to the possibility of indirect review by the courts. It may be that cases brought on other grounds raise issues of the legality of a particular war. Courts Martial brought against soldiers do not directly put the government in the dock for its decisions to go to war, but the soldier may try to claim illegality of the conflict as some sort of defence. However, the courts have given short-shrift to any attempt to claim that a soldier’s unlawful actions can be excused by reason of the alleged illegality of the conflict in which they are involved. When Flight Lieutenant Malcolm Kendall-Smith argued that he could not be obliged to go to Iraq to fight an illegal war, the Judge Advocate convicted him in 2007 for disobeying orders, ruling that the order was not unlawful since it was given after UN Resolutions had authorized the presence of the multinational force in post-invasion Iraq; but he also ruled that it was no defence that the defendant believed the order to be unlawful.

When Margaret Jones claimed in her defence to a charge of criminal damage to military equipment (after breaking into an RAF base on 13 March 2003) that it was justified to prevent the commission of a greater crime—the crime of aggression against Iraq—the court dismissed her argument. Although the Law Lords found, without deciding whether Iraq was an illegal aggressive war, that aggression was a crime under international law, it was not a crime under English domestic law. Lord Bingham, without any sense of irony, stated that it was ‘an important democratic principle’ in Britain, ‘that it is for those representing the people in the country in Parliament, not the executive and not the judges, to decide what conduct should be treated’ as criminal under English law. Further, ‘there are well-established rules that the courts will be very slow to review the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed services’. Thus while democracy is important for

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56 Ibid., para 44.
determining the criminal law of the country, it is not important enough to restrict the executive’s right to go to war.

Similarly, when Rose Gentle, the mother of a soldier killed in Iraq, claimed a right to have an independent inquiry into the wider circumstances surrounding the death of Fusilier Gordon Gentle and his comrades on 28 June 2004, as part of the British government’s obligation to uphold the right to life under article 2 of the European Convention on Human Rights incorporated into English law by the Human Rights Act 1998, the Law Lords again were unwilling to become involved in upholding rights that would challenge the government’s decisions to go to war. Lord Bingham gave a number of reasons as to why article 2 of the European Convention ‘has never been held to apply to the process of deciding on the lawfulness of the resort to arms, despite the number of occasions of which member states made that decision over the past half century and despite the fact that such a decision almost inevitably exposes military personnel to the risk of fatalities’. First of all, ‘the lawfulness of military action has no bearing on the risk of fatalities’, giving the example of the Japanese surprise attack on Pearl Harbor, which, though illegal, minimized Japanese casualties. In any case Fusilier Gentle had been killed after ‘Security Council Resolution 1546 had legitimated British military action in Iraq, so that such action was not by then unlawful even if it had earlier been so’. Finally, to allow such claims would mean that the courts would be ‘drawn into consideration of issues which judicial tribunals have traditionally been reluctant to entertain because they recognise their limitations as suitable bodies to resolve them’.

Though their Lordships exercised the traditional restraint on issues of ‘high policy’, the mention of the legitimating effect of Resolution 1546 does offer some crumbs of comfort for those seeking signs of a willingness to review. Stronger fare can indeed be found in the opinion of Baroness Hale who labelled the advice given by the Attorney General on the 7 March 2003 on the legality of the invasion of Iraq as ‘very far from clear and unambiguous’ with the revival argument within it—that Resolution 678 (1990) was revived in 2003—being ‘controversial’. She expressed sympathy with the mothers of the dead soldiers: ‘if the use of force was lawful, it would be of some comfort to know that their sons had died in a just cause. If it was not, there might at least be some public acknowledgment and attribution of responsibility and lessons learned for the future’. Baroness Hale went on to say that though she wished ‘that we could spell out of article 2 a duty in a state not to send its soldiers to fight in an unlawful war’, the House of Lords could not go that far given that ‘the lawfulness of war is an issue between states, not between individuals or between individuals and the state’. Clearly Baroness Hale struggled with the issue but ultimately declined to suggest a move towards review stating that while the ‘state that goes to war cannot and should not be the judge of whether or not the war was lawful

59 R (Gentle) v The Prime Minister [2008] UKHL 20, para 8.
in international law’, ‘that question can only be authoritatively decided, not by us or by Strasbourg, but by the international institutions which police the international treaties governing the law of war’.\textsuperscript{60} The problem is that with the UK having a veto on the main body which polices the UN Charter, we have to look to other bodies such as the General Assembly, or the International Court of Justice to see if they can call the government to account for their illegal wars. As we have seen, the General Assembly, while willing to act as the conscience of the superpowers during the Cold War, has lost its voice after the fall of the Berlin Wall. The International Court of Justice is severely hampered by the fact that states must consent to its jurisdiction before it can hear a case.

Though the House of Lords has established that the European Convention does apply to places of detention in Iraq thereby allowing claims of human rights abuse to be brought by Iraqi detainees or their families against the government,\textsuperscript{61} this falls short of reviewing the decisions to go to war themselves. Essentially, the English courts have refused to question the government’s decisions to go to war; in effect they have refused individuals the right to call the government to account for waging allegedly illegal wars which have led to the loss of British lives. The courts’ decision is not purely a legal one, though it is based on a traditional view of the constitution whereby such executive decisions cannot be challenged before the courts. However, the courts have expressed a willingness to review the use of prerogative powers in other areas.\textsuperscript{62}

Turning to cases brought before international courts against the British government for violations of international law, including international and regional human rights law, the picture is no brighter. In fact the \textit{Corfu Channel} case of 1949, dealt with in chapter two, is the main instance in the International Court’s history of Britain being found to have violated international law in that case by despatching a minesweeping operation to Albanian waters. Even then the court spoke about unlawful intervention by the UK rather than the unlawful use of force.\textsuperscript{63} Another occasion on which the UK has appeared before the court was as one of the respondents in cases brought by Serbia against the UK and nine other NATO countries in 1999 for their bombing of Serbia during the air campaign to stop Serbian repression in Kosovo. Ultimately the court did not find that it had jurisdiction to hear the case in 2004.\textsuperscript{64} Though there may be cases

\textsuperscript{60} Ibid., paras 47, 53–8.
\textsuperscript{62} Most recently the House of Lords in \textit{R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs} (No 2) [2008] UKHL 61.
\textsuperscript{63} 1949 ICJ Rep. at 35.
\textsuperscript{64} \textit{Case Concerning the Legality of Use of Force (Serbia and Montenegro v UK) Preliminary Objections}, 2004 ICJ Rep. 1307. See also the case brought by relatives of those killed by NATO bombing of the Serbian TV station before the European Court of Human Rights in \textit{Bankovic v Belgium}, ECHR Decision of 12 Dec. 2001 (Appl. No. 52207/99) at 9. The Court declared it did not have jurisdiction given that the right to life guaranteed by the European Convention did not
brought against Britain in the future, the fact that before the International Court states must consent to its jurisdiction\(^65\) makes it unlikely, at least in any systematic sense. Thus the most controversial war, namely that prosecuted against Iraq in 2003, was not litigated before the International Court. Though the Court’s jurisprudence on the use of force, in cases such as the Corfu Channel, reinforces and develops the rules, it is not equipped to be a regular and reliable mechanism of accountability.

There is though the prospect of indicting individual political leaders for their decision to go to war before the International Criminal Court (ICC). However, this will not happen until the state parties to the Rome Statute establishing the Court have agreed on a definition of aggression.\(^66\) It is interesting to note that while German leaders were tried for crimes against peace before the Nuremberg Tribunal in 1946, there can, as yet, be no trial for the equivalent crime of aggression before the International Criminal Court though it is listed as one of the crimes.\(^67\) Though the post-Cold War period has seen the international trial of a political leader of a country (President Milosevic of Serbia before the ICTY who died during the trial in 2006), and the request for an arrest warrant against another (President al-Bashir of Sudan in July 2008 by the ICC Prosecutor), the charges against them were for crimes against humanity and genocide, not aggression. Although there were attempts to persuade the ICTY and the ICC to indict Prime Minister Tony Blair for alleged crimes committed against Serbia in 1999 and Iraq in 2003, they singularly failed. More progress was made on the issue whether NATO had committed war crimes in relation to targeting issues during the Kosovo bombing campaign, when targets included bridges, roads, convoys and a TV station leading to several hundred civilian casualties. The jurisdiction of the ICTY extends to possible NATO crimes in Yugoslavia, article 7 of the tribunal’s Statute stating that a political leader can be held individually responsible ‘if he knew or had reason to know that the subordinate was about to commit such actions’. However, the Prosecutor ruled out any prosecution of individuals involved in the NATO operation on the questionable grounds that ‘either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence’.\(^68\)

extend to the applicants who were not within a state party to the Convention nor in an area under the effective control of such a party.

\(^{65}\) Art 36(1) of the Statute of the International Court of Justice 1945.

\(^{66}\) A Special Working Group on the Crime of Aggression was established in 2002 by the Assembly of State Parties to the Rome Statute, and is making progress towards a proposal to be put forward for adoption at the Rome Review Conference in 2009. For the latest Working Group Report see ICC-ASP/6/20/Add. 1 (June 2008).


6. The Dominance of Security Concerns before the Courts

We have seen that domestic courts have been unwilling to review decisions to go to war. An explanation of this is the reluctance of the courts to adjudicate on issues of national security, since this might compromise the nation’s defence. We might expect international courts to be less influenced by this concern. In a wider security context, which includes non-forcible as well as forcible measures, this has led to the British government relying on the supremacy of Security Council resolutions before courts in order to prevent any review of its policies. If we look at the International Court’s jurisprudence more widely to include cases in the area of peace and security involving Britain we can see an alarming trend in which the government in effect tries (often successfully) to hide behind Security Council resolutions. By consistently arguing that a combination of articles 25 and 103 of the UN Charter which between them provide that binding decisions of the Council prevail over any other inconsistent treaty obligation, the UK government has argued on a number of occasions, before domestic courts and regional courts as well as the International Court, that this means that it cannot be held to account for violations of its treaty obligations, including those arising under human rights covenants.

This argument has been made by the UK government when applying UN economic measures against countries and more recently individuals. It argues that Security Council economic sanctions imposed under chapter VII (article 41) of the Charter are binding by virtue of article 25 on all member states and therefore they must be applied against the target state or targeted individuals. Further, given that article 103 provides for the supremacy of Charter obligations over other treaty duties, the argument is that states are obliged to disregard any treaty duty (including one protecting human rights) that might prevent the successful application of the sanctions.

This argument was successfully used by the UK before the International Court of Justice in a case brought against it (and the US) by Libya in 1992. Libya had argued that by securing Security Council Resolution 748 of 1992 that imposed sanctions on Libya unless two Libyan individuals suspected of the Lockerbie bombing of 1988 were handed over, the UK (and the US) had violated the Montreal Convention of 1971. The 1971 Convention, to which all three of the litigant states were parties and which provided for the International Court’s jurisdiction in case of dispute, covered the sort of terrorist offence committed over Lockerbie, and entitled the Libyans to prosecute the individuals themselves rather than hand them over to other states that claimed jurisdiction. In its provisional measures judgments of 1992, the Court upheld the British and American arguments and denied Libya’s request for protection by declaring that the obligations imposed by Resolution 748 *prima facie* applied to all the parties and that
this obligation prevailed over any other treaty obligation including those in the 1971 Convention by virtue of article 103 of the UN Charter.⁶⁹

It is important to note that the judgment only accepted this contention prima facie, which led to speculation that the argument might not be accepted at the merits stage, speculation fuelled both by the separate opinions of several of the judges in 1992,⁷⁰ and by the fact that the court allowed the case to proceed to the merits. Ultimately the case was not decided as relations between the countries improved and the case was withdrawn from the court’s docket in 2003. Despite these caveats the supremacy of Security Council decisions became accepted orthodoxy, and has been followed by both the English House of Lords and the European Court of Human Rights.

Although not a case involving economic sanctions, the Al-Jedda judgment of the House of Lords in 2007 raised similar issues of supremacy. The appellant (a British/Iraqi national) had been held since 2004 by British troops at detention facilities in Iraq. He complained that the detention infringed his rights under article 5 of the European Convention on Human Rights (‘everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law . . . ’). Al-Jedda was not charged with any offence, and no charge or trial was in prospect. As explained by Lord Bingham in the judgment ‘he has been arrested and has since been detained on the ground that his internment is necessary for imperative reasons of security in Iraq. He is suspected of being a member of a terrorist group involved in weapons smuggling and explosive attacks in Iraq’. ‘These allegations are roundly denied by the appellant, and they have not been tested in any proceedings’.⁷¹

The courts below were faced with the issue of whether article 5(1) of the Convention was qualified by Security Council Resolution 1546, which was adopted under chapter VII of the UN Charter and which empowered the multinational force in Iraq to take ‘all necessary measures to contribute to the maintenance and stability in Iraq . . . including by preventing and deterring terrorism’. The Resolution also endorsed a letter attached to the Resolution from the US Secretary of State (Colin Powell) which stated that measures included ‘internment where . . . necessary for imperative reasons of security in Iraq’. In upholding the government’s argument that the obligations imposed by the Security Council prevailed, it is clear that their Lordships were uneasy. Lord Bingham was clearly of the opinion that the appellant’s rights had been violated but felt that the court had to accept the overriding nature of the obligation

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imposed by the Council. ‘In the absence of some exonerating condition, the detention would plainly infringe his right under article 5(1).’\(^\text{72}\) In dismissing the appeal, the court was not prepared to challenge the security imperative behind the Resolution and strongly advocated by the British government. The clash between the duty to detain and the duty to secure the appellant’s human rights could only be reconciled by ruling that the ‘UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must ensure that the detainee’s rights under article 5 are not infringed to any greater extent than is inherent in such detention.’\(^\text{73}\) Though the court in Al-Jedda did try to reduce the harshness of detention powers granted, it is not clear that this was adequate to allay Lord Carswell’s fears that ‘internment without trial is so antithetical to the rule of law as understood in a democratic society.’\(^\text{74}\)

The European Court of Human Rights has also addressed the supremacy of Security Council imposed obligations in the \textit{Behrami} case of 2007, which involved the death and injury of the applicant’s sons caused by unexploded NATO cluster bombs that had not been cleared in post-conflict Kosovo by French-KFOR troops.\(^\text{75}\)

The judgment was a controversial one but turned on the issue of responsibility. Since it found the UN and not France responsible,\(^\text{76}\) it was not necessary for the court to comment on the application of article 103. However, both the respondent states as well as the UK government in its representations to the court, argued the supremacy of Security Council obligations in Resolution 1244 (1999), which was the legal basis of KFOR and UNMIK in Kosovo.\(^\text{77}\) In response to these arguments the court stated generally that ‘the Convention has to be interpreted in the light of any relevant rules of international law applicable in relations between its Contracting Parties’.

\(^{72}\) Ibid., para 27.

\(^{73}\) Ibid., para 39. Lords Rogers and Brown agreed, as did a reluctant Baroness Hale saying the ‘right is qualified but not displaced… the right is qualified only to the extent required or authorised by the resolution’ (para 126). Lord Carswell adopted a similar line saying that the power to intern may lawfully be exercised by the UK but only in such a way ‘to minimise the infringement of the detainee’s rights’ under the Convention (para 136). In particular he identified the following ‘safeguards’: ‘the compilation of intelligence about such persons which is accurate and reliable as possible, the regular review of the continuing need to detain each person and a system whereby that need and the underlying evidence can be checked and challenged by representatives on behalf of the detained persons, so far as is practicable and consistent with the needs of national security and the safety of other persons’ (para 30).

\(^{74}\) Ibid., para 57. A further case is expected before the English courts on the detention of Iraqis by UK forces: see \textit{R (Al-Saddoon and Mufdhi) v Secretary of State for Defence} being litigated before the High Court in November 2008 (<http://www.publicinterestlawyers.co.uk>) (accessed 26 Jan. 2009)).

\(^{75}\) \textit{Behrami and Saramati v France, Germany and Norway}, ECHR Grand Chamber Decision as to Admissibility of Application No. 71412/01, and Application No. 78166/01.

\(^{76}\) Ibid., para 33.

\(^{77}\) For UK argument see ibid., para 113.
The court therefore had regard to the two complementary provisions of the UN Charter—articles 25 and 103 ‘as interpreted by the International Court of Justice’—citing the Lockerbie cases.\(^7^8\) It went on to state that ‘the primary objective of the UN is the maintenance of international peace and security’, and that ‘while it is equally clear that ensuring respect for human rights represents an important contribution to achieving international peace...the fact remains that the UNSC has primary responsibility, as well as extensive means under Charter VII, to fulfil this objective, notably through the use of coercive powers’.\(^7^9\) This, according to the court meant that the Convention could not be ‘interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court’. The court stated that ‘to do so would be to interfere with the fulfilment of the UN’s key mission in this field including...with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself’.\(^8^0\)

This seems to accept the supremacy of Security Council resolutions and puts the obligations created by that organ over those under existing human rights treaties, including the right to life. The Behrami judgment is reflective of a growing tendency to accept the Security Council as increasingly omnipotent, especially when dealing with global threats such as al-Qaeda, so that a combination of articles 25 and 103 of the UN Charter will even override human rights.\(^8^1\) In effect, supposedly constitutional provisions of the UN Charter (especially article 103)\(^8^2\) are being used to override constitutional rights. This seemed to be the orthodoxy until the European Court of Justice’s judgment in Kadi in 2008.\(^8^3\) In the case the applicant sought to overturn Community legislation that implemented Security Council anti-terrorist resolutions (especially Resolution 1267 of 1999), on the basis that his listing by the Security Council had led, by dint of the obligation imposed by the Security Council, to the freezing of his assets, thereby denying his right to property and his right to challenge the freezing order. True to its arguments before the House of Lords in Al-Jedda, and the European Court of Human Rights in Behrami, the UK government strongly argued for the supremacy of Security Council imposed obligations in its representations to the European Court of Justice.\(^8^4\)

At the outset of the *Kadi* judgment the European Court of Justice cited relevant provisions of the UN Charter (including articles 25 and 103), but also significantly mentioned article 24,⁸⁵ paragraph 2 of which states that the Council in carrying out its duties to maintain international peace and security ‘shall act in accordance with the Purposes and Principles of the United Nations’. The purposes and principles contained in articles 1 and 2 of the Charter are broad but they include the achievement of international co-operation ‘in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, language, or religion’. It is in fulfilment of this purpose that instruments such as the 1948 Universal Declaration of Human Rights were adopted by the General Assembly, embedding human rights in the UN system, and being the source of customary law and the inspiration for treaties both international and regional. Thus when article 103 speaks in terms of ‘a conflict of obligations… under the present Charter and… obligations under any other international agreement’, the matter is not a simple application of articles 25 and 103 to override any treaty obligation that might impinge on the most efficient method of implementing the sanction.

The court’s reasoning in *Kadi* is compatible with a human rights approach to Security Council resolutions, though the judgment was limited to the issue of the implementation of regulations within the EU legal order. The court was very clear though on the fundamentals of the EU legal order which is based on the rule of law, and a legal order which contains a ‘complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions’.⁸⁶ There is no critique of the UN system by the court, but there is clearly a less developed legal order within the UN, to the extent that we can say that though lawmaking and judicial elements are present, it is not governed by the strict application of the rule of law, exemplified in the workings of the Security Council where judicial, legislative and executive powers are intertwined and almost completely subject to unaccountable political judgment. To give such a political body power to override human rights, even in the name of peace and security, would be to allow it to subvert the rule of law in domestic and regional systems.

The European Court of Justice in *Kadi* puts fundamental rights at the heart of the EU legal order drawing ‘inspiration’ from the domestic legal order of member states and from international instruments, especially the European Convention on Human Rights. Thus ‘respect for human rights is a condition of the lawfulness of Community acts’,⁸⁷ with the result that implementation of obligations imposed under the UN Charter within the EU legal order cannot undermine human rights.⁸⁸ At the same time the court accepted that its judgment did

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⁸⁵ Ibid., para 4. Article 24 of the UN Charter is also mentioned at para 294.
⁸⁶ Ibid., para 281. ⁸⁷ Ibid., paras 283–4.
⁸⁸ Ibid., para 285.
'not entail any challenge to the primacy’ of the Security Council’s resolution in international law. By allowing the Council of Ministers a brief period of time to fix the regulations ‘to remedy the infringements found, but which also takes account of the considerable impact of the restrictive measures concerned on the appellant’s rights and duties’, the European Court of Justice was in effect recognizing that targeted sanctions are lawful if they are imposed in such a way as to be human rights compliant.

Despite its limitations, the Kadi judgment does give some hope that the courts will be more willing to challenge the supremacy of Security Council resolutions. Though there remains little possibility of the International Court reviewing the legality of Security Council resolutions, this should not stop other courts assessing more carefully their effects. Countries like the US and UK are seeking Security Council authority for their actions not simply to enable them to wage war or to list suspected terrorists, but to argue that the authority granted to them in these resolutions effectively can override even the most important of obligations—those requiring states like the UK to protect human rights. While the courts might not be able to challenge resolutions per se, they can at least mitigate the effects of them by recognizing that they do simply sweep aside any international obligation that might impinge on their effective implementation. It is interesting that the English Court of Appeal has in 2008 considered the implementation of targeted sanctions within the UK by orders made under the United Nations Act of 1946. While accepting the legality of these orders it did state that the applicant was entitled to have a merits based review of the basis of the listing, and if the court were to hold that the individual should not be listed then the government should take steps to delist him.

None of this though enables the British or international courts to challenge decisions to go to war per se, especially if the decision is undertaken by dint of authority granted by the Security Council in a resolution authorizing ‘necessary measures’. Though such a resolution cannot override the obligations of member states under humanitarian law if they act under the resolution, it does exonerate them from their obligation not to use force in international relations, for as was stated in chapter two, acting under the authority of the Security Council is a clear exception to the prohibition on the use of force in the UN Charter. However, where there is no such resolution, international courts clearly have jurisdiction and domestic courts may decide at some future point that decisions to go to war

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89 Ibid., para 288. 90 Ibid., para 375.
91 Though it is not clear that the Security Council as a whole intends this: see SC Res. 1456 of 20 Jan. 2003 (Declaration on Combating Terrorism) which in part declares that states ‘must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt measures in accordance with international law, in particular international human rights, refugee, and humanitarian law’.
that are not clearly justified under international law should be within their power of review. Having said this, a comparative analysis of other countries shows that judicial review of such decisions is far and away the exception to the rule.⁹⁴

With the International Court of Justice hampered by the fact that states must consent to appear before it, more pressure is on domestic and regional courts, which are at least more accessible, to take the initiative. Domestic courts have taken the approach that decisions to go to war are issues of high policy or are political questions, but this calls into question the very heart of democracies based on the rule of law. The Lockerbie cases before the International Court of Justice show the difficulty of obtaining a review of Security Council resolutions at the international level. At both domestic and international levels the rule of law is incomplete when considering decisions to go to war. At both domestic and international levels the executive will not be held to account before the courts for such decisions. At regional level, despite the judgment in Kadi, the European Court of Justice’s lack of competence over the second pillar of the EU—concerning foreign and security policy—restricts its capability to review decisions on security issues except where they involve economic matters over which it has jurisdiction. Finally the European Court of Human Rights’ competence is restricted to breaches of the Convention, which may only indirectly raise issues of war. Thus the prospect of developing a more than incidental form of judicial review of decisions to go to war is remote.

7. Conclusion

While criticism may be made of illegal interventions at the international level, principally by the UN General Assembly, this is not going to stop illegal wars from being prosecuted. This can only be done, at the current time, at the domestic level. The consensus in the UK seems to be that reform is necessary to require that parliamentary approval be given before troops can be deployed to any conflict zone. Though the proposal has been weakened over time, this would at least require the government’s case to be made to parliament. The absence in the proposal of any requirement for impartial advice on the legal basis of the proposed military action is predictable but disappointing given that the major problems of legitimacy that the government has encountered with recent military interventions, especially in Iraq in 2003, are directly traceable to the lack of a sound legal basis of the military action. If the action has such a basis, as with a number of British military actions examined in this book—principally Korea in 1950, the Falklands in 1982, and Iraq in 1991—and others that seemed to be

accepted at the international level as lawful (Sierra Leone for instance in 2000 and Afghanistan in 2001), then the government has little to fear. However, given that British governments, both Labour and Conservative, have a record of more dubious interventions—from the Corfu Channel incident in 1946, to Suez in 1956, as well as Kosovo in 1999 and Iraq in 2003, the unwillingness to release clear legal advice is understandable, but the concern of parliament should be to prevent illegal wars from being prosecuted.

With clarity about the international legal basis, the House of Commons ought to be more willing to challenge those decisions to go to war that are in breach of the rules governing the use of force. It might decide that in certain cases analogous to Kosovo the moral imperative is to take action though there is no clear justification in international law, but at least it will do so on the basis of clear legal advice. All this though depends on MPs freeing themselves from party discipline on such matters as war and peace as well as from what appears to be a fear of appearing weak, and overcoming the unwillingness of politicians to be perceived as undermining the morale of the armed forces. Criticizing the legal, political and military justifications given by the government should not be seen somehow as unpatriotic. MPs should take account of and give voice to the views of the people they represent. In addition, they should be open to the views of organized groups of pro as well as anti-war protestors, as well as any clearly identifiable public opinion on the legality, legitimacy and desirability of any proposed conflict.

The role of ‘world opinion’ in shaping political decisions is perhaps exaggerated, though there were widespread demonstrations against the Iraq war of 2003. The idea that all global citizens should be able to influence political decisions that affect them is an ideal that, if we consider the democratic deficit in international organizations, is a long way from being achieved. Cosmopolitan democracy may be a distant dream, but within democracies the arguments of this school of thought are persuasive. Daniele Archibugi has recently argued that ‘popular control should restrain the executive from waging wars that jeopardize the life and welfare of its citizens’. However, the reality is that ‘the incidence of wars waged by democracies is comparable to that waged by autocracies’, a fact explicable by the strategy deployed by countries such as the US and the UK to use technology to limit their casualties as much as possible, epitomized by Operation Allied Force over Kosovo. Archibugi adopts a strong Kantian position that democracies should act abroad as they act within their own countries, rather than ignoring basic norms of behaviour as autocracies do. When abuses of international law are committed by democracies ‘they violate the democracies’ own constituent pact’, thereby ‘jeopardizing the very existence of the political community’.95

Could greater review by independent courts be a part of the framework of accountability? The reluctance of domestic courts to concern themselves with such matters of high policy is understandable. For one thing there would be a great fear that embroiling the government in court cases would inhibit the efficiency of decision-making and therefore the effectiveness of response. But as has been argued the urgency to respond is great in situations of aggression or genocide, but not so in other situations where troops are deployed (for example in the case of breach of disarmament resolutions). Judicial intervention in these cases may not be detrimental to the effective prosecution of military action.

Given that decisions to go to war primarily have an impact in the international legal order between states it should be the International Court of Justice that has the capability of calling the government to account. The consensual basis of its competence severely restricts its impact as a mechanism of accountability, and there appears little prospect of it being reformed since it is clearly based on a traditional view of international law. The International Criminal Court, which paradoxically challenges the traditional approach to international law, will potentially have more impact as regards the potential criminal responsibility of political leaders for decisions to go to war once a definition of aggression is agreed by the state parties to the Rome Statute. Expectations might be higher of the European Courts especially after the Kadi case of 2008 challenged the competence of both the EU executive and indirectly the Security Council, but it must be remembered that this was a decision about non-forcible measures against individuals, not decisions to use force against states.

A strengthening of mechanisms of judicial review and accountability at the international level is the most that we can hope for, a process that might eventually lead to governments (and executives of international organizations) being held to account by courts for decisions to go to war in breach of international law. It will be argued by democratically elected governments that with current world instability, with armed conflict being all too commonplace, it is premature to subject political decisions to use military force to judicial review. However, the stronger argument must be that with war being increasingly waged by liberal democracies, the very democratic fabric of these countries is under threat, demanding greatly increased levels of democratic and judicial accountability for decisions to go to war.