1. Introduction

When a country decides to go to war, there are many political, economic, and of course, military considerations that enter into the decision-making process. This complex matrix will be shown throughout this book, but the main purpose of looking at these factors in decision-making is to put the legal frameworks that seek to regulate war-making within a wider context. When a government decides to deploy troops to combat zones around the world there will be two main types of law seeking to both regulate and empower that choice—the constitutional law of the country in question and the norms and customs of international law (within which we include the notion of regional law). The law seeks to regulate the decision by positing certain rules and procedures that should be followed if the decision is to avoid charges of illegality. It will also empower the government to make decisions that have the most serious consequences for the country it represents, and for the country to which troops are dispatched.

This chapter focuses on the British constitution and considers the origins and application of prerogative powers in decisions to deploy British forces to conflict and post-conflict zones. The roles of the executive, legislative and judicial branches of government are outlined. The traditional dominance of the executive (in reality smaller groupings of the Cabinet in formal committees or informal arrangements) is considered, as is the role of parliament, which appears to have increased in recent years. The current discussion as to whether this should culminate in parliamentary approval being given before the deployment of troops will be outlined at this stage, and the reasons for it returned to in later chapters, before being fully debated and concluded on in chapter eleven. The slow encroachment of the judiciary into other aspects of the royal prerogative is be contrasted with the reserved domain of foreign affairs and the deployment of troops.

2. The Sovereign’s Army

In matters of deploying troops and waging war, the Prime Minister has quite startling ‘prerogative’ powers under British constitutional law. The Prime Minister has at his or her disposal a highly trained army, navy and air force, currently numbering about 200,000.² The constitutional framework within which the prerogative is operated in modern times will be reviewed more fully below. The purpose of this section is to trace the origins of this power to the medieval monarchs of England. Michael Prestwich describes the English army of over 10,000 men led into Scotland by Edward I in 1300:

The army was commanded by the king himself, and some of the cavalry were paid regular members of the royal household. Others were present because landowners had been requested to provide military service under the terms by which they held their land. Yet others served voluntarily at their own expense. Many knights and men-at-arms had entered into contracts to serve a magnate as part of his retinue. There were even a few foreign mercenaries. The infantry were mostly there unwillingly, recruited by royal commissioners. They were paid for their service, but their columns were diminished daily by desertion.³

The only standing element of this army, one that was always in the king’s service and at his disposal, was the royal household, which in general terms provided several hundred knights. This was clearly inadequate for most of the military operations undertaken by the Crown.⁴ The demise of feudal service in the fourteenth century, was replaced by an ‘obligation on all free men to bear arms in defence of their country’, an obligation that can be traced back to Anglo-Saxon times. It is clear that the ‘military obligation was to . . . defend the land; it would not apply to offensive expeditions’.⁵

While the knights and nobles fought for glory, position and reward, the ordinary men in the infantry ‘faced a dismal prospect of discomfort and exhaustion, dysentery and sickness. If they were captured, they were not worth ransoming, and so were far more likely to be killed in battle than the knights’.³

Furthermore, the ‘only group which received a significant favour from the Crown in exchange for fighting were criminals’, who were promised pardons in return for service.⁶

While the medieval king had complete constitutional power to wage war, he was faced with considerable practical limitations on that power especially when raising an army. The lack of a standing army meant that ‘war was the most complex enterprise in which the medieval English state was involved’.⁷ Furthermore, since the signing of the Magna Carta in 1215, the monarch could not levy the taxes necessary to wage expensive wars without the then rudimentary parliament’s approval.⁸ Another limitation that did not seem to prevent the raising of armies for foreign war, but an interesting one nonetheless, was that the obligation on free men to serve in the army was confined to actions in defence of the realm. Early examples of debates about the line between defensive and offensive wars can be found with F.W. Maitland who wrote that ‘the Welsh and Scottish Wars of Henry VI were regarded as defensive, resistances on invasion, and the county forces could lawfully be called to meet them’.⁹

By the outset of the sixteenth century, the core armed force at Henry VII’s disposal consisted of 2,000–3,000 men in arms. This force was supplemented in the main by the obligation of all men to defend the realm which in the sixteenth century was ‘modernized and made the backbone of the nation’s defences on land’.¹⁰ Further troops consisted of foreign mercenaries. In Henry VIII’s wars against France, out of a force of 44,000—‘the largest army ever seen under English command on the Continent until the late seventeenth century’—a quarter were foreign troops.¹¹ The effects of war, especially for the many wounded and disabled men returning from Henry’s and Elizabeth I’s wars, caused ‘a growing war weariness’ so that ‘MPs, JPs, and local communities alike became less co-operative towards the demands of government’.¹² This discontent was exacerbated with the onset of the Thirty Years War and the military expeditions ordered by Charles I.

⁷ Ibid., 23.
¹¹ Ibid., 27. During the Napoleonic wars in 1813, the British army numbered over 250,000 troops: D. Gates, ‘The Transformation of the Army 1783–1815’, in Chandler and Beckett (eds), History of the British Army, 132 at 139. Though the numbers varied, by 1914 at the outbreak of the First World War the army stood at just under 250,000, but by 1918 it had risen to 3,458,586, one and a half million of whom were in France: T. Travers, ‘The Army and the Challenge of War 1914–1918’, in Chandler and Beckett (eds), History of the British Army, 211 at 211. At the end of the Second World War the British Army stood at 2,920,000: A. Danchev, ‘The Army and the Home Front 1939–1945’, in Chandler and Beckett (eds), History of the British Army, 298 at 302.
The loss of life in these expeditions was very great: Members of Parliament were shocked by the sight of discharged sailors and soldiers dying in the streets of west country ports. Parliament made it plain its discontent in the Petition of Right in 1628, which placed severe restraints on the demands which the Crown could make on the subject in time of War.¹³

As Ian Loveland states, ‘by the seventeenth century the Commons and Lords had become increasingly reluctant to give approval for the levying of taxes without a guarantee that the Monarch accepted certain limits on his personal powers’.¹⁴ The monarch could try to by-pass parliament by relying on his prerogative powers but ‘the difficulty arose whenever the Crown needed money above and beyond its own resources—whenever it wanted to go to war for example’.¹⁵ The power struggle between parliament and the Sovereign culminated in a number of constitutional ‘moments’ in history, moments when the balance of power changed significantly. The Magna Carta of 1215 was an early example,¹⁶ and the Bill of Rights of 1689 a later one. In 1642, the struggle between Charles I and parliament produced internal conflict. The civil war in England, 1642–8, led to the two sides creating ‘war machines comparable to those…laying waste [to] whole areas of the Continent’.¹⁷ Control of the warring armies reflects, in a way, the current debate about who should control military operations, with the Cavaliers under the control of the King and the New Model Army or Roundheads under the control of parliament, though considerable discretion was left to the commanders on the ground.¹⁸

Although the standing army was reduced by half during the Protectorate of Oliver Cromwell (1653–1658) neither he, nor his regime’s successors, resolved the dilemma of maintaining a still large standing army with the low taxes enjoyed by the gentry before the Civil War.¹⁹ Though Charles II and his successors were aware of this, Cromwell laid the foundations, not only for a standing army but also for Britain’s subsequent ‘great power status’.²⁰ Despite the Civil War and the growth in power of parliament, it was true to say that up until the intervention of William of Orange in the so-called ‘Glorious Revolution’ of 1688, ‘the army belonged to the king. In peacetime, a standing army was unknown to English statute law and the army was not knowingly recognized by parliament. The army was commanded by the king and ranked as a department of the royal household’.²¹ Parliament did, however, control the purse strings more tightly, thus restricting the monarch’s ability to create a powerful army, at least without parliamentary support. ‘It was arguably James II’s persistent disregard of parliamentary authority that eventually triggered the 1688

¹³ Ibid., 42. ¹⁴ Loveland, Constitutional Law, 23.
¹⁵ Ibid., 23. ¹⁶ Lyon, Constitutional History, 39–40.
¹⁸ Ibid., 43. ¹⁹ Ibid., 45. ²⁰ Ibid., 45.
revolution’. The intervention of William of Orange in England in the Glorious Revolution, ‘motivated by European rather than English concerns’, ‘brought a profound and lasting alteration in the relations between Crown, parliament, and the army’. William’s war against France meant that his desire for more troops led to his willingness to restrict the Crown’s prerogative power in military matters.

The 1688 revolution, like Magna Carta and the Civil War before it, marked the crossing of a political watershed. A new political ‘contract’ was struck between Parliament and the Monarchy, and consequently a new constitutional foundation was laid. In return for the throne, William and Mary accepted that the Crown’s ability to govern the English nation through its prerogative powers would be severely limited in future. The Monarch might still be responsible for governing the country, and she/he could appoint the Ministers who would do the job, but those Ministers would govern the country according to laws defined by Parliament.

The Bill of Rights produced by parliament in 1689 declared that ‘levying of money for and to the use of the Crown by pretence of prerogative without grant of Parliament is illegal’, which re-iterated the Magna Carta, but also ‘that the raising or keeping of a standing army within the kingdom in time of peace unless it be with the consent of Parliament is against the law’. The latter clause ‘removed the standing army from the royal household and placed it firmly under the control of parliament making it a national institution’. Further, it meant that ‘both constitutionally and financially, the Crown could no longer employ the army as its own political tool’; the British army was now destined to be the servant of parliament.

Though constitutionally control of the army passed from the king to parliament, the gradual transference of power to parliament from 1689 onwards did not mean the disappearance of the prerogative nor the monarch’s involvement in decision-making and war-making. But the extent of the Sovereign’s prerogative powers was limited, and the remaining prerogative could be amended or abolished by legislation. Since the Revolution of 1688 there has been a decline in the practical significance of the Sovereign’s powers. By the mid-eighteenth century the relationship between the Sovereign and his Ministers had changed so that neither George I nor George II were involved to any great degree in government affairs. By 1740 the ‘Prime Minster’—the first one being Sir Robert Walpole—was practically in control of the Cabinet. Though progress towards the modern constitutional monarchy was by no means smooth, the trend was towards Cabinet government, which was ‘pretty much in place by 1810’.

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²² Loveland, *Constitutional Law*, 87.
²⁶ ‘King George II was the last British monarch to lead his troops into action, at Dettingen on 27 June 1743’, A.J. Guy, ‘The Army of the Georges 1714–1783’, in Chandler and Beckett (eds), *History of the British Army*, 92 at 98.
the modern age the ‘Queen is now largely just a figurehead, performing ceremo-
nial and symbolic functions’ within the current constitutional framework.²⁹

The prerogative powers have been eroded but they have not gone. ‘For most prac-
tical purposes, prerogative powers are exercised on the monarch’s behalf by the
government’.³⁰ Such powers remain in areas as important as the conduct of for-
eign affairs, including the signing of treaties and the decisions to go to war or to
otherwise deploy troops.

Though the waging of war and the deployment of troops came within the remit
of the emerging democracy in England, it was not exercised by parliament, but
by Ministers using powers formerly possessed by the Sovereign. Ministers were
accountable to parliament for such decisions, but the beginning of the end of the
Sovereign’s concern for government in the eighteenth century ‘coincided with the
emergence of a sophisticated system of party political organisation’.³¹ This meant
that the levels of accountability for decisions to go to war were limited, for in gen-
eral terms the electoral system in the UK ensured that the executive dominated
parliament, as will be explained in the next section.

3. Democracy and War

Historically, as democracy has grown in the UK, we have seen the power to wage
war being transferred from the monarch to the government, which in turn is
accountable to parliament. In a democratic system it might be expected that pol-
itical pressure from MPs and the electorate would prevent the country from going
to war too readily. Indeed, in 1795 Immanuel Kant put forward a theory for
democratic peace on the premise that democracies are far less likely to wage war.

If… the consent of the citizenry is required in order to determine whether or not there
will be war, it is natural that they consider all its calamities before committing themselves
to so risky a game… By contrast, under a nonrepublican constitution where subjects are
not citizens, the easiest thing in the world is to declare war. Here the ruler is not a fellow
citizen, but the nation’s owner, and war does not affect his table, his hunt, his places of
pleasure… Thus he can decide to go to war for the most meaningless of reasons, as if it
were a kind of pleasure party, and he can blithely leave its justification to his diplomatic
corps, who are always prepared for such exercises.³²

The proposition that democracies do not readily wage war, a proposition usually
confined to explain the absence of war between democracies,³³ is premised on

²⁹ Loveland, Constitutional Law, 88.
³⁰ Ibid., 88.
³¹ Ibid., 88.
³² I. Kant, Perpetual Peace, and Other Essays on History and Morals (Indianapolis: Hackett
³³ See for example T.M. Franck, ‘The Emerging Right to Democratic Governance’ (1992) 86
AJIL 82; S.R. Weart, Never at War: Why Democracies Will Not Fight One Another (New Haven: Yale
University Press, 1998); B. Russett, Grasping the Democratic Peace: Principles for a Post-Cold War
the Kantian assumption that the electorate, or their elected representatives, control belligerent decision-making. However, as has been seen in the above section, the modern reality is that in the UK, the executive, in the form of the Cabinet or a sub-group of that body, makes the decision to commit military forces. The House of Commons, representing the electorate, then has a chance to debate the matter. As will be seen in this book, in recent times parliament, mainly through the House of Commons, has acted as a more significant control on the actions of the executive, in the sense that the military action is subject to questioning and debate in the House of Commons and in its relevant Select Committees, though this has not been a consistent practice.

Although not playing a major role in parliament’s scrutiny of the executive’s actions in times of conflict, the unelected upper house, the House of Lords, can play a subsidiary role principally in seeking information from the government. This can be explained by the ‘intensity of party discipline and paucity of investigatory resources in the lower house [that] places stringent restrictions on the effectiveness of MPs’ supervisory capacities. Consequently, there is appreciable scope for the Lords to complement and reinforce the Commons in this respect,

³⁴ although this supporting role is less pronounced in the field of foreign affairs.

One of the questions this book wants to consider is whether prior parliamentary approval should be required before troops could be deployed. This might seem to be a quick and easy solution to the problem but there are a number of issues associated with this possible change that need to be addressed. First, would this reduce the effectiveness of the government in responding to aggression against Britain or its allies and threats to the peace arising from crises around the world, perhaps prompted by humanitarian concerns? Second, might the reduction in inefficiency be justified by the relative increase in democracy that such a reform would bring? Third, would parliamentary approval be a real check on the power of the executive?

Historically, ‘the Glorious Revolution of 1689 was about subjecting executive power—the king—to a range of limitations that secured that certain laws could not be changed, and things could not be done without the consent of the Commons and Lords in Parliament assembled’.³⁵ As we have seen, this left certain powers, those of concerning the royal prerogative, including decisions to wage war and deploying troops, largely untouched by the requirement of the consent of parliament. Parliament annually consents to the presence of a standing army, but it is not required to approve of each deployment of those troops.

³⁴ Loveland, *Constitutional Law*, 177.

From 1689 to the constitutional reforms in the nineteenth and twentieth centuries by which the right to vote was made universal, parliamentary sovereignty, signifying parliament’s supreme legislative capacity, was not reflecting democracy but was developed to ‘secure government by consent’, namely of the Commons and the Lords. With the widening of the franchise the concept of representative democracy developed whereby, with the exception of the prerogative powers, parliament, representing the electorate, controlled the government. At some point though, in the post-1945 period, through a combination of ruthless control of the political parties, the first-past-the-post electoral system that ensures that one party usually dominates parliament, and the ever increasing often technical legislative burden, parliament no longer controlled the government. The reality became that ‘the executive governs through Parliament’.

Thus with the concepts of representative democracy and parliamentary sovereignty being undermined (the latter by other external factors as well such as the impact of European Community legislation), one might question whether the solution to the perceived lack of democracy in the areas of the prerogative, such as the decision to deploy troops, is to bring it within the remit of parliamentary control. This issue will be returned to in later chapters, and concluded upon in chapter eleven. In this chapter the debate will be put within the context of different visions of democracy that might be used to control the executive, both in terms of its core competence and its prerogative powers.

Lessons might be learnt from other countries. In other parliamentary democracies there is a spectrum from the executive having almost complete dominance in the UK, towards the other end, for example in Germany, which requires advanced parliamentary approval for decisions to commit military power. Even within countries with established constitutions the pendulum might swing between the executive and parliament in different cases though in general there has been what has been labelled a ‘parliamentarization’ of the decision-making process, with debate and approval within parliaments increasing, in recognition that within democracies ‘it is only when military policies are fully debated and understood through the constitutional processes of democratic societies [that] there will be sufficient assurance of public support for them’.

A similar pendulum effect can be seen within Presidential systems such as the United States where there has been a ‘long-running and fundamentally irresolvable controversy over the allocation of domestic authority to decide upon the external uses of military force’. The President, on the one hand, has asserted

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37 Oliver, Constitutional Reform, 32. 38 Ibid., 33.
40 Ibid., 54. 41 Ibid., 60.
sole constitutional authority to commit US troops, but on the other, in the War Powers Resolution of 1973, Congress has claimed a share in decisions to commit troops to hostilities. The President might not recognize the legality of Congress’ position, but sometimes he will have to recognize the political necessity of Congressional approval:

In the Gulf War [of 1991], although President Bush insisted that he did not need the approval of ‘some old goat in the United States Congress to kick Saddam Hussein out of Kuwait’, he did request and receive congressional authorization under the War Powers Resolution, thereby significantly enhancing the legitimacy of the military effort in the eyes of the public.

The need for that legitimacy was also evidenced by the fact that President George W. Bush secured Congressional approval for launching wars in Afghanistan in 2001 and Iraq in 2003.

Lessons might be learnt as well from democratic and constitutional theory. In answer to the question of what is democracy, Robert Dahl argues that it is about providing opportunities for members of any association, namely: for effective participation, equality in voting, gaining enlightened understanding, exercising final control over the agenda, and for the inclusion of all adults. Clearly democracy at the level of the state is almost always deficient when tested against these standards. It cannot be said that representative democracy normally allows all citizens ‘effective participation’ in the sense that ‘before a policy is adopted’ all the citizens ‘must have equal and effective opportunities for making their views known to the other’ citizens ‘as to what the policy should be’; nor that the citizens have final control of the agenda to be debated; nor do they normally have enlightened understanding ‘about the relevant alternative policies and their likely consequences’.

The paradox is that the larger an organization or institution becomes the less practical full participatory democracy becomes. John Stuart Mill recognized this in 1861—‘since all cannot, in a community exceeding a small single town, participate personally in any but some very small portions of the public business, it follows that the ideal type of perfect government must be representative’. The advent of dominant political parties must, however, call into question the ideal. Furthermore, the origins of representative democracy are far from ideal: ‘representative government originated not as a democratic practice but as a device by which nondemocratic governments—monarchs, mainly—could lay their hands on precious revenues and other resources they wanted, particularly for fighting wars’. Though generally defending representative democracy, Dahl recognizes

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44 Ibid., 49.  
47 Ibid., 37.  
its ‘dark side’ whereby citizens ‘delegate enormous discretionary authority over decisions of extraordinary importance’.\(^{50}\)

Attempts have been made in recent years to remedy the deficiencies of representative democracy with elements of ‘participatory’ democracy, but, in the UK they have focused on trying to improve the model that assumes that ‘the electorate participates in government primarily through voting and holding ministers to account via MPs in Parliament’. To improve this there has been some move towards proportional representation (at least in the devolved Scottish and Welsh electoral processes), and improved rights of access to information so that more informed electoral choices can be made, enhanced by the protection of freedom of information under the Human Rights Act 1998. However, that does not go as far as allowing the full participation of citizens in the democratic process which could, for example, be achieved through giving ‘opportunities to put forward one’s views for consideration by officials’, giving ‘rights to be consulted and have one’s representations responded to’, and ‘rights to vote on decisions’. A variation would be to improve ‘deliberative’ democracy which envisages citizens discussing ‘together and with officials the solutions to problems’.\(^{51}\)

The latter could be achieved by an active civil society—‘the professions, pressure groups, trade unions, the voluntary sector . . . spontaneously engaging in discussion and consultation with a receptive government about policy and administration’,\(^{52}\) and thus providing a balance to the dominance of the political parties. In the UK, there is an absence of any participation by civil society in decisions to deploy troops, although there have been consultations in the recent process of reviewing prerogative powers reviewed in chapter eleven.

Furthermore, decisions about war and the deployment of troops are regularly made on the international stage, for example by the UN Security Council deciding that a peacekeeping force will be sent to a particular country. Though the UK, in general terms, has no international legal obligation to provide troops, it may well commit them in negotiations with the UN Secretary General without any reference to parliament let alone wider society. The lack of democracy in such decisions at the national level is more evident at the international level. Though there is a strong trend towards international organizations supporting the spread of democracy within nation states, combined with a trend towards international law recognizing democratic rights as part of the internal aspect of the right to self-determination,\(^{53}\) there is limited evidence of democracy within international organizations themselves, though international civil society in the form of

\(^{50}\) Ibid., 113.


\(^{52}\) Oliver, *Constitutional Reform*, 37.

non-governmental organizations (NGOs) have made an impact in certain specific areas.\textsuperscript{54} Theorists such as David Held have advocated global or ‘cosmopolitan democracy’ which involves the ‘creation of a democratic community which both involves and cuts across democratic states’.\textsuperscript{55} Following from this, Susan Marks advocates the recognition of a principle of ‘democratic inclusion’, which is the ‘idea that all should have a right to a say in decision-making which affects them, and that systematic barriers to the exercise of that right should be acknowledged and removed. For this purpose, the relevant processes of decision-making and barriers to participation include not only those operating within nation-states, but also those operating among nation-states and in transnational arenas’.\textsuperscript{56}

In general terms, though, there is little democratic input, certainly in a participatory sense, nationally or internationally, into executive decisions to deploy troops. It would be unjust though to say that such decisions were totally undemocratic as the executive is, in a very basic sense, the ‘elected’ government of the UK, and furthermore it represents the UK at international level. There is still democratic accountability of the government to the electorate. The government may become increasingly unpopular if it sends troops to conflicts with consequent heavy loss of life to British service personnel and with no real prospect of withdrawal. Democratic accountability means that the electorate can judge the record of those holding political power in the UK.\textsuperscript{57} However, given the number of factors that the electorate has to take into account, and given that the main concern of electors is the next five years not so much the previous five years, democratic accountability, at least as operated in the UK, is not generally going to be precise enough to act as a check on individual decisions to go to war. The prosecution of the war in Iraq in 2003 and the consequent on-going commitment of troops to that increasingly violent country was unpopular with the electorate, but that did not stop the Labour government keeping its hold on power in the 2005 elections. The issue of democratic accountability will be returned to in chapter eleven where the question will be asked whether there are other forms of accountability, political and perhaps legal, that should be developed to scrutinize decisions to deploy troops.

The presence of other checks and balances, for instance through parliamentary Select Committees, will become apparent in this book,\textsuperscript{58} but in general controls


\textsuperscript{56} S. Marks, \textit{The Riddle of All Constitutions} (Oxford: Oxford University Press, 2000) 119.

\textsuperscript{57} For definition see C. Harlow, \textit{Accountability in the European Union} (Oxford: Oxford University Press, 2002) 8.

\textsuperscript{58} See for example the Foreign Affairs Select Committee’s report of 7 June 2000 (HC 28-I) into the Kosovo campaign. A much earlier example was the select committee established in 1855 to look into the Crimean war: P. Burroughs, ‘An Unreformed Army? 1815–1868’, in Chandler and Beckett (eds), \textit{History of the British Army}, 161 at 183.
are quite limited, whether political, legal or financial. Political and legal methods of accountability will be a theme throughout the book. In general, financial checks do not prevent such decisions from being made in that the funding of each operation does not need the sanction of parliament, with at least initial finances being taken by the government out of the already approved Defence budget.⁵⁹

Democratic or political control or even criticism within parliament is in reality limited since dissent about UK military action is often seen as unpatriotic. Bipartisanship, whereby there is agreement between government and the opposition within parliament, is the norm. Confidential discussions between the leaders of the parties may well be held before parliamentary debates on the deployment of military forces. For instance, this appeared to be the case before the UK’s military response to the events of 11 September 2001 when terrorists attacked the United States. Prior to the American and British military response against the Taliban and Al-Qaeda in Afghanistan on 7 October 2001, Prime Minister Blair made it clear in the House of Commons that the leaders of the other main parties had been consulted, and further he made it clear that the British would fight alongside the United States in Afghanistan.⁶⁰ With party leaders on board, party discipline and the sense of patriotism that surrounds these issues ensures that criticism is usually from a small number of ‘maverick’ MPs. Thereafter, the main concern of the government is to keep public opinion on board. It is only in this diluted sense that the electorate can influence decision-making. Government, often assisted by large sections of the media, normally successfully maintains public support for the military operation. In 1999 at the outset of the Kosovo campaign, the headline of The Sun, the most popular newspaper in Britain, ran ‘Clobba Slobba. Our Boys batter Serb butcher in NATO Bomb Blitz’.⁶¹ In 2003, at the outset of the invasion of Iraq, the same newspaper declared, in slightly more muted terms, ‘Wanted Dead or Alive: 100,000 Allies move to front line for invasion as Saddam stands defiant’.⁶²

In internationally sanctioned operations a high level of popular support for military actions is often sustained even though it is not British territory or interests that are under direct attack. It is still seen as somewhat subversive if criticism is made of British forces while engaged in dangerous military operations. Indeed, this is perhaps strengthened by the change in emphasis away from wars of national interest (Suez in 1956 and the Falklands in 1982), to wars of international concern (the Gulf in 1991 and Kosovo in 1999). The imprimatur of an international

⁵⁹ A. McSmith and P. Beaver, ‘Commander Blair Goes it Alone’, The Observer, 18 April 1999, 14. On financial controls see S. de Smith and R. Brazier, Constitutional and Administrative Law (8th edn, London: Penguin, 1998). Any review of expenditures on armed conflicts is normally retrospective by the Public Accounts Committee, and the Comptroller and Auditor General. In the case of Kosovo the initial expenditure of the bombing (about £2m a day) was met out of contingency reserves.


organization gives the government the necessary legitimacy to take military action. The invasion of Iraq in 2003, was markedly more unilateral (or bilateral) in nature, and seemed to mark the development of a more critical attitude from the electorate, and to a lesser extent, their representatives in parliament.

4. The Modern Constitution and Military Action

The prerogative powers of the Crown still prevail on the issue of troop deployment, and wider constitutional theory about the nature of statehood reflects this. From the perspective of international law the UK is undoubtedly a state, but in UK constitutional theory it is not. The UK has been described as a ‘stateless society’, since its ‘constitutional system has been constructed largely without the use of the concept of the state’. UK legislation rarely refers to the concept of ‘state’. In one rare instance of usage, in the Official Secrets Act of 1911, s 1 of which makes it an offence to enter any prohibited place ‘for any purpose prejudicial to the safety and interests of the State’, the UK’s highest court, the House of Lords, struggled to define its meaning. Lord Devlin stated in 1964:

What is meant by ‘the State? Is it the same thing as what I have just called ‘the country’? Mr Foster, for the appellants, submits that it means the inhabitants of a particular geographical area. I doubt if it ever has as wide a meaning as that . . . the more precise use of the word ‘State’, the use to be expected in a legal context, and the one which I am quite satisfied . . . was intended in this statute, is to denote the organs of government of a national community. In the United Kingdom, in relation at any rate to the armed forces and to the defence of the realm, that organ is the Crown . . .

The state is not defined in terms of the People but in terms of the Crown. As we have seen in this chapter, the ‘Crown’ has evolved from a person—the monarch—to an organ or institution—the government. In the modern era ‘it is usual to refer to “the Sovereign” in matters concerning the personal conduct or decisions of the monarch, and to “the Crown” as the collective entity which in law may stand for central government’. Central government is largely coterminous with ‘the Executive’. Executive functions include ‘the execution of law and policy,
the maintenance of public order … the direction of foreign policy, the conduct of military operations’.⁶⁹ The fulcrum of the executive is the Cabinet, headed by the Prime Minister. In theory, major policy, and in the case of military operations and foreign policy, decision-making, is hammered out in the Cabinet and in various standing and ad hoc Cabinet committees. Decision-making on issues of foreign affairs and the deployment of armed forces are within the prerogative power of the Crown.⁷⁰

A.V. Dicey defined prerogative powers as follows:

The prerogative appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown … From the time of the Norman conquest down to the Revolution of 1688, the Crown possessed in reality many of the attributes of sovereignty. The prerogative is the name for the Crown’s original authority … Every act which the executive government can lawfully do without the authority of the Act of Parliament is done in virtue of this prerogative.⁷¹

Though Dicey’s constitutional theory, first expounded in the late nineteenth century, has been criticized,⁷² his definition of the prerogative remains useful. As prerogative powers, both foreign affairs and the placement of armed forces are exercised on the authority of the Cabinet or of Ministers, particularly the Prime Minister, the Secretary of State for Foreign and Commonwealth Affairs, and the Secretary of State for Defence.

The presence and exercise of prerogative power has two serious consequences for the rule of law and democratic accountability. First: ‘while Parliamentary approval is not generally needed before action is taken, Ministers are responsible to Parliament for their policies and decisions’.⁷³ Second, the courts have no power to review the decisions of the Crown on the disposition and use of the UK’s armed forces.⁷⁴ Given that prerogative powers by-pass normal methods of democratic control and accountability, it is necessary to re-evaluate the balance between necessity and democracy. There is certainly a strong view that the deployment of troops and the waging of war, or more generally ‘the exercise of the physical might of the modern state’ should be subject to democratic control.⁷⁵

⁷² See for instance Loveland, Constitutional Law, 21.
⁷³ Bradley and Ewing, Constitutional and Administrative Law, 352.
⁷⁴ China Navigation Co. Ltd v Attorney General [1932] 2 KB 197 (Court of Appeal). Chandler v Director of Public Prosecutions [1964] AC 736 (House of Lords). P. Rowe, Defence: The Legal Implications (London: Brassey’s, 1987) 3. There is a discernible trend to review the prerogative in other areas: Lester and Oliver, Constitutional Law, 250.
⁷⁵ Bradley and Ewing, Constitutional and Administrative Law, 373.
It is true that the Bill of Rights of 1689 asserted constitutional superiority over the armed forces when it declared that the raising or keeping of a standing army within the Kingdom in time of peace, unless it be with the consent of parliament, is against the law. However, the purpose of this part of the Bill was to prevent the King establishing his own army. Parliamentary authority was asserted over the standing army, not over each deployment of troops. The parliamentary power to withdraw authority for the maintenance of an army is not a realistic control in the modern age. Although regular (annual) legislation is required to renew parliamentary authority, it is adopted as a matter of course.\footnote{de Smith and Brazier, \textit{Constitutional and Administrative Law}, 217.}

The reality of the exercise of prerogative powers in the areas of foreign affairs and the disposition of armed forces is shown by the exchange in the House of Commons in 1982 when negotiations were taking place for the settlement of the Falklands conflict in the period between the Argentinian invasion and the arrival of the British task force to defend the islands.\footnote{Reviewed more fully in chapter seven.} The Leader of the Opposition, Neil Kinnock, claimed that ‘the House of Commons has the right to make judgment on this matter before any decision is taken by the government that would enlarge the conflict’. In response, the Prime Minister, Margaret Thatcher, declared that ‘it is an inherent jurisdiction of the government to negotiate and reach decisions. Afterwards the House of Commons can pass judgment on the government’.\footnote{\textit{Hansard}, HC vol 23, cols 597–8, 11 May 1982.}

The method by which the lower house passes judgment on the government can vary. As the Foreign Affairs Select Committee noted in its report on Kosovo produced on 7 June 2000:

\ldots the British Government commits our armed forces to any conflict by exercise of the Royal Prerogative. For that reason, it has become normal for Governments to rely on motions for the adjournment to debate the United Kingdom’s involvement in a conflict. These procedural motions are unamendable. This is a traditional means of preventing an alternative proposition to that of the Government being offered to the House. Governments have not always shied away from substantive motions. The Korean War and the Suez intervention were both approved by substantial resolution of the House. The Falklands War was, however, only debated on the adjournment, and the Gulf War was also debated in the adjournment on four occasions before a substantive motion was moved. All the debates on the Kosovo conflict were held on the adjournment.\footnote{HC Foreign Affairs Committee, Fourth Report, 7 June 2000 (HC 28-I), para 166.}

Only substantive motions truly enable the lower house to challenge the government’s decision.\footnote{According to Erskine May, while a substantive motion ‘is a proposal for the purpose of eliciting a decision of the House’, to which amendments ‘may be tabled as soon as the motions have been tabled’. Motions for the adjournment are in fact ‘technical’ forms ‘devised for the purpose of enabling the House to discuss matters without recording a decision in terms. It is, therefore, not subject to amendment’ (21st edn, 1989) 625, 321, and 325.} The vote has traditionally been one of approval, but it does put the government more firmly under the spotlight. It is interesting though that
while the Kosovo conflict of 1999 was the subject of much more debate in the lower house, it was not subject to a substantive vote, thereby reducing the chances of the government’s decisions being challenged. The debates prior to the invasion of Iraq in 2003 did, however, culminate in a substantive vote in the House of Commons on 18 March, two days before the invasion.

In theory the legislature controls the executive since a government can be ousted by a vote of no-confidence in parliament. However, the often decisive majorities commanded by the government of the day in the House of Commons, produced by the first-past-the-post electoral system, signify that any control exerted is limited. A government with a large majority in the House of Commons has been described as an ‘elective dictatorship’ by the most conservative of commentators⁸¹ even in matters requiring legislation; this is clearly more so in the case of prerogative powers. There may often be quite lively debates in parliament, primarily in the House of Commons, though limited discussion may also be found in the House of Lords. Furthermore, there may be the questioning of Ministers before the Defence Select Committee or the Select Committee on Foreign Affairs of the House of Commons.⁸² However, it is questionable whether these operate as robust controls on Cabinet decision-making. Crucial decisions have already been made, making the controls appear, at best, retrospective. Nevertheless, Ministers may curtail their decisions when considering the possible adverse reaction of the House of Commons or the relevant Select Committee in the near future.

5. War Before the Courts

In addition to this possibility of political accountability, there are possible avenues for the government to be held legally accountable. At national level the prerogative has been gradually opened up to judicial review. Lord Roskill declared in the *GCHQ* case in the House of Lords in 1985 that he could not see:

> Any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of power statutory. In either case that act in question is the act of the executive. To talk of that act as the act of the sovereign savours of the archaism of past centuries.⁸³

However, this was not a green light to signal that all prerogative powers were to be reviewable; it also depended on whether they were justiciable, in other words whether the dispute was suitable to resolution by judicial decision. If the dispute

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⁸¹ Turpin, *British Government*, 393 citing the former Lord Chancellor, Lord Hailsham.

⁸² For example the Foreign Affairs Committee examined the sinking of the *General Belgrano* during the Falklands conflict, HC 11 (1984–85).

⁸³ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 417 (hereinafter *GCHQ* case).
involves ‘a great many points of view all of which have to be weighed and balanced in the search for an overall political solution’,⁸⁴ such as national security,⁸⁵ the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of parliament and the appointment of Ministers,⁸⁶ then ‘judicial process is totally inept to deal with the sort of problems’ raised.⁸⁷ While currently excluding decisions to deploy troops from judicial review, the question remains though as to whether this is a fixed list, or whether the overriding concept of justiciability is ‘like other common law principles . . . prone to sudden and substantial change’.⁸⁸ Some acts of foreign affairs such as the making of treaties have been held to be non-justiciable.⁸⁹ On the other hand the issue and renewal of passports, although an exercise of prerogative power, was held to be justiciable in the case where an individual’s passport was not renewed.⁹⁰ Taylor LJ suggested that foreign relations issues that involved matters of ‘high policy’ were non-justiciable, and that the granting of passports did not fall into this category.

On this basis the decision of government to go to war or otherwise to commit troops overseas would appear to be an issue of ‘high policy’ and therefore non-justiciable and non-reviewable. Thus while not reviewing government decisions to go to war or to deploy troops, the judiciary will hear cases brought against soldiers for breaches of military law and international humanitarian law before military courts (courts martial), and more recently by civilian courts under the Human Rights Act 1998.

There have been a spate of recent cases arising out of the Iraq war that will be returned to in more detail in chapter eleven. There was the court martial of soldiers for abuse of Iraqi prisoners at ‘Camp Breadbasket’ in Basra in May 2003.⁹¹ The death of Baha Mousa, an Iraqi civilian who died after suffering ninety-three separate injuries while in detention in Basra in September 2003, led to a largely unsuccessful prosecution of a number of British soldiers by court martial,⁹² a decision by the House of Lords that the Human Rights Act did apply to Iraqis held in places of detention under the authority and control of British forces,⁹³ and a public inquiry announced by the government on 14 May 2008.⁹⁴

⁸⁵ *GCHQ* case, Lord Diplock at 412.
⁸⁶ *GCHQ* case, Lord Roskill at 418.
⁸⁷ *GCHQ* case, Lord Diplock at 412.
⁸⁹ *Ex parte Molyneaux* [1986] 1 WLR 331.
⁹⁰ *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] QB 811, CA.
⁹¹ Seven members of the Queen’s Lancashire Regiment faced a court martial. Six were acquitted and one was jailed for a year after admitting committing a war crime under the International Criminal Court Act 2001 <http://news.bbc.co.uk/1/hi/uk/6609237.stm>, 30 April 2007 (accessed 26 Jan. 2009).
⁹² Seven members of the Queen’s Lancashire Regiment faced a court martial. Six were acquitted and one was jailed for a year after admitting committing a war crime under the International Criminal Court Act 2001 <http://news.bbc.co.uk/1/hi/uk/6609237.stm>, 30 April 2007 (accessed 26 Jan. 2009).
⁹⁴ The inquiry is chaired by a retired Court of Appeal Judge (Sir William Gage) and its terms of reference are ‘to investigate and report on the circumstances surrounding the death of Baha Mousa and the treatment of those detained with him, taking into account of the investigations which have already taken place, in particular where responsibility lay for approving the practice of conditioning
*Al-Jedda* case decided by the House of Lords in 2007, the Court found that the appellant’s right to liberty under Article 5 of the European Convention on Human Rights had been violated by his detention in Iraq since 2004 without charge or trial, but that those rights had been overridden by a Security Council resolution (1546 of 2004) which authorized the detention of suspected terrorists; in effect upholding the government’s argument to the effect that the security concerns embodied in the Security Council decision should prevail over human rights.⁹⁵

The position of the judiciary in matters of war will be returned to in chapter eleven, where the question of why issues of ‘high policy’ should be excluded from the courts will be re-considered. Though the recent cases coming out of the brutal conflict in Iraq after the invasion of 2003 show an increasing juridification of war,⁹⁶ attempts to question the legality of the war have thus far failed. Cases brought against the Prime Minister by the CND and Rose Gentle (the mother of a soldier killed by a roadside bomb in Iraq) failed because the courts refused to confront the use of prerogative powers by the government.⁹⁷ Similarly in a criminal case (for criminal damage of military equipment in protest at the Iraq war), the courts (ultimately the House of Lords) refused to be drawn on the legality of the war in Iraq.⁹⁸ Finally the attempted defence of Flight Lieutenant Malcolm Kendall-Smith for disobeying orders to serve in Iraq on the basis that the war was illegal was dismissed by the judge at his court martial.⁹⁹ Though the courts are willing to exercise jurisdiction over soldiers for crimes committed in war, and, in certain circumstances, recognize that there has been a violation of the human rights of civilians in combat zones by UK forces, attempts to make military and political leaders legally accountable for their decisions, especially the ultimate decision—to go to war—have failed.

On the issue of the individual responsibility of politicians for decisions to use force, in extreme cases, for example where a Minister has sanctioned a war crime or a crime against humanity, that person could be forced from office, although there has been no instance of this occurring in the UK. As shall be seen, issues of troop deployment and going to war have led on occasions to the resignation of senior politicians but this has largely been due to them taking responsibility for failures of policy. In Israel the Minster of Defence, and future Prime Minister, Ariel Sharon, was forced to resign for having indirect responsibility for the Sabra and Shatila Palestinian camp massacres in 1982, following a report by an


⁹⁵ *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58.


⁹⁷ *Campaign for Nuclear Disarmament v The Prime Minister of the United Kingdom* [2002] EWHC 2777; *R (Gentle) v Prime Minister* [2008] UKHL 20.

⁹⁸ *R v Jones* [2006] UKHL 16.

independent commission of inquiry into the episode.¹⁰⁰ Independent commissions of inquiry are to be found within the UK system in instances of internal violence committed by UK troops (the Widgery Inquiry of 1972 into the Bloody Sunday Massacres in Belfast, now re-opened with the current Saville Inquiry), on issues of foreign affairs (the Scott inquiry into arms to Iraq),¹⁰¹ and on issues connected to military actions (the Hutton inquiry into the death of Dr David Kelly 2004).¹⁰²

The main international court that could play a role in apportioning individual criminal responsibility is the International Criminal Court (ICC) whose Statute was agreed in 1998, though it did not come into force until 1 July 2002. The UK is a party to the Statute, having signed the Statute in 1998 and having ratified it on 4 October 2001. The potential impact of this Statute as a means of attributing individual criminal responsibility to politicians, military commanders and soldiers is limited, bearing in mind that the Statute is not retrospective, though Corporal Payne was convicted of committing a war crime for his acts at Camp Breadbasket under the International Criminal Court Act 2001. Subject to the limited impact of the ICC and other ad hoc international criminal tribunals, military discipline and punishment for unlawful conduct by British troops is in practice normally under the control of the British contingent’s commander and British Courts Martial operating under UK legislation, principally the Armed Forces Act 2006, which replaced three separate discipline acts of the 1950s.

6. The War Cabinet

With the slow and as yet unfulfilled encroachment of mechanisms of judicial accountability on the decision to go to war, we must return to the issue of political accountability, and consider the way such decisions are made. In general terms the gap between accountability to parliament and the reality of government is shown by the committal of armed forces to combat. Bradley and Ewing state that ‘[l]ike other branches of central government, the armed forces are placed under the control of the ministers of the Crown, who are in turn responsible to Parliament’.¹⁰³ The authorization and control of military operations are the province of the Cabinet. Indeed, normally military operations are run by an inner War Cabinet known as the War Cabinet, a mechanism that seems to have been accepted in UK constitutional practice. In relation to the prosecution of wars, the chain of political authority runs from the inner Cabinet to the Cabinet, then to the party, parliament and the public at large. In times of conflict, it has

¹⁰³ Bradley and Ewing, Constitutional and Administrative Law, 375.
been said that the main concern of the Prime Minister is keeping ‘the Cabinet happy’. The Party is ‘important; Parliament as a whole, [is] useful but not essential; and the public? Well, the day of reckoning at the next general election [is] some way off’.¹⁰⁴

These inner War Cabinets are almost always *ad hoc* arrangements established at the behest of the Prime Minister, by-passing the standing Cabinet committees whose structure and role has been predetermined. The only exception to this practice in the post Second World War period was the Korean War, when the existing Cabinet Defence Committee ran the British contribution to the war. It has been suggested that Prime Minister Attlee ‘had least need to consider forming an ad hoc committee’, one reason being that the UK was not ‘running’ the Korean War, given that the Korean military action was a UN sanctioned operation under Unified (US) command.¹⁰⁵ However, a suggestion that in UN authorized operations the existing institutions of government will be respected is not borne out by subsequent UK involvement in such operations. For instance the British involvement in the Gulf War of 1991 was coordinated by an *ad hoc* War Cabinet consisting of the Prime Minister, the Chancellor of the Exchequer, and the Secretaries of State for Foreign Affairs, Defence and Energy. The British contribution to the NATO sanctioned Kosovo operation in 1999 was directed by an even looser inner cabinet. Prime Minister ‘Blair ha[d] no formal War Cabinet, but supervise[d] the campaign through daily face-to-face meetings with Chief of Defence Staff, General Sir Charles Guthrie, [Defence Secretary] Robertson, Foreign Secretary Robin Cook and trusted officials’.¹⁰⁶

However, the difference between the Cabinet Defence Committee and the various *ad hoc* War Cabinets is not that great, both are small committees with specialist membership, normally attended by all the Chiefs of Staff headed by the Chief of Defence Staff, whose decisions tend to be rubber stamped by the full cabinet. The reason for having such a small body directing the UK’s forces appears to be the need to remove political debate from the running of an efficient military operation.¹⁰⁷ The danger of this is clear—the military operation can simply become the domain of a few people—indeed in extreme cases can become the Prime Minister’s war, as with Anthony Eden in Suez, to a lesser extent Margaret Thatcher in the Falklands,¹⁰⁸ and Tony Blair in relation to Kosovo. In the latter case, this is still true even though the operation was not a British one but a NATO one, with the Prime Minister being referred to quite regularly as the ‘NATO leader’.¹⁰⁹

¹⁰⁵ Ibid., 188.
¹⁰⁶ McSmith and Beaver, ‘Commander Blair Goes it Alone’, 14.
¹⁰⁸ Ibid., 185–7.
The deployment and use of military forces are clearly the gravest issues in politics and therefore to exclude wider political debate and input seems perverse. Indeed, the emergence of War Cabinets has two consequences which increase the democratic deficit in these situations—‘[t]he dangers of tunnel vision among the decision-makers, and the dangers of military professionals dominating the politicians’. By excluding all ‘extraneous’ political factors from their decision-making the War Cabinet is in danger of becoming obsessed with the successful prosecution of the war—in effect this becomes the War Cabinet’s raison d’être. This is compounded by the fact that they are only receiving input from the military in the shape of the Chiefs of Staff under the Chief of Defence Staff.¹¹⁰

This mechanism, at least in the modern sense, originates from the world wars. During the First World War, ‘authority was concentrated in an inner War Cabinet’, led by Prime Minister Lloyd-George, ‘detached from administrative routine and charged with the framing of a policy to which the action of every department was related’.¹¹¹ Prime Minister Churchill formed a War Cabinet during the Second World War. In such total wars, by necessity of survival, ‘politics generally is subordinated to military considerations’.¹¹² Though Churchill did engage with parliament during the Second World War, democratic accountability to the electorate was suspended.¹¹³ However, in the case of more limited wars, in which Korea, the Gulf, Kosovo, and Afghanistan must be included, the government should be considering the war in relation to all its other policies and goals.

It seems at least questionable whether the War Cabinet system provides a good method of resolving this. The basic dilemma is that the War Cabinet tends to become fixated on the war and is quite unsuited to achieving an overview; while the full Cabinet is likely to be progressively less in touch and equally ill-equipped to take a balanced view. The system is in disequilibrium. The consequence of this situation may be that the War Cabinet gets more and more involved in short term goals, and with means more than ends.¹¹⁴

The effective by-passing of the Cabinet and parliament obviously is a serious shortcoming when looking at the accountability of the Ministers prosecuting the war.

In the Korean War, for instance, Prime Minister Attlee had approved of British support in the Security Council for a resolution of 25 June 1950 condemning the North Korean attack.¹¹⁵ The Cabinet then responded on 27 June 1950 to the US draft circulated to Security Council members recommending assistance be given

¹¹⁴ Seymour-Ure, ‘War Cabinets’, 198.
to repel the North Korean armed attack.¹¹⁶ As well as supporting this resolution, the Cabinet directed the Minister of Defence to organize a report from the Chiefs of Staff to the Defence Committee on the logistics of military assistance. Within a day of the Security Council resolution being adopted, on 28 June the Defence Committee met, approved of the recommendations of the Chiefs of Staff that naval forces be put at the disposal of the US Naval Commander, and authorized instructions be given to that effect. Thus the decision to commit UK forces to the UN authorized operation under US command was made, ‘without any reference to the Cabinet’.¹¹⁷ Thereafter the main decisions about the British commitment to the conflict were taken by the Defence Committee of the Cabinet, including, on 24 July the deployment of land forces under US command.¹¹⁸ The Defence Committee made this decision and put it into effect, it was then ‘endorsed’ by the Cabinet, and made public in a House of Commons debate two days later.¹¹⁹ Although the Cabinet was kept informed by the Minister of Defence during the conflict, its main concern was managing the debates within parliament, and keeping public opinion on board.¹²⁰

The absence of Cabinet papers in relation to more recent conflicts makes detailed analyses of the inner workings of the executive more difficult. Focusing on the Kosovo conflict of 1999 for a moment though, it is interesting to note how the actual conduct of military operations was in the hands of Prime Minister Blair and Secretary of State for Defence Robertson. As was reported in The Observer, during the bombing campaign of 1999:

In the early stages of the [bombing] campaign—when most of the targets were large, fixed installations—virtually every [RAF] bomb that landed had the personal approval of either Blair or . . . Robertson. Now that the Harriers and Tornados are circling over Kosovo hunting moving targets, orders are more general—but still ultimately come from Downing Street.¹²¹

In relation to the UK’s contribution to the war fought against the Taliban and Al-Qaeda in Afghanistan from October 2001, in response to the attacks against the United States of 11 September 2001, a War Cabinet met on 9 October, two days after the hostilities had started. This body consisting of Prime Minister Tony Blair, his Deputy John Prescott, Chancellor Gordon Brown, Foreign Secretary Jack Straw, Defence Secretary Geoff Hoon, Leader of the House Robin Cook, International Development Secretary Claire Short and the Chief of Defence Staff replaced the ad hoc arrangements of Ministers and advisers who had been in charge of planning the UK’s role since 11 September.¹²²

Prior to the invasion of Iraq by the US and UK in March 2003, there were a number of meetings of a rolling group of Ministers and advisers to plan the British involvement.¹²³ These meetings continued after the outbreak of hostilities and although there was no official reference to a War Cabinet,¹²⁴ the press did describe it in those terms, saying it was drawn from a group of Ministers and advisers including Prime Minister Tony Blair, his Deputy John Prescott, Chancellor Gordon Brown, Foreign Secretary Jack Straw, Defence Secretary Geoff Hoon, the Attorney General Lord Goldsmith, International Development Secretary Clare Short, Chief of Defence Staff, and the Head of MI6.¹²⁵

The role of the War Cabinet, the executive as a whole, and parliament will be the subject of greater analysis when individual conflicts are looked at in greater detail in chapters four, six, eight, nine, and ten. While the theory of Cabinet government still persists, as a matter of practice, it appears that the role of the Cabinet as a whole has declined, so that executive decisions are very rarely made by this body any more. In tracing the historical development of Cabinet government from 1900, Anthony Seldon identifies that in the period 1900–1914 the Cabinet was the sole decision-making body. From 1914–1945 the Cabinet became the principal decision-making body, since decisions were increasingly taken in standing cabinet committees and, in times of conflict, the War Cabinet. From 1945–1979, ‘the Cabinet committee system came of age’. ‘Decisions were taken mainly in Cabinet committees, but important decisions would always be presented for ratification (if not always discussion) by Ministers to full Cabinet which could very occasionally reverse those decisions’. From 1979–1987, the Cabinet was the supreme discussion and information-giving body, but executive decision-making lay elsewhere, some still in the committees but increasingly outside that system, in small groups of ministers, sometimes just the Prime Minister and one other Minister. The Labour government from 1997 resulted in what Seddon calls a ‘personal system’, whereby Prime Minister Blair had an even more ‘informal system of conducting business at the heart of government, so that principal decision-making is neither with the Cabinet or established committees. Cabinet has become a place for a “weekly exchange of views”, no more’.¹²⁶

Thus in terms of executive decision-making on something as profoundly significant for Britain and its service personnel (not to mention the people of the country subject to military intervention) as the deployment of troops to conflict and post-conflict situations, there are a number of warning signs that even the limited democratic and constitutional checks and balances that have emerged

over the centuries are being eroded. Parliamentary debate of the executive decision to deploy might be more lively and protracted than ever before but party control of parliament renders it of reduced value as a means of accountability. The electorate has an increasing number of domestic and global issues to concern it so that decisions to deploy troops rarely come under the spotlight in elections to make that aspect of democratic accountability a true check on executive power. And finally the doctrine of collective Cabinet responsibility that ensured that at least all Ministers of State were behind decisions to deploy troops has been reduced as a check, as executive decision-making has largely moved outside of the cabinet, and even beyond the established cabinet system of committees.

As pointed out by Daintith and Page, there may be as much, if not more, value in looking at remedying the lack of ‘internal’ controls within the executive as in looking at increasing the effectiveness of ‘external’ controls by parliament and the courts. Daintith and Page are critical of the traditional constitutional analysis that applies the doctrine of separation of powers, and concentrates on the relations between the executive, legislative and judicial branches of government. The doctrine of separation of powers is the orthodox way of trying to ensure a democratic system of government is in balance, with no organ dominating and with checks and balances between the different organs. The doctrine provides a limited critical analysis of the actual and possible controls over each branch:

While the trinity of executive, legislative and judicial functions may be the most powerful rationalization of the specialization process that has yet been offered, it cannot by itself capture the overall significance of any given structure of government for constitutional values such as democracy and accountability.

The authors warn us to ‘resist the easy assumption that the allocations of powers and functions within each of the organizational blocs identified by separation of powers doctrine are less significant to the protection of constitutional values than are the relations between those blocs’. Most significant organizations rely on ‘internal’ as well as ‘external’ audit to identify weakness, whether in finance, management or other aspects of accountability.

### 7. Conclusions

Following from this review of the elements of the UK’s political system as it relates to decisions to deploy troops, the democratic deficit is so severe that we might question whether we have a system that is little different from that which surrounded the king in the fourteenth and fifteenth centuries. F.W. Maitland

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129 Ibid., 12.
portrays the monarch of that time as ‘the ruler of the nation, the commander of its armies and its fleets’, advised not by parliament (which did exist in a very early form) but by the king’s council, the members of which ‘can be dismissed by the king whenever he pleases; they are sworn to advise the king according to the best of their cunning and discretion’. ‘The function of the council… is to advise the king upon every exercise of the royal power’.¹³⁰ It would be easy to compare the modern Prime Minister and his ministerial colleagues to the king and his council, but it is not necessarily as straightforward as that. Indeed, although the medieval king had untrammelled power on paper, there were increasing pressures from parliament, from his subjects (soldiers and civilians), and from his treasury that meant that in political terms waging war was not as simple as might appear from the constitutional framework.¹³¹ In modern times, there are similar pressures, and although the British constitutional legal framework is still limited, there is increasing pressure for reform—an issue that will be returned to in chapter eleven.

Furthermore, in the era of globalization it is true to say that ‘national democratic politics cannot be understood without reference to international forces’.¹³² It must not be forgotten that Britain has since 1945 become part of a wider international institutional and legal order, which may affect its ability to wage war. In different areas of decision-making, sovereignty has been limited by European law, both of an economic nature from the EC and of a human rights kind from the Council of Europe. The question of whether these and other international legal frameworks and institutions have restricted the government’s prerogative powers in military matters is the issue to be considered in the next chapter.

¹³¹ Ibid., 324–9.
¹³² Marks, *The Riddle*, 100.