HOUSE OF LORDS
HOUSE OF COMMONS
JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by Sir Michael Wood, K.C.M.G.

Summary

1. The present arrangements whereby the Attorney General gives legal advice to the Government are preferable to any of the alternatives that have been canvassed. It is axiomatic that legal advice, if it is to be frank, should not be disclosed.

2. The draft clauses on 'Ratification of Treaties' are satisfactory, though it would be preferable for Clause 23 to contain a power to add new descriptions of treaties to which Clause 21 does not apply.

3. If there is to be any change as regards 'war powers', the better route would be by way of parliamentary resolution, as proposed in the White Paper. The legislative option has grave disadvantages.

Introduction

1. I was the Legal Adviser to the Foreign and Commonwealth Office from 1999 to 2006. I am now a barrister in private practice, specialising in the areas of foreign relations law and international law. My evidence is concerned chiefly with the foreign relations aspects of the proposals in the White Paper (Cm 7342).

I. Attorney General: Legal Advice

2. I welcome the approach in the White Paper, and agree, for the reasons there given, that the Attorney General should remain the Government's chief legal adviser, and that he or she should

remain a Minister, a member of one of the Houses of Parliament, and continue to attend Cabinet whenever necessary (paras. 51-54 and 61-65).

3. My particular concern is with the Attorney General's role in furnishing the Government with advice on questions involving public international law. Given the nature of international law, and the critical nature of many of the matters with which it deals, it is important that legal advice within Government should be advanced firmly and convincingly in high-level policy discussions. The existing arrangements comprise, in addition to the Attorney General, the Legal Advisers at the Foreign and Commonwealth Office and the lawyers in the Attorney General's Office. These arrangements are effective in melding together expertise in international law with the extra weight of the Attorney General's broader experience, and his or her standing as a Member of the Government. They ensure that the importance of complying with international law is fully taken into account, not least under circumstances of intense political pressure. The Attorney General's status as a Minister gives him or her a greater possibility than would be secured by any other arrangement of ensuring that legal considerations are not misunderstood (or ignored) in high-level decision-making on foreign affairs. The current arrangements also ensure that there is a degree of Parliamentary accountability in respect of the legal positions which the Government adopts.

4. I agree with the approach in the White Paper to the disclosure of the Attorney General's advice (paras. 66-69).

5. Suggestions that the legal advice tendered to the Government should be published are misconceived. This is so with regard to the often delicate and uncertain questions of international law as with other areas of the law. The normal rule of confidentiality (the 'Law Officers' convention, enshrined in section 35 of the Freedom of Information Act 2000) needs to be maintained. International situations, and especially crisis situations, are rarely static, but develop, often at great speed. When this happens, and legal questions are involved, seeking legal advice is an iterative process. The advice sought may go to tactics as well as substance. To reveal the legal advice (including whether legal advice has been sought on a particular question) could seriously damage the Government's hand in fast-moving international diplomacy.

II. Treaties

6. Clauses 21 to 24 of the draft Bill (Ratification of Treaties) are technically satisfactory, subject to one point.

7. Clause 23 should contain a power to add further descriptions to the list of descriptions of treaties to which Clause 21 does not apply, as was proposed in the Green Paper. Such flexibility would have

at least two advantages. First, it would enable account to be taken of experience under the legislation, which might show that the procedure set forth in the Act was not necessary or appropriate in certain cases. And it would enable categories of treaties that have been overlooked or that may emerge in future international practice to be brought within Clause 23. Parliament should have the final say on whether this is appropriate, so it would be right for the power to be exercisable by a procedure requiring the assent of Parliament, such as a statutory instrument requiring an affirmative resolution of each House.

8. My (brief) responses to the specific questions listed in the Call for Evidence are as follows:

Question 31

Yes, on all counts.

Question 32

Parliamentary scrutiny of draft treaties (which I take to be a reference to scrutiny while negotiations are ongoing) is not a matter to be dealt with in an Act of Parliament.

In many cases, such scrutiny will not be practical. Treaty negotiations are often conducted behind closed doors. Sometimes the very fact that negotiations are taking place at all is a matter of considerable sensitivity, to one side or the other (or both). In addition, it may well not be possible for the Government to reveal its negotiating hand or its tactics, without damaging consequences.

There are exceptions, particularly in the case of multilateral treaties negotiated within an international organization or at an international conference, where negotiations do take place to some degree in public. I believe that Parliament did, for example, discuss the draft Statute of the International Criminal Court while it was under negotiation.

Question 33

Current arrangements, reflected in the draft Bill, have proved to be satisfactory in practice, and seem to strike the right balance between Parliament and the Executive in this matter.

Question 34

Clause 22 as drafted seems right. It should be for Government to decide whether exceptional circumstances (which are likely to be very rare) exist. Only they will have the necessary

information (including possibly sensitive information) to take such a decision, and be in a position to balance all relevant considerations, foreign policy and other.

Question 35

Yes.

Question 36

This is a matter for Parliament, and I express no view.

III. 'War Powers'

9. It would have been a serious error to have placed new arrangements in respect of 'war powers' on a statutory footing. To have done so would inevitably have involved the judges in the application of the powers. This applies also to the 'hybrid solution'. In addition, detailed legislation would have introduces an inappropriate degree of rigidity into new and untried procedures that relate to the most difficult and crucial of governmental decisions.

10. There is much to be said for leaving matters as they stand at present, with a developing constitutional practice that the House of Commons will, wherever possible be consulted in advance of any major use of force. If, however, that is considered undesirable, proceeding by way of a detailed parliamentary resolution, as proposed in the White Paper, would be the right way to go. This will be effective in formalizing Parliament's role, which seems to be the purpose of the exercise, without opening up matters of war and peace to the risk of inappropriate judicial scrutiny.

11. 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. Among the difficult issues that might come before the courts would be the interpretation of the scope of a

'conflict decision' and its application to an ongoing conflict. Ministers and military commanders would continually need to have regard to the 'judge over their shoulder.' The distraction of court proceedings (which might well take place in the lead up to or during a conflict), both political and for the individuals implicated, would be considerable, at a time when all concerned are fully stretched by the day-to-day conduct of the conflict. And there would be the prospect of legal proceedings dragging on for years thereafter.

12. To illustrate the kind of issues that could well arise, if the courts were asked to decide whether 'war powers' legislation had or had not been complied with, I draw attention to a very recent Judgment of the German Constitutional Court (BVerfG, 2 GvE 1/03 of 7 May 2008). The Constitutional Court held, in May 2008 (that is, five years after the event) that the Federal Government had violated the rights of the Federal Parliament by not seeking its approval for the participation of German soldiers in NATO aerial surveillance measures (AWACS) over Turkey between 26 February and 17 April 2003. In reaching this conclusion, the judges of the Constitutional Court had to decide whether the participation of German soldiers in the unarmed AWACS fights over Turkey, at a time when Turkey was not itself involved in an armed conflict, amounted to the involvement of German soldiers in armed undertakings. This required a detailed examination of the nature of NATO's 'Operation Display Deterrence.' The judges examined the particular role of the AWACS planes in the NATO Operation, and their communications links to Patriot anti-missile launchers and NATO fighter planes stationed in Turkey for the defence of that country in the event of an attack by Iraq. The judges also had to consider the effect of decisions of NATO's Defence Planning Committee, and the applicable NATO Rules of Engagement (which the NATO authorities changed in the course of the short operation, making them significantly more robust).

13. Among other things, this case illustrates the real difficulty (even in the German system where there already is a substantial case-law on the subject) of drawing a clear line between those deployments that require Parliamentary approval and those that do not. If this were a matter for the British courts, I could foresee a host of interesting and difficult cases.

14. The possibility was raised (in the 'Legislative Option' set out in the October 2007 Green Paper (Cm 7239)) of including a subsection in an Act of Parliament to the effect that 'A conflict decision is not unlawful because it is not approved as required by this Part.' Quite apart from the nonsense involved in saying that something done in violation of an Act of Parliament is 'not unlawful', any such provision would be unlikely to oust the jurisdiction of the courts. The courts traditionally (and rightly) have usually found ways to avoid 'ouster' clauses.

15. The detailed draft resolution in the White Paper gives Parliament an appropriate degree of control over conflict decisions. Certain matters must inevitably be left to Government, and the draft properly reflects that.

16. It is right that approval should not be required for a conflict decision involving Special Forces. It would be incompatible with the effectiveness of the operations of Special Forces to require Parliamentary approval.

17. Whether the term 'conflict decision' has been adequately defined depends on how widely (or narrowly) Parliament wishes the procedure to apply. Whatever definition is used there are bound to be difficult borderline cases (as, for example, in the German case referred to at paragraph 12 above). Experience may well suggest a need for changes in the scope of the new procedure. Proceeding by way of a resolution will allow for improvements to be made in this and other respects much more easily than if the details were enshrined in an Act of Parliament.

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6 June 2008

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This evidence is submitted on an individual basis.