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## IV. THE GOVERNANCE OF BRITAIN

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services;<sup>95</sup> the exigencies of urgency;<sup>96</sup> or where national defence requires continued business dealings with the listed contractor.<sup>97</sup> The upshot is that any waivers must be necessary to prevent a severe disruption of the agency's operation to the detriment of the Government or the general public.<sup>98</sup>

The possibility that any debarment against BAE may be waived remains a real one, if one draws an analogy with the recent high-profile suspension (temporary debarment of up to 18 months)<sup>99</sup> of Boeing from US public contracts. This suspension was twice lifted to permit Boeing to receive substantial contracts from the US Government,<sup>100</sup> and it has been argued that the consolidation of the defence industry in the US has made it impossible to suspend or debar major defence firms from public contracts.<sup>101</sup> In addition, the lack of competition that follows the exit of a major contractor from the marketplace as a result of a debarment<sup>102</sup> has in the past led to price increases for the Government—another reason behind Boeing's short-lived suspension from US Government contracts.

Although BAE may survive its conviction and possible subsequent debarment in the US, the conviction of BAE in the US may have potential consequences for the company's business in the European Union. This is because, in 2004, the latest revision to the European Community (EC) procurement directives<sup>103</sup> made it mandatory for contracting authorities in the EC to exclude or debar firms that had received a conviction for corruption.<sup>104</sup> This means that if BAE is convicted of corruption in the US, EC contracting authorities will be required to exclude BAE from obtaining public contracts in the EC. This might mean that future contracts from countries like the UK, Sweden and Denmark, where BAE has significant interests, may be in jeopardy.

SOPE WILLIAMS\*

#### IV. THE GOVERNANCE OF BRITAIN

One of the first actions of the Government of Prime Minister Gordon Brown, who took office on 27 June 2007, was to publish a Green Paper called 'The Governance of Britain'.<sup>1</sup> Although the document looks forward to the possibility of a comprehensive,

<sup>95</sup> DFARS 209.405 (a) (i).

<sup>97</sup> DFARS 209.405 (a) (iv).

<sup>99</sup> FAR 9.407-1.

<sup>100</sup> J Zucker, 'The Boeing Suspension: Has Increased Consolidation Tied the United States Department of Defense's Hands' (2004) 5 PPLR 260.

<sup>101</sup> A Schutz, 'Too Little Too Late: An Analysis of the General Service Administration's Proposed Debarment of WorldCom' (2004) 65 Administrative L Rev 1263, 1273.

<sup>103</sup> Directive 2004/18/EC of the European Parliament and of the Council of March 31 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L/134/114 (hereafter public sector directive); Directive 2004/17/EC of the European Parliament and of the Council co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L134/1 (hereafter utilities directive).

<sup>104</sup> Art 45 public sector directive. See Williams (n 80) 715.

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<sup>1</sup> 'The Governance of Britain' Cm 7170 (July 2007) ('GB'). See also the Prime Minister statement to the House of Commons, *Hansard* HC vol 462 col 815–(3 July 2007).

written constitution, this is seen not as an inevitable prospect and, particularly, not an immediate one.<sup>2</sup> The main concerns at the moment are the formalization and even restriction of certain executive powers and increasing the accountability for the exercise of governmental power, in and out of Parliament.<sup>3</sup> The importance of the Green Paper to international lawyers is that its substantial focus is on the prerogative powers exercised by ministers, many of which concern the conduct of foreign affairs and are directly relevant to or touch indirectly on matters of international law. The Green Paper sets out a list of seven main areas where the Government exercises prerogative powers. Six of them have direct or consequential relations with international law. They are:

- Deploying and using the Armed Forces overseas;
- Making and ratifying treaties;
- Issuing, refusing, impounding and revoking passports;
- Acquiring and ceding territory;
- Conducting diplomacy; and
- Sending and receiving ambassadors.<sup>4</sup>

As FA Mann indicated in his well-known book, *Foreign Affairs in the English Courts*,<sup>5</sup> in the UK foreign affairs are conducted largely by means of prerogative powers. The result is that accountability for the exercise of executive power is more limited than if the powers had a statutory basis. The domination of the House of Commons by the Government, including its control over the Commons timetable, means that political accountability for the use of prerogative powers is limited. As for judicial control, even where there is jurisdiction, it is constrained by considerations of justiciability. This is not to say the old orthodoxies insulating the prerogative have remained unchanged. Statute has occupied some of the ground once within the purview of the prerogative (such as the War Powers Act 1965 and the Immigration Act 1971). Government has said that it would no longer rely on certain prerogative powers (for instance, the power to recognize foreign governments).<sup>6</sup> After the *GCHQ* case,<sup>7</sup> the courts have assumed authority over some exercises of the prerogative (the issuing of passports,<sup>8</sup> the government of dependent territories<sup>9</sup>), though making it clear at the same time that other matters remained beyond their jurisdiction (entering into treaties and other treaty actions, such making reservations).<sup>10</sup> Practices with respect to the exercise of other

<sup>2</sup> GB para 213.

<sup>3</sup> GB paras 14–19.

<sup>4</sup> GB para 22, Box 2.

<sup>5</sup> FA Mann, *Foreign Affairs in English Courts* (OUP, Oxford, 1986).

<sup>6</sup> See S Talmon, 'Recognition of Governments: An Analysis of the New British Policy and Practice' (1992) 63 BYIL 231.

<sup>7</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 6 (*GCHQ*).

<sup>8</sup> *RV Foreign Secretary Ex P Everett* [1988] EWCA Civ 7.

<sup>9</sup> On the saga of the Chagos Islanders, see S Allen, 'Looking beyond the *Bancoult* cases: International Law and the Prospect of Resettling the Chagos Islands' (2007) 7 Human Rights L Rev 441. The latest judgment is *Secretary of State for Foreign and Commonwealth Affairs v R (Bancoult)* [2007] EWCA 498.

<sup>10</sup> See *GCHQ* (n 5), per Lord Roskill: 'I do not think that that right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised . . . I do not think [some prerogative powers] could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm . . . are not, I think, susceptible to judicial review because their nature and subject matter is such as not to be amenable to the judicial process. The courts are not the place wherein to

prerogative powers have modified the ways in which they have been used, even to the extent that constitutional conventions have been established about what should happen, such as the transmutation of the Ponsonby Rule about the publication of treaties from a statement of one government's policy into a fully fledged convention.<sup>11</sup> Other practices are less well-established, such as consultations about ratification of treaties<sup>12</sup> or about the form of legislation necessary to implement them:<sup>13</sup> these have been ad hoc initiatives. Prominently (and not without relevance to the political climate in which the Government's proposals are being made, perhaps), the Government put to a vote in the Commons its decision to use force against Iraq in March 2003 and gained the support of the House (even if not of a majority of its own supporters). The then Leader of the House told the Commons in January 2007 that Prime Minister Blair's statement that it was now inconceivable that there would be a future deployment of troops overseas without consultation of the Commons was 'the convention we have established';<sup>14</sup> possibly a premature conclusion.

Although the current of recent concern about the prerogative began to run before the invasion of Iraq,<sup>15</sup> it is the question of the power to deploy the armed forces overseas which has enjoyed the greatest salience, given the political and legal controversies which accompanied the action and which have persisted since. There have been several unsuccessful attempts to introduce legislation which would submit a government's power to varying degrees of parliamentary control. The House of Lords Committee on the Constitution recommended the development of a convention in the manner of the Ponsonby Rule to assure a measure of parliamentary participation in future.<sup>16</sup> The response of the Blair Government was a peremptory rejection of the Committee's recommendation,<sup>17</sup> which in turn received an indignant reply from the Committee.<sup>18</sup> It now feels itself vindicated by the 'Governance of Britain' Green Paper,<sup>19</sup> because the Green Paper, in one of the two prerogative powers it treats in any detail, accepts more or less the Constitution Committee's proposal on the deployment power (see below).

One of the factors which generated the most strenuous differences immediately before the invasion of Iraq, differences which have continued to be aired since, was

determine whether a treaty should be concluded or the armed forces disposed in a particular manner ...'.

<sup>11</sup> See <<http://www.fco.gov.uk/Files/kfile/ponsonbyrule,0.pdf>>.

<sup>12</sup> FCO Consultation on the UN Treaty on Jurisdictional Immunities of States.

<sup>13</sup> Consultation of the International Criminal Court Bill, which had some impact on the International Criminal Court Act 2001.

<sup>14</sup> *Hansard* HC vol 455 col 19 (8 Jan 2007).

<sup>15</sup> Commons Select Committee on Public Administration, 'Taming the Prerogative: Strengthening Ministerial Accountability' (2004) HC 422. (The inquiry had started before March 2003.)

<sup>16</sup> 'Waging war: Parliament's role and responsibility' Volume I: Report (2006) HL 236-I. I was the special adviser to the Committee on this matter. None of the material in this note should be taken to implicate the Committee in anyway and all information is based on public sources.

<sup>17</sup> 'Government's Response to the House of Lords Constitution Committee's Report' (2006) Cm 6923.

<sup>18</sup> 'Waging War: Parliament's Role and Responsibility'. Follow-up (2007) HL 51. See also *Hansard* HL vol 691 col 979 (1 May 2007) and *Hansard* HC vol 460 col 481 (17 May 2007) for debates on the deployment power.

<sup>19</sup> 'The Governance of Britain' (2007) HL158, para 4.

concerns about the information which was revealed to the House of Commons before the vote. There were two questions—what was the Commons to know and what was the quality of the information which was provided to it. Of the many matters canvassed—intelligence, strategic and tactical assessments, the objectives of the deployment—I shall deal here with only one matter, that is the legal justification for the conflict. Because of the nature of the prerogative, the legality of the Iraq operation could be measured only against the standards of international law. Although it does not loom large (or even at all) in the specifications of the Attorney-General's responsibilities, in his role as the Government's chief legal adviser, he is the source of its international legal advice (except, as in *Suez*, when he isn't).<sup>20</sup> The complication of the Attorney-General's status and duties is not restricted to questions of international law and it has raised political interest comparable to that about the exercise of the deployment power.<sup>21</sup> It is not a surprise that consideration of the Attorney-General's functions features in the 'Governance of Britain' Green Paper<sup>22</sup> and that a consultation paper has already been circulated by the Ministry of Justice.<sup>23</sup> The deep divisions which have persisted about the legitimacy of the Iraq operation indicate that concerns about government decision-making go further than considerations about the formal basis of its powers, so that if the reforms are to meet objections, attention will have to be given to the substantive matters as well. The Green Paper acknowledges this for intelligence information<sup>24</sup> but not, explicitly, for its legal advice.

#### *A. Prerogative Powers*

It is not too far-fetched to suggest that there seems to have arisen in Parliament about accountability for the exercise of prerogative powers something not dissimilar to the reasons which prompted reconsideration of the reviewability of prerogative powers undertaken by the courts in the *GCHQ* case. It is a recognition that it is the substance or effects of these great but ancient and arbitrary powers which should determine how their use is controlled. In any event, the absence of real accountability is itself a defect for the governing of a modern State, even if any discrete use of a power was beyond criticism. The courts could see no substantive difference between powers based on statute (and therefore subject to judicial review) and some of those finding their source in the prerogative (and, apparently, beyond judicial supervision). Some of the Parliamentary activity about prerogative powers is based on similar concerns about mechanisms of accountability. It would be unrealistic not to recognize that it is anticipated by reformers that some decisions would come out differently if taken under transparent and accountable conditions, than they would if the Government was able to rely on the existing dispensations which regulate the prerogative. Once the courts took on the task of supervising the prerogative, they found it necessary to accept some limits to their authority, but these were functional and prudential rather than formal. The

<sup>20</sup> G Marston, 'Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice Tendered to the British Government' (1988) 37 ICLQ 773.

<sup>21</sup> HC Constitutional Affairs Committee, 'Constitutional Role of the Attorney General' (2007) HC 306.

<sup>22</sup> GB paras 52–6.

<sup>23</sup> 'The Governance of Britain: A Consultation on the Role of the Attorney General' (2007) Cm 7192.

<sup>24</sup> GB para 18.

limits which the courts saw on their powers with respect to the prerogative were based on various considerations of justiciability—that some matters were ‘political’, ‘without manageable judicial standards’, and so beyond the competence of the courts.<sup>25</sup> It is the exercise of these powers where attention on the defects of political accountability has been most marked. However, some of these powers, most notably the power to deploy armed forces overseas, are subject to the constraints of international law, where the non-justiciability claim of the national courts has a different flavour. The UK courts sometimes will take international law into account, even without express statutory authority to do so.<sup>26</sup> Indeed, it has been said that that the protection of the rule of law requires judges to do so.<sup>27</sup> That the judicial writ appears not to run all the way against the Government<sup>28</sup> goes against present trends about the courts’ access to international law and increases the responsibility of Parliament to assert itself, even against the considerable (and necessary) power of the Executive. If the domestic forum for some matters of international law is the political sphere, it will be the case that international law will be one of many factors conditioning decision-making, not having the same weight as it would in the courts.

#### B. The Prerogative Power to Deploy Armed Force Overseas

Of the ministerial prerogative powers identified in the Green Paper, two are referred to in more detail—the power to deploy the armed forces and the power to make and ratify treaties. The formal position is that the decision to use the armed forces overseas may be taken by the Government without any need for authorization or endorsement by Parliament. Such decisions appear to be beyond the reach of judicial review, even if the case sought to be made is that the deployment would be contrary to international law. There have been attempts to put this power on a statutory footing but they have failed.<sup>29</sup> The House of Lords Constitution Committee recommended the development of a convention which would require the House of Commons to vote in favour of non-emergency deployments.<sup>30</sup> With emergency operations excluded (which really means national self-defence measures), internationally lawful operations involve an element of choice by the Government and, usually, there would be sufficient time for consideration to be given to any British participation in the action. There may be an invitation from a foreign government to provide assistance; there may be a Security Council resolution authorizing action as necessary pre-conditions—neither would oblige a response by the UK. Accordingly, the political sentiment has been growing that operations of this kind need a democratic endorsement for both reasons of legitimacy and for assuring the troops themselves that there is support for them. That, of course, is what the Government said did happen about Iraq and would always happen in the future, the implication being that the Commons would be required to vote on the

<sup>25</sup> *GCHQ* (n 12).

<sup>26</sup> For a general account, see R Gardiner, *International Law* (Longman, London, 2003) ch 4. In particular, *Kuwait Airlines v Iraqi Airlines (No 2)* [2002] UKHL 19.

<sup>27</sup> *R v Horseferry Road Magistrates Court ex p Bennett* [1994] AC 42.

<sup>28</sup> For instance, on the deployment power, *Campaign for Nuclear Disarmament v Prime Minister* [2002] 2759.

<sup>29</sup> For references, see ‘Waging War ...’ (n 16) para 80. The latest is a private member’s bill, *Waging War (Parliament’s Role and Responsibility) Bill*, introduced by Michael Meacher MP in December 2006.

<sup>30</sup> ‘Waging War ...’ (n 16).

deployment, with the implication that if the vote were not in favour of sending the armed forces, they would not go.<sup>31</sup> There are reasons for scepticism about this conclusion. Coincidentally, while this view was being put to the Constitution Committee, the Government was engaged in strengthening its military commitment in Afghanistan (a deployment which it seems likely the Committee would have envisaged falling within those which should need authorization) but was confining itself to making statements to Parliament about its intentions without providing the opportunity for a full-scale debate. More to the point was that the decision about Iraq was clouded by uncertainty about the adequacy of the intelligence information and its use by the Government about the situation in Iraq, and by doubts about the way in which the Attorney-General's opinion about the international legality of the attack had been arrived at.<sup>32</sup> What was wanted was not merely information on these questions but better assurances about its weight and authority—by proposing the development of convention, the Constitution Committee thought that these matters of detail could be filled out—both what the informational pre-conditions should be and what degree of accountability for the information provided was appropriate. The Green Paper now says:

The Government will propose that the House of Commons develop a parliamentary convention that could be formalised by resolution. In parallel, it [the Government] will give further consideration to the option of legislation, taking account of the need to preserve flexibility and security of the Armed Forces. It will be important to strike a balance between providing Parliament with enough information to make an informed decision while restricting the disclosure of information to maintain operational security.<sup>33</sup>

There is no mention of access to the legal advice on the position in international law on which the Government founds its right to take action. This is important because, in the absence of legislation, international law provides the only legal yardstick to measure the legality of a proposed action. If the House of Commons is to be properly informed, any opinion should be sufficiently detailed and presented in a timely manner which would allow for its considered assessment. It appears that the question of legality is one which matters increasingly to senior military commanders.<sup>34</sup> As more information has become available about the way in which the Attorney-General reached his view on the legality of the Iraq operation, which he put to the House of Lords on 17 March 2003, the less convincing it has become.<sup>35</sup> In controversial cases in future, it might well be that the House of Commons would be inclined to obtain its own legal advice, however handicapped any adviser might be by his limited access to information. One matter which remains unaddressed is the continuing role of the Attorney-General in supervising continued compliance with the terms of his advice, where that advice admits only a specifically limited right to use force. Here, the distinction which the

<sup>31</sup> Lord Falconer, oral answers to questions 270 and 271, 'Waging War . . .', Vol II (2006) HL 236-II.

<sup>32</sup> For the relevant documentation and detail, see 'Freedom of Information Enforcement Notice' and 'Attorney-General's Office Disclosure Statement—Iraq Legal Advice' (22 May 2006), <[http://www.attorneygeneral.gov.uk/sub\\_disclosure\\_log\\_2006.html](http://www.attorneygeneral.gov.uk/sub_disclosure_log_2006.html)>.

<sup>33</sup> GB para 29.

<sup>34</sup> Lord Bramhall, answer to question 109, 'Waging War . . .' Vol II (n 31).

<sup>35</sup> See P Sands, *Lawless World* (rev edn, Penguin, London, 2006) ch 12, 'This Wretched Legal Advice'.



Constitution Committee tried to stick to between the decision to deploy force and operational decisions about how it is used would become harder to maintain.<sup>36</sup> One might like to think if Parliament goes as far as it can, any gap left about the international legality of a military action would be regarded as a matter which the courts could take on, but the indications are all against it.<sup>37</sup>

The Consultation Document on the Attorney-General asks whether the proposals in the Green Paper to put some prerogative powers on a statutory footing should involve any reconsideration of the Attorney-General's role and where Parliament is given a scrutiny function, whether or not it should have access to any germane legal advice from the Attorney.<sup>38</sup> Although some previous Attorneys have described their position by the homely (but quite inappropriate) simile of the family solicitor<sup>39</sup>—an analogy from which Lord Goldsmith quite properly distanced himself<sup>40</sup>—there is a significant difference between ordinary practitioners and the Law Officers on the matter of confidentiality of their opinions. The Law Officers' opinions are protected by professional privilege but the present ministerial code goes further, saying that even whether or not the Attorney General has been consulted, as well as any opinion which he gives may not be revealed without his consent.<sup>41</sup> It is a protection which has come under challenge.<sup>42</sup> If, as a result of the consultation, the Attorney-General's position were fundamentally changed, doubtless access to his advice would change too. As things stand, there may be reasons why confidentiality should be maintained but surely better ones can be found than that prayed in aid by Lord Goldsmith before the Constitution Committee, that advice might be different if the advisor knew that it might be revealed.<sup>43</sup>

### C. The Prerogative Power to Negotiate and Ratify Treaties

The prerogative power to negotiate and conclude treaties puts the Government in a powerful position. It does not need to seek a negotiating mandate from Parliament and can keep its positions confidential until the conclusion of negotiations. There are significant, indirect limitations on the power (and, exceptionally, there may be legislative conditions attached). Where the implementation of a treaty requires action in domestic law, implementing legislation is required in order to do this. The Government's control in Parliament and the likelihood that a treaty would have to be accepted in its totality by Parliament as legislator diminishes the actual bite of this constraint but, nonetheless, the practice is not to ratify any treaty which will require implementing legislation until it has been obtained. The Ponsonby Rule which requires that treaties which come into force on ratification must first be laid before both Houses of Parliament has been supplemented by an undertaking that time for a debate would be provided where major political issues would be raised by ratification and by the

<sup>36</sup> See 'Waging War ...' (n 16) para 13.

<sup>37</sup> *CND* (n 26) and *R v Jones* [2006] UKHL 16.

<sup>38</sup> (n 23) paras 1.15, 2.3, 2.4.

<sup>39</sup> Lord Morris of Aberavon, answer to question 210, 'Waging War ...' Vol II (n 31).

<sup>40</sup> *ibid*, question 238.

<sup>41</sup> Ministerial Code (2007) para 2.13.

<sup>42</sup> For instance by Harriet Harman MP, then Minister for Constitutional Affairs, *The Guardian* (1 Feb 2007) 6.

<sup>43</sup> 'Waging War ...' Vol II (n 31) answer to question 242.

practice of governments to append explanatory memoranda to treaties so laid before Parliament.<sup>44</sup> However, as the Green Paper acknowledges, debates have been rare. The controversy about the UK–US extradition treaty has focused attention on the domestic effects of treaties but it is not clear that it was the use of the prerogative that was responsible for what are claimed to be its defects—these occur because of the drafting of the Extradition Act, which allowed for unilateral implementation of the treaty (and which provided the power of extending the ‘no prima facie case’ option to States like the United States).<sup>45</sup> It should be noted that the prerogative power extends to the details of treaty arrangements—making and withdrawing reservations, accepting and altering optional provisions and withdrawing from treaties altogether lie in the hands of the Government.<sup>46</sup> In the past, the political nature of treaty-making and the need for confidentiality in the negotiating process has underpinned governments’ objections to changes in the legal basis governing treaty participation. Now, in the Green Paper, this Government says:

[It] believes that the procedure for allowing Parliament to scrutinise treaties should be formalised. The Government is of the view that Parliament may wish to hold a debate and vote on some treaties and, with a view to its doing so, will therefore consult on an appropriate means to put the Ponsonby Rule on a statutory footing.<sup>47</sup>

This is a limited concession but it draws the line between conclusion of a treaty text (for the Government) and participation by the UK in the treaty (in some cases requiring Parliamentary approval). Pre-ratification scrutiny on an intermittent basis goes on already. In addition to the examples above,<sup>48</sup> beginning with consideration of the 14th Protocol to the European Convention on Human Rights,<sup>49</sup> the Joint Committee on Human Rights (JCHR) has included pre-ratification scrutiny of treaties with human rights implications in its work programme.<sup>50</sup> In addition, the House of Lords Committee engages in scrutiny of EC treaties. This practice suggests that there is no reason why other select committees should not do the same for treaties which fall within their mandates. Whether such developments, which go much further than what is proposed in the Green Paper, would be welcomed by Departments is not certain. The recourse to Memoranda of Understanding, where that is a constitutional possibility,<sup>51</sup> would provide a way round any obstacles Departments find uncongenial. It, though, might be thought that there is too ready a recourse to MOUs as it is. The JCHR sees an enhancement of the legitimacy of human rights treaties coming from their pre-ratification scrutiny, a position perhaps influenced by the stance of its legal adviser,

<sup>44</sup> See (n 11) and C Warbrick, ‘Treaties: Recent Developments’ (2000) 49 ICLQ 944.

<sup>45</sup> *Birmingham and others (R on the application of) v Director of the Serious Fraud Office and the Home Secretary* [2006] EWHC (Admin) 2000; see C Warbrick, ‘Recent Developments in UK Extradition Law’ (2007) 56 ICLQ 199.

<sup>46</sup> For instance, the recent amendment to the UK’s acceptance of the Optional Clause jurisdiction of the ICJ, see ‘UKMIL 2004’ (2004) 75 BYIL 803.

<sup>47</sup> GB, para 33.

<sup>48</sup> Notes 12 and 13.

<sup>49</sup> ‘First Report, Protocol No 14 to the European Convention on Human Rights’ (2004) HL8/HC106.

<sup>50</sup> ‘The Committee’s Future Working Practices’ (2006) HL239/HC1575, para 68. On reservations to human rights treaties, see Lord Chancellor’s Department, ‘Report on the UK’s Inter-Departmental Review of the UK’s position under various International Human Rights Instruments’ (2004) and JCHR, ‘Review of International Human Rights Instruments’ (2005) HL99/HC264.

<sup>51</sup> ‘UKMIL 2005’ (2005) 76 BYIL 703.

Murray Hunt, who takes an expansive view of the domestic legal effects of human rights treaties, implemented by legislation or not.<sup>52</sup>

The legitimacy argument is an important one, all the same, even if it does not carry quite the same weight for treaties in general. All attempts to secure greater accountability for the exercise of prerogative powers encounter objections that the costs of doing so will be to undermine the effectiveness of government decision-making and action. It is a theme of the Green Paper that this is sometimes a price which will be worth paying—sometimes, but not always, the Green Paper says that none of its proposals concern the ‘uses of the royal prerogative in countries and *British Overseas Territories* other than the UK of which The Queen is the Monarch.’<sup>53</sup> However, for the UK, the Green Paper is only a beginning. It deals with ‘some specific concerns’ but the Government says that it intends to begin ‘a modern, systematic reform of the scope and nature of the prerogative powers’.<sup>54</sup> One thing the Government may do is to clear away obsolete powers—of course, it gives the example of impressment to the navy—at least, it ‘will consider options for ending them’.<sup>55</sup> This is a rejection of any doctrine of obsolescence of prerogative powers and, if it be legally sound, the repeal of some of these ancient doctrines is most desirable: disinterring them for proper burial might be tricky, though. However, we may be sure that one item in the list of powers set out above, the conduct of diplomacy,<sup>56</sup> is not among them and that the conduct of foreign policy will be in the future largely on a government’s terms.

The Government published a further Green Paper, ‘The Governance of Britain—War, Powers and Treaties: Limiting Executive Powers’ (cm 7239), inviting replies to a number of detailed questions on possible reforms by early in 2008.

COLIN WARBRICK\*

<sup>52</sup> M Hunt, *Using Human Rights Law in English Courts* (Hart Publishing, Oxford, 1997).

<sup>53</sup> GB, para 49, n 13 (emphasis added). No concessions about the use of the power being contested in *Bancoult* (n 9).

<sup>55</sup> *ibid* para 17.

<sup>54</sup> *ibid* para 49.

<sup>56</sup> Note 4.

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