Reconfiguring the War Prerogative: How Executive-Legislative Tensions Continue to Determine, and Obscure, the Legal Basis on Which Armed Forces are Deployed to Overseas Conflicts Under the UK Constitution

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'In times of war, laws are silent.'
Cicero

Introduction

The power to commit a nation to war is perhaps the most important power an agency of state – whether executive or legislative - can ever engage. It is certainly one of the most severe and sombre. The ability to deploy troops to armed conflict overseas is integral to a state's right to self-defence and its responsibility to protect ('R2P') under International Humanitarian Law (IHL). It follows that the constitutional regime governing deployment decisions must be highly effective and sufficiently robust and coherent lest national security be compromised. That is not the case in the UK, however. Due to the organic and evolutionary character of the British constitution, the law regulating the use of the war powers is increasingly unclear and unsettled.

The legal basis for the exercise of the war powers has invited comprehensive parliamentary and academic scrutiny since the Iraq Invasion of 2003. Private members bills centring on or including reform to the war powers have been brought by Neil Gerrard MP,[1] the late Tony Benn,[2] Lord Lester of Herne Hill[3] and Clare Short MP[4] between 1998-2006.

[1] Armed Forces (Parliamentary Approval for Participation in Armed Conflict) HC Bill (2004-5) [31].
[2] Crown Prerogatives (Parliamentary Control) HC Bill (1998-1999) [55] .
[3] Executive Powers and Civil Service HL Bill (2003-2004).

Parliamentary Select Committees, including the Public Affairs Select Committee (PASC), the House of Lords Constitution Committee and the Joint Committee on the Draft Constitutional Renewal Bill, have conducted extensive enquiry and published recommendations for reforming existing constitutional procedure. Parliamentary and academic interest in the exercise of the war powers was reinforced in 2013 with the crystallisation, and widespread institutional recognition, of a new constitutional convention requiring prior parliamentary consultation. The Political and Constitutional Reform Committee (PCRC) (2010-2015) was particularly successful in identifying areas requiring reform and engaging the executive in dialogue to that effect. This article draws on the conclusions of the PCRC reports;[5] the oral evidence of parliamentarians, academics and practitioners; and government responses. It supplements this with parliamentary *dicta* and legal and non-legal scholarship. These include, but are not limited to, Rosara Joseph's seminal work rehearsing the 'history, reform and constitutional design' of the War Prerogative;[6] the written and oral evidence tendered to the PCRC by Professor Nigel White and Dr David Jenkins in their capacity as expert witnesses; the advisory input of Public Administration Select Committee (PASC) specialist advisor Professor Rodney Brazier, including his work on a draft bill proposing statutorisation of the war powers;[7] and the commentaries of British foreign policy expert Dr James Strong.

Background

Parliamentary and academic enquiry has demonstrated two main trends in political discourse relating to reform of the War Prerogative: one which

[4] Armed Forces (Parliamentary Approval for Participation in Armed Conflict) HC Bill (2005-2006) [16].

[5] PCRC, *Parliament's Role in Conflict Decisions* (HC 923, 2011); PCRC, *Parliament's Role in Conflict Decisions: An Update* (HC 649, 2013); PCRC, *Parliament's Role in Conflict Decisions: A Way Forward* (HC 892, 2014).

[6] R. Joseph, *The War Prerogative: History, Reform and Constitutional Design* (Oxford University Press, 2013).

[7] Ministers of the Crown (Executive Powers) Bill.

rejects reform to the war powers; and one which advocates for it. For ease of reference, I call these movements 'retentionism' and 'reformism' respectively. The retentionist movement is characterised by its defence of the status quo in order to maintain executive discretion and operational efficiency when taking deployment decisions, finding support from government ministers and military personnel. By contrast, the reformist movement refers to those advocating for further reform to the War Prerogative by making provision in the constitutional apparatus for a more substantive role for Parliament in the making of deployment decisions.

Recent British governments have been broadly retentionist in approach but pragmatic in practice. Under the *aegis* of David Cameron, the Coalition (2010-15) and Conservative governments (2015-2016, 2016-) conceded a formal role for Parliament by recognising the existence of the Consultation Convention, which provided that Parliament must at the very least be consulted when the government makes deployment decisions; but the extent to which this development was predicated on reformist principles, as opposed to political concession, is questionable to say the least. The May Ministry (2016-) has been more assertive in challenging the dominant interpretation of the Consultation Convention as giving Parliament a *de facto* control over deployment decisions. In April 2018, it bucked the trend towards incremental reform by authorising airstrikes independently of Parliament and limited lawmakers' involvement with that decision to a post-deployment debate on the merits of military intervention with no meaningful retrospective legal effect. In so doing, it effectively undermined 15 years of parliamentary practice and reasserted a model of executive dominance.

In the light of the above, it would be fair to say that the law on the matter is in a state of disarray today. In my opinion, it remains to be seen whether the convention can ever recover its lost glory. The next sections explore the development and decimation of the convention, before considering how its spirit might be revived even though its form may continue to languish.

'A Prerogative Unchallenged?
'The 'Consultation Convention' Reforms, 2003-2018

In order to understand the constitutional operation of the war powers, an overview of their substantive provisions and scope of application is first necessary. The term 'war powers' refers to a spectrum of legal powers a sovereign or constitutionally authorised body can engage in times of war. These powers are exercised under the UK constitution by recourse to the 'War Prerogative' which, as its nomenclature suggests, is a component of the Royal Prerogative: that compendium of powers which, once the privilege of the monarch, now lay at the disposal of the British Prime Minister as a matter of normative constitutional practice. A. V. Dicey described these powers as the 'residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.'[8] Prerogative powers sanctioning the exercise of political power, such as those applying to national security, defence and foreign affairs policy, are now vested exclusively with the Executive.[9] In practice, this means that, since the migration of these powers to Downing Street, it is now the Prime Minister who may solely engage the provisions of the War Prerogative *intra vires*.

There are two elements to the War Prerogative: the declaratory and deployment powers, respectively. The first is simply the right to declare war, which is generally obsolete today. Formal declarations of war are now not merely anachronistic, but are in fact legally inordinate under the IHL regime:

> 'Developments in international law since 1945, notably the United Nations (UN) Charter, including its prohibition on the threat or use of force in international relations, may well have made the declaration of war redundant as a formal international legal instrument.'[10]

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[8] A.V. Dicey, *Introduction to the Study of the Constitution* (8th revised edn., Liberty Fund Inc., 1982).

[9] Some prerogative powers, referred to as the 'Personal Prerogative powers', have no political import and continue to be exercised by the King or Queen. These include the right to award honours and awards, continue to remain at the disposal of the Monarch due to their ceremonial importance and relevance.

[10] Select Committee on Constitution, *Waging War: Parliament's Role and Responsibility* (HC, 2006).

The substantive weight of the War Prerogative is thus situated exclusively with its second limb: the right to commit forces to armed conflict overseas. That power, which concerns substantive war-making, is generally termed the 'deployment power', and the orthodox constitutional position concerning its exercise is that the executive will decide on the commitment of troops to armed conflict. Constitutional convention stipulates that it is specifically for the Prime Minister to authorise deployment,[11] although in practice that decision is taken on the advice of the Secretaries of State for Foreign and Commonwealth Affairs and Defence, the National Security Council and the Defence Council. Notwithstanding the dictates of that convention, parliamentary practice during the years 2003-2013 challenged the orthodox understanding of the operation of the Prerogative, laying the foundations for the emergence and consolidation of a 'Consultation Convention' providing for the right of Parliament, so far as practicable, to be consulted on proposed military action prior to the deployment of troops.[12]

Described by A. V. Dicey as the 'understandings, habits, or practices' regulating the 'conduct of the several members of the sovereign power, of the Ministry, or of officials',[13] conventions give are essential in giving shape and substance to rules of the UK constitution, but remain legally unenforceable. Their ability to morph and merge in response to changing circumstances perhaps explains why conventions continue to endure as a cornerstone of the English constitutional architecture. In light of the centrality of conventions to the constitutional regime, a brief overview of the development, consolidation and recognition of the consultation convention is required, before its impact on the exercise of the deployment power can be assessed.

The convention traces its origin to the parliamentary vote preceding military action in Iraq in 2003. On 18 March 2003, MPs voted on substantive motions tabled by the government to take military action against Saddam Hussein, whose possession of weapons of mass destruction and non-compliance with Security Council Resolutions constituted a 'threat to

[11] House of Commons Library, *Parliamentary Approval for Military Action* (CBP-7166, 2015).
[12] PCRC, *Parliament's Role in Conflict Decisions: An Update* (HC 649, 2013).
[13] Dicey, *Introduction to the Study of the Constitution.*

international peace and security.'[14] Parliamentary debate preceding military action was an established practice, but this was the first time Parliamentarians were entitled to *vote* on deployment. Though this suggests that MPs might have been capable of blocking deployment,[15] the vote had very limited significance, being purely advisory and non-binding.[16]

The decision to allow MPs to vote in March 2003 may have been an act of political concession, but it set an important precedent for the executive to consult parliament prior to deployment via a vote in the House of Commons.[17] Thus, in March 2011, the Coalition government tabled a motion in favour of military action against Col Gaddafi in Libya, pursuant to Security Council Resolution 1973 authorising the use of 'all necessary measures' by Member States to protect civilian life and enforce a no-fly zone in Libyan airspace. It took lengths to secure parliamentary approval, publishing a six-paragraph commentary on Resolution 1973 outlining for MPs' attention the legal basis for deployment.

The real significance of this development lies in the fact that the government sought parliamentary approval despite acting pursuant to a Security Council resolution. Ordinarily, this would engage executive powers *ipso facto* and bypass the need for parliamentary consultation. Notwithstanding James Strong's theory that this was an exercise of PR

[14] HC Deb 18 March 2003, Col 901.

[15] Ministry of Justice, *The Governance of Britain – War Powers and Treaties: Limiting Executive Powers* (CP26, 2007).

[16] It seems the vote was designed to diffuse political tensions rather than reform the constitutional framework for deployment: military action in Iraq was contentious due to foreign policy considerations, uncertainty concerning its conformity with international law, as expressed by Kofi Annan (Interview with Owen Bennet-Jones (BBC, 2004) accessed 3 April 2016), and anti-war sentiment amongst MPs. In a Private Members Bill introduced under Ordinance No. 23 in 1999 (Military Action Against Iraq (Parliamentary Approval) HC Bill (1998-1999) [35]), Tam Dalyell MP proposed that military intervention in Iraq should be authorised by simple majority vote in Parliament, but the Bill could not proceed for second reading because its proposed modification to the Royal Prerogative required Queen's Consent, which was duly refused on government advice.

[17] James Strong, 'Why Parliament Now Decides on War: Tracing the Development of the Parliamentary Prerogative through Syria, Libya and Iraq' (2015) The British Journal of Politics and International Relations 604.

strategy, designed to distance PM Cameron from the legacy of the Iraq War and ongoing Chilcot Inquiry,[18] Foreign Secretary William Hague committed emphatically to 'enshrine in law for the future the necessity of consulting Parliament on military action.'[19] The government proceeded to apply the 2003 precedent for consulting Parliament, which catalysed the development of the convention, in line with its vision for modernising the rules governing deployment. Sir George Young MP, Leader of the House of Commons, spoke of how 'a convention has developed in the House that before troops are committed, the House should have an opportunity to debate the matter.'[20] Similarly, the Cabinet Manual was amended in its second edition to expressly include the convention,[21] although, importantly, the wording did not go so far as to identify a prior parliamentary vote as an integral requirement of the Convention; it merely reaffirmed that parliamentary consultation prior to deployment would be desirable. The March 2011 vote on proposed military intervention in Libya was instrumental in developing the precedent of parliamentary consultation into a fully-formed constitutional convention which, although not legally binding, would be capable of prescribing the method of exercise of legal powers as a matter of constitutional reality.[22]

The Consultation Convention as a Power of Veto: Syria 2013

The Coalition government's treatment of proposed military action in Libya paved the way for the emergence of the consultation convention as a discrete rule of constitutional practice. The foundations laid in 2011 were then consolidated in August 2013 when the Commons was recalled from its summer recess to debate military action against President Assad in Syria in order to deter the use of chemical weapons against civilians. MPs voted down the motion by a majority of 13, the first time a government had suffered defeat in the Commons on proposed deployment since the emergence of the convention. The government abided by the outcome and

[18] Strong, 'Why Parliament Now Decides on War', p. 604.
[19] HC Deb 21 March 2011, col 799 [Commons Chamber].
[20] HC Deb 11 June 2012, col 1066 [Commons Chamber].
[21] PCRC, *Constitutional Implications of the Cabinet Manual* (HC 734, 2011) 61.
[22] P Hogg, Q.C., *Constitutional Law of Canada* (5th edn., Carswell 2007).

did not pursue military intervention despite its theoretical entitlement to under the prerogative. David Cameron, conceded defeat and chose not to engage his right, as Executive, to override Parliament's decision. In fact, he reasoned it would be antidemocratic to defy the outcome of the Commons' vote in that manner:

> 'I strongly believe in the need for a tough response to the use of chemical weapons, but I also believe in respecting the will of the House of Commons… it is clear to me that the British Parliament, reflecting the views of the British people, does not want to see British military action. I get that and the government will act accordingly.'[23]

This was highly significant because it recognised that Parliament would be required *de facto* to approve deployment before military action could proceed. The fact that the government adhered to the vote was telling. It revealed the extent to which the theoretical basis for deployment was reconfigured: the case for British military action was grounded in strong political reasoning yet the government was prepared to withdraw from a coalition of NATO powers and potentially strain its relationship with key allies, including its 'special relationship' with Washington, in pursuit of serving the democratic will. Second, it reveals something of the scope of the convention, indicating that the result of a parliamentary vote on proposed deployments could be politically binding for future governments. Greg Clark MP, Minister for the Cabinet Office, promised the Political and Constitutional Reform Committee (PCRC) in June 2014 that the next major revision of the Cabinet Manual would reference the Syria vote as having clarified the rules governing deployment decisions.

The Consultation Convention as 'a Parliamentary Prerogative?'

The convention has been engaged three times since the vote on military action in Syria: first in September 2014, then in December 2015, and latterly in April 2018. The first two instances helped crystallise the convention as established practice. In September 2014, MPs voted by a majority of 431 to

[23] HC Deb 29 August 2013, Col 1545

initiate Operation Shader against ISIL in Iraq. The decision to exercise the deployment power in this instance is remarkable for two reasons: it applied the convention as a matter of procedure and it was arrived at after seven hours of debate in the Commons. The fact that the decision was the product of lengthy debate was promising from the standpoint of deliberative democracy because it confirmed that the case for airstrikes was mooted comprehensively and openly on the floor of the House before vote-casting took place.

The second instance came in December 2015 in relation to a motion proposing airstrikes against ISIL in Syria pursuant to Security Council Resolution 2249. The motion succeeded by 397-223 and invited more than ten hours of parliamentary debate. Shadow Foreign Secretary Hilary Benn defying his party leader in an impassioned closing speech making the case for military intervention was a particularly remarkable feature of that debate.[24] The length of the debate, together with waivers applied to party whips, points to a better quality of debate brought into existence by the Convention. Parliamentary consultation enabled a greater scrutiny of the moral, political and legal questions at stake in connection with deployment decisions. In this respect, it is commendable that the convention formalised the prioritisation parliamentary debate. The revision of the legal regime in this way allowed parliamentary debates on deployment to become politically determinative, which was a significant development even if those decisions could not be held to be legally binding. . Writing at that time, James Strong comments 'while the prime minister retains the legal freedom to direct the armed forces as he sees fit, in terms of practice parliament now wields a political veto over that freedom.'[25] Strong terms this the 'parliamentary prerogative,' but that categorisation is problematic because it assumes that parliament now had the final say on deployment, which was true only to the extent that a government would face political pressure if it ever elected to derogate from the outcome of a parliamentary debate by exercising executive privilege. Yet the truth of the matter is that, in terms of the hierarchy of constitutional law sources, the Convention was a political mechanism regulating the exercise of a legal power. As such, the

[24] HC Deb 2 December 2015, Col 484.

[25] Strong, 'Why Parliament Now Decides on War', p. 604.

Convention was influential in determining the terms on which the deployment power was engaged, but fell short to the extent that the Executive remained the supreme arbiter of power. That is the reality of the constitutional architecture; whether it is just or justifiable is questionable. Steven Sedley goes so far as to call it 'an affront to the rule of law.'[26]

The Scaling Back on the Convention: Syria 2018

The picture that developed from the parliamentary practice of the years 2003-2013 is one of increased parliamentary influence over the exercise of the war prerogative. This trend was interrupted, however, in April 2018 when Prime Minister Theresa May introduced a radical new reading of the requirements of the Consultation Convention which left little room for Parliamentary control of deployment decisions. Mrs May authorised precision air strikes by the RAF 'to degrade the Syrian Regime's chemical weapons capability',[27] in response to a reported chemical attack at Douma, north of Damascus. As part of Operation Damascus Steel and protracted hostilities with Islamist coalition Jaysh Al-Islam, SAA Forces were reported to have deployed barrel bombs laced with chemical munitions and chlorinated gas, killing 70 people and causing a further 500 to suffer injuries from 'exposure to toxic chemicals' according to the WHO.[28] Significantly, Mrs May authorised the strikes without first consulting MPs, judging it 'to be in Britain's national interest' to act expediently and in partnership with US and French allies to prevent the normalisation of chemical weapons attacks.[29] Parliament was not recalled from its recess as in 2013, but was instead given the opportunity to debate the airstrikes two days after strikes had concluded, leading Opposition Leader Jeremy

[26] S. Sedley, *Lions Under the Throne: Essays on the History of English Public Law* (Cambridge University Press, 2015).
[27] HC Deb 16 April 2018, Col 39.
[28] Stephanie Nebehay, 'WHO: 500 Syrian Patients Show Symptoms Pointing to Toxic Weapons Exposure', Reuters (11 April 2018). <https://www.reuters.com/article/us-mideast-crisis-syria-ghouta-who/who-500-syrian-patients-show-symptoms-pointing-to-toxic-weapons-exposure-idUSKBN1HI18D> (Here and subsequently, all internet links were last accessed on 18 November 2018.)
[29] Strong, 'Why Parliament Now Decides on War', p. 604.

Corbyn to accuse the Prime Minister of a 'flagrant disregard' for Parliament's constitutional rights under the convention.[30] May's decision to bypass Parliament was viewed in some quarters as having prioritised *realpolitik* over constitutional principles and propriety. The air strikes were construed at once as a conciliatory move to appease a Trump Administration 'locked and loaded' for military confrontation in Syria *and* simultaneously as an act of indirect retaliation against the Kremlin implicated in the use of a lethal nerve-agent, Novichok, against the Skripal family at Salisbury in March 2018. Notwithstanding these question marks, Mrs May's decision to engage the deployment power prior to parliamentary debate was in fact legally defensible. By framing her decision in terms of humanitarian intervention, May appealed to the 'emergency exception' appended to the convention text in the Cabinet Manual. This small print appears to exempt governments from consulting Parliament where it would be inappropriate to do so. The exception is engaged where 'the open and deliberative character of parliamentary debate would impede necessary, urgent military action.'[31] David Cameron had confirmed that humanitarian concerns would fall squarely within these parameters as early as 2014: 'if there were a critical British national interest at stake or there were the need to act to prevent a humanitarian catastrophe, [the Executive] could act immediately and explain to the House of Commons afterwards.'[32]

The Convention Reconfigured

May's justification for having sidestepped the convention may succeed on the basis of the emergency exception, but the future of convention is shrouded in uncertainty as a result. Authorities on the law governing deployment have gone so far as to question whether the convention

[30] Ibid., p. 604.
[31] M. Bennet, 'The Ever Expanding 'Emergency' Exception: Syria, the War Powers Convention, and the Bypassing of Prior Parliamentary Debate', UK Constitutional Law Association (25 April 2018) <https://ukconstitutionallaw.org/2018/04/25/mark-bennett-the-ever-expanding-emergency-exception-syria-the-war-powers-convention-and-the-bypassing-of-prior-parliamentary-debate/>.
[32] HC Deb 26 September 2014, Col 585.

'continues to exist', and even if it does, 'whether it exists in any meaningful sense.'[33] The inference is that what remains is a toothless convention - not the recognisable rule that crystallised in 2013 following two decades of parliamentary practice. In order to assess the validity of that claim, it is important to revisit the rules governing the lifespan of conventions as part of the English constitutional toolkit. Unlike the three-pronged 'Jennings Test' which establishes an authoritative framework for identifying the genesis of a given convention, the procedure for pinpointing the expiration of a convention is less clear-cut. Professor Mark Elliott writes that:

> Conventions are organic in nature, meaning that whether they still exist — and, if so, what they require — turns upon whether those to whom they are directed consider themselves to be bound by the practice in question which, in turn, will depend upon the weight and meaning that they attach to the constitutional principle underlying the practice.[34]

In effect, this means that 'the contingency of a convention's establishment – relying on consistent practice – would mean that a significant departure from it would risk undermining its careful and tentative development.'[35] The question here is whether the PM's decision not to consult Parliament represents a departure from the convention altogether, or whether it simply signifies a reinterpretation of its procedural and substantive requirements. On closer inspection of the rationale served to Parliament in the days following the air strikes, the latter seems likely.

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[33] V. Fikfak and H. Hooper, 'Whither the War Powers Convention? What Next for Parliamentary Control of Armed Conflict after Syria?, in *UK Constitutional Law Association* (20 April 2018), <https://ukconstitutionallaw.org/2018/04/20/veronika-fikfak-and-hayley-j-hooper-whither-the-war-powers-convention-what-next-for-parliamentary-control-of-armed-conflict-after-syria/>.

[34] Professor Mark Elliott, 'Replacing the Human Rights Act: The House of Lords, The Parliament Acts and the Salisbury Convention', in *Public Law for Everyone* (11 May 2015), <https://publiclawforeveryone.com/2015/05/11/replacing-the-human-rights-act-the-house-of-lords-the-parliament-acts-and-the-salisbury-convention/>.

[35] T. Chowdhury, 'Does the UK Government require Parliamentary approval for the use of military force?', in *The Law of Nations* (16 May 2017), <https://lawofnationsblog.com/2017/05/16/uk-government-require-parliamentary-approval-use-military-force/>.

In a statement to the House on 16 April, the PM advanced 'four fundamental reasons' for why the air strikes fell outside the scope of the consultation convention. Three will be examined here. Allowing MPs to vote on the matter could (1) compromise the effectiveness of air strikes, (2) pose a risk to national security by disclosing top-secret intelligence, and (3) jeopardise allied forces' action by disclosing their military strategies. Fikfak and Hooper identify these reasons as generally consistent with a 'public interest justification for non-consultation of the Commons'.[36] They go on to identify the Prime Minister's statement to the Commons on 17 April 2018 as a reinterpretation of the scope of the consultation convention, having significant implications for its future application. First, by linking Parliament's right to vote on military action to the form, scale and nature of the conflict concerned, the PM effectively excluded minor and non-convention military engagements such as air strikes and drone warfare from the scope of the consultation convention.[37] Second, by clarifying that the consultation convention applies singularly to 'combat' situations, Mrs May dismissed the possibility that Parliamentarians could vote on non-combative intervention taken by the UK overseas. Given the emergence of irregular and unconventional modes of warfare, where domestic forces are not directly engaged in combative operations but instead lend support to resistance movements or insurgencies, in the post-WW2 era, much modern warfare will be excluded from the scope of the Consultation Convention in its latest incarnation. Similarly, the relocation of key theatres of operations to cyber space, and the development of belligerent cyber and information warfare capabilities, means states will increasingly fight their battles in the computerised world. On the Prime Minister, May's, reading, these crucial engagements will not be amenable to Parliamentary debate owing to their non-combative characterisation.

It seems to me that the convention does still exist. However, its scope is now significantly reduced to the effect that only two scenarios will engage its provisions, namely (1) prolonged, military campaigns e.g. the Iraq War; and (2) combative engagements involving ground battle as opposed to aerial campaigns or cyber warfare. Its ability to serve as a

[36] Strong, 'Why Parliament Now Decides on War', p.604.
[37] HC Deb 17 April 2018 vol. 639 col. 203.

parliamentary backstop on executive monopolisation of control of the War Powers is highly doubtful in its present state.

What next? The Momentum for Statutory Footing, and the Workability of a future War Powers Act

Professor George Jones once theorised of executive power in terms of 'elastic band theory'. It is for the Prime Minister to test the limits of her power before a newer constitutional order is either set, or the established frameworks are reinstated by a consortium of constitutional actors. If we accept this analogy to be accurate, then Mrs May could be said to have stretched the elastic band to a new limit vis-à-vis the War Prerogative. It remains to be seen whether the full spectrum of constitutional actors will assimilate or reject the latest permutation of the convention. Much is at stake: war powers are by nature highly sensitive and the UK continues to live with the legacy of deployment decisions taken with respect to Iraq and Afghanistan in the preceding decade. The reinterpretation of the Convention by Mrs May and her cabinet in April 2018 'serves as a stark reminder that the executive remains, as a matter of legal and constitutional reality, largely unencumbered as the primary decision-maker in the context of deploying armed forces overseas.'[38] Ultimately, only time will tell which way the pendulum will swing. It will be through a process of institutional conflict and dialectical engagement that a conclusive and authoritative interpretation of the consultation convention will arrive at.

The *de facto* monopoly which the Executive enjoys in connection with deployment decisions has reignited calls for a more radical reconfiguration of the legal basis on which the UK commits troops to war. There is a long history of parliamentarians calling for the enactment of legislation providing for power-sharing to address the power asymmetry in place between legislature and executive vis-à-vis deployment decisions. The aim would be to achieve a statutory regime having similar effect to the US War Powers Resolution of 1973 which uses federal law to prevent the President from committing troops to war in the absence of congressional authorisation. Most recently, Opposition Leader Jeremy Corbyn has

[38] HC Deb 21 March 2011, col 799 [Commons Chamber].

advocated the need for a 'War Powers Act in this country to transform a now-broken convention into a legal obligation.'[39] A subsequent Labour Party statement has proposed the creation of a statute that would oblige future governments to 'seek parliamentary approval before committing to planned military action.'[40] But would that be workable? Attempts to formalise in statute an increased parliamentary role in war-making have consistently failed in the UK. Clare Short tabled a draft bill in 2005, which was rejected during a Parliamentary debate before it could even reach committee stage. Similarly, academic efforts to conceptualise a Bill that could transfer the authority to engage the War Powers to MPs have lost momentum due to political apathy and a change in legislative priorities. Professor Brazier's 'Ministers of the Crown (Executive Powers) Bill', as agreed by the Public Administration Select Committee (PASC), and s 47 of Professor Blackburn's Written Constitution, entitled 'War and Armed Conflict', present illustrative blueprints for how a future War Powers Act could theoretically operate. But whether a statutory model is realistic for the future remains a question of political priorities. There is little evidence of a reformist agenda within the Conservative Party, but the inclusion of the issue in the next Labour Manifesto and the electoral success of that party at the next general election could place war powers reform high on the legislative agenda for the future.

The advantages of statutory format include an increase in clarity of the law governing deployment decisions; modernisation of the relevant procedure in line with other liberal democracies' law and practice; and the reliability of statute as a robust source of UK constitutional law as compared with the discretionary and arbitrary elements built into prerogative powers and conventions as a matter of constitutional design. Disadvantages include the 'problems of definition, the risk of challenge in the courts, the risk of parliamentary engagement in operational decisions, [and] the need to preserve political and military flexibility'[41] enumerated by Baroness Jay in 2013. Of these, the first two could be remedied by appropriate and effective statutory drafting: the incorporation of a clause harmonising domestic legal and International Humanitarian Law (IHL

[39] HC Deb 16 April 2018, Col 39.
[40] HC Deb 17 April (Standing Order No. 24).
[41] HC Deb 28 Nov 2013 Vol. 749.

understandings of the definition of 'armed conflict' would create a universal understanding of what would fall within the scope of the Act's provisions; similarly, the inclusion of an 'ouster clause' excluding the jurisdiction of domestic courts to review the provisions of the Act would prevent private citizens bringing claims against the State and close the floodgates to extensive litigation. The latter two could be mitigated by implementing more substantive measures designed to uphold the operational independence of the Armed Forces and limit any avenues for Parliament to exert influence over the Chain of Command or the shape, strategy or progression of a military engagement once a deployment decision has been reached.

A War Powers Act could be a workable solution to counter the drift towards executive monopoly our constitutional landscape is currently witnessing. But this would hinge on two public policy safeguards being built into the statute to provide sufficient flexibility in the exercise of the powers, namely the provision of a set of emergency powers for the executive to engage where a threat to national or international security is so immanent that prior parliamentary consultation would be impracticable; and the inclusion of an ouster clause excluding the amenability of the statute from Judicial Review - similar to how other pieces of legislation having importance for national security, including the Regulation of Investigatory Powers Act (RIPA) 2000, are immune from the jurisdiction of the Administrative Court in this respect.. This would be to remain true to established legal principles. In 1984, the House of Lords in its landmark GCHQ judgment established *inter alia* that War Powers are by nature non-justifiable and 'unsuitable for discussion or review in the Law Court.'[42]

Conclusion

Parliamentary practice during the years 2003-2018 is defined by a trajectory towards greater parliamentary control of the war powers. The crystallisation of the Consultation Convention and its recognition in the Cabinet Manual as an authoritative statement of constitutional practice served as a bulwark against executive monopoly of the war powers.

[42] *Council of Civil Service Unions v Minister for the Civil Service [1983] UKHL 6.*

However, this trajectory was knocked off course in April 2018, when Theresa May authorised airstrikes in Syria without consulting Parliament or obtaining prior Parliamentary approval. As a direct result of this step-change in practice, the convention is left in a state of crisis. Whilst its foundations remain intact, it has been pulverised such that it represents no more than a shadow of the constitutional cornerstone it once was. Its scope has been significantly reduced and Mrs May's refined terms of reference for the operation of the Convention appear to now exempt aerial and all non-combative operations and engagements from its ambit.

Whether this latest reconfiguration will survive to inform future practice is dependent upon how the broader constitutional apparatus will react to new procedural requirements. If a radical new model for taking deployment decisions were to be advanced, it is plausible that the spirit of the initial reading of this Convention could be revived.[43] A statute would be the most obvious option, offering clarity and coherence, but its success would depend on effective legal drafting to ensure the inclusion of emergency executive powers to provide flexibility in times of national emergency; and the insertion of an ouster clause preventing its provision from the supervisory or adjudicatory jurisdiction of the Courts. Ultimately, it will be a process of institutional conflict and dialectical deliberation between the executive and legislative branches of state that will determine, or continue to obscure, the future basis on which the War Powers will be engaged and controlled in conflict scenarios.

[43] That is, the reading of the Convention under David Cameron (and generally speaking prior to Theresa May's cabinet).