War with ISIL: Should Parliament Decide?

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The Government of Canada presently possesses the power to commit Canadian soldiers to battle without Parliamentary approval. On this basis, troops were deployed to Northern Iraq after a brief debate inaugurated by a non-binding take note motion presented in the House of Commons. This article notes that this power is anomalous in the era of responsible government, and argues that it should be reconsidered in the light of recent changes to the constitutional order of the United Kingdom.

The article describes the constitutional convention created in the United Kingdom in 2012. This requires the Government to abide with the results of a vote in the House of Commons on the deployment. This article argues that the adoption of the convention was not a response to abstract concerns about the balance of powers. Rather, it was deemed be politically necessary owing the revelations about the Blair Government's abuse of the royal prerogative.

The article further argues that the same incentives for abuse of the Government's power over combat deployments exist in Canada at present. The creation of a Canadian constitutional convention requiring prior Parliamentary approval would promote the transmission of accurate information about the factual and legal basis for military action and would serve as a check on deployments that might violate international law. Accordingly, the article describes how such a convention might be created in Canada and concludes that it is both appropriate and necessary in the current political environment.

Actuellement, le gouvernement du Canada a le pouvoir d'engager les soldats canadiens au combat sans l'approbation du Parlement. Dans ces conditions, des troupes furent déployées dans le nord de l'Iraq après un bref débat inauguré par une motion d'actualité non contraignante présentée dans la Chambre des communes. L'auteur de cet article constate que ce pouvoir est anormal à l'ère du gouvernement responsable et il soutient qu'on devrait le réexaminer à la lumière de changements récents à l'ordre constitutionnel du Royaume-Uni.

L'auteur décrit la convention constitutionnelle créée au Royaume-Uni en 2012. Ceci exige du gouvernement qu'il respecte le résultat d'un vote sur le déploiement à la Chambre des communes. Dans cet article, l'auteur soutient que l'adoption de la convention n'était pas une réponse à des inquiétudes abstraites relativement à l'équilibre des pouvoirs. Plutôt, on a jugé qu'elle était nécessaire, sur le plan politique, en raison des révélations touchant l'abus de la prérogative royale par le gouvernement Blair.

En outre, l'auteur soutient que les mêmes motivations à l'abus du pouvoir du gouvernement sur les déploiements militaires existent actuellement au Canada. La création d'une convention constitutionnelle canadienne nécessitant l'approbation préalable du Parlement favoriserait la transmission d'informations exactes par rapport au fondement factuel et juridique pour une action militaire et servirait de frein aux déploiements qui pourraient violer le droit international. Par conséquent, l'auteur explique comment une telle convention pourrait être créée au Canada et conclut qu'elle est à la fois appropriée et nécessaire dans le contexte politique actuel.

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Introduction

The Canadian Army has been engaged in ground combat in northern Iraq sporadically since January 2015, when "[i]n the first ground battles between Western troops and ISIL . . . Canadian special forces exchanged gunfire with fighters belonging to the . . . militant group."[1] The soldiers targeted by "effective mortars and small-arms fire"[2] are members of Joint Task Force Two and the Canadian Special Operations Regiment taking part in Operation Impact, the Canadian contribution to the U.S.-led campaign against the force that now has effective control of most of eastern Syria and northern Iraq.[3]

The news that these soldiers are not merely conducting air strikes or training Kurdish troops, but are instead exchanging gunfire with ISIL[4] and targeting air strikes from the ground, has catalyzed renewed criticism of the operation. The key concern is 'mission creep' — the fear that military campaigns without strictly-defined objectives will metastasize, spreading to other regions and consuming more and more resources.[5]

Reports that Canadian troops are involved in ground operations appear to justify the fears that an ill-defined mission has allowed the Cabinet to authorize military action that is considerably broader than what was originally presented to Parliament. The motion presented in October of 2014 stated that Canada would not "deploy troops in ground combat operations"; Operation Impact had been described at that time as a training mission.[6] However, the communications director in the Prime Minister's Office responded to concerns posed by the official opposition about mission creep by stating that the exchange of gunfire and advanced tactical air support do not constitute ground combat.[7]

1 "Canada's special forces clash with ISIL in Iraq", *Agence France Press* (19 January 2015).

2 *Ibid.*

3 "ISIS: Portrait of a Jihadi Terrorist Organization", *The Meir Amit Intelligence and Terrorism Information Center* (26 November 2014) at 4 [*MAITIC*].

4 The majority of the states participating in the coalition against the organization known in Arabic as ad-Dawlah al-Islāmīyah fī al-'Irāq wash-Shām refer to that group as ISIL, although the group is also commonly referred to in the West as ISIS. In the Middle East, it is more commonly known by the Arabic acronym Daesh.

5 See William J. Lahneman, "Conclusions: Third Parties and the Management of Communal Conflict" in Joseph R Rudolph & William J Lahneman, eds, *From Mediation to Nation Building: Third Parties and the Management of Communal Conflict* (Lanham, MD: Lexington Books, 2013) 481 at 487.

6 See Steven Chase, "Mission creep concerns raised in Canadian fight against Islamic State," *The Globe and Mail* (19 January 2015) [Chase, "Mission Creep"]. See also *House of Commons Debates*, 41st Parl, 2nd Sess, No 12 (6 October 2014) at 1200 (Hon John Baird).

7 Chase, "Mission Creep", *supra* note 6.

The initial reports of engagement on the ground with ISIL did not refer to isolated events, but to a change in the mission's focus, which media reports referred to as evidence of "an evolving role for this nation's soldiers" in advance of a long-anticipated Kurdish assault on the city of Mosul. While Prime Minister Stephen Harper told Parliament that the mission to train Kurdish forces would not require Canadian soldiers to accompany them into battle, the Minister of Defense subsequently argued that he was not sure that the Canadian Armed Forces ". . . could train troops without accompanying [Kurdish forces]."[8]

Moreover, Operation Impact had been scheduled to end in April 2015, at which time it was extended and expanded.[9] Parliament did not play a significant role in determining the contours of the mission extension, having once again been given only the opportunity to debate a non-binding take-note motion. The absence of meaningful debate raises the issue about whether the terms and purposes of parliamentary consultation before deployment should be re-examined. This article argues that these non-binding, take-note motions on the subject of military interventions are inadequate. They do not promote responsibility for and oversight of monumentally important decisions.

Further, a deployment protocol requiring prior parliamentary debate and approval in the service of these goals is an urgent priority. The most straightforward way to implement such a process is to create a constitutional convention mandating a decisive role for Parliament on matters of possible military engagement. An analogous constitutional convention was created in the United Kingdom in 2013 in response to the risk of approving a war of aggression based on faulty intelligence and tainted legal opinions; the article accordingly considers the past decade of constitutional history in the U.K. and argue that Canada should follow suit in establishing a similar convention.

Before turning to the example of the United Kingdom, the article will first examine the legal basis for command authority over the Canadian Armed Forces and raise the question of why Parliament has not played a more active role in the oversight of combat deployments.

8 Steven Chase, "Canadian soldiers engaged in more firefights against Islamic State, military says", *The Globe and Mail* (26 January 2015).

9 See Roland Paris, "Canada's mission creep in Iraq (and why it matters)", *Canadian International Council* (26 January 2015), online: <opencanada.org/features/canadas-mission-creep-in-iraq-and-why-it-matters/>.

I. Command Authority: Constitutional or Statutory?

In the United Kingdom, the decision to deploy the military has always been considered the Crown's prerogative.[10] The Dominion of Canada, which was guaranteed a constitution similar in principle to that of the United Kingdom,[11] inherited a royal prerogative with analogous features. However, in both countries, the doctrine of parliamentary sovereignty has long been understood to mean that legislators can replace and diminish the prerogative by statute.[12] Accordingly, before one concludes that control over the Canadian Armed Forces is a matter of prerogative, one must consider whether the Parliament of Canada has amended or replaced prerogative powers in this area with statutory statements.

Comparing constitutional developments in Canada and the United Kingdom, Ikechi Mgbeoji has pointed out a key difference: in Canada, the military command structure has been made subject to statute, the *National Defence Act*.[13] Mgbeoji notes, however, that owing to the generality of the statute's terms, "[i]t would seem that the position in Canada regarding the ambit of Crown prerogative on matters of armed conflict is somewhat unclear."[14]

This lack of clarity is evident in section 32 of the *Act*, which states:

> "[w]henever the Governor in Council places the Canadian Forces or any component or unit thereof on active service, if Parliament is then separated by an adjournment or prorogation that will not expire within ten days, a proclamation will be issued for the meeting of Parliament within ten days, and Parliament shall accordingly meet and sit on the day appointed. . ."

One reading of this section is that the reason for recalling Parliament is so that it shall debate any decision by the government (made in haste for reasons of necessity) to deploy the military. Certain legal scholars have made the contrary argument about what section 32 implies. Irvin Studin argues that this section adds only a "perfunctory measure of legislated parliamentary

10 Ikechi Mgbeoji, "Reluctant Warrior Enthusiastic Peacekeeper: Domestic Legal Regulation of Canadian Participation in Armed Conflicts" (2005) 14:2 Const Forum Const 7 at 9-11 [Mgbeoji, "Reluctant Warrior"].

11 Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, at preamble.

12 Warren J. Newman, "The Principles of the Rule of Law and Parliamentary Sovereignty in Constitutional Theory and Litigation" (2005) 16 NJCL 175.

13 *National Defence Act,* RSC 1985, c N-5.

14 Mgbeoji, "Reluctant Warrior", *supra* note 10 at 11.

involvement" that does not give it "a legal mandate for scrutiny — let alone control, of the strategic or tactical operations of the Forces."[15] Phillipe Lagassé contends that the omission in section 32 of any stated purpose for recalling Parliament "should be interpreted to mean that parliaments must sit to debate . . . [but] not to decide whether Canada will participate in the conflict."[16]

Studin and Lagassé's arguments appear to have some merit. The wording of the *National Defence Act* (the "NDA") would seem to provide a thin reed for asserting the legal basis for a robust role for Parliament in decision-making over the deployment of Canadian forces, at least without an argument stressing the constitutional principle of parliamentary sovereignty in the context of the NDA. At the very least, such an argument would be contested. While this article acknowledges the argument for parliamentary involvement under the NDA, it emphasizes the greater utility of a constitutional convention requiring prior approval from Parliament for military deployments. [17]

II. The Anomalous Nature of Cabinet Control of Deployments

Jurists in more than one Commonwealth realm have posed the question of whether there is — or should be — a constitutional convention that requires parliamentary approval of a government's plan to send troops into battle. Although the answer to the first question has been is "no," the next logical questions should be "why not?" and "is Parliamentary oversight desirable?"[18] Before moving to answer these follow-up questions, it is helpful to examine the role of constitutional conventions, and to ask whether or not the absence of a convention regulating combat deployments in Canada is anomalous.

The Royal Prerogative can be circumscribed by Parliament at will.[19] Parliament can do so with legislation or via the creation of implicit rules that limit its use to the boundaries that Parliament deems appropriate. A. V. Dicey, who is credited with the term "conventions," describes them as the

15 Irvin Studin, "The Strategic Constitution in Action" (2012) 13 German LJ 419 at 429 [Studin "Constitution in Action"].

16 Philippe Lagassé, "Accountability for National Defence: Ministerial Responsibility, Military Command, and Parliamentary Oversight" (2010) 4 IRRP Study 1 at 8 [Lagassé, "Accountability for National Defence"].

17 Studin "Constitution in Action", *supra* note 15 at 429.

18 See e.g. Ikechi Mgbeoji, "Prophylactic Use of Force in International Law: The Illegitimacy of Canada's Participation in 'Coalitions of the Willing' Without United Nations Authorization and Parliamentary Sanction" (2003) 8:2 Rev Const Stud 169.

19 The only exception to this are the reserve powers of the head of state. See Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1999) at 253.

"understandings, habits, or practices that . . . regulate the conduct of the several members of the sovereign power, of the Ministry, or of other officials. . ."[20] Ivor Jennings outlined his influential theory about the creation of these implicit understandings in 1933:[21]

> We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.[22]

The Supreme Court of Canada adopted this test for the existence of a convention in 1981.[23] Accordingly, a constitutional convention requiring prior parliamentary approval of combat deployments exists if there is at least one precedent indicating that Parliament and the government believe that the government is bound to seek such approval and abide by the result should Parliament reject its plan. Currently, there is no such precedent in Canada.

Responsible government has long been considered a key feature of parliamentary democracies. Indeed, this feature is so fundamental that it is now somewhat neglected within the field of jurisprudence, which has moved on to discuss issues of more contemporary relevance, leaving the principle of responsible government to legal historians.[24] There is simply no debate over whether or not the Cabinet must answer to Parliament for its actions related to fiscal matters; any argument that it should not be responsible would be hopelessly anachronistic and out of step with a political culture that has solidified over the past two hundred years.[25]

The same level of responsibility to Parliament is curiously absent in military affairs. The governments of the Commonwealth[26] have jealously

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20 Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London: Macmillan, 1959) at 24.

21 Sir W Ivor Jennings, *The Law and the Constitution*, 5th ed (London: University of London Press, 1959).

22 *Ibid* at 136.

23 *Reference Re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 888, (*sub nom Reference Re Amendment of the Constitution of Canada* (*Nos 1, 2 and 3*)) 125 DLR (3d) 1 [*Patriation Reference* cited to SCR].

24 See e.g. Gordon Bale, *Chief Justice William Johnstone Ritchie: responsible government and judicial review* (Ottawa: Carleton University Press, 1991).

25 *Ibid*.

26 In the states that comprise the Commonwealth of Nations, the term "government" refers to the bodies that collectively exercise executive authority. Foremost among these is the cabinet, which is comprised of Ministers of the Crown who are collectively responsible to Parliament. See Frank

guarded the right to advise the sovereign as they see fit on the matter of deploying armed forces, even when this right entails a *casus belli*. Rodney Brazier described this anomaly as follows: "How odd — perhaps bizarre — it is that the approval of both Houses of Parliament is required for . . . trivial[] subordinate legislation, whereas it is not needed at all before men and women can be committed to the possibility of disfigurement or death."[27] In the case of the Canadian commitment to the campaign against ISIL, one might also add that this use of the Royal Prerogative also exposes the Canadian public at large to a greater risk of death, as the Government has concluded that at least one of the high-profile attacks of October 2014 was a terrorist act "inspired by" ISIL; this attack took place shortly after the initiation of Operation Impact.[28]

This anomalous absence of responsibility to Parliament for military deployments is not the product of a principled distinction that existed at some point in our constitutional history.[29] Responsible government first emerged in response to irresponsible military policy and the financial burden that it created: the first motion of non-confidence at Westminster was passed against the government of Lord North, who thereafter presented his resignation to George III. The occasion for that motion was the Surrender at Yorktown, which demonstrated that King George's military strategy in the American Revolutionary War had been a resounding and costly failure.[30]

That said, in the view of the momentum towards the creation of such a convention in various commonwealth countries, it is not inconceivable that, before long, such a convention will be seen as an essential feature of any parliamentary democracy. This possibility has been made considerably more likely with the emergence of this convention in the United Kingdom — a convention whose adoption emerged within a particular historical context. The historical moment at issue spans a decade, from the time of the inauguration of the Iraq War (in 2003) to Parliament's rejection of military operations against

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Bealey, *The Blackwell Dictionary of Political Science: A User's Guide to Its Terms* (Hoboken, NJ: Wiley-Blackwell, 1999) *sub verbo* "government".

27 Rodney Brazier, *Constitutional Reform: Reshaping the British Political System*, 2nd ed (Oxford: Oxford University Press, 1993) at 123.

28 Statement by the Prime Minister of Canada in Ottawa (22 October 2014), online: <pm.gc.ca/eng/news/2014/10/22/statement-prime-minister-canada-ottawa>.

29 See generally Ryan Patrick Alford, "Not Even Wrong: The Use of British Constitutional History to Defend the Vesting Clause Thesis", online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2167760>.

30 John Brooke, *King George III* (London: Constable, 1972) at 183. It bears mentioning that North's acknowledgement that he did not have the confidence of Parliament did not immediately create a constitutional convention.

Syria (in 2013) and what was revealed about these military campaigns between those dates.

III. What Does the U.K. Vote on the Syria Crisis Reveal About the Creation of a Constitutional Convention?

In August of 2013, the United States and the United Kingdom were poised to intervene in the Syrian Civil War (a conflict that has subsequently shifted to a war between the Syrian and Iraqi governments against ISIL involving other combatants, including Kurdish military groups and the western states that have supported their operations).[31] The U.S. and the U.K. were prepared to initiate military operations without the mandate of the United Nations in the wake of allegations that the Syrian state had used chemical weapons.[32] However, just when it appeared that air strikes were a foregone conclusion, the unthinkable occurred: the legislatures of these countries rejected their governments' plans.

In the United States, the executive realised that it did not have the necessary support in Congress, and the bill authorizing military force was withdrawn.[33] Conversely, in the United Kingdom the government put the question before the House of Commons for debate on August 29, 2013; the resolution was defeated by 285 votes to 272.[34] Prime Minister David Cameron issued a statement that he intended to abide by Parliament's decision.[35] British constitutional scholars noted that the government had no choice or, at the very least, that it could not ignore the vote without violating a new constitutional convention.[36]

A. How Was this Convention Created and is it Relevant to Canada?

The recent work of certain scholars — in particular, that of Gavin Phillipson — has focused on addressing why the failed vote on the Syrian intervention was the final link in the chain that forged a new convention in

31 *MAITIC*, *supra* note 3 at 2-3.

32 Mark Mardell, "US ready to launch Syria strike, says Chuck Hagel", *BBC News* (27 August 2013).

33 David Espo & Julie Pace, "Obama delays Syria vote, says diplomacy may work", *Associated Press* (10 September 2013), online: <www.ksl.com/index.php?nid=235&sid=26795165&fm=most_popular>.

34 Andrew Osborn & Guy Faulconbridge, "Iraq war ghosts end UK plans to take part in Syria action", *Reuters* (30 August 2013).

35 *Ibid.*

36 Gavin Phillipson, "'Historic' Commons Syria vote: the constitutional significance (Part I)", *UK Constitutional Law Association* (19 September 2013) [Phillipson, "Historic Commons Vote"].

the U.K.[37] His analysis provides a yardstick against which the development of a similar constitutional convention in Canada can be measured. Various Canadian governments have put the question of military deployment before Parliament several times in the twenty-first century.[38] By comparing these events to those in recent British constitutional history, it is possible to discern how far Canada has moved towards the creation of a constitutional convention that requires prior parliamentary approval for military deployment.

1. The Twenty-First Century Drive for Parliamentary Approval in the U.K.

The British road to a constitutional convention that now requires a Commons vote before deployment was both short and direct, and it diverged sharply from the existing precedents. In 2002, just before the Iraq War, the government of the United Kingdom issued the following statement: "The decision to use military force is, and remains, a decision within the Royal Prerogative and as such does not, as a matter of law or constitutionality, require the prior approval of Parliament."[39]

Lord Goldsmith's statement had a firm basis at that time: there was no precedent for such a convention; neither Cabinet nor Parliament believed that the executive was bound by a rule requiring parliamentary approval, and there was no consensus about whether such a rule was justified. Accordingly, it was plain that Ivor Jennings' classic test for the existence of a constitutional convention could not be met at that time.[40]

Nevertheless, the Blair Government decided to hold a parliamentary vote on the subject of the Iraq War for political reasons. The Government feared a "massive Labour rebellion."[41] Despite its political origins, this vote served as the first precedent for the emergence of a convention. Phillipson argues that this is not paradoxical because the relevant political actors cannot believe themselves to be already bound by a convention that, by definition, cannot exist until it is brought into being by their precedent-setting behaviour. What is more important is that Parliament and the government treated that vote as if it had set a precedent.[42]

37 *Ibid.*

38 Mgbeoji, "Reluctant Warrior", *supra* note 10.

39 UK, *Lords Hansard,* vol 644 at 1138 (19 February 2003) (Lord Goldsmith).

40 See Phillipson, "Historic Commons Vote", *supra* note 36.

41 *Ibid.*

42 Joshua Rozenberg, "Syria intervention: is there a new constitutional convention?", *The Guardian* (2 September 2013) [Rozenberg, "Syria Intervention"].

Phillipson notes that the next step towards the creation of the convention was the 2011 vote in the House of Commons on military intervention into the Libyan Civil War. Sir George Young stated the following for the government during a Commons debate on the desirability of interdicting the Libyan Air Force over its own sovereign air space: "A convention has developed in the House that before troops are committed, the House should have an opportunity to debate the matter."[43]

This convention, which required prior consultation (but not prior approval) was also acknowledged in the Cabinet Manual for the year 2011, which, along with the statements of Cabinet Secretary Sir Gus O'Donnell, treated the 2003 vote on the Iraq war as the "foundational precedent" for the convention of prior debate.[44] The Manual states that "[i]n 2011, the Government acknowledged that a convention had developed that before troops were committed the House of Commons should have an opportunity to debate that matter."[45] Accordingly, it can be said that by 2011, both Parliament and the government agreed that the government would violate a constitutional convention should it use the Royal Prerogative to initiate offensive military operations without a debate in the House of Commons. Parliament and the government acted in accordance with their belief that the earlier precedents were binding.[46]

Phillipson notes that the 2013 vote on military operations in Syria built upon the earlier examples, solidifying a requirement that the vote be held before troops are committed and extending the convention to require the government to abide by its result.[47] In a manner similar to the Iraq War vote, the new element of the convention was established by all the relevant actors treating it immediately as if it had binding force. Both the Cameron Government and Parliament expected compliance with the Commons vote; there was simply no question of not abiding with the result.[48]

43 UK, HC, *Parliamentary Debates,* vol 524, col 1066 (10 March 2011) (Sir George Young).

44 Phillipson, "Historic Commons Vote", *supra* note 36.

45 United Kingdom, Cabinet Office, *The Cabinet Manual*, 1st ed (London: Cabinet Office, 2011) at para 5.38.

46 The recognition of this convention in the Cabinet Manual of the United Kingdom raises an issue about the process for the recognition of constitutional conventions in Canada, as this country has no such manual, the closest equivalent being an internal government document known as the Manual for the Procedure of the Government of Canada, which was prepared in 1968. Nicholas J. MacDonald and James W. J. Borden, "Manual for the Procedure of the Government of Canada: An Exposé" (2011) 20:1 Const Forum Const 33.

47 Phillipson, "Historic Commons Vote", *supra* note 36.

48 Rozenberg, "Syria Intervention", *supra* note 42.

This recent history provides a relevant point of comparison for the votes that took place in Canada during the same time period, which related to the deployment and extension of the Canadian military mission in Afghanistan. As the next section demonstrates, a compelling case can be made that a constitutional convention requiring a Commons debate has emerged, and furthermore, that the government's compliance with a failure of a motion on this issue would create a convention that requires compliance.

B. **Parallel Developments in Canada: Is This Country on the Same Road?**

As is the case in the United Kingdom, in Canada the right to declare war is a matter of Crown Prerogative. In the twentieth century, war was declared by means of an Order-in-Council. The Order inaugurating Canada's participation in the First World War was not preceded by a debate in Parliament. This is also true for the decision to declare war against Japan in 1941.[49] There were, however, debates in Parliament before declaring war against Germany and joining the Second World War effort, and before the mobilization of the Canadian contribution to the United Nations' mission in Korea in 1950.[50] Toward the end of the twentieth century, it would seem clear that no convention requiring parliamentary approval or debate was required before the Government's exercise of the Royal Prerogative to deploy the Armed Forces. Two conflicts that bracketed the turn of the twenty-first century, however, may serve as a stimulus for the development of an emergent convention requiring a debate on military deployments. In 1999, Canada participated in the NATO offensive against Serbia, in both the air (as part of Operation Allied Force) and by contributing a battle group and attached units to the ground force (Operation Kinetic). The legality of these deployments was not debated in Parliament, despite the fact that there was no Security Council resolution explicitly authorizing the use of force. This leaves serious doubts about the legality of the intervention,[51] despite the fact that five parties initially supported it[52] and implicitly agreed that deployment was a matter of Royal Prerogative. However, this consensus did

49 Mgbeoji, "Reluctant Warrior", *supra* note 10.

50 In the case of military action taken pursuant to a mandate issued by the United Nations Security Council, Parliament has explicitly waived any right it might have to be consulted, via the *United Nations Act*, RSC 1985, c U-2.

51 Joost P. J. van Wielink, "Kosovo Revisited: The (Il)Legality of NATO's Military Intervention in the Federal Republic of Yugoslavia" (2001) 9 Tilburg Foreign L Rev 133 at 144-48.

52 Michael W. Manulak, "Canada and the Kosovo Crisis: A 'golden moment' in Canadian foreign policy?" (2009) 64:2 Int J 565 at 572.

not last and, after some discussion of the need for parliamentary approval as a means of promoting transparency, accountability, and legitimacy, the Standing Senate Committee on Foreign Affairs opined shortly after this deployment that:

> While the requirement of an explicit and timely vote in Parliament on external military action may ultimately be deemed to be undesirable or infeasible on policy or procedural grounds, the idea should not be rejected out of hand as being incompatible with Canadian parliamentary democracy. Indeed, such a practice could have salutary effects in terms of enhancing both the involvement of parliamentarians in foreign and military affairs and the democratic legitimacy of such decisions.[53]

Canada did not participate in the coalition that launched the Iraq War without a second resolution from the Security Council that explicitly authorized the use of force against Iraq. Accordingly, there was no Canadian House of Commons debate in 2003 analogous to the one that occurred at that time in the United Kingdom. That said, there were significant steps in the development of a convention that requires debate, if not approval, in Canada. For example, in the course of responding to a motion introduced by the Bloc Québecois shortly after the 9/11 attacks that would require parliamentary approval of deployments, Minister of Defence Art Eglington said that "while the government agreed that Parliament should be consulted, it would not agree to a vote on committing the armed forces because this was the responsibility of the government."[54] Such a debate occurred, in similar circumstances in 2006, when the Harper Government proposed deploying a battle group to Kandahar, which would take over responsibility for major combat operations in southern Afghanistan.[55] Parliament voted again to extend that mission in 2007, and once more in 2008, with the aim of terminating the mission in 2011. As noted above, Canada's intervention in northern Iraq was debated in Parliament in October of 2014.

Academic and military commentators have argued that these votes did not create a constitutional convention.[56] However, their objections are misplaced for two reasons. First, the issue is not whether these votes serve as precedents for a convention that the government is bound to respect Parliament's wishes (on this point, Studin correctly notes that the conditions for the approval of

53 Standing Senate Committee on Foreign Affairs, The New NATO and the Evolution of Peacekeeping: Implications for Canada, ch. VIII, "Parliament and Canada's External Security Commitments," April 2000, at 25: quoted in Michael Dewing and Corinne McDonald, "International Deployment of Canadian Forces: Parliament's Role" (2006 Library of Parliament), at 9.

54 *Ibid* at 10

55 Studin, "Constitution in Action", *supra* note 14 at 429, n 30.

56 *Ibid.*

the second extension of the mission in Kandahar were not legally binding).[57] Rather, the issue is whether a convention has emerged that requires debate before deployment into combat operations. Second, while the Chief of Defense Staff (in a paper authored by the staff of the Office of the Judge Advocate General) concluded that the absence of debate before certain deployments demonstrates that there is no such convention, he fails to note that not all mobilizations are created equal. Those missions that are cited as proceeding without prior debate were the peacekeeping and humanitarian aid delivery missions to East Timor, Haiti, and Macedonia.[58] There is no evidence that anyone involved in planning these missions anticipated combat.[59]

It is clear from Parliament's conduct that it has recognized a difference between humanitarian assistance missions and the deployment of battle groups to Afghanistan: Parliament has recognized that only combat missions require prior political debate.

It remains to be seen whether a precedent may emerge to establish a convention requiring that the government abide by Parliament's decision. Such a vote might occur in 2016 when another take-note motion will be presented proposing a second extension of Operation Impact.

The third item of Jennings' criteria for the emergence of a convention, namely that the political actors would act in a manner consistent with its binding nature, would be met should the government abide by the result, in the manner of the Cameron Government when it lost the vote on the Syrian intervention.

The question that remains is whether an analogous Canadian convention would be a positive development. In order to answer that question, we must examine the reasons why such a convention was adopted in the United Kingdom. A review of recent British history demonstrates that the relevant political actors learned a hard lesson after Parliament gave rhetorical approval for the Iraq War without having secured an opportunity to adequately assess

57 *Ibid* at 441, n 57.

58 Canada, Office of the Judge Advocate General, "The Crown Prerogative Applied to Military Operations" (8 June 2008).

59 It should be noted that the status of a peacekeeping mission in international law does not depend in any way on whether the peacekeepers might come under fire. However, this distinction could well be made by Parliament, as this article will argue below that it has a clear incentive to exercise closer oversight over combat missions, as they create a possibility of manipulation of the political environment by the government.

flawed intelligence reports and faulty legal analysis. That war led to numerous British and Iraqi casualties and arguably, to a breakdown in social order that created fertile ground for the emergence of the movement now known as ISIL.[60] The following section describes how the concerns about alleged manipulation of the 2003 debate by the Blair Government constituted a key element of the historical context for the emergence of a convention requiring prior parliamentary approval for initiating combat. This milieu is described in detail because it is not a mere matter of historical interest. Rather, since the context of Operation Impact is remarkably similar, it will prefigure an argument that a Canadian convention of that nature is necessary for similar reasons: namely, to avoid a similar mistake of historic proportions.

IV. British Views on the Desirability of Parliamentary Control

Two reports demonstrate how opinion shifted in favour of the rebalancing of powers between the executive and the House of Commons after 2003. They are the 2006 report of the House of Lords Select Committee on the Constitution, "Waging War," and the follow-up "Second Report" in 2013.[61] [62] Their conclusions are discussed in order to outline the evolving nature of the arguments in favour of legislative constraint over the Royal Prerogative in this area at that time, an evolution that closely tracks a number of revelations about the flawed case for war presented by the Blair Government in 2002 and 2003. The 2006 report identified criticism of the government's control over the deployment power, which, it noted, is subject to a "double democratic deficit."[63] The government is not accountable either nationally or internationally for this use of force.[64] The Select Committee noted that the unaccountable use of the Royal Prerogative was out of line with the constitutional structures that had been established in Europe with the aim of implementing the rule of law. In the United Kingdom, there are no legal limitations on the government's decision to deploy soldiers other than the terms of the constitutional settlement of 1688,

60 Tom Englehardt, "ISIS Is America's Legacy in Iraq: How 13 years of the War on Terror led to the Islamic State", *Mother Jones* (2 September 2014).

61 House of Lords Select Committee on the Constitution, *Waging War: Parliament's Role and Responsibility, Volume I: Report* (London: The Stationery Office Limited, 2006) [Select Committee, *Waging War*].

62 House of Lords Constitution Committee, *Second Report of Session 2013-14: Constitutional Arrangements for the Use of Armed Force* (London: The Stationery Office Limited, 2013) [Constitution Committee, *Second Report*].

63 Select Committee, *Waging War*, *supra* note 61.

64 *Ibid*, citing Hans Born & Heiner Hänggi, "The Use of Force under International Auspices: Strengthening Parliamentary Accountability" (2005) Geneva Centre for Democratic Control of the Armed Forces Policy Paper No 7.

which transferred unaccountable powers from the King to his Ministers.[65] Accordingly, the Committee concluded that it would be desirable for the Prime Minister to possess a power to deploy troops on the basis of a grant of statutory authority from Parliament rather than the Crown.[66]

While this conclusion was predicated on the testimony of a "majority of witnesses [who] agreed that it is anachronistic, in a parliamentary democracy, to deny Parliament the right to pass judgment on proposals to use military force in pursuit of policy . . .",[67] a close reading of the report reveals that these witnesses were not wholly motivated by a sense that the formal constitutional order of the United Kingdom was anachronistic, but also by fresh memories of how these powers had apparently been abused by the government in advance of the Iraq War.

C. The Impact of the Use of the Prerogative to Launch an Illegal War

The Select Committee noted that many of its witnesses ". . . expressed concerns about the legality of deployment decisions", "[p]artly because of the controversies surrounding the decision to invade Iraq. . ."[68] This deceptively mild language conceals the very real outrage that existed in legal and parliamentary circles after the first revelations that the government abused its control over the intelligence agencies and the law officers of the Crown. The details of the Blair Government's manipulation of Parliament helps to explain why a constitutional convention requiring prior parliamentary approval has since come about.

1. The lingering effect of revelations of the manipulation of intelligence

Not long after the supposed rationale for the Iraq War was discredited (i.e., when no weapons of mass destruction were found after the invasion), questions were raised about the quality of the case for war that the government had put before Parliament.[69] The core of this case was outlined in a briefing paper commonly known as the September dossier.

65 *Ibid* at 37, 6.
66 *Ibid* at 26.
67 *Ibid* at 40.
68 *Ibid*.
69 See e.g. Lord Hutton, *Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly C.M.G.* (London: The Stationery Office Limited, 2004).

The Blair Government recalled Parliament on September 24, 2002 in order to debate the contents of the September dossier, which contained a number of alarming claims. The first was that Iraq had the capability to deploy chemical weapons on forty-five minutes' notice. The second was that Iraq was seeking significant quantities of uranium from Niger, presumably as part of a nuclear weapons program.[70] The claim that Iraq could deploy chemical weapons on forty-five minutes' notice caused significant alarm within the British public. The allegation was circulated in the press as a claim that the United Kingdom could itself be targeted with these weapons.[71] BBC journalist Andrew Gilligan subsequently reported that, despite objections from analysts within the Defence Intelligence Service,[72] this claim was included in the dossier on the express orders of Alastair Campbell, the government's director of communications.[73]

The second claim about uranium proved an essential part of the case for war both in Britain and the United States, as it featured prominently in President Bush's 2003 State of the Union address, in which he put the case for war to the American people. In it, he uttered his famous "sixteen words": "the British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa." The credit given to Britain was the result of a fierce battle within the American government, as the Central Intelligence Agency's 2002 National Intelligence Estimate had labelled this claim "highly suspect."[74] It was allegedly for this reason that Colin Powell refused to allude to these reports in his speech to the United Nations.[75]

The Blair Government was well aware that the Bush administration was determined to create a case for war. Within the American executive, these attempts had begun shortly after 9/11, despite unambiguous private advice from the CIA that there was no connection between Iraq and al-Qaeda.[76] The British government's awareness of the relentlessness of the American drive

70 For a discussion of this claim and the tenuous nature of the intelligence supporting it, see House of Commons Foreign Affairs Committee, *The Decision to go to War in Iraq*, Ninth Report of Session 2002-03.

71 See George Pascoe-Watson, "Brits 45 mins from doom", *The Sun* (25 September 2002).

72 See Matthew Tempest, "Memo reveals high-level dossier concern", *The Guardian* (15 September 2003).

73 Chris Ames, "Intelligence experts tried to stop Iraq dossier exaggeration", *The Guardian* (20 May 2011).

74 *NIE 2002-16HC, October 2002, Iraq's Continuing Programs for Weapons of Mass Destruction*, online: <www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB129/index.htm>.

75 Richard M. Pious, *Why Presidents Fail: White House Decision Making from Eisenhower to Bush II* (Lanham, MD: Rowman & Littlefield, 2008) at 221.

76 According to George Tenet, CIA analysts told Vice President Cheney that "If you want to go after that son of a bitch to settle old scores, be my guest. But don't tell us he is connected to 9/11 or to terrorism because there is no evidence to support that. You will have to have a better reason.": See Thomas Powers, "What Tenet Knew", *New York Review of Books* (19 July 2007).

to war was reflected in the minutes of a cabinet meeting of July 23, 2002, commonly known as the Downing Street Memo.[77] It notes that Foreign Secretary Jack Straw believed that "Bush had made up his mind to take military action, even if the timing was not yet decided. But the case was thin . . . We should work up a plan for an ultimatum to Saddam to allow back in the UN weapons inspectors. This would also help with the legal justification for the use of force."[78] It is unfortunate that the allegations about weapons of mass destruction were not scrutinized more carefully by Parliament before the Iraq War. This is understandable, however, since the members of the House of Commons understood their limited role in the oversight of military deployments in the absence of a constitutional convention that required prior approval. The government did not need the support of Parliament and was merely providing intelligence material to explain its choice of policies. Accordingly, there was no incentive or proper justification for legislative scrutiny of the dossier.

Parliament's vote on the Syrian intervention demonstrates how the new constitutional convention catalyses more effective scrutiny of debatable intelligence. In that case, the government produced a summary of reports provided by the Joint Intelligence Committee, the same body that had produced the September dossier.[79] As Peter Flatters noted, "[w]ith the Prime Minister claiming that intelligence findings were compelling enough to warrant action, the remarkable thing was Parliament's response — namely that it did not believe him, or rather that it insisted on seeing the evidence for itself."[80] It is evident that Parliament took notice of having been presented with faulty evidence in which the "intelligence and the facts were fixed around the policy."[81]

77 David Manning, "Iraq: Prime Minister's Meeting 23 July" as "The Secret Downing Street Memo", *The Sunday Times* (1 May 2005) [Manning, "Prime Minister's Meeting"]; see also Richard Norton-Taylor, "Blair-Bush deal before Iraq war revealed in secret memo", *The Guardian* (3 February 2006). General Lord Goldsmith attempted to prevent publication of details about this memorandum by stating publically that this would be a breach of Official Secrets Act and "threatened newspapers with the Act and the Contempt of Courts Act.": John Plunkett, "Memo warning 'attack on press freedom'", *The Guardian* (23 November 2005).

78 Michael Smith, "The Downing Street Memo," *The Washington Post* (16 June 2005).

79 See Tony Blair, "Foreword to the British dossier assessing weapons of mass destruction in Iraq", (24 September 2002), online: <www.theguardian.com/world/2002/sep/24/iraq.speeches>.

80 Peter Flatters, "Syria shows MPs need independent analysis of intelligence", *Politics.co.uk* (2 September 2013), online: <http://www.politics.co.uk/comment-analysis/2013/09/02/comment-mps-must-be-trusted-with-more-intelligence-info>.

81 Manning, "Prime Minister's Meeting", *supra* note 77.

2. The effect of the revelations of faulty legal advice about an aggressive war

While the British and American governments argued that the bombing and invasion of Iraq was legal, they can hardly be considered objective parties. To the contrary, United Nations Secretary-General Kofi Annan stated that, in the absence of a Security Council resolution that explicitly authorized the use of armed force to enforce a ban on the manufacturing of chemical weapons, such actions were illegal and breached the UN Charter.[82]

To date, the most comprehensive review of the legality of the Iraq War is the report of the commission of inquiry appointed by the government of the Netherlands, authored by the former President of the Dutch Supreme Court Willibrord Davids.[83] The 551-page Davids Commission report concluded that there was no legal basis for the invasion of Iraq. The report specifically rejected the theory that prior Security Council resolutions requiring Iraq to abandon its chemical weapons programs provided any authorization for the use of force.[84] Although a similar commission of inquiry set up in the United Kingdom has not yet released its results, the evidence put before that body (known as the Chilcot Inquiry)[85] appears to show that the British government presented its legal position to Parliament on the basis of the seriously flawed (and disputed) legal opinions of the law officers of the Crown, particularly those of the Attorney General, Lord Goldsmith.

When the Blair Government presented its case for war to Parliament, it noted that it had received legal advice from Lord Goldsmith that military action against Iraq would not be contrary to the Charter of the United Nations. However, it resisted calls to make that advice public. Unbeknownst to Parliament, the Attorney General's original advice to the government stated that "the language of resolution 1441 leaves the [legal] position unclear . . . Arguments can be made on both sides."[86] A month later, after Prime Minister

82 See Ewen MacAskill & Julian Borger, "Iraq war was illegal and breached UN charter, says Annan", *The Guardian* (16 September 2004).

83 WJM Davids, *Rapport Commissie van Onderzoek Besluitvorming Irak*, (Amsterdam: Wilco, 2010).

84 *Ibid* at 524. The Commission concluded that the government of the Netherlands presented arguments to the House of Representatives that Dutch participation in the invasion would be legal under international law. The Commission not only rejected this conclusion, but it noted that the government had ignored advice to the contrary, as its record included a leaked copy of a report of the Dutch foreign ministry's lawyers that concluded that the war would be illegal.

85 Statement from Sir John Chilcot, Chairman of the Iraq Inquiry (30 July 2009).

86 Memorandum from Lord Goldsmith to Prime Minister Tony Blair (30 January 2003).

Blair asked for clarification, Lord Goldsmith wrote a second memorandum, which came to the opposite conclusion.[87]

Speaking before the British Institute of International and Comparative Law in 2008, Lord Bingham (a former Lord Chief Justice) noted that Goldsmith had no legal basis to claim that the invasion was lawful. He added, "if I am right . . . there was, of course, a serious violation of international law and of the rule of law."[88] Goldsmith was confronted with the allegation that he had revised his opinion for political reasons at the Chilcot Inquiry in 2010. When asked about Tony Blair's comments on his original advice, Goldsmith responded that he "could not recall" that critical conversation. He was also confronted with the claim that he had been coerced by "close allies" of Tony Blair[89] who "pinned him up against the wall and told him to do what Blair wanted."[90]

In the wake of the invasion of Iraq, the 2006 report of the House of Lords Select Committee on the Constitution noted that, ". . . while there might be cogent objections to the imposition of a requirement for parliamentary authorisation of the overseas deployment of British forces, a more persuasive case could be made for requiring the Government formally to explain the legal justification for such a deployment. . ."[91] After it was revealed that the government had put pressure on Lord Goldsmith, the Constitution Committee was more direct about the need to ensure accurate information about the legality of the use of military force, noting that "all of our witnesses agreed that the legality of any deployment . . . is of overriding importance."[92]

While the results of the Chilcot Inquiry have yet to be released, it appears that the Parliament of the United Kingdom is acting as if a lesson was learned from the Iraq War experience — that is, if Parliament has no right to vote down the government's proposal for military intervention, it has no effective means of

87 The Attorney General's second memorandum was itself subsequently leaked and became the subject of substantial controversy. Sir Menzies Campbell (at that time, spokesperson for the Liberal Democratic Party), argued, "I have no doubt what[so]ever that if Parliament had been told these things, the Government would not have achieved its majority and [would have] been unable to go to war. Public opinion, already deeply divided, would have swung overwhelmingly against the Government". Martin Bright, Antony Barnett & Gaby Hinsliff, "Army chiefs feared Iraq war illegal just days before start", The Guardian (14 March 2003).

88 "Iraq war 'violated rule of law'", *BBC News* (18 November 2008).

89 "Goldsmith admits to changing view over Iraq advice", *BBC News* (27 January 2010).

90 Simon Walters, "Iraq Inquiry bombshell: Secret letter to reveal new Blair war lies", *Daily Mail* (29 November 2009).

91 Select Committee, *Waging War*, *supra* note 61 at 28.

92 Constitution Committee, *Second Report*, *supra* note 62 at 15.

obtaining accurate information about the factual and legal basis for that action. Without being able to dispose of the government's plans, it has no leverage to obtain anything other than the information that the government chooses to present.

V. The Desirability of a Constitutional Convention in Canada

This article has explained why the United Kingdom created a constitutional convention requiring prior parliamentary approval for combat deployments. The decision to create the convention was not wholly predicated on an academic critique of the Royal Prerogative. The convention was created by the rejection of military action against Syria in 2012. Nor was that vote motivated by purely theoretical concerns. Rather, it was motivated in part by the fact that the Parliament of the United Kingdom learned that it had been asked in 2003 to vote in favour of an illegal war on the basis of biased summaries of intelligence reports and faulty legal opinions.[93]

Having been presented with a non-binding motion addressing the deployment, the Parliament of the United Kingdom was asked to share political responsibility for the Iraq War despite having no power to hold the government accountable. The same is true for the Canadian Parliament when it is asked to consent to deployments on the basis of take-note motions presented in the House of Commons. Given the political context of the military deployments aimed at degrading ISIL, the urgent question remains as to whether a constitutional convention similar to that created in the United Kingdom in 2012 would be desirable in Canada. The first question that must be answered is whether Parliament has been presented with adequate information about the facts and legality of Operation Impact. If adequate information has not been received, the second question is whether this lack of information increases the risk that Canadian soldiers might be deployed to carry out an ill-advised or illegal combat mission.

D. The Objectives of Operation Impact are Vaguely Defined

The text of the take-note motion presented to Parliament on October 6, 2014 appears to define the scope of Operation Impact. After asking the

93 It is not the purpose of the article to conclusively demonstrate that the either the Iraq War or the bombing of Syria are contrary to international law. Rather, it raises issues with the legal justifications produced by the government as a means of demonstrating that further parliamentary oversight might have exposed problems with these arguments.

House of Commons to recognise certain alleged facts, the government asked that House to:

> (a) support the Government's decision to contribute Canadian military assets to the fight against ISIL, and terrorists allied with ISIL, including air strike capability for a period of up to six months; (b) note that the Government of Canada will not deploy troops in ground combat operations; and (c) continue to offer its resolute and wholehearted support to the brave men and women of the Canadian Armed Forces who stand on guard for all of us.[94]

It should be noted that in section (a), the government does not define its "contribut[ion] [of] Canadian military assets to the fight against ISIL," nor does it define the "assets" involved. This was left for speeches in the House and the statements of the Prime Minister that were released to the public. In his statement, Prime Minister Harper described the debate as being predicated on "a motion in Parliament to participate in air strikes against ISIL."[95] While the Prime Minister did specify that "Canada's engagement in Iraq is not a ground combat mission," later events revealed that this statement's truth depends upon a restrictive definition of that phrase, as noted above. It should also be noted that the motion does not restrict the "fight against ISIL" to the sovereign territory of Iraq, which has invited the coalition's participation. Crucially, it does not preclude combat operations within Syria, which, without Syrian approval, would constitute aggressive war, much like the invasion of Iraq.

E. **The Government Ignored the Illegality of Possible Operations in Syria**

The fact that the coalition is now targeting rebel groups on Syrian soil necessitates rigorous analysis of its compliance with international law. The United States has advanced some novel legal theories in support of its policies. Ambassador Samantha Power outlined these in her letter to Secretary-General Ban Ki Moon. She argued that because Syria is unable to prevent attacks against Iraq from being carried out from within its borders, attacks within Syria are authorised by Article 51 of the UN Charter.[96] However, the International Court of Justice has held that Article 51 applies only to attacks by states, and not to attacks by non-state actors operating from within another foreign state,

94 *House of Commons Debates*, 41st Parl, 2nd Sess, No 12 (6 October 2014) at 1200.

95 Statement from the Prime Minister of Canada (7 October 2014) on ISIL motion debated in Parliament.

96 To say that this argument is merely novel (when neither Iraq nor Syria are members of a collective defense organization) is something of an understatement.

even if that state is unwilling or unable to stop those attacks.[97]

To date, there have been only three air strikes by the Canadian Air Force in Syria.[98] As noted, it appears from the terms of the take-note motion and the Prime Minister's statements that he reserves the right to authorise them after the expansion of the mission in April 2015.[99] Leader of the Opposition Thomas Mulcair commented that the take-note motion had "opened the door to Canadian involvement in Syria's bloody civil war."[100] The United States Air Force has confirmed that coalition airstrikes in Syria have resulted in civilian casualties: in particular, it admitted that two children were killed in an air strike carried out by an unnamed coalition partner.[101] In August 2015, an independent monitoring group released a report alleging that the coalition airstrikes were responsible for 459 civilian deaths.[102] At that time it was also reported that the government of the United States has authorized air strikes against the Syrian Armed Forces,[103] a decision which may prefigure another significant and legally-problematic escalation of the conflict, in which Canada may participate without further debate in Parliament.

The absence of meaningful debate in Canada contrasts parallel developments United States. Legislative authorization for air strikes were in place before air strikes in Iraq and Syria began (in the form of the Authorizations for the Use of Military Force in Iraq of 2002[104] and Against Terrorists[105]). There is also no dispute that the deployment of ground troops would require

97 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinions, [2004] ICJ Rep 4. It should be noted that it is possible that an attack by a non-state actor that meets the Caroline test, where the need for pre-emptive self-defence is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation" would be in accordance with the norms of international law. A state harboring such actors might also be deemed a legitimate target, in accordance with the Draft Articles on the Responsibility of States for Internationally Wrongful Acts of the International Law Commission.

98 Stephen Chase, "Only three Canadian airstrikes in Syria since Islamic State mission expanded", *The Globe and Mail* (9 July 2015).

99 Stephanie Levitz, "Ottawa's ISIS motion calls for airstrikes, no troops in Iraq", *The Canadian Press* (4 October 2014).

100 Postmedia News et al, "Canada at war: Vote to launch combat mission against ISIL passes 157-134 in House of Commons", *National Post* (7 October 2014).

101 Raya Jalabi, "Pentagon admits two children probably killed in US-led air strike in Syria", *The Guardian* (21 May 2015).

102 Associated Press, "Report: US-Led Strikes in Iraq, Syria Killed 459 Civilians," *The New York Times*, (3 August 2015).

103 Adam Entous, "U.S. to Defend New Syria Force From Assad Regime", *The Wall Street Journal* (2 August 2015).

104 *Iraq War Resolution*, 116 Stat. 1498 (2002).

105 *Authorization of the Use of Military Force Against Terrorists*, 115 Stat. 224 (2001).

the approval of Congress. Such an authorization was debated and rejected in 2013,[106] when Secretary of State John Kerry alleged that the Syrian government was using chemical weapons against civilians. Despite the support of the leaders of both parties in Congress, the executive's initiative failed after Kerry was subjected to intense and prolonged questioning about the need for ground troops.[107] With respect to the war against ISIL, the White House has sought legislative authorization for its actions there, but Congress has to date declined to act on this request.[108]

It is troubling that, in Canada, the executive's plans for combat deployments are not subjected to similar scrutiny; in the United States, the use of a volunteer military in this manner bears a substantial risk of moral hazard. The absence of meaningful oversight is even more problematic in Canada than it would be in the United States, as the Canadian military deployment serves American foreign policy interests; this has been the case since the United States began portraying its military interventions as the work of coalitions (the attempt to obtain military assistance against ISIL is the direct descendent of Lyndon Johnson's "More Flags" program during the Vietnam War, in which foreign contributions of marginal military significance were sought for propagandistic purposes).[109]

An independent Canadian examination of the intervention's legality is particularly important. Before the votes supporting Operation Impact, Parliament did not receive any summary of the government's legal advice. This is troubling, given the possibility that Operation Impact, as expanded, might arguably violate the most important provisions of international law that prevent wars of aggression. The nations that were forced to address the legality of the Iraq War after the fact now demonstrate the requisite attention to this issue. Operation Shader, the British air campaign in northern Iraq, was initiated with a motion in the House of Commons that explicitly limited the scope of the mission to Iraq. Prime Minister David Cameron has committed to putting another motion before the House of Commons before initiating any air strikes

106 Susan Davis, "Senate delays Syria vote as Obama loses momentum", *USA Today* (9 September 2013).

107 Nicole Gauette, "Senators Prod Kerry to Rule Out Sending Troops to Syria", *Bloomberg Business* (3 September 2013).

108 Peter Baker, "Obama's Dual View of War Power Seeks Limits and Leeway", *The New York Times* (11 February 2015).

109 Sylvia Ellis, *Britain, America, and the Vietnam War* (Westport: Greenwood Publishing Group, 2004), at 5.

on Syrian territory[110] (the territorial limitation on air strikes to Iraq alone is common to all of the European nations that have agreed to participate in the U.S.-led coalition: namely, the Netherlands, France, Belgium, and Denmark).[111]

The Canadian Prime Minister's response to questions from the opposition about the legality of the mission was problematic. When asked about Operation Impact's legal basis for action in Syria during Question Period he responded, "I'm not sure what point the leader of the NDP is making. If he is suggesting, Mr. Speaker, that there is any significant legal risk of lawyers from ISIL taking the government of Canada to court and winning — the government of Canada's view is the chances of that, Mr. Speaker, are negligible [sic]."[112] Hopefully, if Parliament has the ultimate responsibility for the approval of combat deployments — and for compliance with international law, and for avoiding the serious recriminations of the sort that followed the Iraq War in Britain and the Netherlands — then this sort of glib response will no longer be deemed satisfactory.

IV. The Justiciability of a Canadian Constitutional Convention

One might concede that greater accountability over combat deployments is necessary without accepting the conclusion that a new constitutional convention would achieve that purpose. The government could simply ignore the vote against the deployment, or could ignore any limits imposed in any vote in favour of a combat operation. The latter scenario is more likely than the former, as the government could simply avoid a public rebuke by expanding a humanitarian aid mission into combat operations, as was done shortly after Operation Impact was launched (but before the take-note motion of October 6, 2014).

In the same manner, the scope of a combat mission could be expanded in such a way that it would violate international law. This appears to have been contemplated by Prime Minister David Cameron. As noted above, the Parliament of the United Kingdom rejected combat operations in Syria. They did, however, approve air strikes in Iraq. Yet, in the wake of that vote, Cameron noted that, while he believed that this precluded "pre-meditated" military

110 UK, HC, *Daily Hansard*, "Iraq: Coalition Against ISIL" (26 September 2014).

111 See Stephen Castle and Steven Erlanger, "3 Nations Offer Limited Support to Attack on ISIL", *The New York Times* (26 September 2014).

112 Lee Berthiaume, "Harper rebuffs legal concerns over bombing Syria", *Ottawa Citizen* (25 March 2015).

action in Syria, he reserved the right to intervene without another vote in the House of Commons if "urgent action" was required to prevent a humanitarian crisis.[113] In this scenario, the Prime Minister would be making the decision on his own authority and he would be the sole judge of whether or not urgent action was necessary.

It is unclear what action the Parliament of the United Kingdom could take at this point, short of a motion to withdraw the confidence of the House of Commons. This, of course, would be very difficult given the public support for the government that is often a reflexive response to a military campaign. Accordingly, the issue might be raised about what purpose such a constitutional convention might serve in Canada. The answer presents itself when one considers the differing approaches of the judiciary in Canada and Britain to the question of the justiciability of conventions.

The decision in *Patriation Reference*[114] would provide a basis for Supreme Court review of whether a combat deployment that goes beyond what the House of Commons approved (once a constitutional convention requiring prior approval is created) is in violation of such a convention. This could be done pursuant to the referral of a private bill to the Supreme Court by either House or Parliament,[115] wherein the reference would specify the issue.[116]

A court challenge of this nature might be deemed non-justiciable on the basis identified in *Aleksic v. Canada,*[117] namely that courts are not well placed to examine matters of high policy.[118] A reference case addressing the government's decision to ignore or exceed the scope of what was specified by Parliament would not call for the court to examine whether the government's choice of policies is correct or even lawful, but rather if, in ignoring Parliament, it is in violation of a constitutional convention. In such a case, the issue would appear to be justiciable for the same reason identified by Madam Justice Wilson in her concurrence in *Operation Dismantle*, wherein she noted that review for *Charter* compliance is appropriate because it would not require the courts to "second guess" the executive on matters of defence.[119]

113 Nick Robinson, "British military action in Iraq: what next?", *BBC News* (26 September 2014).

114 *Patriation Reference*, *supra* note 23.

115 See e.g. Senate, *Rules of the Senate of Canada*, 12 February 2014 update (Ottawa: Senate of Canada, 2014) at paras 11-18.

116 *Supreme Court Act*, RSC 1985, c S-26, s 54.

117 *Aleksic v Canada (Attorney General)* (2002), 215 DLR (4th) 720 (Ont Div Ct).

118 This is not a foregone conclusion, however, as the government's high policy defence was rejected in *Amnesty International Canada v Canada (Chief of the Defence Staff)* (FC), 2008 FC 336, [2008] 4 FCR 546.

119 *Operation Dismantle v The Queen* [1985] 1 SCR 441 at para 64.

As Adam Dodek has observed, in this new century the Supreme Court has increasingly adopted the role of "a constitutional crisis manager."[120] It is possible that the threat of the Court's intervention into a constitutional crisis might deter the government from ignoring an emergent convention not to deploy combat troops without prior parliamentary approval.

In the event that the government fails to comply with the vote, a declaration against the Attorney General would be an effective means of correcting the government's behaviour. This is not because the government would be required to comply with a binding judgment from the Supreme Court of Canada: the *Patriation Reference* case explicitly states that the Court cannot grant a legal remedy. However, a political remedy (in the form of a conclusion that a constitutional convention had been violated) would likely catalyse compliance. As Dodek has argued, the distinction between the recognition of a constitutional convention and the enforcement of a convention is problematic.[121] The Court "translat[ed] this practice of 'recognition' into 'declaration' of conventions."[122] This shift approaches a legal remedy, since any government's decision to ignore such a ruling would likely be seen as an unseemly challenge to one of the nation's most trusted and prestigious institutions. The political price of such open defiance might be too costly to bear.

Accordingly, a Canadian constitutional convention would not be a paper tiger, and could serve as a powerful incentive for broad disclosure to Parliament and to a vigorous debate about the prudence and legality of combat operations.

Conclusion

A constitutional convention requiring a vote in the House of Commons before combat deployments would not be a panacea. It would not limit the government's freedom of action as effectively as legislation clarifying the *National Defence Act*. However, it is possible to create a convention merely by rejecting the government's take-note motion, should the government honour that decision. This convention would create an incentive for Parliament to demand much more in the way of factual and legal justification for combat action, something that is both necessary and lacking at present. Additionally, the justiciability of such a convention in Canada would create a stronger incentive for the government to

120 Adam M Dodek, "Courting Constitutional Danger: Constitutional Conventions and the Legacy of the *Patriation Reference*" (2011) 54 SCLR (2d) 117 at 121.

121 *Ibid* at 129.

122 *Ibid* at 141.

comply. It is likely that the next year will present a favourable opportunity for the creation of such a convention, as the government is committed to fighting ISIL in Iraq and Syria "as long as it is there."[123] However, the most recent public opinion polls gauging the outcome of the 2015 general election predict a return of a minority government, at best. This is precisely the scenario that Lagassé thought "might easily" catalyze the assertion of Parliamentary authority over military deployments.[124]

Parliament appears to be learning the lesson that the government can have perverse incentives to put Canadian troops in harm's way. It has yet to learn how to push back against ill-advised missions that nonetheless serve partisan ends. What remains to be seen is whether the House of Commons will learn the lesson the easy way — by examining the history of a Parliament that has failed to do so, but corrected itself — or the hard way.

123 Jake Edmiston, "Stephen Harper tells opposition that Canada will fight ISIS threat for 'as long as it is there'" *National Post* (24 March 2015).

124 Lagassé, "Accountability for National Defence", *supra* note 16 at 14-18.