



# Mind the Gap: Parliament in the Age of Remote Warfare

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## Summary

For centuries, the Crown Prerogative—powers that were once the privilege of the British Sovereign, but today are wielded by the Prime Minister and his or her Ministers—has provided the occupant of Number 10 Downing Street with a source of individual and discretionary power, which can be employed without parliamentary approval.<sup>1</sup>

In recent decades, however, demands have been made across the political spectrum for greater accountability and constraint over the use of the Crown Prerogative—particularly for decisions over the deployment of British Armed Forces. In a 1994 op-ed, Jack Straw, who was destined for a seat at the Cabinet table, described how the Prerogative allowed “Government Ministers [to] rule virtually by decree in many areas not covered by statute” including “the control, organisation and disposition of the armed forces”.<sup>2</sup> This position was part of the Labour Party’s wider reform agenda which would propel them to power in 1997.

During his second term in office, Prime Minister Tony Blair deferred his right to use the Crown Prerogative by inviting the House of Commons to vote on British military intervention in Iraq. This event was the first step towards establishing what is now widely recognised as a constitutional convention mandating the House of Commons

to accept or reject proposed deployments of the British Armed Forces. Today, this is referred to as the War Powers Convention (hereafter referred to only as the Convention) and was reinforced by the 2013 Parliamentary defeat the Cameron Government suffered over proposed military intervention in Syria.

However, this vote did not change the fact that the Convention remains non-binding. As a Convention, it remains reliant on parliamentary pressure and government goodwill to be enforced. This has led some academics and politicians to posit that it would only take a government sufficiently unwilling to submit itself to the rule—or a Parliament insufficiently informed about changes in military engagement to challenge Government attempts to bypass it—for a wide range of British military activity to pass under the Convention’s radar, undermining the *spirit* on which the Convention was founded.

Discussions of enshrining the Convention, through either a Parliamentary Resolution or War Powers Act, have been revisited repeatedly over the past decade by Governments and oppositions across the political spectrum; including committees in the House of Lords and Commons. However, the complex technical hurdles that would have to be overcome if either a Resolution or Law were introduced have prevented reform.

The growing role of UK Special Forces, for example, whose deployments are already exempt from the Convention, would continue to fall through the procedural or legislative cracks even if either of the above approaches were enacted. The changing character of military engagements abroad is happening at a pace that policies and mechanisms put in place to scrutinise it cannot keep up with. This undermines the *spirit* of the Convention which has sought to empower Parliament in decisions affecting the use of lethal force.

There is growing evidence that suggests large deployments of British boots on the ground are becoming less common than remote forms of warfare. This approach places local and regional troops on the frontlines of the fight against groups like Islamic State, al-Shabaab, al-Qaeda and Boko Haram, with the UK providing a combination of air and intelligence support, enabled by small teams of military trainers and Special Forces. While offensive airstrikes (whether by manned or unmanned aircraft) do fall under the current Convention, combat operations carried out by Special Forces are exempt, as are frontline training missions (no matter how high the chances of troops coming under fire) and British support to allied strikes (even when UK assistance is 'critical' to the strike being carried out).

This accountability gap may have a range of detrimental implications for British security:

- **Effectiveness** – The existence of the Convention potentially increases the appeal of utilising Special Forces or drones over regular forces, as there remain grey areas over their use. The likelihood of this happening in the future was exacerbated by the 2013 vote on the principle of military intervention in Syria because it demonstrated the political risks involved in deferring the final decision on deploying conventional military forces to Parliament. For purposes of political expediency, therefore, governments may find it preferable (at least politically) to call on Special Forces to take on operations that could otherwise be carried out by conventional troops, in order to avoid the political risks involved in waiting for Parliament's sign-off.

- **Accountability** – The War Powers Convention has provided British lawmakers with the opportunity to debate political decisions to deploy the British Armed Forces in combat environments. However, the circumstances under which it is applied often depends on the level of political pressure placed on the Executive. When the Convention was introduced, it represented acceptance on behalf of the government for the principle of *ex ante* parliamentary scrutiny over the use of lethal force. But by increasingly adopting covert methods of warfighting, the government undermines democratic openness over the use of force that had emerged as a recognized good in the preceding decade. Without the means to hold crucial defence and security decisions under the microscope, there has emerged a critical gap in accountability. In doing so, the government undermines the *spirit* the Convention was founded on.

- **Legitimacy** – The War Powers Convention has offered Parliament the opportunity to legitimate government decision-making over the deployment of Britain's Armed Forces. While some have cynically argued this could be a means to deflect criticism from Parliament, if military interventions authorised by parliamentary vote are proved unsuccessful, military leaders such as Lord Guthrie have argued that legitimising executive decision-making over the decisions to deploy the Armed Forces can boost morale by injecting a sense of collective approval in support of their mission objectives.<sup>3</sup>

## Origins of the War Powers Convention

In 1982, then-leader of the Labour Party Michael Foot called on Prime Minister Margaret Thatcher to invite Parliament to authorise her decision to deploy British Armed Forces to deter Argentinian aggression on the Falkland Islands.<sup>4</sup> Mrs. Thatcher demurred: “It is an inherent jurisdiction of the government to negotiate and reach decisions... afterwards the House of Commons can pass judgment on the government.”<sup>5</sup>

In subsequent conflicts—the Gulf War, Kosovo and Afghanistan—decisions to use lethal force upheld Lady Thatcher’s interpretation of Parliament’s role in such decision-making.<sup>6</sup> Though Parliament did debate the decision to deploy the military in the cases above, it did so only after the fact—not before it. The vote on military intervention in Iraq on 18<sup>th</sup> March 2003 marked a turning point.

The House of Commons vote, where 412 to 149 voted in favour of military intervention, represented “the first example in modern times of prior parliamentary approval having been sought, and granted” to authorise the deployment of British Armed Forces.<sup>7</sup> To some extent, this established a Parliamentary Convention in which the House of Commons was recognised as having a formalised role in “any future decisions on military action.”<sup>8</sup> It was the first time a PM had deferred the war powers prerogative to Parliament, placing the fate of war in their hands. But how far has the Convention created a permanent role for Parliament in decisions of war?

## The Convention working in practice

The early years of David Cameron’s leadership of the Conservative Party suggested its permanency would hold. In Opposition in 2007, William Hague (who would become Foreign Secretary in 2010) wrote an explicit defence of strengthening Parliament’s role in the decision to go to war.<sup>9</sup> And in Government, the Conservative-Liberal Coalition appeared to recommit to the War Powers Convention.

Under his premiership, Cameron invited the House of Commons to provide its consent for: the 2011 NATO mission in Libya, to join the coalition of countries fighting in Syria in 2013 (and again in 2015), and Iraq in 2014. Most important among these, however, was the vote on Syria in 2013.

When Cameron lost the Parliamentary vote, it stood as a true test of executive deference to the Convention—hitherto no Government had been defeated after applying the Convention.

## Understanding ‘combat’ in today’s grey zone world?

While on this occasion Cameron recognised that the “British Parliament [did] not want to see military action”, and accordingly cancelled plans to extend airstrikes from Iraq to Syria, there have been other incidences when, arguably, the *spirit* of the Convention has not been followed.<sup>10</sup> Many of these instances hinge on tight definitions of ‘combat’ that have failed to live up to the realities on the ground. The decision to deploy troops to Helmand in 2006, for example, was made without a parliamentary vote, even once it became very clear that what may have been intended as a stabilisation mission was most definitely a combat deployment.<sup>11</sup>

While the UK may not consider itself a party to the US-led War on Terror, our research shows that the UK is nevertheless engaging militarily in places like Iraq, Syria, Libya, Yemen and Somalia alongside allied partners. Sometimes this takes place on the front lines on train and assist missions or by using Special Forces. Notwithstanding the above, the UK also plays a supporting role by providing intelligence and/or embedding troops in foreign forces.<sup>12</sup>

## Ruling out a War Powers Law

In April 2016, the Secretary of State for Defence, Sir Michael Fallon, announced the Government had abandoned its commitment to introduce a war powers law.<sup>13</sup> In many ways, this was unsurprising. Inquiries evaluating the pros and cons of strengthening the Convention, either by parliamentary resolution (a written motion adopted by the House of Commons) or in law, has often thrown up more questions than it has answers.<sup>14</sup> A useful example of the complex nature of this debate can be demonstrated by the divergence of opinion shared by the House of Commons<sup>15</sup> and House of Lords<sup>16</sup> on this issue.

Even if a law was introduced it may only serve to increase the risk of perverse incentives for the Government to exploit the grey zone between combat and non-combat missions to avoid enhanced scrutiny. For example, recent War Powers bills have not included Special Forces, frontline training missions, or mission-critical

assistance to allies under the criteria for requiring legislative authorisation, and therefore a vote would not be necessary even if the Convention were to be placed on a statutory footing.<sup>17</sup>

Recognising potential caveats with a war powers law, Lord Attlee pointed out during the debate on Baroness Falkner's bill in July 2016 that, "I am not well briefed on Special Forces operations, for obvious reasons, but I can safely surmise...use of our Special Forces could get us in a lot of trouble if it went wrong," and that by not including them in the wording of the bill, if enacted the legislation would not have the "effect the noble Baroness wants."<sup>18</sup> The same is true of the 'crucial' assistance that the UK has provided to partners—such as the US in its controversial drone strikes, the Saudi-led coalition in Yemen or support of Misrata in Libya.

Thus, while there has been a growing acceptance that conventional deployments of troops should be scrutinised by Government, these "grey area" techniques receive far less scrutiny.

### **The link between transparency and effectiveness**

During the 19<sup>th</sup> Century, John Stuart Mill made the case for a causal link between transparency and effective policy-making. He argued that, "vigorous discussion of alternatives...and open dissemination of information in democratic systems" produce better outcomes.<sup>19</sup> Similarly, Snyder and Van Evera have posited that the "relatively open marketplace of ideas [in democracies] decreases the chances that democratic leaders will engage in foolhardy wars".<sup>20</sup> This speaks to a general principle which is accepted in democracies, that transparency over information is congruent with a political system that protects liberal-democratic values. Moreover, it suggests a link between greater information sharing and effective policy-making.

The current government's approach thwarts informed discussion about the UK's defence and security strategy - where and why UK forces are deployed, who the UK is working with, and what the long-term vision is in terms of UK security. Answers to the above questions would be helpful, for example, in assessing the extent to which UK Special Forces can fulfill the objectives they are being set, more than, say, regular British infantry would be. Without any fora in which

these issues can be debated—whether in a closed or open setting within Parliament—neither MPs nor Peers have the means to critically assess whether the UK's military engagement abroad is effectively achieving its objectives.

The Convention has never been, and never will be, the only means for holding Government military action to account, however. With a minority government in power, which will likely continue to demonstrate an inherent aversion to risk, there is an opening for Parliamentary Committees to reassert themselves and exert influence over defence and security policy more so than in the past.<sup>21</sup> Therefore, the 2017 parliament presents MPs and Peers with an opportunity for parliamentary empowerment and expanded legislative scrutiny over the use of lethal force.

### **Future-proofing oversight of UK military deployments**

Challenges to the Convention are not only demonstrated by the increased role Special Forces are playing as an instrument of UK defence and security strategy. Remotely-Piloted Air Systems (RPAS), or drones, also challenge the Convention's reliability. The UK Government has been relatively transparent about their use in conventional theatres. Indeed, in a 2016 Airwars report commissioned by the Remote Control Project on the air war against ISIS in Iraq and Syria, it was concluded that "Overall, the UK is rated...as the most transparent active member of the US-led Coalition"<sup>22</sup> and "The MoD's decision to report consistently and openly on its air campaign in Iraq and Syria is therefore a welcome one."<sup>23</sup>

The difference lies in the dual-use of armed drones for 'combat' and 'non-combat' operations—which can change from one to the other very quickly, and without prior parliamentary approval.<sup>24</sup> Drones provide the UK government with the ability to conduct intelligence, surveillance, and reconnaissance missions for prolonged periods over suspected targets in areas where it is not considered party to a conflict. As with other 'non-combat' deployments, these missions do not fall under the Convention or require recourse to Parliament. However, if these same drones carry out strikes, without a prior vote in Parliament—such as the strike against Reyaad Khan—this raises important questions about

how well the UK's systems of oversight can keep up with the fluid and rapidly changing nature of drone operations in areas the UK does not consider itself a party to a conflict. This dual-use is not shared by manned aircraft—the new F-35 fighter jet for example, will not perform ISR missions.

Although there is not room to discuss it at great length, the future of offensive cyber also has the potential to place strains over the Convention. The Government currently discloses very little detail about its cyber capabilities and if it is actively engaged in utilising what could be, for example, a potentially unique and invasive weapon. With the potential of penetrating deep into an adversary's infrastructure, offensive cyber could have devastating consequences for dense population centres without firing a single shot. The future governance and accountability mechanisms over offensive cyber operations will be—or at least should be—of growing interest and concern to British lawmakers.

## Conclusion

The War Powers Convention was founded in response to concerns of executive overreach and insufficient scrutiny over prime ministerial decision-making on matters of war. The 2003 vote on the intervention in Iraq marked the first occasion Parliament formally approved, *ex ante* rather than *post facto*, a Prime Minister's proposal to deploy British Armed Forces. Prior to this event, the norm had been that prime ministers retained the constitutional authority to authorise military action; and that Parliament was only there to pass judgement after the event. The 2011 vote on Libya demonstrated the Convention's continuity from one Government to another. But the true test to the Convention's permanency was the 2013 vote on Syria, in which the defeat of the Cameron Government (and prime ministerial deference to it) marked the first time a prime minister's prerogative had been constrained after applying the Convention.

In the wake of large military deployments in Iraq and Afghanistan, and less of a political appetite for deploying the British Armed Forces, Governments are now resigned to the fact that calling a vote in the House of Commons comes with high political risks. This this does not necessarily mean the Government would not apply the Convention on occasions that are clearly delineated as conventional combat operations. Rather, a

culmination of varying factors has increased the proclivity for Governments to utilise alternative weapons in its armory that deviate from parliamentary scrutiny—a form of political expediency that potentially leads Governments to wield the wrong tools for the job.

The level of transparency over the UK's secret wars not only undermines our parliamentary democracy but also prevents wider scrutiny of the efficacy of the UK's defence and security strategy. A war powers law is not the answer to addressing the accountability gap. Instead, Parliamentarians should call on government to share information more widely to *improve*—which is not synonymous with *restrain*—Government defence and security strategy.

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**Remote Control** is a project of the **Network for Social Change** hosted by **Oxford Research Group**. The project examines changes in military engagement, with a focus on remote control warfare. This form of intervention takes place behind the scenes or at a distance rather than on a traditional battlefield, often through drone strikes and air strikes from above, with special forces, intelligence operatives, private contractors, and military training teams on the ground.

## Endnotes

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