

CHAPTER 6

**THE ‘CONVENTION’ TO CONSULT
PARLIAMENT ON DECISIONS TO DEPLOY
THE MILITARY: A POLITICAL MIRAGE?**

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Canada’s military is active. At the time of writing, the Canadian Armed Forces (“CAF”) had more than 1200 personnel deployed abroad on operations, including in Haiti, South Sudan, the Sinai Peninsula, in support of NATO assurance measures in Eastern Europe, and as part of the Middle East Stabilization Force in Iraq.¹ Only a small segment of the Canadian population is aware of some deployments, with fewer still holding a position on whether they are a good or bad thing. Other deployments are more broadly known and discussed and might be the subject of intense opinions. To take two examples of those in the latter class, on 17 May 2006 a contentious vote took place on a government motion framed in terms of House of Commons “support” for the government’s decision authorizing a two-year extension to the mission in Afghanistan,² and the motion narrowly passed with 149 yeas to 145 nays. Nearly eight years later in mid-April of 2014 and in response to Russian actions concerning Ukraine, the government offered a number of assets including six CF-188 Hornets as part of NATO “reassurance measures”. There

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1. Government of Canada, “Operation IMPACT” online: Government of Canada <<http://www.forces.gc.ca/en/operations-abroad-current/index.page>> (This figure is the lowest it has been for more than a decade, following Canada’s engagement in the armed conflict in Afghanistan).
2. The government moved that “the House support the government’s two year extension of Canada’s deployment of diplomatic, development, civilian police and military personnel in Afghanistan and the provision of funding and equipment for this extension.”

was some discussion in the press about whether this was the right thing to do, but the House of Commons did not pay much attention to the matter, and there was no debate, and no vote.³ Most recently, the CAF deployed six CF-188 Hornet fighter aircraft, along with a Polaris aerial refueller and two CP-140 Aurora surveillance aircraft, to Iraq. Before the deployment, and as the House of Commons discussed the situation in Iraq, the media generated analyses of the pros and cons on Canadian engagement there, with the *Globe and Mail* inviting the government and opposition to make their cases and asking the public to comment, and vote.⁴ In the event, the government put forward a motion in the House supporting its decision to deploy which passed 157-134 on 7 October 2014.⁵

In Canada's system of government, it is the executive – the cabinet, the Prime Minister, and on occasion individual ministers – that is empowered to authorize the deployment of the CAF on international operations.⁶ The relevant legal authority flows from the Crown prerogative, in Peter Hogg's definition "the powers and privileges accorded by the common law to the Crown".⁷ This legal authority is separate and distinct from authority granted the Crown in statute, but it is no less legitimate or important. Parliament plays no legal role in the exercise of the Crown prerogative to deploy the CAF.

The fact that the executive possesses powers and privileges independent of those sourced in parliamentary grants – and the power to deploy the CAF is only one of many – is a cause of concern to some. The Crown prerogative is archaic, they might argue, or an ill fit with Canada's 21st Century parliamentary democracy; relevant powers should belong to the House of Commons. For Rosara Joseph, writing about the situation in the United Kingdom, "the decision to deploy the armed forces is too important and solemn a decision to leave to the Prime Minister and an inner cabal of government ministers"; she

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3. Philippe Lagassé, "Parliament Neglects its Duty to Debate Military Deployments", *Ottawa Citizen* (5 May 2014).
 4. "Your turn to vote: Should Canada enter Combat in Iraq?", *Globe and Mail* (3 October 2014).
 5. *House of Commons Debates*, 41st Parl, 2nd Sess, no 124 (7 October 2014) at 2045.
 6. For general discussion on the Crown prerogative authority to deploy the CAF, including decision making mechanisms, see A Bolt, "The Crown Prerogative in Canada and its Use in the Context of International Military Deployments", Office of the JAG Strategic Legal Paper Series Issue 2, 2008 [Bolt].
 7. P W Hogg, *Constitutional Law of Canada*, 5th ed loose-leaf (Toronto: Thomson Reuters, 2007) at 1.9. [Hogg] (this definition of the Crown prerogative was accepted by the Supreme Court of Canada in *Ross River Dena Council Band v Canada*, 2002 SCC 54 at 217, 2 SCR 816).

continues “in a constitution such as ours, which enshrines democratic values, we must revise our constitutional arrangements”.⁸ Others, including this author, hold contrary opinions: considered, as it must be, in the context of Canada’s system of responsible government, the Crown prerogative is a legitimate and often necessary source of authority.⁹

Connected to this debate in an interesting way are statements about the existence of a “convention” to consult Parliament before deployment decisions are made. Some in Canada appear to hold the position that such a convention exists.¹⁰ Others suggest there should be a convention along these lines, and that one may form at some point in the future,¹¹ while still others argue that this may not be the best way forward.¹² But perhaps a convention to consult Parliament before deployment decisions is a political mirage. It is not clear

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8. R Joseph, *The War Prerogative: History, Reform, and Constitutional Design* (Oxford: University Press, 2013) at 219 [Joseph].
 9. See e.g. A Bolt, “Crown Prerogative Decisions to Deploy the Canadian Forces Internationally, a Fitting Mechanism for a Liberal Democracy” in D Michael Jackson and Philippe Lagassé, eds, *Canada and the Crown: Essays on Constitutional Monarchy* (Kingston: McGill-Queen’s University Press, 2014) [Bolt, *Crown Prerogative Decisions*].
 10. See e.g. J Ibbitson, “Commons unanimously backs Canada’s deployment to Libya”, *Globe and Mail* (21 March 2011): (“While constitutionally, the federal government can commit forces without consulting Parliament, Mr. Harper has adopted the convention of seeking parliamentary approval for deployments that involve military force”); (Interestingly, Lagassé – who elsewhere counsels caution in the formation of a convention – suggests that consultation is now an “expectation” which might be described as a “custom” (P Lagassé, “How Should Canada’s Parliament Decide Military Deployments? Lessons from the United Kingdom”, Policy Paper for Canadian Defence & Foreign Affairs Institute, Dec 2013 at 3 [Lagassé, “How Should Canada’s Parliament Decide Military”]).
 11. C Forcese, “Parliament, Creeping Constitutionalism, and the Deployment of Canadian Forces?” National Security Law: Canadian Practice in International Perspective, (5 January 11) (Blog) (asking the question “A New Constitutional Convention?”, Forcese concludes “There is no compelling record of which I am aware... suggesting that any (or at least a notable number) of the actors within the executive or Parliament considered that the vote on deployment was required by a mandatory rule. That expectation may develop organically with the passage of time, if deployment votes continue. But we aren’t there yet.”); see also P Lagassé, “Accountability for National Defence: Ministerial Responsibility, Military Command and Parliamentary Oversight” (March 2010) 4 Institute for Research on Public Policy at 14.
 12. See, generally Lagassé, “How Should Canada’s Parliament Decide Military”, *supra* note 10 (examining whether Canada should follow the “British example” and grant “members of Parliament control over the executive’s power to deploy the armed forces by means of a constitutional convention.”). See also P Lagassé, “Parliament shouldn’t decide when we go to war”, *Ottawa Citizen* (9 April 2010) (arguing against “subjecting military action to greater parliamentary control by convention or statute”) [Lagassé, “Parliament shouldn’t decide when we go to war”]; P Lagassé, “How Canada Goes to War”, *Ottawa Citizen* (3 December 2013)

what is meant by the term “convention”, in this context, in the first place. Indeed, it will be argued in this chapter, that either the term “convention” as applied to Commons consultation practices refers to a “constitutional convention”, or it is a concept empty of meaning in Canadian law and parliamentary practice.

If what is being suggested is a “constitutional convention” to consult the House of Commons before a military deployment, such a convention would stand alone among its peers; it would neither look like other constitutional conventions nor serve comparable purposes. And even if a consultation constitutional convention were a theoretical possibility, the test for the establishment of one is extremely hard to meet, and it has not been met.

Those discussing a consultation convention in Canada will often-times refer to the UK experience. This is reasonable; after all Canada’s constitution is “similar in Principle to that of the United Kingdom”.¹³ And has not the UK accepted the fact of a convention to consult their Parliament in advance of a deployment decision, and cannot we reposition the Canadian debate as a matter of when we will adopt the UK approach rather than whether a convention is even possible in the first place? While the broader Crown prerogative debate in the UK is very advanced, and a quick review of the relevant parliamentary and government statements might suggest a recognition by all of a convention to consult Parliament before deployments, this seemingly clear picture blurs on a closer look.

Given all of this, why are we talking about conventions in the military deployment context? It will be argued here that such talk is intimately linked with criticism of the underlying Crown prerogative authority for such deployments; for those who do not like the Crown prerogative’s use in the deployment context, a consultation convention is a desirable thing. Yet the argument – based in criticism – that a consultation convention exists has important implications for other modes of criticism. In the final analysis it is better to disregard the mirage of a convention to consult Parliament and instead focus analytical and critical energy on the first order questions: are we making deployment decisions in the right way, and are we making the right deployment decisions?

(referring to lessons Canadian Parliamentarians might learn from the UK experience, while suggesting existing arrangements might be good enough).

13. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 (preamble) [*Constitution Act*].

“CONVENTIONS”

A central fact of the convention debate is that the word “convention” is not given a single meaning by participants. Part of the problem is that it is a common word with a well-known, if loose, meaning. In regular speech, convention suggests consent to a practice, but this consent might be informal, perhaps implied or even just evidenced by anticipated or accepted behaviour. But even as the word convention can cover a wide range of practices, the term “constitutional convention” has a meaning in law and political theory that is very precise. Given this, those who would speak of conventions in the deployment context must be clear on what is meant. Foremost, it is crucial that those expressing views on consultation conventions not use the vernacular meaning for definitional purposes, and then, having found the existence of a “convention”, fall back on the legal sense of the term to supply the meaning and import of this finding.

Although some use terms such as “parliamentary convention”, “political convention¹⁴” or “binding convention”,¹⁵ or others,¹⁶ the term used most often in the deployment debate context is simply “convention”. On reading this single word, one might assume it is being used as shorthand for “constitutional convention”¹⁷ or that it is not. The key point here is that if “constitutional convention” is not meant, then the word is being used in a way devoid of legal or even practical meaning. In law and formal parliamentary practice, there are no conventions other than the constitutional kind.¹⁸ If a convention other

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14. C Haddon, “Parliament, the royal Prerogative and decisions to go to war” Institute for Government Blog (6 September 2013) (Blog), uses both terms.
 15. See, e.g. J Hallwood, “The Syria vote was a triumph of parliamentary sovereignty” *New Statesman* (30 Aug 2013): “Votes such as last night’s are no longer mere rubber stamps but a binding convention that can change the foreign policy of a government” [Hallwood].
 16. P Brode, “War Powers and the Royal Prerogative” *Law Times* (1 May 2006) (uses the unlikely term “new prerogative”, described as where “Parliament is not only informed of events but demands a real say over whether or not the country goes to war in the first place.”)
 17. In at least one UK instance, this is implied. House of Lords Constitutional Committee, “Constitutional Arrangements for the Use of Armed Force” (24 July 2013) HL Paper 46 at footnote 42 (states: “The word ‘convention’ is, in constitutional parlance, a term of art. Although there is no universally accepted definition of the term, the feature common to all definitions is that, whilst a convention is not justiciable, it is nevertheless regarded by all relevant parties as binding. Constitutional conventions may therefore be regarded as practices which are politically binding on all involved, but not legally binding”)
 18. Leaving aside “conventions” in completely different contexts. For example, the title “convention” is used for certain types of treaties.

than a constitutional one were violated there would be no formal consequences beyond purely political ones; one side would state that a convention existed and that it was not followed and therefore that a wrong had been committed, and the other side could counter that the convention does not exist or that it exists in a form other than the one suggested. In other words, we can refer to conventions that are not constitutional conventions, but in doing so we commit ourselves to imprecision and indeterminacy. Such an approach is ill-suited to serious criticism, let alone policy-making.

In the UK context, we see an expert witness refer to a “convention with a small ‘c’” as a way of identifying this important difference.¹⁹ In Canada, the tendency has been to use completely different terms to capture the distinction. In the important decision of the Supreme Court of Canada (SCC) in the *Patriation Reference*,²⁰ and in Professor Hogg’s treatise on constitutional law, a convention is contrasted with a “usage”, or “practice”.²¹ It is undeniable that practices have developed respecting how the executive will make deployment decisions and the role the Parliament will have in these decisions (as they have in other areas). In Joseph’s words “governments have normally (consistent with constitutional orthodoxy) asserted their exclusive power over war and denied a role for Parliament in its exercise. But through practice, they have implicitly recognized that they must exercise the power in conjunction with Parliament”.²² But are these practices properly considered “constitutional conventions”? The answer is no.

19. See House of Lords Select Committee on the Constitution, “Waging War: Parliament’s role and responsibility” (27 July 2006) HL Paper 236-I at 88 (referring to witness Dr Howells’ interpretation of Gordon Brown as stating “that the way the House works at the moment (if you like, convention with a small ‘c’) is the way it ought to proceed”).

20. *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753 at 883 [*Patriation Reference*] (the majority adopted an earlier definition of a convention which provided in part that “a convention occupies a position somewhere in between a usage or custom on the one hand and a constitutional law on the other,” and “that if one sought to fix that position with greater precision he would place convention nearer to law than to usage or custom”. Going even further, Jennings suggested that “members of the Government do not know and need not bother to know whether a rule is a matter of law or convention,” and “indeed, it is better that the rule should be law and not convention, for a law may be changed by legislation and a convention is rather difficult to change abruptly”: Sir Ivor Jennings, *The Law and the Constitution*, 5th ed (London: University of London Press, 1964) at 132 [Jennings].)

21. Hogg, *supra* note 7 at 1.10(c): “a usage is not a rule, but merely a governmental practice which is ordinarily followed.”

22. Joseph, *supra* note 8 at 96.

CONSTITUTIONAL CONVENTIONS

In contrast to the imprecision and indeterminacy of “conventions”, constitutional conventions have an extremely important place in Canada’s constitutional fabric. The purpose of constitutional conventions and how they interact with the law and what might be called mere practice are discussed by commentators in law and political science. In addition, however, we have an in-depth analysis of constitutional conventions by the SCC in its 1981 decision in the *Patriation Reference* where it held²³ that there was a convention requiring the federal government obtain a “substantial” degree of provincial consent before it requested the UK Parliament to enact an amendment to the Constitution of Canada.²⁴

British constitutional theorist A.W. Dicey probably coined the term, and he described conventions as “the principles and rules of responsible government”.²⁵ Hogg describes “rules of the constitution that are not enforced by the law courts”.²⁶ Two things may be said. First, constitutional conventions are *rules*, rather than practices: the relevant norm is that the concerned players *must* act in a certain way by constitutional rule. Second, far from referring to political practices that have developed simply as rules of procedure, the term “constitutional convention” is reserved for rules foundational to the operation of our parliamentary democracy. “Constitutional conventions are the manifestation of constitutional principles”,²⁷ and as the SCC has said, “constitutional conventions plus constitutional law equal the total constitution of the country”.²⁸ So important are constitutional conventions to the operation of the political system that if they were not followed a change in the law would be required.²⁹ To violate a convention is to act unconstitutionally.³⁰

23. Six of the justices agreed on the “conventional aspect” of the case, with three dissenting.

24. As Hogg argues at 1.10(b), it is not clear that the SCC should have decided the question at all given that the conclusion that a convention exists did not have legal relevance. With the *Patriation Reference* the SCC became the first in the Commonwealth to engage directly with the matter of constitutional conventions: see Hogg, *supra* note 7 at 1.10(c).

25. *Patriation Reference*, *supra* note 20 at 878.

26. Hogg, *supra* note 7 at 1.10(a) (citation omitted); in a similar vein see Jennings at 103.

27. J Bowden & N MacDonald, “Cabinet Manuals and the Crown” in D Michael Jackson and Philippe Lagassé, eds, *Canada and the Crown: Essays on Constitutional Monarchy* (Kingston: McGill-Queen’s University Press, 2014) [Bowden & MacDonald].

28. *Patriation Reference*, *supra* note 20 at 883-84.

29. See e.g. Hogg, *supra* note 7 at 1.10(e): “Since conventions are not legally enforceable, one may well ask: why are they obeyed? The primary reason is that breach of a convention would result in serious political repercussions, and eventually in changes in the law.”

30. *Ibid* at 1.10(a); *Patriation Reference*, *supra* note 20 at 883-84.

The “main purpose of constitutional conventions” as described by the SCC “is to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period”.³¹ For Jennings, “the short explanation of the constitutional conventions is that they provide the flesh which clothes the dry bones of the law; they make the legal constitution work”.³² Several examples of existing Constitutional conventions serve to illustrate their preeminence:

- At law, the Queen could refuse assent to bills passed by the legislature, but convention prohibits this; such an action would be “unconstitutional”.
- Also at law, a government could refuse to resign following a general election won by the opposition; in certain circumstances such an action would be a very serious breach of convention, and would amount to a coup d’état.
- By convention, the person who is appointed Prime Minister must have the support of the House of Commons.
- By convention, Ministers are appointed on the advice of the Prime Minister.³³

A further example of a constitutional convention benefits from closer study. By law, the prerogatives of the Crown are exercised by the titular Crown “on the advice of” the government.³⁴ Without conven-

31. *Patriation Reference*, *supra* note 20 at 880. Quoting this statement, Hogg goes on to say: “they bring outdated legal powers into conformity with current notions of government.” (1.10(e))

32. Jennings, *supra* note 20 at 81-82, (Jennings also states that they are “the motive power of the constitution” (at 83)).

33. This list comes from the *Patriation Reference*, *supra* note 20 at 878-82 (not being necessary for determination of the case, the list is *obiter dicta*. Note there has been a great deal of discussion lately about the first two of these examples, in which simplified versions of the rules have been called into question. For discussion on the first example, see “The Day After an Election,” briefing session, Institute for the Study of the Crown in Canada, Massey College, 9 June 2014. The points being made here do not depend on whether rules applicable in these situations are or are not properly titled “constitutional conventions,” the exact content of the rules, or precisely how they apply practically, but simply that these are *the sorts of situations* that are dealt with by constitutional conventions. In fact if the “rules” for these two situations – central as they are to the proper functioning of responsible government – are not constitutional conventions, or the constitutional conventions are more complex than previously thought, this would strengthen the argument that there are no constitutional conventions surrounding “mere” executive decisions to deploy the military).

34. In fact, the advice is to come from the Privy Council, and the Sovereign or the Governor General can also make decisions alone: see *Constitution Act, 1867*, *supra* note 13 at ss 9-13.

tion to modify the legal rule, it would be the Sovereign making Crown prerogative decisions, possibly through the person of the unelected Governor General.³⁵ By constitutional convention, however, decisions under Crown prerogative power are made by the government: whole of cabinet, the Prime Minister, and in certain circumstances individual ministers. The “advice” called for by the law becomes, by convention, the decision itself.³⁶

THE IDEA OF A CONSULTATION CONVENTION TO CONSULT PARLIAMENT

Given the place of constitutional conventions in the Canada’s constitution, their purpose, and examples of them, what do we make of a practice to consult Parliament before military deployment?

Before getting into this question, we need more clarity on what such a convention would look like, and most importantly what it would say about actual decision-making power. Unfortunately, oftentimes the convention is kept at the level of abstraction – for example a “convention to consult Parliament” or even “Parliament is engaged in deployment decisions as a matter of convention” – rather than given a concrete form. There are three options as to what a “convention to consult Parliament” could actually be:³⁷

1. The convention to “consult” Parliament could mean that the House of Commons is the actual decision-making authority on the deployment, with the executive merely putting an option on the table.³⁸

35. The Governor General was appointed by the Queen (under prerogative authority) by the *Letters Patent Constituting the Office of Governor General of Canada, 1947*, RSC 1985, Appendix II, No 31.

36. For a discussion on this point see Bolt, *supra* note 6 at 9.

37. Given the categorization that follows it is difficult to know what to make of statements such as this one by Hallwood, *supra* note 15: “while the Prime Minister officially retains the Royal Prerogative to declare war, it is clear that this power is now tempered by the convention that Parliament must vote on the matter beforehand.”

38. Several commentators suggested this for the UK following the Syria vote, see e.g. G Phillipson, “Parliament’s Role in the Use of Military Action After the Syria Vote”, videotaped lecture: March 2014, available at <http://vimeo.com/88916249> [Phillipson], who described the Commons as having “a real veto”; “Syria intervention: is there a new constitutional convention,” *The Guardian* (2 September 2013): “the convention also now requires a vote on a substantive motion and that an adverse vote would make military action impossible...”; and C Moore, “The world is not a better place for Britain taking a back seat over Syria”, *Telegraph* (30 August 2013): “Mr Cameron has, in effect, lost what is called the ‘royal prerogative’”.

2. The convention to “consult” might amount to a “two-key” decision-making process, with the agreement of both executive and the Commons required for a particular deployment.³⁹
3. The convention to consult could mean simply that: the executive must put its decisions to the Commons for reaction and debate, but the Commons does not hold any formal authority to veto the decision or substitute another decision for it.⁴⁰

The first possibility must be discarded. As mentioned, there is another convention, itself sourced in the constitutional authority for the Privy Council to “advise” the Sovereign, which requires that the executive make Crown prerogative decisions. Were the consultation convention to be interpreted as granting Parliament sole decision-making authority, this would amount to the abolishing of this underlying convention. The development of such a “consultation” convention would therefore involve two important changes: first, the existing legal and conventional structure giving the executive authority to decide on deployments would need to be destroyed, and second the Parliamentary decision-making power – sourced in constitutional convention – would spring into being. It appears that no one is actually suggesting that the executive has been or should be stripped of its authority to exercise the Crown prerogative. Furthermore, this change would move a decision-making power from the executive branch to the legislature, and perhaps such a fundamental change should not occur via development of constitutional convention. Some would argue that the executive’s control over the military – including deployment authority – exists in the written constitution and could therefore not be changed by ordinary legislation, let alone a constitutional convention.⁴¹

Likewise, the second possibility is not workable. Both this possibility and the previous one stretch the meaning of the word “consult”

39. Perhaps suggested by former UK Parliamentary Under Secretary of State at the Foreign and Commonwealth Office Alistair Burt, “Vote that ties Britain’s hands,” (2014) 70:1 *The World Today* 30 at 32, (where he states that Parliament and government have “worked to a convention that if troops are to be deployed, then the Commons will get a vote”.)

40. This appears to be Joseph’s position. *Supra* note 9 at 109, (she asserts the existence of a constitutional convention to consult, but also states “The executive is the policy and decision-making body. Parliament’s participation is limited to trying to influence those policies and decisions”.)

41. P Lagassé, “The Crown’s Powers of Command-in-Chief: Interpreting Section 15 of the Constitution Act, 1867” (2013) 18:2 *Review of Constitutional Studies* 189 (suggests that such a change would have to come through constitutional amendment).

past its breaking point. Beyond this, a “two-key” decision-making process would be unprecedented not only as a process sourced in convention, but in the wider activity of Canadian government. The system of responsible government works through a mechanism of single, accountable, decision-making authorities. For example, executive decision-making is subject to criticism in the Commons and the Senate, and the government ultimately requires the confidence of the Commons to remain in power. It is Parliament that makes statute law in Canada; the Crown’s role in this law-making process is limited to the almost entirely symbolic providing of assent.⁴² Hogg seems to suggest against the possibility of a convention that would create a two-key system when he states: “some conventions have the effect of transferring effective power from the legal holder to another official or institution. Other conventions limit an apparently broad legal power, or even prescribe that a legal power shall not be exercised at all”.⁴³ At all events combined decision-making must be ill advised. In such a case accountability for the decision is shared and responsibility is hard to apportion. Also, the institutionalized critic function inherent in the Commons would be lost.⁴⁴

The third possibility – that the posited convention requires the executive to consult with the Commons but not to grant the Commons veto authority – is by far the most likely. This type of consultation has precedent in other political processes.⁴⁵ What must immediately be acknowledged, however, is that this is a very limited form of parliamentary power. In addition, however, this conception of the consultation convention raises questions about whether such a “rule” is sufficiently important and central to the workings of responsible government to be termed a constitutional convention.

It might first be said that such a consultation practice does not seem like the sort of matter that is dealt with by constitutional convention. The Crown’s role in the passage of legislation, the resignation of a government defeated in a general election, the appointment

42. For a discussion of assent to Bills, as well as royal recommendation and consent, see chapters 4 and 5.

43. Hogg, *supra* note 7 at 1.10(a).

44. For a discussion of this point in the context of wider criticism of the Crown prerogative, see Lagassé, “Parliament shouldn’t decide when we go to war”, *supra* note 12 at 12-13, 16.

45. See Jennings, *supra* note 20 at 102: “It is now recognised that in framing social legislation the appropriate department must consult the appropriate outside ‘interests.’” (Clearly, Jennings did not mean to imply that such outside interests – including e.g. the trade unions – had actual decision-making power).

of ministers who will have executive authority: related decisions are at the core of functioning responsible government, and the rules governing such decisions are properly accorded constitutional status. Conversely, while critics might object to deployment decisions made under Crown prerogative authority, it must be granted that consultation with Parliament is not *necessary* for our responsible government system, which functions fine without such a practice. In discussing the relationship between conventions and law, Hogg has said: “Each convention takes a legal power that would be intolerable if it were actually exercised as written, and makes it tolerable. If the convention did not exist, the legal power would have to be changed”.

In the *Patriation Reference* the SCC spoke of conventions having a “constitutional value” as a “pivot”.⁴⁶ In that case a convention was found because the “federal principle” could not tolerate federal authority to modify provincial powers unilaterally.⁴⁷ But the SCC also spoke of the “democratic principle” as a convention pivot: “the powers of the state must be exercised in accordance with the wishes of the electorate”.⁴⁸ It is presumably this principle that would be at play with a convention to consult Parliament before deployment decisions. This position, however, would misapprehend the notion of the constitutional pivot and the reason for constitutional conventions.⁴⁹ In the *Patriation Reference*, the SCC described the resulting convention as an “essential requirement” of the “federal principle”,⁵⁰ stating “the purpose of this conventional rule is to protect the federal character of the Canadian Constitution and prevent the anomaly that the House of Commons and Senate could obtain by simple resolutions what they could not validly accomplish by statute”.⁵¹ On the other hand, the democratic principle is already met with existing deployment decision-making mechanisms and is inherent in the system of responsible government. The government is formed by the party

46. *Patriation Reference*, *supra* note 20 at 880.

47. *Ibid* at 905 (it is this framework for the decision-making power at issue that makes it different in kind from the notion of a convention to “consult” Parliament before executive deployment decisions).

48. *Ibid* at 880.

49. Likewise, in an argument that misses the mark in the sense of falling short of the purposes for and requirements of constitutional conventions, Joseph states at *supra* note 8 at 183: “it seems clear that a rule requiring the government to seek parliamentary approval before going to war serves a necessary role in promoting constitutional government.” With respect, a “necessary role in promoting constitutional government” is not enough to ground out a constitutional “rule” requiring parliamentary consultation.

50. *Supra* note 21 at 906.

51. *Ibid* at 908.

that can carry the confidence of the House of Commons, ministers of the Crown are generally selected from among those elected, and the government must at all times hold the confidence of the elected house. While it could be argued that deployment decisions would be *more* democratic were they to be made in consultation with Parliamentarians (again, not a universally held view), the important fact is that decisions without consultation are not *undemocratic*.⁵² Executive decisions to deploy the military made without parliamentary consultation may be criticised by some, but such decisions are not “intolerable”, and they certainly cannot be considered “unconstitutional”.⁵³

A second and related idea is that based on existing conventions, rules on *who* in Canada’s political system should be making decisions are properly the subject of constitutional conventions. Rules about *how* these decisions are made are different in kind. In the first category are rules such as that requiring the legislature (rather than the Sovereign) to be the lawmaker, and the electorate (rather than government) decide who will govern the country. A consultation convention would be different; such a practice would not relate to who made the deployment decision (it would still be made by the executive) but instead would insert an element of procedure. Such a practice is simply a *practice*. It is not a constitutional convention.

A final idea relates to the source of the underlying decision-making authority for military deployments. As earlier discussed, it is the executive that wields this authority and not the person of Sovereign. But, and importantly, this is so because of convention. With this background, it is clear that a convention to consult Parliament in advance of military deployments would amount to a “convention on a convention”. This would be a situation unique in Canada’s constitution,⁵⁴ but also raises questions about the absolute and necessary status constitutional conventions are meant to have. Positing conventions of this secondary class would broaden immeasurably the

52. For an argument against the view that Crown prerogative decisions to deploy violate the democratic principle, see Bolt, *Crown Prerogative Decisions*, 2014.

53. Indeed, Jennings, *supra* note 20 at 133 states that not only is a violation of a convention “unconstitutional”, it will also be “contrary to the traditions of a free people and the principles upon which democratic government must be based.”

54. Note Phillipson seems to accept the notion of a second convention on top of a first: G Phillipson, “‘Historic’ Commons’ Syria vote: the constitutional significance (Part I)” (19 Sep 2013) (Blog), online: UK Constitutional Law Association <<http://ukconstitutionallaw.org/2013/09/19/gavin-phillipson-historic-commons-syria-vote-the-constitutional-significance-part-i/>> [Phillipson] (see also Phillipson, 2014 videotaped lecture. In any case this understanding is necessary to his logic).

class of activities that could be considered conventions, but would also do existing conventions a disservice. If a violation of a convention to consult Parliament before a deployment had the same status as a refusal of the government to resign in the face of a contrary general election, something of the import in the latter would be lost.

THE DIFFICULT CONSTITUTIONAL CONVENTION TEST HAS NOT BEEN MET

In the previous section, it was argued that there is something flawed about the very idea of a constitutional convention to consult Parliament before a deployment decision. But even if this hurdle is cleared and we accept that such a convention is a theoretical possibility, the simple fact is that there is no such constitutional convention in Canada. The test for the establishment of a constitutional convention is a very difficult one. For any practice to consult Parliament on military deployments this test has not been passed to date, but beyond this it would be extremely difficult to pass in the future.

In his seminal work on the UK constitution, Sir Ivor Jennings devoted an entire chapter to constitutional conventions, and laid down the test for the existence of one: “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?”⁵⁵ This was the test applied by the majority in the *Patriation Reference* and it is the law of Canada.⁵⁶ It may be said unequivocally that even if one were possible, there is no constitutional convention to consult Parliament before deploying the military because this test has in no way been met. In fact the application of the test hangs up in its every aspect.

The simple and overriding fact here is that there has been no consistent practice of consulting the Parliament on deployment decisions. Sometimes it is done, sometimes not; when it is done different mechanisms are used. Generally speaking, governments from 1950 to 1992 used the *National Defence Act* mechanism of placing members of the military on “active service”.⁵⁷ This mechanism has a statute-

55. Jennings, *supra* note 20 at 136; Phillipson, *supra* note 54, refers to Jennings’ “classic three fold test for the existence of a Convention”.

56. *Patriation Reference*, *supra* note 20 at 888. For Hogg’s discussion of the test see *supra* note 7 at 1.10(c)

57. RSC 1985, c N-5 s 31(1) (section 31(1) [NDA] reads: “The Governor in Council may place the Canadian Forces or any component, unit or other element thereof

based Commons debate requirement,⁵⁸ and was used from Korea, through a 1964 Order-in-Council on Cyprus, in the early 1990s on Iraq, to the deployment in Somalia. Importantly, and contrary to the views of some,⁵⁹ there is no relevant legal significance to these active service designations;⁶⁰ the governments of the relevant day used them to enable Commons debate only: throughout this period and into the present, all regular force military members were and are on active service “for all purposes”.⁶¹

Since 1992, however, successive governments have moved away from bespoke active service designations towards Commons “take note” debates for some but not all deployments, sometimes followed by a vote on a related motion and sometimes not. This practice was used, for example, for operations in the Former Yugoslavia, for peacekeeping in Ethiopia and Eritrea, the engagement in Afghanistan, and most recently for Canada’s deployment in 2014 to Iraq. Importantly, with those debates that do involve votes the relevant motions have been worded in a way that is highly significant: the House of Commons has voted in each such case to indicate its support for a government deployment decision.⁶² For example, the recent government-introduced motion on Iraq asked in part that the House “support the Government’s decision to contribute Canadian military assets to the fight against ISIL, and terrorists allied with ISIL, includ-

or any officer or non-commissioned member thereof on active service anywhere in or beyond Canada...”)

58. See NDA s 32.

59. See e.g. dissenting opinion of J DeP Wright J in *Aleksic v Canada (Attorney General)* (2002), 215 DLR (4th) 720 at 724, (Ont Div Ct).

60. Being placed on active service simply means that a number of disciplinary and other consequences are brought into existence with respect to the member: see NDA ss 30(1) and 77, 88, 97. A member can be placed on active service without being deployed, and a deployed CAF member need not be placed on active service.

61. The current Order-in-Council is P.C. 1989-583 (6 April 1989), which is merely the last in an unbroken line of designations from P.C. 1950-4365 of 9 Sep 1950 at the time of participation in the Korea action.

62. For a discussion of the practice until May 2006, see M Dewing & C McDonald, “International Deployment of Canadian Forces: Parliament’s Role”, Library of Parliament (18 May 2006) at appendices 1 and 2. On 13 March 2008, the House passed a motion supporting the government’s decision to extend the mission in Afghanistan to July 2011. While this motion states that the “extension of Canada’s military presence in Afghanistan is approved by this House,” this statement is under a heading containing the words “it is the opinion of the House,” and the lengthy motion is full of “should” phrasing. While the motion does not contain the “support” to the government formula, its overall tenor is one of support (see e.g. Allan Woods, “Conservatives, Liberals extend Afghanistan mission”, *Toronto Star* (14 March 2008) which reported that the House “endorsed the will of the Conservative government”).

ing air strike capability for a period of up to six months”.⁶³ This voting mechanism is clearly driven by political considerations, rather than recognition of a consultation rule or principle.

Not only has the practice been inconsistent, it is highly relevant that sometimes the government has failed to consult Parliament at all. For example, there was no consultation in relation to Canada’s contribution in 2014 to NATO Reassurance Measures regarding Ukraine. As the majority stated in the *Patriation Reference*, the precedents put forward for a convention must be considered in both positive and negative terms.⁶⁴ In coming to its conclusion that there was a convention to get the substantial agreement of the provinces, the majority noted that “no amendment changing provincial legislative powers has been made since Confederation when agreement of a province whose legislative powers would have been changed was withheld. There are no exceptions”.⁶⁵ By contrast, history shows a practice of consulting Parliament before deployment decisions that is replete with exceptions.

The requirement for precedents is only the first arm of the test: even if we had the practice – and it is clear that we do not – in Jennings’ words “practice alone is not enough. It must be normative”.⁶⁶ In other words, there is a requirement that actors in the precedents act in that way because they believe there are *obligated* to do so.⁶⁷ In finding that this arm of the test was met in the *Patriation Reference*, the majority pointed to confirmatory language in a White Paper, as well as statements by different government ministers.⁶⁸ In the case of a parliamentary consultation convention, however, we have no similar record of government statements.⁶⁹ In addition, two facts make it clear that governments have *not* thought consultation to be obligatory. The first is the inconsistent practice itself, which suggests that far from governments acting on the basis of a perceived obligation of some sort, they are motivated by political expediency. The second is

63. House of Commons, *Journals*, 41st Parl, 2nd Sess, No 123 (6 October 2014) (Government Business No 13).

64. *Patriation Reference*, *supra* note 20 at 891.

65. *Ibid* at 893.

66. Jennings, *supra* note 20 at 135.

67. There is a parallel here with the formation of customary international law, see *Statute of the International Court of Justice* article 38(1)(b), and the *North Sea Continental Shelf* (1969), ICJ at paras 74 and 77.

68. *Supra* note 21 at 898-902.

69. One place in which such a practice might be “officialised” is in the *Manual of Official Procedure of the Government of Canada*, Henry F Davis & André Millar (Ottawa: Government of Canada, 1968): see Bowden & MacDonald, *supra* note 27.

the simple and overwhelming fact of statements to the contrary. In November of 2010, for example, Prime Minister Harper announced that Parliament need not be consulted on the government's extension of the Afghan mission.⁷⁰

The recent experience in the lead up to the Iraq deployment is also illustrative of both of these points. In the face of opposition calls for a Parliamentary debate and vote, the government first indicated that it had no intention of holding a vote on a possible deployment to Iraq, suggesting strongly it did not believe it was required by law or convention to do so.⁷¹ While the government did, one month later, move that the House support the government's deployment decision, it was guaranteed to win the resulting vote since it held a majority in the House; it is clear the decision to have a vote was driven by political and not legal considerations. But the situation also produced an interesting secondary debate. The Opposition and certain commentators⁷² linked the earlier refusal to hold a vote to the government position that the mission in Iraq would not involve 'combat,' and suggested that this meant votes would, or must, be held when they do involve combat.⁷³ If we accept for the moment that the government was drawing a true distinction, this would provide clear evidence that the government did not believe a convention to consult existed for non-'combat' deployments (however these may be defined). Further, none of this amounts to recognition of a consultation convention for 'combat' missions. A key government quote seized on by the opposition as evidence of an undertaking is the Prime Minister's: "whenever there has been deployment of a combat nature, the government

70. "Afghan training mission doesn't need vote: PM", *CBC News* (12 November 2010).

71. L Berthiaume & D Pugliese, "Opposition calls for vote, debate over Iraq deployment", *Ottawa Citizen* (6 September 2014). See also M Petrou, "Iraq and the proper path to war", *Maclean's* (1 October 2014)[Petrou]; and J Wingrove, "Iraq deployment not up for vote, Harper says", *The Globe and Mail* (15 September 2014) [Wingrove].

72. See e.g. *Ibid*; see also P Lagassé, "When Does Parliament Get to Vote on Military Deployments?" CIPS Blog (8 September 2014) online: CIPS <<http://cips.uottawa.ca/when-does-parliament-get-to-vote-on-military-deployments/>>, and Petrou, *supra* note 71, who seems to go further, suggesting that special treatment for "military missions involving combat", or deployments in an "explicit combat capacity", respectively, have been rules of longer standing.

73. This position amounts to a reframing of the issue considered in this chapter. Instead of a convention to consult Parliament on deployment decisions being at issue, the question would concern a narrower class made up of a certain type of mission (one involving 'combat') only. All of the arguments made here against the existence of a convention would apply with equal force to the narrower convention, acknowledging that those based on past precedent (negative and positive) would contain fewer applicable examples.

has put this to Parliament for a further confidence vote. Mr. Speaker, that is not the case with the present mission to Iraq.”⁷⁴ This phrasing describes past events and suggests a pattern for the future. At all events its use supports recognition of a political undertaking, rather than a legal or conventional obligation.

The third requirement for a constitutional convention is a reason for it, and the application of this arm of the test may be dealt with summarily. As has already been argued, a practice of consulting Parliament before military deployments is not a good fit with existing constitutional conventions because it is unlike the others and has no constitutional value “pivot”. Much less can it be said that such a convention would have the required “reason”.

UK EXPERIENCE

Some have argued that in the UK there is a convention to consult Parliament before deployments, and that therefore the Canadian convention debate can be reduced to the straightforward one of whether Canada has adopted the UK position, or should adopt it in the future.⁷⁵ However the UK position is not so simple.

There is no doubt the wider Crown prerogative analysis is far advanced in the UK. Since 2004 and following on the UK decision to go to war in Iraq, there have been no fewer than 24 official reports or statements dealing with the Crown prerogative in the UK: nine by three different House of Commons committees, three by Lords committees, one by a joint committee, seven by the government, and four by the Commons Library. Thirteen of these reports and statements – of varying lengths – deal specifically with the Crown prerogative authority to deploy the military. On top of this, during this time period the UK has gone through a general election in which the Crown prerogative to deploy was an issue, plus a decision to deploy in Libya and the now-famous August 2013 Commons decision not to further consider a deployment in Syria. This has resulted in a rich dialogue on the Crown prerogative power to deploy the military, and no small number of references to a “convention” to consult Parliament before exercise of this power. Yet in spite of all of this activity, a definitive UK position on the existence or not of a relevant constitutional convention is elusive.

74. Wingrove, *supra* note 71.

75. See e.g. Lagassé, “How Should Canada’s Parliament Decide Military”, *supra* note 10.

Broadly speaking, the UK dialogue on the convention issue can be separated into two: that which took place before the general election of 2010, and that after. Prior to the election, both a Commons committee in 2004⁷⁶ and Lords committee in 2006⁷⁷ referred to the argument that a convention to consult Parliament before a deployment had already formed following the 2003 Iraq deployment decision (in which prior parliamentary approval was obtained). However neither committee accepted this argument, and, importantly, the government expressly denied that the convention existed.⁷⁸ In fact at this time, the *development* of a convention was one of several options on the table for a Parliamentary consultation framework⁷⁹ (one with which the government expressly disapproved).⁸⁰ While there was a slight change in approach when Gordon Brown took over from Tony Blair as prime minister, this change was simply that the government first said it *would* propose that a “parliamentary convention” be developed,⁸¹ and then put forward language for a related parliamentary resolution.⁸² But in the event, before the government could

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76. UK, The House of Commons Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (16 March 2004) (London: The Stationery Office Limited) HC 422 at 6.
77. House of Lords Select Committee on the Constitution, *Waging War: Parliament's role and responsibility*, 2006 at 86.
78. A February 2005 statement by the Prime Minister to the effect “he did not think the vote set a constitutional precedent,” was acknowledged by the 2006 Lords Committee at 86, and the Lord Chancellor confirmed this position to the committee directly in answer to its question 273, stating: “you could not possibly go to war with Parliament against you because it is the embodiment of the people, but that is not the same as saying, as you are trying to say, that therefore gives rise to a convention that subject to emergencies or secrecy you have got to go to Parliament and have a vote on the substantive motion as to whether or not Parliament supports it.”
79. For the 2006 Lords Committee, the appropriate way forward was the development of a “parliamentary convention” (at 108).
80. See Government Response to the House of Lords Constitution Committee's Report, 15th Report of Session 2005-06, *Waging War: Parliaments Role and Responsibility* (7 November 2006) (London: The Stationery Office Limited) CM 6923 (the government went on to say: “the existing legal and constitutional convention is that it must be the Government which takes the decision in accordance with its own assessment of the position”.)
81. UK, “Governance of Britain”, cm 7170, Green Paper (July 2007) at 29; See also “War powers and Treaties: Limiting Executive powers”, cm 7239, Consultation Paper (25 October 2007) at 22 and its question 11.
82. UK, HC, “Constitutional Renewal”, cm 7342-I, White Paper (25 Mars 2008) at 215 and Annex A “draft detailed war powers resolution”. UK, The Commons Public Administration Select Committee, *Constitutional Renewal: Draft Bill and White Paper* (4 June 2008) (London: The Stationery Office Limited) HC 499 at 79; and the Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill* (31 July 2008) HL 166-I and HC 551-I at 318, 347; both agreed that the resolution capturing the “parliamentary convention” was the best way forward.

submit the draft resolution for formal consultation,⁸³ it was replaced following the May 2010 general election by the Conservative and Liberal Democrat coalition.

The Coalition Government's approach to the convention issue would be markedly different from that of its Labour predecessor. Most importantly, in a number of statements the government purported to acknowledge the existence of a "convention" – at least of some sort – to consult Parliament before deployments. In an oft-quoted example, in the March 2011 run-up to the intervention in Libya, Sir George Young, Leader of the House of Commons, stated: "A convention has developed in the House that before troops are committed, the House should have an opportunity to debate the matter. We propose to observe that convention except when there is an emergency and such action would not be appropriate".⁸⁴ Later that year, following pressure from the Commons Political and Constitutional Reform Committee⁸⁵, the government amended the Cabinet Manual – which was then in draft form – to read: "In 2011, the Government acknowledged that a convention had developed in Parliament that before troops were committed the House of Commons should have an opportunity to debate the matter and said that it proposed to observe that convention except when there was an emergency and such action would not be appropriate".⁸⁶

The coalition approach made great political sense. The two parties that made up the coalition had both campaigned in part on the promise to submit decisions regarding deployments to Parliamentarians. Upon taking the leadership of the Conservative Party in 2005, and in the role as critic of the ruling Labour government, David Cameron established the Democracy Task Force which produced a 2007

83. As it promised to do in Ministry of Justice, *The Governance of Britain*, "Review of the Executive Royal Prerogative Powers: Final Report" (October 2009) at 37.

84. UK, HC, *Parliamentary Debates*, vol 524, No 130, col 1066 (10 March 2011); Joseph, *supra* note 8 at 105 without any analysis on the point, refers to this statement as an acknowledgement of a "constitutional convention". See also *Constitution Act*, *supra* note 13 at 183.

85. UK, Political and Constitutional Reform Committee, *Constitutional Implications of the Cabinet Manual* (29 March 2011) (London: The Stationery Office Limited, 2011) HC 734 at 61; UK, Political and Constitutional Reform Committee, *Parliament's role in conflict decisions* (17 May 2011) (London: The Stationery Office Limited, 2011) HC 923 at 3.

86. "The Cabinet Manual: A guide to laws, conventions and rules on the operation of government," 1st ed (October 2011) at 5.38. (The Manual defines "Conventions" as "Rules of constitutional practice that are regarded as binding in operation but not law".)

report calling for parliamentary approval of military deployments.⁸⁷ More broadly, criticism of the Crown prerogative can be linked with populist strands of political conservatism.

Notwithstanding that the Coalition Government acknowledgement of the convention probably owes more to political and ideological factors than any objective assessment of parliamentary practice, the fact remains that the government did make statements about a convention to consult. However what has the Coalition Government said, exactly? There is no clear answer to this. Very importantly, the use of the terms “convention”⁸⁸ and “parliamentary convention,”⁸⁹ rather than “constitutional convention,” suggest what is referenced is a usage or practice rather than a constitutional obligation.⁹⁰ Also, in support of the existence of the “convention,” the government referred to the decision-making on the 2003 Iraq deployment; precisely the same precedent that was rejected by the Labour government (which was in power at the time) as creating a constitutional convention.⁹¹ We also find ambiguity in the words used to describe the “convention”. It provides an “*opportunity* to debate” a deployment; and situations of emergency where debate “would not be appropriate” are excluded.⁹² In addition, the actual practice of the coalition is not entirely consistent with the view that it was constitutionally bound to consult

87. R Gough, *An End to Sofa Government: Better working of Prime Minister and Cabinet* (London: Conservative Democracy Task Force, March 2007) at 1, 7-8.

88. UK, Political and Constitutional Reform Committee, *Parliament's role in conflict decisions: a way forward* (27 March 2014) (London: The Stationery Office Limited, 2014) HC 892 at 3.

89. See e.g. “The Government’s Response to the Report of the Lords Constitution Committee into Constitutional Arrangements for the Use of Armed Force Published on 24 July,” 25 Oct 2013, in which the government referred to “its commitment to respect the existing Parliamentary convention: that, before UK troops are committed to conflict, the House of Commons should have the opportunity to debate the matter, except where there was an emergency and such action would not be appropriate.”

90. Haddon implies this in discussion on the Syria vote: “a strong political convention has therefore been set...so the question that now remains is whether such a convention should be fixed constitutionally”. See also UK, House of Commons Library, “Parliamentary Approval for Deploying the Armed Forces: An Update”, SN05908 (13 October 2014), which seems to use the terms “constitutional convention” and “convention” to refer to two separate things.

91. In his March 2011 in reply to a question of the Commons Political and Constitutional Reform Committee, Cabinet Secretary Sir Gus O Donnell said: “the Government believes that it is apparent that since the events leading up to the deployment of troops in Iraq, a convention exists that Parliament will be given the opportunity to debate the decision to commit troops to armed conflict...”

92. For Joseph, *supra* note 8 at 185, “the government wanted to protect its extensive discretion and power over the decision to go to war and to restrict Parliament’s involvement to a purely formal approval of the executive’s decisions...”

Parliament. The government announced British participation in the operation to enforce the no-fly zone in Libya under United Nations Security Council Resolution 1973 on 18 March 2011, three days before the Commons would have the opportunity to debate the matter;⁹³ and in 2013, the government declined to engage Parliament at all in its decision to deploy assets in Mali.⁹⁴ Finally, even in the face of seemingly clear government acknowledgment of a convention, some academics have denied one has sprung into being. For example, in evidence to the Commons Political and Constitutional Reform Committee referred to in its 2011 report, Professor Nigel White stated: “I don’t think there is a constitutional convention or unwritten law that Parliament should be consulted about conflict decisions”.⁹⁵

On 29 August 2013, the House of Commons engaged in a debate on the situation in Syria and options for UK engagement there. Following debate, the Commons voted down a motion including wording that “a strong humanitarian response is required from the international community and that this may, if necessary, require military action that is legal, proportionate and focused on saving lives by preventing and deterring further use of Syria’s chemical weapons”.⁹⁶ Immediately following the announcement of the vote results, The Right Honourable Edward Miliband MP, Leader of the Opposition, raised a point of order asking “the Prime Minister [to] confirm to the House that, given the will of the House that has been expressed tonight, he will not use the Royal Prerogative to order the UK to be part of military action before there has been another vote in the House of Commons”.⁹⁷ Prime Minister Cameron answered: “Let me say that the House has not voted for either motion tonight. I strongly believe in the need for a tough response to the use of chemical weapons, but I also believe in respecting the will of this House of Commons. It is very clear tonight that, while the House has not passed

93. The Commons motion, which provided in part that the Commons “supports Her Majesty’s government...in the taking of all necessary measures” was approved 557 to 13.

94. This was acknowledged by the UK, House of Commons Library, “Parliamentary Approval for Deploying the Armed Forces: An Update”, SN05908 (13 October 2014) at 1, 4 [SN05908]: “military forces deployed to Mali in 2013 were neither the subject of a debate or a vote in Parliament”; (the government stated that the deployment was in response to an emergency request, and that British troops would not be placed in a combat role).

95. UK, Political and Constitutional Reform Committee, *Parliament’s role in conflict decisions*, (17 May 2011) (London: The Stationery Office Limited, 2011) HC 923 at 5, (referring to question 4).

96. UK, HC, Parliamentary Debates, vol 566, No 40, col 1425 (29 August 2013).

97. *Ibid* at col 1555.

a motion, the British Parliament, reflecting the views of the British people, does not want to see British military action. I get that, and the Government will act accordingly”.⁹⁸ Many commentators would jump on the Syria vote as evidence of a convention to consult Parliament, and even breathlessly declare that a new convention had been established requiring Parliament vote on all deployments,⁹⁹ or even approve them.¹⁰⁰

Yet even following the Syria experience, the Commons Library would opine that “under the Royal Prerogative, matters pertaining to defence and the Armed Forces are exercised by the Government on behalf of the Crown. In the event of a declaration of war, or the commitment of British forces to military action, however, *constitutional convention requires that authorisation is given by the Prime Minister. In constitutional terms therefore, the Government has liberty of action in this field*”.¹⁰¹ It would go on to state “on the occasion where a vote on the deployment of the Armed Forces has been held, were the Government to be defeated it would have been under *no constitutional obligation* to change its policy. The defeat would indicate the view of Parliament without prejudice to the exercise of the prerogative powers, although there would be great political pressure on the Government to take Parliament’s views into account”.¹⁰²

The government itself referred to the complexity of the issue following the Syria vote. Lord Wallace, Government Whip for the Foreign and Commonwealth Office, said the following in answer to a question of the Commons Political and Constitutional Reform Committee: “The Government has an evolving position... This Government, like its predecessor, has discovered as it goes into it that this is a great deal more complex than one thought. The definition of armed conflict and the deployment of forces has all sorts of ragged edges, questions of urgency and secrecy come in [...]. We are in the process of discover-

98. *Ibid* at col 1555-56.

99. For Phillipson, *supra* note 38 or 55: “It may now be said with some confidence, therefore that, following the Syria episode, a constitutional convention exists to the effect that the government must, before, commencing any military action, permit a debate and vote in the House of Commons and abide by its result, subject to a narrow exception exists where truly urgent action is required.” Hallwood, *supra* note 15 states: “While the Prime Minister officially retains the Royal Prerogative to declare war, it is clear that this power is now tempered by the convention that Parliament must vote on the matter beforehand”.

100. Joshua Rozenberg, “Syria intervention: is there a new constitutional convention”, *The Guardian* (2 Sep 2013).

101. SN05908, *supra* note 94 at 2 [Emphasis added.]

102. *Ibid* at 3 [Emphasis added.]

ing we need a strong convention but how we actually interpret it... is a large question".¹⁰³ Former UK Parliamentary Under Secretary of State at the Foreign and Commonwealth Office Alistair Burt has said that the Syria vote "expands the current convention of foreign policy relationships between the executive and the legislature to an as yet unknown and, crucially, uncertain extent".¹⁰⁴

The debate continues, and in 2014 the Commons Political and Constitutional Reform Committee would propose a parliamentary resolution framework, in part on the basis that it would assist by "embedding the current convention and clarifying some of the ambiguities that exist under current arrangements", and in reference to evidence that it had received arguing that "formalising Parliament's role would end any uncertainty about the existence of a convention, and also serve to clarify its terms".¹⁰⁵ These are hardly words describing a clear-cut constitutional convention. The Commons Defence Committee has since stated that "wherever possible, Parliament should be consulted prior to the commencement of military action, [recognizing] that this will not always be possible such as when urgent action is required",¹⁰⁶ with the lack of the word "convention", and the use of "wherever possible" and "should", suggesting something other than a "constitutional convention". It added words that come very close to the post-Syria vote Commons Library statement: "on the occasion where a vote on the deployment of the Armed Forces has been held, it could be argued, that were the Government to be defeated, it would be under no constitutional obligation to change its policy given its prerogative power in these matters",¹⁰⁷ and would refer to evidence of Steven Haines: "It is an interesting question whether or not the current PM's decision to refer Syria to Parliament has set a precedent that subsequent PMs will find it difficult not to repeat. One suspects this is the case but, as with all such constitutional shifts, we must wait for subsequent experience to either confirm a shift in that direction or mark the Syria decision out as an exceptional departure from a constitutional norm".¹⁰⁸

103. UK, Political and Constitutional Reform Committee, *Parliament's role in conflict decisions: a way forward*, (27 March 2014) (London: The Stationery Office Limited, 2014) HC 892 at 18 (referring to Lord Wallace's answer to Q 23)[HC 892].

104. Alistair Burt, "Vote that ties Britain's hands" (2013) 70:1 *The World Today* 30 at 30 [Burt, "Vote that ties Britain's hands"].

105. HC 892, *supra* note 103 at summary 9, 51.

106. UK, House of Commons Defence Committee, *Intervention: Why, When and How?* (28 April 2014) (London: The Stationery Office Limited, 2014) HC 952 at 11.

107. *Ibid* at 54. The 10 December 2013 version of SN05908 contained the similar statement, which was reproduced in the 13 October 2014 update.

108. *Ibid* at 62.

Thus in 2014, even after the August 2013 vote in the Commons that led the government to reverse its position on military intervention in Syria, the convention question lingers in the UK. While there have been Coalition Government statements and a Cabinet Manual entry suggesting the existence of a convention, all understandably seized upon by parliamentarians and some academics, it is not clear what the “convention” requires exactly, and there is a strong suggestion the word “convention” is being used as a synonym for a practice or usage rather than as shorthand for a “constitutional convention”. In other words, the view that a “constitutional convention” to consult Parliament would not be appropriate in Canada, and in any case that such a convention has not formed, is entirely consistent with the UK experience.

TALK OF CONVENTION AS CRITICISM OF THE CROWN PREROGATIVE

Given this, why are we talking about constitutional conventions at all in the deployment context? The answer is that positing a convention is part of a wide-ranging approach that is, at its heart, critical of the underlying Crown prerogative authority. The why of the criticism is plain enough: as discussed, there are those who believe certain types of executive power – including the power to deploy troops abroad – are an ill-fit with our political system. If the convention exists and Parliament must be consulted, then the underlying Crown prerogative-based deployment authority is weakened to that extent; Parliament has seized some of this suspect power for itself.¹⁰⁹ A parliamentary convention is one of several modes which can help shine the light of democracy on corners left dark by historical accident. Positing a consultation convention, therefore, is a form of second-order Crown prerogative criticism.

Two points follow. First, this critical underpinning for the positing of the convention can inform the analysis and discussion. Since critics are not dispassionately concerned with the list of existing constitutional conventions, arguments against the existence of the consultation convention – no matter how persuasive they may be

109. Again, there are others who would argue against this point of view, including in the particular situation of constitutional conventions: see, e.g. Moore who says in respect of the situation in the UK following the Syria vote: “Parliament cannot work if it tries to run the country as opposed to keeping a check on the people who run it”.

objectively – will never satisfy. This means that in respect of all but the most superficial level of analysis, discussion will be more fruitful when aimed at the broader questions. It does not really matter, ultimately, whether there can be a constitutional convention requiring parliamentary consultation or if there is one in fact. The crux of the matter is the proper role of Parliament in deployment decisions. This, ultimately, is where the hope of agreement lies; the thirsty desert traveller does not really care about whether the water hole does or does not exist, she just wants a drink.

The second point that can be made about the relationship between convention talk and general Crown prerogative criticism concerns what such talk implies about other anti-Crown prerogative arguments. In particular, statements about the existence of the consultation convention are often paired with arguments that the legislature should pass laws seizing the deployment authority from the executive. But the two arguments interact in an important way. If we find that there is a constitutional convention relating to executive decisions on military deployments, we suggest strongly that the underlying executive power is a *constitutional* one.¹¹⁰ Indeed, some, including Lagassé, have reached the position that the authority to deploy the military could be a constitutional one through a different route (analysis of s. 15 of the *Constitution Act, 1867*.)¹¹¹ But what is important in this context is the necessary corollary. If the executive's underlying authority to deploy is a constitutional one, then it cannot be abolished by ordinary statute and instead a constitutional amendment would be required.¹¹² For this reason, asserting the existence of a constitutional convention requiring that the government consult Parliament before deciding on a military deployment could undercut the oft-paired argument that Parliament can and should seize the deployment authority for itself by “occupying the field” through statute law.

110. The implication is also important in reverse: if we say the authority is not a constitutional one, then perhaps we undercut the argument that a practice related to its exercise can be a constitutional convention.

111. See P Lagassé, “The Crown’s Powers of Command-in-Chief: Interpreting Section 15 of the Constitution Act, 1867” (2013) 18:2 *Review of Constitutional Studies* 189.

112. *Ibid*: “In Canada...it is unclear if an act of Parliament could ever fully eclipse the Crown’s military prerogatives, under section 15 of the Constitution Act, 1867”. K Chapman, “The Unjustifiable Aspiration of the Canadian Parliament to Vote on Military Missions” (Jan-Feb 2014) 74:1 *RCMI Sitrep* 3 at 4 seems to go further, suggesting that the constitutional authority to deploy the military cannot be amended through “an emerging ‘convention’”.

CONCLUSION

When it is said that there is a “convention” requiring that Parliament be consulted before the executive decides on a military deployment, what is meant exactly? Perhaps the reference is to a simple practice, an approach that different governments have taken when making political choices on how to engage Parliament. It may be politically expedient to follow such a practice, or failure to follow it may present political difficulties, but that is the whole of it. The trouble is that the word “convention” can be taken to refer to a “constitutional convention”, a binding rule the violation of which amounts to an unconstitutional act. We must know which type of convention is meant each time the word is used. Above all, we cannot accept the establishment of a “convention” on the basis of the loose and common meaning of the term, only to turn around and supply the content and meaning of the established convention through reference to “constitutional” conventions. Perhaps this error is made with a convention to consult Parliament before military deployments, with a loose and ill-defined analysis used to posit the convention, and reference to constitutional obligations used to describe its violation. Alistair Burt, former UK Parliamentary Under Secretary of State at the Foreign and Commonwealth Office, is well aware of this important distinction when he states, in discussing changes to the relevant “convention” following the Syria vote, “I do not pretend to be a constitutional expert, and do not write as such, but as a practical politician with experience of executive Government”.¹¹³

This chapter has argued that there can be no constitutional convention to consult Parliament in advance of a deployment decision for the basic reason that this is not the sort of matter that is dealt with by constitutional conventions. Beyond this, even if such a convention were a possibility, the facts fall far short of satisfying the difficult test for the establishment of one. And while Canada can look to the rich UK experience to help inform its debate, the position that a constitutional convention has been established in that country is too simple.

Conjured from elements of political reality and a belief that Crown prerogative decision-making should not stand unchallenged, a constitutional convention requiring consultation with Parliament before deployment decisions is a political mirage: it does not and cannot exist in fact. Sourced in an underlying idea that the Crown

113. Burt, “Vote that ties Britain’s hands”, *supra* note 104 at 32.

prerogative authority to deploy the military is an ill-fit with Canada's form of liberal democracy, the positing of a consultation convention is a form of second order criticism. And yet it is a critical form that may prejudice others; in particular, if there is a constitutional convention requiring consultation with Parliament before the executive decides on a military deployment, then perhaps the whole deployment decision-making structure is a constitutional one and changes to it could not be made through ordinary legislation.

We could have a discussion about consultation "conventions" broadly-defined while acknowledging that the term is being used in an extra-legal way, or we can apply all of the meaning of the legal and political science term "constitutional convention" to the very narrow class it will cover, a class that will exclude a constitutional convention to consult Parliament on military deployments.¹¹⁴ Perhaps all of those concerned with the authority to deploy the military, and particularly those who would challenge the current executive decision-making power, would be better served focusing on the wider issue: how should Parliamentarians be involved in decisions to deploy the military? Under current decision-making systems, parliamentarians are involved in such decisions: they can ask questions of the executive and act as institutionalized critic, they control Business of Supply without which the military is undeployable, and ultimately the government must retain the confidence of the House of Commons to remain in power. For Joseph, parliamentary engagement in the exercise of what she calls the "war prerogative" fulfils "four functions": "legitimation", "mobilising consent", "scrutinizing", and an "expressive function".¹¹⁵ This involvement is an unqualified good, and there are interesting questions to be asked about whether parliamentarians are doing enough with what they have.¹¹⁶

114. For Joseph, *supra* note 8 at 107, these are two separate discourses: "[This chapter] has demonstrated that the Commons has played a varying, but influential, role in the exercise and scrutiny of the war prerogative. It has also highlighted the disparity between orthodox political and constitutional discourses, which assert the executive's exclusive power over war, and how the war prerogative is exercised in practice."

115. *Ibid* at 107-08

116. P Lagassé (5 May 2014) suggests that perhaps "the legislature is the source of its own marginality" on deployment decisions, *supra*, note 3.