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# **Towards Unilateralism? House of Commons Oversight of the Use of Force**

*C.R.G. Murray and Aoife O'Donoghue\**

## **Key Words**

Syrian Conflict – Use of Force – Humanitarian Intervention – Collective Self Defence – UN Security Council – Democratic Oversight – War Prerogative – UK Constitutional Conventions

## **Abstract**

Engaging democratically elected assemblies in national decision-making over the extraterritorial use of force seemingly provides a secure check on executive abuses of power. Many liberal democracies therefore maintain constitutional requirements that their elected national assembly must authorise decisions to use military force. By comparison, the UK Parliament has historically played a limited and often indirect role in authorising the use of force. From the vote on the Iraq War in 2003 onwards, however, the UK Parliament's role has increased to the point where, in August 2013, the defeat of a Government motion seeking approval for the use of force undermined efforts to build an international coalition to intervene in the on-going Syrian conflict. Whilst debate regarding this shift has hitherto concentrated on the degree to which parliamentary oversight of the war prerogative is desirable, in this article we consider what Parliament's evolving role heralds for the general relationship between domestic and UN mechanisms. We challenge the underlying assumption that Parliament's interventions mark an indisputably positive development in constraining the use of force. When coupled with the focus upon the doctrine of humanitarian intervention which has accompanied many controversial exercises of UK military force since the end of the Cold War, the involvement of Parliament in the decision-making process risks hollowing out UN Charter safeguards. Arguably, successive UK Governments have acquiesced to the extension of Parliament's role in an effort to shift the locus for legitimating uses of force

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away from UN institutions, where the UK cannot control the actions of other states, and towards domestic processes which are more susceptible to the Government's influence.

## Introduction

One of the more striking features of the ongoing crises in Libya, Syria and Iraq, is that the resultant use-of-force debates have not been confined to foreign ministries or the United Nations Security Council (UNSC), but have spilled over into many domestic assemblies. Executive-led justifications of proposed uses of force based upon accounts of national interest and international law might have triggered these debates, but they have been shaped by the legacy of the “new-world-order” humanitarian interventions of the 1990s and the post-9/11 invasions of Iraq and Afghanistan. Our article evaluates whether this turn towards, and even extension of, domestic use-of-force arrangements is aimed at circumventing inconvenient UN mechanisms. Orthodox accounts of international law have long treated the legitimacy of domestic constitutional arrangements for authorising force as irrelevant to the question of whether military action is legal.<sup>1</sup> Thus, when the United States (US) has characterised uses of force as “police actions”<sup>2</sup> or when President Barack Obama invoked the 2001 Authorization for the Use of Military Force to intervene in Syria and Iraq in 2014,<sup>3</sup> these evasions of the US Constitution's requirement of congressional approval of military action<sup>4</sup> have generally been thought not to affect these actions' compliance with international law.<sup>5</sup> In this article we treat the United Kingdom (UK) as our primary case study of state efforts to use domestic authorisation to side-step the Charter's strictures. The UK's permanent UNSC membership, its shifting domestic use-of-force arrangements and its invocation of novel legal bases for action combine to make its state practice worthy of particular study.

In the course of House of Commons debates over the UK's involvement in airstrikes in Libya, Syria and Iraq since 2011, the Government's legal justifications for action have included humanitarian intervention<sup>6</sup> and collective and individual security<sup>7</sup> in addition to

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<sup>1</sup> See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Judgment [1986] ICJ Rep 14, para.263. See also J. d'Aspremont, 'Legitimacy of Governments in the Age of Democracy' (2006) 38 NYUJ Intl L & Pol 877, 878-879.

<sup>2</sup> See T. Franck & F. Patel, 'UN Police Action in Lieu of War: "The Old Order Changeth"' (1991) 85 AJIL 63.

<sup>3</sup> Authorization for Use of Military Force 2001, Pub.L. 107-40.

<sup>4</sup> US Constitution, Art.I., s.8(11).

<sup>5</sup> See S.K. Murray, 'The Contemporary Presidency: Stretching the 2001 AUMF: A History of Two Presidencies' (2015) 45 PSQ 175, 192-194.

<sup>6</sup> See, for different perspectives on the doctrine, S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (OUP, 2001), A. Orford, *Reading Humanitarian Intervention: Human*

UNSC resolutions. These justifications complicate the question of whether a use of force complies with international law and can serve to cloak proposed military actions in superficially-impressive legalese. Such complication, however, has served the UK Government efforts to marginalise the significance of international institutions in use-of-force decisions and to enhance Parliament's role in the authorisation process. Historically, UK legislators played little role in authorising uses of force. As one judge put it bluntly in the 1960s, '[a] schoolboy's knowledge of history is ample to disclose some of the disasters which have been due to parliamentary ... attempts at control'.<sup>8</sup> Notwithstanding the dawn of democratic governance Parliament remained side-lined by executive dominance of the war prerogative throughout the twentieth-century. When the UN Charter invested the UNSC with the responsibility for authorising responses to threats to international peace and security, Parliament appeared further marginalised. In the twenty-first century, however, a constitutional convention has rapidly emerged by which the House of Commons' agreement is ordinarily necessary to authorise military action.<sup>9</sup>

The orthodox explanation of this development is that, amidst the on-going fallout from the 2003 Iraq War, ministers have been obliged to gain Parliament's assent to demonstrate their commitment to thorough oversight of the use of force.<sup>10</sup> This development has been cast in positive light, as bringing 'necessary democratic balance' to use-of-force decisions<sup>11</sup> and providing an additional check against abuses of power.<sup>12</sup> We maintain, however, that Parliament's developing role poses serious risks. MPs have become a key audience for Government efforts to vest extraordinary legal significance in UK state practice. Unlike, other states where legislature approval for use of force is ordinarily predicated upon separate UNSC authorisation,<sup>13</sup> the parliamentary process is not explicitly envisaged as

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*Rights and the Use of Force in International Law* (CUP, 2003), and J. Pattison, *Humanitarian Intervention and the Responsibility To Protect: Who Should Intervene?* (OUP, 2010).

<sup>7</sup> See C. Gray, *International Law and the Use of Force* (3<sup>rd</sup> Ed., OUP, 2008) 209-226.

<sup>8</sup> *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 100 (Lord Reid).

<sup>9</sup> See J. Strong, 'Why Parliament Now Decides on War: Tracing the Growth of the Parliamentary Prerogative through Syria, Libya and Iraq' (2015) 17 BJPIR 604, 605.

<sup>10</sup> *ibid.*, 606.

<sup>11</sup> N.D. White, 'Libya and Lessons from Iraq: International Law and the Use of Force by the United Kingdom' (2011) 42 NYIL 215, 225. See also A. McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71 MLR 853, 866-867.

<sup>12</sup> See S. Dieterich, H. Hummel & S. Marschall, 'Bringing Democracy Back In: The Democratic Peace, Parliamentary War Powers and European Participation in the 2003 Iraq War' (2015) 50 C&C 87 and D. Peters & W. Wagner, 'Between Military Efficiency and Democratic Legitimacy: Mapping Parliamentary War Powers in Contemporary Democracies, 1989-2004' (2011) 64 PA 175.

<sup>13</sup> European Council, 'Seville Declarations on the Treaty of Nice' (21 Jun 2002). See also the Irish Department of Foreign Affairs on Ireland's 'Triple-Lock' system securing its neutrality, available at: <http://www.dfa.ie/home/index.aspx?id=26263>.

supplementing the Charter's requirements. The newfound ministerial willingness to submit use-of-force decisions to Parliament may well mark an effort to supplant, rather than supplement, international mechanisms for legitimating the use of force.<sup>14</sup>

We open our account with an explanation of the multiple conceptions of legitimacy in the context of the use of force and how governments can manipulate this indeterminacy to generate a basis for military action. We then trace the development of two trends in UK use-of-force decision making. We designate the first trend as the external dimension, because it deals with the UK Government's interpretation of when military action is in accordance with international law. Rather than exhaustively recounting the controversial recent history of humanitarian intervention or anticipatory self-defence we specifically address how the UK Government has sought, through its characterisation of state practice, to bring about changes to international law. Parliament's expanding role in use-of-force decisions provides the internal dimension of the UK's changing practice. We examine how the UK Government has combined parliamentary authorisation with novel legal bases for action to facilitate the use of military force. In his efforts to persuade Parliament to authorise interventions in Libya in 2011, Syria in 2013, Iraq in 2014, and again in Syria in 2015, David Cameron has repeatedly sought to relegate international institutions to the margins. This approach potentially gives free rein to unilateralist and hegemonic exercises of military power yet many parliamentarians have maintained the need for engagement with international mechanisms to legitimate the use of force.

## **Legality and Legitimacy in the Use of Force**

Given humanitarian intervention's scant grounding in international law<sup>15</sup> commentators have exposed how, during NATO's 1999 Kosovo intervention, participating states began to cast the doctrine as legitimate, rather than legal. The shift in language was not subtle. At the height of NATO's airstrikes Tony Blair declared that this was 'a just war, based not on any territorial ambitions but on values'.<sup>16</sup> A month later the UK Foreign Secretary, Robin Cook, dismissed questions over the legality of using force as a distraction from 'the evil that we are

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<sup>14</sup> As such, humanitarian intervention could amount to little more than an 'antiseptic version of imperialism'; B.R. Barber, 'Constitutional Faith' in M.C. Nussbaum (ed), *For Love of Country: Debating the Limits of Patriotism* (Beacon Press, 1996) 30, 33.

<sup>15</sup> S. Chesterman, *Just War or Just Peace?: Humanitarian Intervention and International Law* (OUP, 2001) 231.

<sup>16</sup> A. Blair, 'Doctrine of the International Community' (Speech delivered at Chicago, 24 April 1999). Available at: <http://webarchive.nationalarchives.gov.uk/+/www.number10.gov.uk/Page1297>.

fighting'.<sup>17</sup> Bruno Simma came perilously close to endorsing such claims by asserting that the Kosovo intervention could 'with all due caution ... be regarded as legitimately, if not legally, following the direction of ... UN decisions'.<sup>18</sup> This shift was not a mere linguistic trope. Whereas the legality of a use of force is dependent upon compliance with rules of international law the legitimacy of such an action is arguably the product of a combination of legal, political and moral considerations which do not necessarily align.<sup>19</sup> The balance between these factors can shift depending upon whether a government is seeking to persuade international institutions or a domestic audience that a proposed military action is legitimate. The concept of legitimacy can therefore be grounded in 'particular values and on unilateral or partial appreciations' of an action,<sup>20</sup> providing a level of indeterminacy which can be exploited when militarily powerful countries seek to evade international law's restrictions upon military force.

Nonetheless, Anthea Roberts suggests that a binary account of the relationship between legality and legitimacy is unhelpful; 'one of the functions of law is to help delimit legitimate actions from illegitimate actions and thus help guide behaviour'.<sup>21</sup> When we speak of "legalised" legitimacy, derived in part from a rules-based assessment of the validity of actions, political legitimacy, derived from the democratic accountability of the actors involved in a decision, and moral legitimacy, derived from the values-based arguments for intervention (such as the desirability of assisting allies or alleviating a humanitarian crisis), these facets of "rightful" international conduct are not demarked by fixed boundaries.<sup>22</sup> Even in the context of the Kosovo intervention, the Blair Government might have wrapped the UK's involvement in the rhetoric of legitimacy, but it also advanced response to a humanitarian catastrophe as a legal basis for action.<sup>23</sup> The subsequent machinations surrounding UNSC Resolution 1441<sup>24</sup> as a legal basis for the Iraq War in 2003,<sup>25</sup> show the

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<sup>17</sup> HC Deb, vol.331, col.890 (18 May 1999). See also col.886.

<sup>18</sup> B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 EJIL 1, 12. For echoes of this position see the Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (2000) 164 and T. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (CUP, 2002) 175-184.

<sup>19</sup> See C. Thomas, 'The Use and Abuses of Legitimacy within International Law' (2014) 34 OJLS 729, 733.

<sup>20</sup> J. Crawford, 'The Problems of Legitimacy-Speak' (2004) 98 ASILC 271, 272.

<sup>21</sup> A. Roberts, 'Legality vs Legitimacy: Can Uses of Force Be Illegal but Justified?' in P. Alston & E. MacDonald (eds), *Human Rights, Intervention, and the Use of Force* (OUP, 2008) 179, 207.

<sup>22</sup> See J-M. Coicaud, 'Deconstructing International Legitimacy' in H. Charlesworth & J-M. Coicaud (eds), *Fault Lines of International Legitimacy* (CUP, 2010) 29, 56-67.

<sup>23</sup> See I. Brownlie, 'Kosovo Crisis Inquiry: Memoranda on the International Law Aspects' (2000) 49 ICLQ 878. Michael Glennon exposes the tensions within the UK Foreign Office and between the UK and US on a legal basis for the Kosovo intervention; M. Glennon, *Limits of Law, Prerogatives of Power: Intervention after Kosovo* (2001) 178.

<sup>24</sup> UNSC Res. 1441 (8 Nov 2002) UN Doc. S/RES/1441.

continuing importance of building a legal (and not simply political or moral) case for UK military action.

When the UK has sought to use force outwith a clear basis under the Charter these examples indicate that the Government has placed a premium on constructing plausible “legalised” grounds for action. Inconvenient international law strictures needed to be weakened as a corollary of these efforts. Throughout his time in office Tony Blair maintained that a ‘reconsideration’<sup>26</sup> of the UNSC’s role was necessary and warned that he could not contemplate the escalation of perceived threats to peace and security when ‘the UN – because of a political disagreement in its Councils – is paralysed’.<sup>27</sup> International law, as it so the case within the UK’s dualist legal order, was presented as more malleable than domestic law, no matter how firmly established the specific rules on the use of force.<sup>28</sup> This combination of questioning the UNSC’s role and positing alternate bases for the use of force was not intended to substitute legitimacy for legality, but to give an action enough of a flavour of international legality to generate a base of support amongst domestic actors. UK Government circles internalised the lesson from these events that a case for military action couched in legalised language and approved by authoritative figures like the Attorney General could make an action appear sufficiently legitimate to neutralise some domestic opposition.

The shift towards a legalised, as opposed to legal basis for war, is not simply some rhetorical ruse, it signals a deeper transformation in the use-of-force discourse. Legalised arguments and political and moral legitimacy claims provide a mutually-reinforcing cycle. In the context of our UK case study this discourse can be seen at work in the recent UK Parliamentary debates over intervention in the Middle East and the Maghreb. The summary of the Attorney General’s advice published prior to the 2013 Syria-intervention debate parsed the relevant international law. It focused upon intervention’s potential for ‘detering and disrupting’<sup>29</sup> the use of chemical weapons by the Assad regime, but referred to the absence of a UNSC mandate only obliquely, in stating that the ‘UK is seeking a resolution ... which

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<sup>25</sup> See G. Simpson, ‘The War in Iraq and International Law’ (2005) 6 *MelbJIntLaw* 167.

<sup>26</sup> A. Blair, ‘Doctrine of the International Community’ (Speech delivered at Chicago, 24 April 1999). Available at: <http://webarchive.nationalarchives.gov.uk/+www.number10.gov.uk/Page1297>.

<sup>27</sup> A. Blair, ‘The Threat of Global Terrorism’ (Speech delivered at Sedgefield, 5 Mar 2004). Available at: <http://www.theguardian.com/politics/2004/mar/05/iraq.iraq>.

<sup>28</sup> See T. Franck, *The Power of Legitimacy Among Nations* (OUP, 1990) 4-8.

<sup>29</sup> See D. Grieve, ‘Guidance: Chemical Weapon Use by Syrian Regime: UK Government Legal Position’ (29 Aug 2013) para.2. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/235098/Chemical-weapon-use-by-Syrian-regime-UK-government-legal-position.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235098/Chemical-weapon-use-by-Syrian-regime-UK-government-legal-position.pdf).

would ... authorise member states ... to take all necessary measures to protect civilians in Syria'.<sup>30</sup> Little over a year later David Cameron insisted that a military response to the rise of Islamic State (ISIS) in both Iraq and Syria would be legal on the basis of self-defence concerns,<sup>31</sup> generated by the return of UK-resident ISIS fighters, and the need to protect refugees and minority communities.<sup>32</sup> In the event, only a deployment in Iraq, which had requested assistance, was subject to a vote, but through such claims the Government was attempting to establish a legalised basis for a more extensive action should the issue be revisited. Although UNSC inaction has overshadowed many of these parliamentary debates, even when it has acted, as in the case of Resolution 2249 (albeit not under Chapter VII) on the threat to international peace and security posed by ISIS,<sup>33</sup> the UK Government has maintained its freedom of action with regard to this precedent by declaring that this 'resolution is not necessary ... to justify action'.<sup>34</sup> By contrast, with regard to action against ISIS in Syria, the Prime Minister has characterised the Commons' support for UK action as being so significant that he would not hold a vote 'if there is a danger of losing it'.<sup>35</sup> These examples showcase the UK Government attempting to generate legitimacy for an action through superficially plausible, even if far from orthodox, legal explanations of the use of force. If the Commons accepts these claims, and authorises such an action, a necessary degree of domestic political legitimacy will attach to an action.

When Parliament is swayed by legalised language, it generates a precedent which makes support for future actions easier to secure. As with executive practice, domestic assemblies can contribute to the state-practice basis for customary international law.<sup>36</sup> In theory, therefore, a legislature's acceptance of non-Charter-based justifications for military force could contribute to the legality of such an action. When a legislature has been democratically-elected, its authorisation of a use of force poses a challenge to the basis of international institutions' authority.<sup>37</sup> As such, "democratic" authorisation can be used to silence or marginalise "peace through law" enthusiasts'.<sup>38</sup> In the post-9/11 era, the Bush

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<sup>30</sup> *ibid.*, para.3.

<sup>31</sup> Charter of the United Nations (24 Oct 1945) 1 UNTS XVI, Article 51.

<sup>32</sup> HC Deb, vol.585, col.1255 (26 Sep 2014).

<sup>33</sup> UNSC Res. 2249 (20 Nov 2015) UN Doc. S/RES/2249.

<sup>34</sup> J. Wright, HC Deb, vol.602, col.1468 (26 Nov 2015).

<sup>35</sup> HC Deb, vol.602, col.1505 (26 Nov 2015).

<sup>36</sup> See M. Wood (ILC Special Rapporteur), 'Second Report on Identification of Customary International Law' (2014) UN Doc A/CN.4/672, para.41. Available at: [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_672.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_672.pdf).

<sup>37</sup> See A. Slaughter & W. Burke-White, 'The Future of International Law is Domestic (or, the European Way of Law)' (2006) 47 Harv Intl LJ 327 and B.R. Roth, *Governmental Illegitimacy in International Law* (OUP, 2000).

<sup>38</sup> M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 EJIL 907, 911.



Administration used such reasoning to deny the authority of international institutions.<sup>39</sup> The converse of this process is readily identifiable; international institutional activity regularly impacts upon the domestic legitimacy of conflict decisions. Resolution 1973 authorising the 2011 intervention in Libya<sup>40</sup> played an important role in legitimating the US engagement even in the absence of specific congressional approval for the deployment.<sup>41</sup> In the UK, David Cameron similarly harnessed ‘the legitimising power of the Security Council to win ... parliamentary support’.<sup>42</sup> In contrast to democratically-elected domestic assemblies, UN mechanisms are susceptible to critique on the basis of their so-called democratic deficit.<sup>43</sup> Claims that domestic assembly authorisation can enhance the international legal legitimacy of an intervention are therefore difficult for the UNSC to resist, but create obvious dangers.

### **The External Dimension: Sidestepping the UNSC**

The panoply of legal arguments advanced by states regarding the use of force during and since the 2011 intervention in Libya evidences their eagerness to develop novel, and non-Charter-based, legal avenues for military action. The UK’s invocation of humanitarian intervention and self defence illustrates this shift, and in this section we examine the UK’s changing approach to these doctrines. For our purposes self defence covers any effort to justify an action under Article 51 of the Charter, which permits states to use force without Chapter VII authorisation.<sup>44</sup> Humanitarian intervention is understood as the military involvement of one or more states in another state without its consent or UN authorisation for avowedly altruistic purposes, such as protecting civilians from serious human rights abuses by the state or by forces which the state is unable or unwilling to control.<sup>45</sup> This formula adopt a state-centric approach to the global legal order.<sup>46</sup>

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<sup>39</sup> See R. Kagan, ‘America’s Crisis of Legitimacy’ (2004) 83 FA 65, 67.

<sup>40</sup> UNSC Res. 1973, ‘Libya’ (17 Mar 2011) UN Doc. S/RES/1973.

<sup>41</sup> J. Galbraith, ‘International Law and the Domestic Separation of Powers’ (2013) 99 VaLRev 987, 998-999.

<sup>42</sup> J. Strong, ‘Why Parliament Now Decides on War: Tracing the Growth of the Parliamentary Prerogative through Syria, Libya and Iraq’ (2015) 17 BJPIR 604, 615.

<sup>43</sup> See S. Wheatley, *The Democratic Legitimacy of International Law* (Hart, 2010) 50-59 and J. Crawford & S. Marks, ‘The Global Democracy Deficit: An Essay in International Law and its Limits’, in D. Archibugi, D. Held & M. Köhler (eds), *Re-imagining political community: Studies in Cosmopolitan Democracy* (Stanford UP, 1998) 72.

<sup>44</sup> Charter of the United Nations (24 Oct 1945) 1 UNTS XVI, Article 51.

<sup>45</sup> See R. Higgins, ‘Intervention and International Law’, in H. Bull (ed.), *Intervention in World Politics* (OUP, 1988) 31. See also A. Roberts, ‘The So-Called “Right” of Humanitarian Intervention’ (2000) 3 YIHL 3, 5.

<sup>46</sup> See A. Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (CUP, 2003) 56-70 and S. Robertson, ‘Beseeching Dominance: Critical Thoughts on the Responsibility to Protect Doctrine’ (2005) 12 Aust ILJ 33.

States have long invoked humanitarian grounds for intervention even when other means of addressing a situation remained open. The pre-Charter era saw numerous supposedly-altruistic interventions.<sup>47</sup> Pre-Charter debates over interventions were often internal to the intervening powers, especially when the interests of other powerful states were not in question. The value of these interventions as precedents for action did not survive the Charter, which constrains the use of force using Westphalian conceptions of state sovereignty<sup>48</sup> and by the power-relations between the UNSC's five permanent members.<sup>49</sup> A direct reading of the Charter's terms, reinforced by the 1970 UN General Assembly Declaration on Friendly Relations,<sup>50</sup> treats recourse to force as legal if undertaken in self-defence, collective or individual, or under the auspices of Chapter VII resolutions. Outside these confines use of force by states is *prima facie* illegal, although episodes such as "Uniting for Peace" indicate the possibility of alternate bases for UN-authorized action.<sup>51</sup>

The UK's impatience with the confines of the Charter has a dark history stretching back to the Suez Crisis.<sup>52</sup> Prime Minister Anthony Eden declared that no UK Government could ever be expected to give Parliament an absolute 'pledge or guarantee' that the UK would only use force under a UNSC mandate.<sup>53</sup> As the Leader of the Opposition responded, the operative question was rather whether the use of force was authorised by the Charter, given that Article 51 permitted action in self-defence without UNSC approval.<sup>54</sup> Threatening resignation if the Government continued to present the Suez intervention as abiding by international law, the Law Officers maintained that it was 'difficult if not impossible to find any legal justification for our actions'.<sup>55</sup> Charlotte Peevers argues that the Suez debacle not only ended Eden's premiership, but also his approach to the UN within UK policy making.<sup>56</sup>

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<sup>47</sup> See E.C. Stowell, *Intervention in International Law* (John Byrne, 1921) 51-62 and J. MacMillan, 'Historicising Intervention: Strategy and Synchronicity in British Intervention 1815-50' (2013) 39 *Rev Intl Stud* 1091.

<sup>48</sup> Charter of the United Nations (24 Oct 1945) 1 UNTS XVI, Article 2.4.

<sup>49</sup> See S. Krasner, *Sovereignty: Organised Hypocrisy* (Princeton UP, 1999) 14-20.

<sup>50</sup> UNGA Res. 2625 (XXV), 'Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States' (24 Oct 1970) UN Doc. A/8028.

<sup>51</sup> UNGA Res. 377 (V), 'Uniting for Peace' (30 Nov 1950) UN Doc. A/1775. See A. Carswell, 'Unblocking the UN Security Council: The *Uniting for Peace* Resolution' (2013) 18 *JCSL* 453, 456-459.

<sup>52</sup> See, in the context of the Suez Crisis, G. Marston, 'Armed Intervention in the 1956 Suez Canal Crisis: Legal Advice Tendered to the British Government' (1988) 37 *ICLQ* 773.

<sup>53</sup> HC Deb, vol.558, col.307 (13 Sep 1956).

<sup>54</sup> H. Gaitskell, Letter to the Editor, *The Times* (15 Sep 1956).

<sup>55</sup> UK National Archives, PREM 11/1129, Letter from R. Manningham-Buller (Attorney General) to R.A. Butler (Home Secretary) (28 Nov 1956).

<sup>56</sup> Suez might not be quite as clear-cut a turning point as Peevers suggests. Archive materials show that, into the 1960s legal advisors were still working to persuade Ministry of Defence officials that, outside of Article 51's self-defence provisions, a conflict which is not authorised by a UNSC resolution would breach international law.

If Eden had regarded the UN as a mechanism for Great Power management of global affairs,<sup>57</sup> his legal advisers and domestic public opinion instead regarded the Charter as ‘embedding peace through law’.<sup>58</sup> UN mechanisms would, at least for a time, become central to UK policy on the use of force,<sup>59</sup> with its position as a permanent UNSC member being used to restrict recourse to force by its Cold War rivals.<sup>60</sup> Official discussions over the 1970 Declaration on Friendly Relations, for example, regarded the Charter as a basis for denouncing the Brezhnev Doctrine interventions between Warsaw Pact states.<sup>61</sup>

All of the Permanent Five have wielded their UNSC veto to deny the existence of threats to international peace and security or to prevent intervention in response to such threats.<sup>62</sup> Nonetheless, since the Cold War such activity has generated increasing frustration with the UNSC system.<sup>63</sup> It has incentivised efforts to find alternate legal bases for action, even if the UK Law Officers had denied their existence during Suez. The Charter’s recognition of self-defence as a basis for the use of force outwith UNSC authorisation has provided one avenue for action, and state practice under this ground has become increasingly controversial. The invocation by several Attorneys General of the *Caroline Case*<sup>64</sup> places the UK within the imminent-attack school, by which a state does not have to wait for an armed attack to occur, but can strike first when such an attack is clearly anticipated and immediate.<sup>65</sup> Lord Goldsmith’s advice regarding the 2003 Iraq War positions the UK as accepting a right to anticipatory self-defence but also distanced the UK from the pre-emptive “Bush Doctrine” which permits a response to a threat which is more remote in time and location.<sup>66</sup> The US’

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UK National Archives, DEFE 7/2001, Letter from B.B. Hall (Treasury Solicitor’s Department) to P.D. Martyn (Ministry of Defence) (15 Aug 1962) 1-2.

<sup>57</sup> [U]nless the great Powers in the modern world are going to agree and play their part in the world organisation, that organisation cannot function properly’; A. Eden, HC Deb, vol.413 col.677 (22 Aug 1945).

<sup>58</sup> C. Peevers, *The Politics of Justifying Force: The Suez Crisis, the Iraq War and International Law* (OUP, 2013) 90.

<sup>59</sup> *ibid.*, 214-215.

<sup>60</sup> See R. Higgins, *Problems and Process: International Law and How We Use It* (OUP, 1994) 262 and W.M. Reisman, ‘Unilateral Actions and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention’ (2000) 11 EJIL 3, 12.

<sup>61</sup> UK National Archives, FCO 28/920, Letter from C.L.G. Mallaby (FCO Eastern European & Soviet Department) to R. Braithwaite (FCO Western Organisations Department) (2 Jun 1970) para.2.

<sup>62</sup> See A. Roberts, ‘Legality vs Legitimacy: Can Uses of Force Be Illegal but Justified?’ in P. Alston & E. MacDonald (eds), *Human Rights, Intervention, and the Use of Force* (OUP, 2008) 179, 186.

<sup>63</sup> See M. Kumm, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’ (2004) 15 EJIL 907, 911.

<sup>64</sup> The test from the *Caroline Case* allows self defence when the attack is ‘instant, overwhelming, and leaving no choice of means, and no moment for deliberation’. *Caroline Case* (1837) 2 Moore Digest of International Law, ii (1906) 412.

<sup>65</sup> See Justice Select Committee, ‘Oral Evidence: The Work of the Attorney General’ (15 September 2015) HC 409, Q34

<sup>66</sup> Lord Goldsmith, ‘Iraq: Resolution 1441’ (7 Mar 2003). Available at: <http://www.theguardian.com/politics/2005/apr/28/election2005.uk>.

employment of the ‘unwilling or unable’ doctrine has also been controversial. Although most commentators argue that it has yet to become part of customary international law,<sup>67</sup> in 2015 Australia and Canada utilised it within the context of their claims to be acting against ISIS in Syria under self defence.<sup>68</sup> The most significant change to self-defence has come about since 2001 with the potential for non-state actors to fall within Article 51. Previously it was accepted that only state-based armed attacks qualified. This has arguably been extended to include non-state actors such as Al Qaeda and ISIS, albeit such a change to customary international law remains contested.<sup>69</sup> In the background of these claims is the need to conform to the Charter, demonstrated by states notifying the UNSC of a use of self-defence and by the UNSC’s capacity to affirm the existence of a threat to international peace and security to which a response is required. Such factual determinations by the UNSC are becoming increasingly significant when states seek to take action against terrorist threats.

That the Charter does not expressly prohibit humanitarian intervention and in certain circumstances such action might address some of the Charter’s underlying objects and purposes, are the tenuous grounds often relied upon by that doctrine’s proponents.<sup>70</sup> Although articles of the Charter have been re-interpreted in light of customary international law,<sup>71</sup> a state’s ability to control its internal and external affairs, or to consent to ceding control, remains paramount.<sup>72</sup> The International Court of Justice (ICJ) moreover maintained, in the

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<sup>67</sup> See D.I. Ahmed, ‘Defending Weak States against the “Unwilling or Unable” Doctrine’ (2013) 9 JILIR 1, 5-13 and A. Deeks. “‘Unwilling or Unable’: Toward a Normative Framework for Extra-Territorial Self-Defense’ (2012) 52 VaJIL 483.

<sup>68</sup> Letter from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General UN, (23 Sep 2014) Doc., S/2014/695. Letter from the Chargé d’Affaires of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council (31 Mar 2015) UN Doc. S/2015/221, Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council (9 Sept 2015) UN Doc. S/2015/693. See D.I. Ahmed, ‘Defending Weak States against the “Unwilling or Unable” Doctrine’ (2013) 9 Journal of International Law and International Relations 1, 5-13, Ashley Deeks. “‘Unwilling or Unable’: Toward a Normative Framework for Extra-Territorial Self-Defense’ (2012) 52 Virginia Journal of International Law 483.

<sup>69</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment [2005] ICJ Rep 168 and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136.

<sup>70</sup> See K. Anderson, ‘Legality of Intervention in Syria in Response to Chemical Weapon Attacks’ *ASIL Insight* (30 Aug 2013), available at: <http://www.asil.org/insights/volume/17/issue/21/legality-intervention-syria-response-chemical-weapon-attacks>.

<sup>71</sup> Changes to the Charter through though customary international law include UNSC abstentions not being understood as rejecting a proposal under Article 27.3 and expansions to the UN Secretary General’s role under Article 99. In the latter regard, see A. O’Donoghue, ‘Good Offices: Grasping the Place of Law in Conflict’ (2014) 34 LS 469, 477.

<sup>72</sup> See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment [2005] ICJ Rep 168, para.148. The R2P doctrine affirms this position but places additional emphasis on the responsibilities of a state towards its own population; see UNGA Res. 60/1, ‘Responsibility to Protect, World Summit Outcome’ (24 Oct 2005) UN Doc. A/RES/60/1 and UNSC Res. 1973, ‘On Libya’ (17 Mar 2011) UN Doc. S/RES/1973.

*Nicaragua Case*, that the UNSC has primary (but not exclusive) authority on the use of force<sup>73</sup> and further that there were, to date, no working examples of humanitarian intervention.<sup>74</sup> The UK's 1984 Foreign and Commonwealth Office (FCO) Policy Document provides one of the clearest state articulations, concluding that 'the best case that can be made in support of humanitarian intervention is that it cannot be said to unambiguously illegal'.<sup>75</sup> The FCO further highlighted the uncertainty surrounding existing state practice:

[H]istory has shown that humanitarian ends are almost always mixed with other less laudable motives for intervening, and because often the "humanitarian" benefits of an intervention are either not claimed by the intervening state or are only put forward as an *ex post facto* justification of the intervention.<sup>76</sup>

Some Charter violations could be linked to humanitarian crises (including India's intervention in East Pakistan,<sup>77</sup> Vietnam's intervention in Cambodia<sup>78</sup> and Tanzania's intervention in Uganda<sup>79</sup>). But despite the subsequent reliance on these examples by humanitarian intervention's proponents, intervening states often recognised that they were acting illegally and rarely, if ever, employed humanitarian intervention as a justification.<sup>80</sup> General Assembly resolutions on the use of force, provide no support for humanitarian intervention and the vast majority of states continue to deny its existence.<sup>81</sup>

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<sup>73</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Jurisdiction and Admissibility [1984] ICJ Rep 392, para.94

<sup>74</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Judgment [1986] ICJ Rep 14, para.124-125. Of particular importance is the ICJ's recognition, at para.268, that '[t]he protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports ... or ... with the training, arming and equipping of the Contras'.

<sup>75</sup> FCO Paper, 'Is Intervention Ever Justified?' Foreign Policy Document No.148 1984 (1986) 57 BYIL 614, 618.

<sup>76</sup> *ibid.*, 619.

<sup>77</sup> See 1971 UNYB 144-146. See also T.M. Franck & N.S. Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force' (1973) 67 AJIL 275.

<sup>78</sup> See 1979 UNYB 271-279.

<sup>79</sup> See 1979 UNYB 262-263. In 1984, the UK FCO stated that the Uganda and Bangladeshi examples constituted self-defence claims, even though they have subsequently been described as examples of humanitarian intervention; FCO Paper, 'Is Intervention Ever Justified?' Foreign Policy Document No.148 1984 (1986) 57 BYIL 614, 619.

<sup>80</sup> Intervention in Cambodia attracted General Assembly condemnation UNGA Res. 34/22, 'The Situation in Kampuchea' (14 Nov 1979) UN Doc. A/RES/34/22.

<sup>81</sup> UNGA Res. 2625 (XXV), 'Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States' (24 Oct 1970) UN Doc. A/8028 and UNGA Res. 3314 (XXIX), 'Definition of Aggression' (14 Dec 1974) UN Doc. A/9631. Group of 77 South Summit, Havana, Cuba (10-14 Apr 2000) para.54, available at: [http://www.g77.org/summit/Declaration\\_G77Summit.htm](http://www.g77.org/summit/Declaration_G77Summit.htm). See also, Movement of the Non-Aligned Countries, XVI Ministerial Conference, Tehran (26-31 August 2012) para.598, available at: <http://www.pmiran.at/NAM/Final%20Document%20%28NAM%202012%29.pdf>.

The post-Cold War era saw an increasing debate over the doctrine.<sup>82</sup> Whilst the US, UK and France did not invoke a stand-alone right to humanitarian intervention during the 1991 enforcement of no-fly zones over Iraq, preferring to rely on a very broad interpretation of UNSC Resolution 688, the mixing of multiple basis for use of force would become more prominent. In particular, assertions of apparent UN authorisation would become a hallmark of US state practice.<sup>83</sup> The basis for UK involvement was less than clear. Whereas one minister maintained that ‘[i]t is difficult and probably undesirable to lay down rules concerning a right to intervene’,<sup>84</sup> the FCO Legal Adviser Anthony Aust subsequently informed parliamentarians that the no-fly-zone operations had been based not on UNSC Resolutions, but on humanitarian intervention.<sup>85</sup> While admitting that this doctrine had no agreed definition, Aust gamely articulated his account of the necessary criteria for invoking the doctrine; first, the intervening state must consider there to be a compelling and urgent situation of extreme humanitarian distress, second, the affected state would have to be unwilling or unable to address such distress itself, third, a lack of practical alternatives to intervention and, fourth, any action by the intervening state should be limited to the time and scope necessitated by the crisis.<sup>86</sup> Aust, however, subsequently asserted that most precedents for humanitarian intervention related to the protection of nationals abroad, an entirely separate issue under international law.<sup>87</sup> In the early 1990s the UK position on humanitarian intervention was therefore characterised by confusion over the grounds for invoking the doctrine, compounded by reliance upon irrelevant precedents and scant consideration for how to evidence the basis for an intervention before domestic and international fora.

Despite its doubtful legality, UK policy makers rely upon NATO’s 1999 operations in Kosovo as an example of state practice, even though the main legal argument invoked by both the US and UK was implied authorisation under UNSC Resolutions 1199 and 1203.<sup>88</sup>

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<sup>82</sup> UNSC Res. 794, ‘On Somalia’ (3 Dec 1992) UN Doc. S/RES/794.

<sup>83</sup> UNSC Res. 688, ‘On Iraq’ (5 Apr 1991) UN Doc. S/RES/688. China, Russia and the Arab League, all opposed the action, while the UN Secretary General reiterated the Security Councils’ pre-eminence. See O. Schachter, ‘United Nations Law in the Gulf Conflict’ (1991) 85 AJIL 452. See also N. Blokker, ‘Is the Authorization Authorized? Powers and Practice of the UN Security Council to authorize the Use of Force by “Coalitions of the Able and Willing”’ (2000) 11 EJIL 541.

<sup>84</sup> Earl of Caithness, HL Deb, vol. 534, col. 1380 (29 Jan 1992).

<sup>85</sup> Foreign Affairs Committee, *Third Report: The Expanding Role of the United Nations and its implications for United Kingdom Policy* (23 Jun 1993) HC 235-III, Q109.

<sup>86</sup> *ibid.*, Q142.

<sup>87</sup> *ibid.*, Q143. An example of the protection of nationals abroad would be the Entebbe Incident of 1976 involving Israel and Uganda; D. Gordon, ‘Use of Force for the Protection of Nationals Abroad: The Entebbe Incident’ (1977) 9 Case WRJIL 117.

<sup>88</sup> UNSC Res. 1199, ‘On Kosovo (FRY)’ (23 Sep 1998) UN Doc. S/RES/1199 and UNSC Res. 1203, ‘On Kosovo’ (24 Oct 1998) UN Doc. S/RES/1203. See also UNSC Res. 1160, ‘On the letters from the United Kingdom (S/1998/223) and the United States (S/1998/272)’ (31 Mar 1998) UN Doc. S/RES/1160.

Critically, Tony Blair's administration did employ humanitarian intervention rhetoric, placing it within its new approach to international community,<sup>89</sup> but this departure from previous FCO policy was not without historical revisionism. Following the Kosovo intervention Robin Cook asserted that since 1989 there is an 'obligation to recognise that the international community does have a right to intervene where the sovereign state is permitting or practising genocide or gross humanitarian violations.'<sup>90</sup> He later developed this claim:

First, any intervention is by definition a failure of prevention. Force should always be the last resort; second, the immediate responsibility for halting violence rests with the state in which it occurs; but, third, when faced with an overwhelming humanitarian catastrophe and a government that has demonstrated itself unwilling or unable to halt or prevent it, the international community should act; and finally any use of force in this context should be collective, proportionate, likely to achieve its objective, and carried out in accordance with international law.<sup>91</sup>

Cook insisted that humanitarian intervention ought to be undertaken in line with the rule of law and alongside international partners. Critically, from the perspective of domestic debates, these qualifications point towards collective action rather than an individual state's "right" to invoke humanitarian intervention.<sup>92</sup> Parliament's Foreign Affairs Committee was unmoved by these claims, asserting that the Kosovo operation 'was contrary to the specific terms ... of the UN Charter'<sup>93</sup> and that 'the doctrine of humanitarian intervention has a tenuous basis in current international customary law ... [which] renders NATO action legally questionable'.<sup>94</sup> In response the Government welcomed the Committee's acknowledgment of its efforts to obtain a clearer UNSC mandate, but high-handedly and curiously given the Executive's later reliance on Parliamentarians, concluded 'that disputes about international law are not ones that the Committee can resolve'.<sup>95</sup>

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<sup>89</sup> A. Blair, 'Doctrine of the International Community' (Speech delivered at Chicago, 24 April 1999). Available at: <http://webarchive.nationalarchives.gov.uk/+/www.number10.gov.uk/Page1297>.

<sup>90</sup> R. Cook, Speech at the London School of Economics, 13 Jan 2000 (2000) 71 BYIL 641, 642.

<sup>91</sup> R. Cook, Speech at Chatham House, 28 Jan 2000 (2000) 71 BYIL 643, 643-644.

<sup>92</sup> See Robin Cook's discussion of a 'comprehensive approach' when humanitarian crises arise; R. Cook, Speech to the American Bar Association, 19 Jul 2000 (2000) 71 BYIL 646, 647-648.

<sup>93</sup> Foreign Affairs Committee, *Fourth Report: Kosovo* (7 Jun 2000) HC 28-I, para.128

<sup>94</sup> *ibid.*, para.132. The Committee did go on to note, at para.134, that 'faced with the threat of veto in the Security Council by Russia and China, the NATO allies did all that they could to make the international intervention on Kosovo as compliant with the tenets of international law as possible'. The Committee, at para 144, suggested the creation of new instruments to enable such actions ought to be considered.

<sup>95</sup> R. Cook, Press Statement, 7 Jun 2000 (2000) 71 BYIL 645, 645.

Kosovo provides a dubious basis for claims of a change in state practice. NATO was vague in its justifications, and certainly did not directly claim a right of humanitarian intervention, referring obliquely to the need to respond to humanitarian catastrophes.<sup>96</sup> Most NATO states justified their intervention by reference “implied authorisation” under UNSC Resolutions. France, the Netherlands and Slovenia explicitly drew upon the UNSC’s acceptance under Chapter VII that events in Kosovo constituted a threat to international peace and security, albeit both China and Russia’s strongly opposed the suggestion that this provided a basis for NATO’s action.<sup>97</sup> In the subsequent ICJ case, instigated by Serbia, there was scant reliance upon the supposed right of intervention.<sup>98</sup> Dismissed at the provisional measures stage, only Belgium provided substantive legal grounds justifying intervention. These justifications centred upon implied authorisation, noting the UNSC’s rejection of Russia’s draft resolution condemning the intervention.<sup>99</sup> Humanitarian intervention was raised only as an ancillary argument. India, Tanzania and Vietnam’s historical interventions were erroneously invoked as examples of relevant state practice.<sup>100</sup> Serbia, by contrast, maintained that there was no right of intervention.<sup>101</sup>

In spite of the UN Secretary General re-iterating the UNSC’s centrality within the international security system,<sup>102</sup> the Kosovo intervention has been drawn upon as a model for circumventing the Charter. Although at the time Germany denied that Kosovo set a precedent for future action, the then German Chancellor, Gerhard Schroeder, has subsequently claimed that NATO’s actions in Kosovo provided a precedent for Russia’s intervention during the Crimea Crisis; ‘[w]e sent our plan[e]s to Serbia and together with the rest of NATO they bombed a sovereign state without any UN security council backing’.<sup>103</sup> Other NATO states also relied upon the failure of diplomatic efforts as a justification for military action.<sup>104</sup> Again, such claims would subsequently resurface in the context of proposed military action against the Assad regime in Syria in response to its use of chemical weapons in 2013, with

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<sup>96</sup> NATO Press Release (99)12 (30 Jan 1999) para.4-5.

<sup>97</sup> See C. Gray, *International Law and the Use of Force* (3<sup>rd</sup> Ed., OUP, 2008) 47.

<sup>98</sup> As can be seen from the US position, *Legality of Use of Force (Yugoslavia v United States of America)* 1999 ICJ Pleadings (Verbatim Record: CR 1999/24) (11 May 1999) 10, available at: <http://www.icj-cij.org/docket/files/114/4577.pdf>.

<sup>99</sup> *Legality of Use of Force (Yugoslavia v Belgium)* 1999 ICJ Pleadings (Verbatim Record: CR 1999/15) (10 May 1999) 7, available at: <http://www.icj-cij.org/docket/files/114/4491.pdf>.

<sup>100</sup> Belgium also invoked the UK’s intervention in Sierra Leone in 1999, on which see K. Samuels, ‘*Jus Ad Bellum* and Civil Conflicts: A Case Study of the International Community’s Approach to Violence in the Conflict in Sierra Leone’ (2003) 8 JCSL 315.

<sup>101</sup> *Legality of Use of Force (Yugoslavia v United States of America)*, Application (29 Apr 1999) 5, available at: <http://www.icj-cij.org/docket/files/114/7173.pdf>.

<sup>102</sup> *Report of the Secretary General on the work of the Organization*, UN Doc A/54/1 (1999) para.66.

<sup>103</sup> See T. Paterson, ‘Merkel fury after Gerhard Schroeder backs Putin on Ukraine’ *Telegraph* (14 Mar 2014).

<sup>104</sup> See 1999 UNYB 342-343.



UNSC members which supported intervention characterising it as a last resort to prevent humanitarian catastrophe after the failure of all diplomatic efforts. China, by contrast, viewed events in Syria as an internal matter and emphasised Article 2.4 of the Charter.<sup>105</sup> The development of responsibility to protect (R2P) provides a legal basis for intervention where states are unwilling or unable to protect their own citizens.<sup>106</sup> R2P recognises that states owe a broad range of duties to protect their populations and after a failure to do so the international community may take collective action to protect populations within the Charter's terms.<sup>107</sup> This doctrine, which Kofi Annan envisaged as forestalling action without UN authorisation,<sup>108</sup> undermines claims that a right of humanitarian intervention has emerged over the past two decades.<sup>109</sup>

This section has demonstrated the UK's increasing intermixing of legal justifications for uses of force in recent decades. Even when doctrines like humanitarian intervention have grabbed headlines, they have never stood alone as credible legal bases for action. In some supposed instances of legal humanitarian intervention Chapter VII UNSC Resolutions have fully authorised the use of force. In other cases they have been relied upon as providing implied authorisation or as establishing the factual scenario of a threat to international peace and security. Self-defence, either collective or individual, has in many respects become as controversial a basis for action as humanitarian intervention. The US and UK have asserted that Article 51 of the Charter grants states a very broad remit to decide when to invoke self-defence, provided they report their action to the UNSC. As Christine Gray argues, this 'lip-service' to the basis of self-defence risks dressing up uses of force in a 'vener of legality'.<sup>110</sup> Justifying uses of force based upon a concoction of grounds 'boils with the danger of abuse',<sup>111</sup> particularly if such a case is constructed with the aim of swaying the opinion of domestic legislators.

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<sup>105</sup> See Security Council 7019<sup>th</sup> Meeting (19 Aug 2013) UN Doc. S/PV.7019, 27.

<sup>106</sup> ICISS Report, *Responsibility to Protect* (Dec 2001), available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

<sup>107</sup> *ibid.*, para.139. See also UN Secretary General Report, *Implementation of the Right to Protect* (12 Jan 2009) A/63/677.

<sup>108</sup> UN Secretary General Report, *In Larger Freedom, Towards Development, Security and Human Rights for All*, (21 Mar 2005) A/59/2005. See also J.L. Cohen *Globalisation and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (CUP, 2012) 172-180.

<sup>109</sup> Ban Ki-moon has stated that R2P is only triggered by specific crimes, such as genocide or crimes against humanity, inflicted by a state against its population; UN Secretary General Report, *Responsible Sovereignty: International Cooperation for a Changed World* (15 Jul 2008) SG/SM/11701.

<sup>110</sup> C. Gray, *International Law and the Use of Force* (3rd Ed., OUP, 2008) 166

<sup>111</sup> R. Dworkin, 'A New Philosophy for International Law' (2013) 41 P&PA 2, 25. See also I. Johnstone, 'The Plea of Necessity in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism' (2004) 43 CJTL 337, 365.

## **The Internal Dimension: The UK Parliament's Expanding Role in Use of Force Decisions**

The path towards the adoption of a constitutional convention whereby the House of Commons will be consulted on military action and thereby provide democratic oversight of the use of force begins in the nineteenth century, before the UK's governance arrangements became truly democratic. A.V. Dicey's contradictory interpretations of the UK war prerogative illustrate how difficult it would be for the Commons to develop an oversight role. Initially, Dicey explained that as a prerogative power, 'it is not Parliament, but the Ministry, who ... virtually decide all questions of peace or war'.<sup>112</sup> This position aligned with William Blackstone's account, whereby royal (executive) powers were deliberately excluded from Parliament's purview 'for the sake of unanimity, strength, and dispatch',<sup>113</sup> traits not always associated with parliamentary deliberation. Dicey was, however, writing in an era where representative politics were gaining importance. Even with his distrust of democracy, appreciated that he could not simply recite that executive discretion over conflict decisions remained unfettered. He therefore qualified his claims regarding the prerogative, asserting that these powers were 'exercised by a Cabinet who are really servants, not of the Crown, but of a representative chamber which in its turn obeys the behests of the electors'.<sup>114</sup>

In the early twentieth century "democratic" control of foreign policy often seemed far removed from political reality. When the opposition contemplated a censure motion regarding the conduct of the Boer War, its own MPs expressed a widely held view that Parliament was 'a consultative body' on military affairs; '[i]t can stimulate or it can paralyse action, but it cannot direct it'.<sup>115</sup> Parliamentarians' powerlessness was compounded by a lack of access to information. Ministers alone were able to draw upon the advice of professional diplomats, leading James Bryce to encourage MPs to grant the executive considerable latitude in foreign affairs:

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<sup>112</sup> A.V. Dicey, *An Introduction to the Study of the Constitution* (8<sup>th</sup> Ed., first published 1915, Liberty Fund, 1982) 310.

<sup>113</sup> W. Blackstone, *Commentaries on the Laws of England* (1765) vol. I, 250. For the influence of this view, see F. Flournoy, *Parliament and War* (P.S. King, 1927) 263.

<sup>114</sup> A.V. Dicey, *An Introduction to the Study of the Constitution* (8<sup>th</sup> Ed., first published 1915, Liberty Fund, 1982) 312. Francis Flournoy agreed that the executive's independence in the field of foreign relations, 'so complete in theory, was under a considerable degree of indirect control by Parliament'; F. Flournoy, *Parliament and War* (P.S. King, 1927) 8.

<sup>115</sup> J. Moulton, HC Deb, vol. 78, col 625 (5 Feb 1900).

[T]he foreign relations of modern states are so numerous and complex ... that ... even democratic countries like France and England are forced to leave foreign affairs to a far greater degree than home affairs to the discretion of the ministry of the day.<sup>116</sup>

During his time at the Foreign Office Sir Edward Grey operated under the oversight not of Parliament, nor even of the Cabinet, but of ‘a small group of Ministers who received all ... important dispatches’.<sup>117</sup> Grey stoked parliamentarians uncertainties over foreign affairs,<sup>118</sup> warning them of the perils of foreign policy conducted against a backdrop of ‘constant criticisms of individual Members of the House’.<sup>119</sup> Answers to foreign policy questions were frequently opaque or were refused for reasons of security.<sup>120</sup> Grey was not, however, averse to having his cake and eating it too, informing the French Ambassador that ‘he could promise nothing to any foreign power’ which would not receive Parliament’s ‘whole-hearted support’.<sup>121</sup> Subjection to ‘[a] long course of the Grey treatment’<sup>122</sup> saw some MPs bridle at their marginalisation and call for a dedicated Foreign Affairs Committee with access to diplomatic briefings<sup>123</sup> to strengthen parliamentary expertise and thereby enhance scrutiny.<sup>124</sup> These calls long went unheeded.<sup>125</sup>

Short of a censure motion,<sup>126</sup> Parliament’s avenue for constraining the use of force lay in its control over government spending,<sup>127</sup> given the extraordinary costs associated with

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<sup>116</sup> J. Bryce, *The American Commonwealth* (1<sup>st</sup> Ed., first published 1888, Macmillan, 1918) 221-222. These view had ben first articulated in Bryce’s time as a Foreign Office minister; HC Deb, vol.303, col.1420 (19 Mar 1886).

<sup>117</sup> K.G. Robbins, ‘The Foreign Secretary, the Cabinet, Parliament and the Parties’ in F.H. Hinsley, *British Foreign Policy under Sir Edward Grey* (CUP, 1977) 3, 7.

<sup>118</sup> S. Low, ‘The Foreign Office Autocracy’ (Jan 1912) 41/541 Fortnightly Review 1, 5.

<sup>119</sup> HC Deb, vol.32, col.60 (27 Nov 1911).

<sup>120</sup> F. Flournoy, *Parliament and War* (P.S. King, 1927) 15.

<sup>121</sup> K.G. Robbins, ‘Public Opinion, The Press and Pressure Groups’ in F.H. Hinsley, *British Foreign Policy under Sir Edward Grey* (CUP, 1977) 70, 70. See also E. Grey, *Twenty-Five Years, 1892-1916* (Frederick A. Stokes, 1925) vol. I, 287-289.

<sup>122</sup> G.H. Perris, *Our Foreign Policy and Sir Edward Grey’s Failure* (Andrew Melrose, 1912) 207.

<sup>123</sup> J. Bryce, *The American Commonwealth* (1<sup>st</sup> Ed., first published 1888, Macmillan, 1918) 222. On the influence of Bryce’s writings, see M. Swartz, *The Union of Democratic Control in British Politics during the First World War* (OUP, 1971) 6.

<sup>124</sup> See S. Low, ‘The Foreign Office Autocracy’ (Jan 1912) 41/541 Fortnightly Review 1, 8 and G.H. Perris, *Our Foreign Policy and Sir Edward Grey’s Failure* (Andrew Melrose, 1912) 209-210.

<sup>125</sup> A departmental select committee covering the work of the FCO was ultimately introduced as part of the wider reform of parliamentary committees in 1979. See C. Poyser ‘Proceedings on the Record: The Floor of the House, the Foreign Affairs Committee and other Committees’ in C. Carstairs & R. Ware, *Parliament and International Relations* (Open UP, 1992) 8, 28-32.

<sup>126</sup> See J. Bryce, HC Deb, vol.303, col.1420 (19 Mar 1886).

<sup>127</sup> F. Flournoy, *Parliament and War* (P.S. King, 1927) 8. This traditional lever over executive action was recently emphasised in a Constitution Committee report on the deployments in Iraq and Afghanistan; Constitution Committee, *Waging War: Parliament’s Role and Responsibility* (2006) HL Paper 236-I, para.14.

military campaigns.<sup>128</sup> Radical Liberals did force votes over foreign-policy-related censure and supply motions in the years preceding the First World War, but these were roundly defeated.<sup>129</sup> Amidst the fraught diplomacy of late-July 1914, as the Cabinet fractured over whether the UK should intervene in the event of a continental war,<sup>130</sup> parliamentarians remained slow to express public dissent. Late that month, in a scheduled debate on UK naval spending, the Commons followed the entreaties of Charles Beresford, a leading critic of the UK's foreign policy, that it would 'be most unpatriotic under the circumstances abroad for anyone to make a drastic criticism showing up the weak points in our naval policy at the present moment'.<sup>131</sup> For all of this weakness, however, when Grey came before Parliament on the eve of war, even though no vote was called, in a real sense he was seeking the authority of the Commons. He outlined the Government's view of international relations and law, and put before MPs the circumstances in which he believed the UK would be drawn into conflict. A short debate ensued in which the leaders of the major parties assented.<sup>132</sup> That a vote was not needed speaks to the inevitability of the outcome.<sup>133</sup> To this day Grey's speech remains dogged by controversy, with his critics arguing that Parliament committed the UK to war on the basis of a partial rendering of the events precipitating the conflict.<sup>134</sup>

Parliament's response to the First World War set the tone for its subsequent engagement with the war prerogative. As a matter of law, there may have been no requirement for Parliament's prior permission for the use of force,<sup>135</sup> but prior to 1914 some actors were beginning to speak of a "constitutional" need to involve Parliament.<sup>136</sup> After the war, such involvement would ordinarily be limited to a government's 'informal consultation with Parliament',<sup>137</sup> whereby ministers outlined official policy in an unamendable adjournment motion and invited parliamentary discussion, with the potential risk of censure being constrained by the party whip. By this process Parliament considered, often *ex post facto*, exercises of the war prerogative and gave tacit approval to twentieth-century military

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<sup>128</sup> See C. Ku & H.K. Jacobson, 'Broaching the Issue' in C. Ku & H.K. Jacobson (eds.), *Democratic Accountability and the Use of Force in International Law* (CUP, 2003) 3, 15-18 and N.D. White, *Democracy Goes to War: British Military Deployments under International Law* (OUP, 2009) 269-295.

<sup>129</sup> See HC Deb, vol.41, col.1498 (25 Jul 1912) and HC Deb, vol.50, col.2056 (28 Mar 1913).

<sup>130</sup> P. Richards, *Parliament and Foreign Affairs* (Allen & Unwin, 1966) 40.

<sup>131</sup> HC Deb, vol.65, col.955 (27 Jul 1914).

<sup>132</sup> Beginning in Hansard at HC Deb, vol.65, col.1809 (3 Aug 1914).

<sup>133</sup> See W. Churchill, *The World Crisis* (Charles Scribner's Sons, 1923) vol.I, 235.

<sup>134</sup> F. Flournoy, *Parliament and War* (P.S. King, 1927) 225.

<sup>135</sup> R. Joseph, *The War Prerogative: History, Reform and Constitutional Design* (OUP, 2013) 107.

<sup>136</sup> See F. Flournoy, *Parliament and War* (P.S. King, 1927) 247-248.

<sup>137</sup> *ibid.*, 257.

interventions.<sup>138</sup> Its involvement was intended to scrutinise and ultimately legitimate UK policy, to inform the general public and also to prevent the accumulation of societal tensions by airing different viewpoints on the decision to use force.<sup>139</sup> Often these arrangements meant that the Commons would find itself presented with a “done deal” by ministers;<sup>140</sup> circumstances it would be internationally humiliating for MPs to question the Government’s policy.<sup>141</sup> Even as the mystique surrounding the Foreign Office waned in the aftermath of the First World War,<sup>142</sup> ministers would continue to provide deliberately vague answers to parliamentary questions regarding military operations.<sup>143</sup> Into the Charter era the exigencies of the Cold War thwarted any development of Parliament’s oversight of war powers. Against the backdrop of potential nuclear war, the Ministry of Defence protocol on military deployments warned that ‘almost every military move or alert is a subject of public concern and comment’.<sup>144</sup> When no one could tell whether a proxy war might ignite a wider conflict the watchwords became executive freedom, and ‘any argument about whether Parliament should insist on giving prior approval to a war becomes farcical’.<sup>145</sup> Even in the lead up to the 2003 Iraq War debate the Attorney General maintained that it would ‘be lawful and constitutional for the Government, in exercising the Royal Prerogative ... to engage United Kingdom forces in military action without the prior approval of Parliament’.<sup>146</sup> The most extensive claim that could be made of this history of “democratic oversight” within the UK is consequently subject to extensive caveats; ‘there has not been a significant armed conflict overseas since the beginning of the 20th century in which the United Kingdom has been involved where, in one way or another, at the time of decision or in retrospect, this House has not indicated whether, and in what way, it has consented to the Executive decision taken’.<sup>147</sup>

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<sup>138</sup> Examples of such debates begin in Hansard at HC Deb, vol.351, col.291 (3 Sep 1939) (Second World War); HC Deb, vol.477, col.485 (5 July 1950) (Korean War); HC Deb, vol.21, col.633 (3 Apr 1982) (Falklands War); HC Deb, vol.184, col.23. (21 Jan 1991) (Gulf War); HC Deb, vol.328, col.536 (25 Mar 1999) (Kosovo War).

<sup>139</sup> R. Joseph, *The War Prerogative: History, Reform and Constitutional Design* (OUP, 2013) 107-108.

<sup>140</sup> S. Low, ‘The Foreign Office Autocracy’ (Jan 1912) 41/541 *Fortnightly Review* 1, 6.

<sup>141</sup> R. Joseph, *The War Prerogative: History, Reform and Constitutional Design* (OUP, 2013) 71-72.

<sup>142</sup> Z. Steiner, *The Foreign Office and Foreign Policy, 1898-1914* (Ashfield, 1986) 170-171.

<sup>143</sup> When questions were recently raised over the effectiveness of combat drones in Afghanistan, the Minister of State for Defence refused to answer, on the basis that doing so ‘would be likely to prejudice the capability, effectiveness or security of the armed forces’ and that an evaluation of the strategic lessons from the campaign would not occur until ‘combat operations are complete and all relevant information is available’. M. Francois, vol.584, col.688W (16 Jul 2014).

<sup>144</sup> UK National Archives, DEFE 7/2001, Chiefs of Staff Committee, ‘Authority to Alert and Move Forces’ (25 Jun. 1962) para.4.

<sup>145</sup> P. Richards, *Parliament and Foreign Affairs* (Allen & Unwin, 1966) 38-39.

<sup>146</sup> HL Deb vol.664, col.1138 (19 Feb 2003).

<sup>147</sup> J. Straw, HC Deb, vol.460, col.492 (15 May 2007).

If the Cold War ossified the form of Parliament's involvement in use-of-force decisions, the Charter's provisions did at least change the focus of its scrutiny.<sup>148</sup> Although, in the Charter ratification debate, some MPs noted Parliament's limited role in foreign affairs,<sup>149</sup> through the second half of the twentieth century parliamentarians paid increasing attention to UNSC activity. Other than instances such as the Falkland's War, where the UK's actions were explained by reference to self defence,<sup>150</sup> the bright-line nature of the Charter's restrictions meant that, from the Korean War onwards,<sup>151</sup> it became standard practice for ministers to refer to authorising UNSC Resolutions in motions seeking parliamentary support for military interventions. The effect of the lack of such a Resolution is exemplified by the heated debates over the 1956 Suez Crisis<sup>152</sup> and the 2003 Iraq War.<sup>153</sup> But even in the latter context, the motion before Parliament sought to clothe the UK's use of force on the pretext of destroying Iraq's supposed stockpiles of Weapons of Mass Destruction in the UNSC's authority; 'the opinion of the Attorney General that, ... Iraq being at the time of Resolution 1441 and continuing to be in material breach, the authority to use force under Resolution 678 has revived and so continues today'.<sup>154</sup> Parliament supported this motion by 412 votes to 149.

The Iraq War debate and vote were, at the time, presented as major concessions by the Blair Government. Hitherto, the control of foreign affairs under the Royal Prerogative and arguments that any substantive parliamentary dissent towards UK policy 'might be exploited by the adversary as evidence of division and hence weakness'<sup>155</sup> had enabled ministers to avoid such set-piece debates and votes. The Blair Government's change of approach from its practice at the outset of the interventions in Kosovo, Sierra Leone and Afghanistan, was not without its benefits for the administration. The UK Government enjoys marked advantages in the Commons as opposed to the UNSC in its efforts to legitimate the use of force. Opposition to military action which a Government has made the case for being in the national interest can be cast as unpatriotic in time of crisis. Fear of this label had so affected the Labour Party

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<sup>148</sup> Even in the 1930s some commentators had pointed to the development of international institutional arrangements for authorising uses of force displacing domestic processes; see J.L. Brierly, 'International Law and Resort to Armed Force' (1932) 4 CLJ 308, 318.

<sup>149</sup> '[I]t is necessary that the Government should have behind them an informed House of Commons, whose members can bring home to their constituents throughout the country the true state of international relations'; D. Lipson, HC Deb, vol.413 col.727 (22 Aug 1945).

<sup>150</sup> HC Deb, vol.21, col.571 (2 Apr 1982). See also UK National Archives, FCO 7/4501, I. Sinclair (FCO Legal Adviser), 'Formal Consequences of a State of War Between the UK and Argentina' (9 Apr 1982).

<sup>151</sup> C. Attlee, HC Deb, vol.477, col.485 (5 July 1950). See N.D. White, *Democracy Goes to War British Military Deployments under International Law* (OUP, 2009) 90-104.

<sup>152</sup> Beginning in Hansard at HC Deb, vol.558, col.2 (12 Sep 1956).

<sup>153</sup> Beginning in Hansard at HC Deb, vol.401, col.760 (18 Mar 2003).

<sup>154</sup> HC Deb, vol.401, col.760 (18 Mar 2003).

<sup>155</sup> Foreign Affairs Committee, *Fourth Report: Kosovo* (7 Jun 2000) HC 28-I, para.166.

at the time of its opposition to the Suez intervention that, even after its success in the 1964 General Election, it refused to institute an inquiry into the Crisis.<sup>156</sup> Despite the concerns he expressed before Parliament over the Iraq War, Iain Duncan Smith nonetheless brought the bulk of Conservative MPs to support the action on the basis that ‘when the Government do the right thing by the British people, they deserve the support of the House’.<sup>157</sup> Party loyalty can also be exploited to keep the Government’s own backbench MPs in line with its position on military force,<sup>158</sup> which Tony Blair played up to by suggesting that he would resign if defeated.<sup>159</sup> Moreover, notwithstanding the inherent difficulty with isolating legal issues from the wider context of international relations,<sup>160</sup> the nature of Commons debate precludes authoritative legal or security assessment, leaving parliamentarians beholden to summaries of the advice enjoyed by the Executive. In the context of the Iraq War both the intelligence basis for war<sup>161</sup> and the summary of the Attorney General’s legal advice provided to Parliament were seriously deficient.<sup>162</sup> In the final assessment a parliamentary authorisation of a use of force remains a political assessment drawing upon national interest and moral considerations as well as issues of lawfulness. MPs might therefore accept (as some arguably did in the context of Iraq) an action as legitimate notwithstanding a breach of international law.<sup>163</sup> Exploiting these advantages, the Blair Government harnessed the legitimating force of Parliament’s vote on the use of force to draw attention away from the lack of a clear basis for military action under international law.

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<sup>156</sup> For example, having opposed the use of force in Suez fear of such a backlash dissuaded Labour, when it entered Government in 1964, from See C. Peevers, *The Politics of Justifying Force: The Suez Crisis, the Iraq War and International Law* (OUP, 2013) 124-125.

<sup>157</sup> HC Deb, vol.401, col.774 (18 Mar 2003).

<sup>158</sup> See C. Peevers, *The Politics of Justifying Force: The Suez Crisis, the Iraq War and International Law* (OUP, 2013) 231-233.

<sup>159</sup> HC Deb, vol.401, col.773 (18 Mar 2003).

<sup>160</sup> See *R (Gentle) v Prime Minister* [2006] EWCA Civ 1689; [2007] QB 689, [46] (Clarke MR).

<sup>161</sup> ‘Iraq’s Weapons of Mass Destruction: The Assessment of the British Government’ (2003), available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/272079/5972.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272079/5972.pdf).

<sup>162</sup> The Chilcot Inquiry is yet to publish its report on the lessons from the 2003 Iraq War. The Iraq Inquiry, (HC Deb, vol.494, col. 23 (15 Jun 2009)), now looks unlikely to be published until mid-2016; see BBC News, ‘Chilcot Inquiry: Doubts over report’s release in 2015’ (21 Apr 2015), available at: <http://www.bbc.co.uk/news/uk-32390844>.

<sup>163</sup> See, for example, the position of the Foreign Affairs Committee that the Kosovo intervention, ‘if of dubious legality in the current state of international law, was justified on moral grounds’; Foreign Affairs Committee, *Fourth Report: Kosovo* (7 Jun 2000) HC 28-I, para.138.

## Combining the Internal and External Approaches

The importance of the 2003 Iraq War to the UK's overarching approach to the use of force can nonetheless be overstated. This conflict did not witness the creation of a constitutional convention requiring that the House of Commons be consulted over future uses of force. When the courts thereafter heard challenges to the legality of the invasion no judges spoke of adjusting their approaches in light of a developing convention. At best, the *Gentle*<sup>164</sup> jurisprudence pointed to the hazy nature of democratic oversight of UK military action, as seen in Lord Hope's assertion that the lawfulness of the invasion was 'a matter for ... which ministers are answerable to Parliament and, ultimately, to the electorate'.<sup>165</sup> On becoming Prime Minister Gordon Brown pledged enhanced parliamentary oversight of the use of force,<sup>166</sup> and his Government supported claims that the Iraq vote set a precedent regarding the Commons approval of military action,<sup>167</sup> but did not have cause to act upon this pledge. The Iraq War vote could well have been an aberration, had it not been for the chastening impact of the subsequent 'ill-fated occupation of the country'<sup>168</sup> and David Cameron's consequent eagerness to distance his administrations' repeated uses of force from the Blair Government's practice. Cameron's administrations have intertwined the enhancement of Parliament's role in approving military actions (the internal shift in UK use-of-force processes) with the already-established trend of advancing novel grounds for action in international law (the external aspect of how the UK approaches the use of force). The UK's responses to the collapse of the Libya, the Syrian Civil War and the rise of ISIS have involved the official invocation of almost every conceivable legal justification for the use of force before the Westminster Parliament. Although each successive vote has hardened the constitutional convention that Parliament will be consulted on uses of force, little has been done to strengthen the Parliament's capacity to meaningfully scrutinise proposals for military action.

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<sup>164</sup> *R (Gentle) v Prime Minister* [2008] UKHL 20; [2008] 1 AC 1356.

<sup>165</sup> *ibid.*, [24] (Lord Hope). See also, [62] (Lord Carswell).

<sup>166</sup> HM Government, *The Governance of Britain* (HMSO, 2007) Cm.7170, para.29.

<sup>167</sup> See J. Straw, HC Deb, vol.460, col.492 (15 May 2007).

<sup>168</sup> J. Straw, 'BRISMES Lecture: The Future of British Foreign Policy in the Middle East' (2015) 42 *British Journal of Middle Eastern Studies* 375, 376.



(i) 2011 Debate: Use of Force against Qaddafi's Regime in Libya

Following the 2010 general election the Coalition Government accepted the constitutional force behind Parliament's claims to authority over the 2011 intervention in Libya. As Sir George Young, informed the House of Commons:

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. As with the Iraq war and other events, we propose to give the House the opportunity to debate the matter before troops are committed.<sup>169</sup>

The Government's acceptance that it was, outside exceptional circumstances, bound to give the Commons a consultative vote on military action was in part a function of its nature as a coalition, and in part a conscious effort by David Cameron to differentiate his approach to conflict from Tony Blair's reluctant acceptance of a vote on the 2003 Iraq War.<sup>170</sup> According to Joseph, ministers appreciated that '[t]he decision to deploy the armed forces is too important ... to leave to the Prime Minister and an inner cabal of government ministers'.<sup>171</sup> Notwithstanding these drivers, the shift appeared to radically enhance Parliament's role regarding the war prerogative. Few US Presidents, by comparison, would contemplate 'voluntarily surrender[ing] the discretion that their institutional position provides'.<sup>172</sup>

This change could alternately indicate the Coalition Government's appreciation that trumpeting Parliament's involvement can enhance the legitimacy of conflict decisions. The Young Convention was articulated after the UNSC's unanimous adoption, under Chapter VII, of Resolution 1970 which explicitly cited R2P in demanding 'an immediate end to the violence' in Libya.<sup>173</sup> Just over two weeks later it followed up on this demand, authorising:

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<sup>169</sup> HC Deb, vol.524, col.1066 (10 Mar 2011).

<sup>170</sup> See J. Strong, 'Why Parliament Now Decides on War: Tracing the Growth of the Parliamentary Prerogative through Syria, Libya and Iraq' (2015) 17 BJPIR 604, 613. See also HC Deb, vol.566, col.1428 (29 Aug 2013).

<sup>171</sup> R. Joseph, *The War Prerogative: History, Reform and Constitutional Design* (OUP, 2013) 219.

<sup>172</sup> K.R. Mayer, 'Executive Power in the Obama Administration and the Decision to Seek Congressional Authorization for a Military Attack against Syria: Implications for Theories of Unilateral Action' [2014] Utah LR 821, 821. For an analysis of President Obama's abortive effort to secure specific congressional authorisation for intervention in Syria in 2013, see 826-832.

<sup>173</sup> UNSC Res. 1970, 'Peace and Security in Africa' (26 Feb 2011) UN Doc. S/RES/1970.

Member States ... acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures ... to protect civilians and civilian populated areas under threat of attack ..., while excluding a foreign occupation force of any form on any part of Libyan territory ...<sup>174</sup>

This Resolution ‘represents the first mandate by the Security Council for a military intervention based on the responsibility to protect against the wishes of a functioning government’.<sup>175</sup> The resolution represents a clear, and quite prescriptive, Security Council mandate. The resolution specifically excluded a ground campaign while requiring a no-fly zone as well as further diplomatic efforts and military action that protected civilian populations. Indeed, in the Commons debate on the intervention in Libya, Sir Menzies Campbell confidently asserted that UK action was ‘on much stronger ground’ than previous interventions, including Kosovo, because rather than being predicated on the humanitarian intervention doctrine, ‘the Security Council has said expressly ... that “all necessary measures” may be taken’.<sup>176</sup>

Potentially troubling, in light of Sir George Young’s pledge, was that the UK’s military intervention in Libya that began over the course of the weekend prior to the Commons debate and consultative vote.<sup>177</sup> Although Parliament, as so often in the past, was presented with a *fait accompli*, MPs overwhelmingly backed the intervention.<sup>178</sup> The Government was generally perceived to have acted properly, given the political consensus, clear basis for action in international law and the caveat within the Young Convention allowing it to act in advance of Commons’ authorisation when responding to an emergency situation. Several MPs expressly accepted that the assault on Benghazi by Colonel Qaddafi’s forces would have claimed more civilian lives had intervention been delayed.<sup>179</sup> Despite the apparent significance of the Young Convention’s emergence, Nigel White has noted that even in the context of the 2011 intervention, in which the legal basis for action was uncontroversial, ministers still refused to provide ‘the full legal advice necessary for Parliament to make informed decisions’.<sup>180</sup> Parliament’s access to little more than

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<sup>174</sup> UNSC Res. 1973, ‘Libya’ (17 Mar 2011) UN Doc. S/RES/1973, para.4.

<sup>175</sup> G. Ulfstein & H.F. Christiansen, ‘The Legality of the NATO Bombing in Libya’ (2013) 62 ICLQ 159, 162.

<sup>176</sup> HC Deb, vol.525, col.717 (21 Mar 2011).

<sup>177</sup> See K. Clark, HC Deb vol.525, col.749 and D. Winnick, HC Deb, vol.525, col.752 (21 Mar 2011).

<sup>178</sup> The Libya action was supported by 557 MPs and opposed by 13; HC Deb, vol.525, col.802 (21 Mar 2011).

<sup>179</sup> See R. Drax, HC Deb, vol.525, col.752 (21 Mar 2011).

<sup>180</sup> N.D. White, ‘Libya and Lessons from Iraq: International Law and the Use of Force by the United Kingdom’ (2011) 42 NYIL 215, 224.

fragmentary legal advice would become a re-occurring feature of subsequent intervention debates. Arguably, the Young Convention's effect was to stimulate Parliament's formal role without strengthening the substantive effect of its scrutiny.

(ii) 2013 Debate: Use of Force against the Assad Regime in Syria

By the summer of 2013, the Syrian Civil War had spawned a humanitarian crisis that spilled into Turkey, Lebanon, Jordan and Iraq. In August, the use of chemical weapons near Damascus dramatically heightened the possibility of direct intervention by outside powers. The UNSC condemned the attack, albeit without apportioning blame.<sup>181</sup> Although R2P appeared to fit such circumstances, Russia's continued support of the Assad Regime prevented the UNSC from authorising such action. The UK Government therefore sought Parliament's support for military action against Assad's forces not as an adjunct to UNSC authorisation, but in lieu of any operative resolution.<sup>182</sup>

In contrast to the Libya intervention the 2013 Syria debate took place before force was employed.<sup>183</sup> This was no accident, for before Parliament's summer recess MPs concerned with the Government's intentions had passed a motion requiring that 'no lethal support' would be provided against President Assad's forces 'without the explicit prior consent of Parliament'.<sup>184</sup> Despite the Government's ability to plausibly claim that the chemical weapons attack constituted an emergency requiring prompt response, as it had in Libya, David Cameron recalled Parliament. This development, and the Government's adherence to the outcome of the vote, indicate that ministers regarded themselves as obliged to follow the constitutional convention that they had invoked two years earlier.<sup>185</sup> For the Political and Constitutional Reform Committee, these actions meant that outside exceptional emergency circumstances Parliament must express its opinion on a use of force prior to the UK's involvement.<sup>186</sup> Carsten Stahn has therefore argued that the 'greater involvement of parliamentary control over executive action may be one of the "gains" of the Syrian crises'.<sup>187</sup> When Parliament authorises military force, its consideration of action's legality is, however,

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<sup>181</sup> UNSC Res. 2118, 'Middle East' (27 Sept 2013) UN Doc. S/RES/1118.

<sup>182</sup> HC Deb, vol.585, col.1279 (26 Sep 2014).

<sup>183</sup> See J. Corbyn, HC Deb, vol.566, col.606 (11 Jul 2013).

<sup>184</sup> HC Deb, vol.566, col.628 (11 Jul 2013).

<sup>185</sup> See Political and Constitutional Reform Committee, *Parliament's Role in Conflict Decisions: A Way Forward* (27 Mar 2014) HC 892, para.6.

<sup>186</sup> *ibid.*, para.35.

<sup>187</sup> C. Stahn, 'Between Law-Breaking and Law-Making: Syria, Humanitarian Intervention and "What the Law Ought to Be"' (2014) 19 JCSL 25, 47.

bound together with deliberation upon an action's morality and whether 'it is a politically or militarily sensible operation'.<sup>188</sup> The latter facets of the decision have come to make the UK Parliament one of the decision-making fora at which a proposed use of force can be rejected, thereby bringing decision-making closer to the influence of domestic constituent actors (UK citizens). At issue, however, is whether such activity can displace the UNSC's role.

In his legal advice, published in summary form to bolster the Government's case for action, the Attorney General Dominic Grieve asserted that '[i]f action in the Security Council is blocked, the UK would still be permitted under international law to take exceptional measures in order to alleviate the scale of the overwhelming humanitarian catastrophe in Syria'.<sup>189</sup> His advice had two limbs. The first was that use of force by the UK is not necessarily predicated upon UNSC authorisation and the second explained the circumstances which would trigger the UK's supposed right to intervene by force in another state for humanitarian purposes.<sup>190</sup> The first limb was predicated upon parliamentary affirmation supplying the necessary democratic authority for an action, thereby displacing the need for UNSC input.<sup>191</sup> The implication of the advice is that such domestic activity can and should impact upon an action's international legality.<sup>192</sup> From being mooted as a potential avenue by which to provide 'extra democratic legitimacy to military action' after the Kosovo intervention,<sup>193</sup> the 2013 Syria crisis saw ministers treat Parliament as the only forum necessary for legitimating UK humanitarian intervention. The pace of this change should give reason for pause. The Government's Syria motion pushed Parliament to the fore because of the UNSC's failure 'over the last two years to take united action in response to the Syrian crisis'.<sup>194</sup> That this flattery failed to overcome MPs' concerns over intervention should not obscure the Government's concerted effort to marginalise UN institutions.

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<sup>188</sup> *R (Gentle) v Prime Minister* [2006] EWCA Civ 1689; [2007] QB 689, [43].

<sup>189</sup> D. Grieve, 'Guidance: Chemical weapon use by Syrian regime: UK government legal position' (29 Aug 2013) para 4.

<sup>190</sup> *ibid.* para 4.

<sup>191</sup> See D. Bethlehem, 'Stepping Back a Moment' *EJIL: Talk!* (12 Sep 2013). Available at <http://www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention/> and H. Koh, 'Syria and the Law of Humanitarian Intervention Part II: International Law and the Way Forward' *Just Security* (2 Oct 2013), available at: <http://justsecurity.org/2013/10/02/koh-syria-part2/>. Others consider the re-emergence of unilateralism in use-of-force decision-making to be dangerous; C. Stahn, 'Between Law-Breaking and Law-Making: Syria, Humanitarian Intervention and "What the Law Ought to Be"' (2014) 19 *JCSL* 25, 46.

<sup>192</sup> See R. Buchan, *International Law and the Construction of the Liberal Peace* (Hart, 2014) 73-95.

<sup>193</sup> Foreign Affairs Select Committee, *Fourth Report: Kosovo* (7 Jun 2000) HC 28-I, para.166.

<sup>194</sup> D. Cameron, HC Deb, vol.566, col.1425 (29 Aug 2013).

Many MPs showed some conception of international law's requirements regarding the use of force, with some affirming the importance of the UN.<sup>195</sup> Some, however, readily accepted that interventions can be justified on the basis of a post-Charter paradigm, swathed in the Attorney General's reassuring legalese:

I am, by instinct and nature, a humanitarian interventionist. I support the responsibility to protect. ... I believe that there are sometimes circumstances where it is right to take action without a United Nations Security Council resolution.<sup>196</sup>

Such statements, eliding the distinct concepts of humanitarian intervention and R2P,<sup>197</sup> highlight the risks inherent in the move towards parliamentary authorisation. The Government endeavoured to win parliamentarians over to humanitarian intervention by playing upon frustrations with UN processes which were, after all, designed to stymie opportunities for a state or group of states to intervene in the affairs of another by force.

Having set out the UK Government's position that the UNSC is, in certain cases, dispensable, Dominic Grieve's advice proceeds to lay down a test for the legal use of force in response to an 'overwhelming humanitarian catastrophe'.<sup>198</sup> He advanced three prerequisites for invoking humanitarian intervention:

- (i) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;
- (ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and
- (iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose).<sup>199</sup>

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<sup>195</sup> C. Lucas, HC Deb, vol.566, col.1427 (29 Aug 2013).

<sup>196</sup> M. Gapes, HC Deb, vol.566, col.609 (11 Jul 2013).

<sup>197</sup> For a further example of such confusion, see D. Burrowes, HC Deb, vol.585, col.1263 (26 Sep 2014).

<sup>198</sup> D. Grieve, 'Guidance: Chemical Weapon Use by Syrian Regime: UK Government Legal Position' (29 Aug 2013) para.4.

<sup>199</sup> *ibid.*, para.4. For the alternate approach of the US Government, see Draft Resolution of the Senate Foreign Relations Committee, available at: <http://www.foreign.senate.gov/imo/media/doc/DAV13973.pdf>, 113th Congress, 1st Session, DAV13973. See also the White House Draft, available at: <http://online.wsj.com/public/resources/documents/AUMFresolutiontext.pdf>.

These grounds for intervention pay little attention to the relevant international law.<sup>200</sup> Couched in dense legalese, the test purportedly provides a pragmatic formula for interventions, but is unconvincing regarding the necessary evidence-base. The test relies on the UK Government's conclusion that the "international community" accepts that a humanitarian crisis is ongoing and foists the factual assessment upon domestic legislators (regardless of their capacity perform this task).<sup>201</sup> Philippe Sands questions Parliament's ability to conduct such an analysis in the context of the 2013 debate, especially when 'the assertions by the Prime Minister did not appear to be an accurate summary or account of the legal advice received, and in this way had the effect of misleading Parliament'.<sup>202</sup> The notion of "general acceptance" within the international community of circumstances requiring urgent action attempts to discount the opposition of Russia and China to intervention in the UNSC. As such, the only states that matter under this test are liberal-democratic states which accept the possibility of lawful humanitarian intervention. Russell Buchan has suggested that an operative international community might indeed be confined in this way<sup>203</sup> and that some states' opposition to humanitarian intervention could therefore be 'dismissed as illegitimate'.<sup>204</sup> The 2013 chemical weapons crisis highlighted the weaknesses in this proposition. Russia maintained that good-faith negotiations were capable of resolving the specific chemical weapons crisis and was able to use its leverage with the Assad regime to respond to the US and UK position that Syria could address their concerns by verifiable destruction of all such weapons.<sup>205</sup> The subsequent UNSC activity and destruction of Syrian chemical weapons removed this issue as a basis for urgent action.<sup>206</sup>

US and UK assertions of a right of humanitarian intervention have been described by Harold Koh as an 'evolution' within international law.<sup>207</sup> Loose talk of evolution, however,

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<sup>200</sup> See UNSC Res. 1540 (28 Apr 2004) UN Doc. S/RES/1540, which established the Chemical Weapons Committee.

<sup>201</sup> The possibility of an International Criminal Court indictment under the crime of aggression perhaps permits some limited international oversight; Article 5 & 8bis, Rome Statute of the International Criminal Court (17 Jul 1998) 2187 UNTS 90.

<sup>202</sup> Evidence to the Political and Constitutional Reform Committee, *Parliament's Role in Conflict Decisions: A Way Forward* (27 Mar 2014) HC 892, para 44.

<sup>203</sup> See R. Buchan, *International Law and the Construction of the Liberal Peace* (Hart, 2014) 18.

<sup>204</sup> *ibid.*, 42. Buchan does note that efforts towards such a consensus were damaged by the 2003 Iraq War, 44-48.

<sup>205</sup> J. Kerry, US Secretary of State, 'Remarks with United Kingdom Foreign Secretary Hague' (9 Sep 2013). Available at: <http://www.state.gov/secretary/remarks/2013/09/213956.htm>.

<sup>206</sup> See UNSC Res. 2118 (27 Sep 2013) UN Doc. S/RES/2118, which affirms that the use of chemical weapons anywhere is a threat to international peace and security. See also Organisation for the Prohibition of Chemical Weapons, 'Syria Chemical Weapons Destruction Data, Organisation for the Prohibition of Chemical Weapons' (9 Feb 2015) available at: <http://www.opcw.org/special-sections/syria/destruction-statistics/>.

<sup>207</sup> H. Koh, 'Syria and the Law of Humanitarian Intervention Part II: International Law and the Way Forward' *Just Security* (2 Oct 2013).

avoids discussion of the necessary elements for the alteration of customary international law; state practice and *opinio juris*. Koh is effectively presenting these states' internal discussions as sufficient to constitute state practice. Although official legal advice can evidence state practice,<sup>208</sup> other states would not ordinarily comment upon it, as they would with state actions, meaning that it should be treated with considerable caution.<sup>209</sup> Koh's claims are supported by Sir Daniel Bethlehem, former FCO Legal Adviser, who asserted that strict application of Article 2.4's prohibition on aggressive war would be 'simplistic', and argued that the Commons' rejection of intervention did not challenge the lawfulness of humanitarian intervention as the debate had focused on the 'wisdom of intervention, not on its legality'.<sup>210</sup> The latter claim is dubious in light of the specific focus on questions of legality by many of the contributions to the debate, but the former assertion points towards Bethlehem's acceptance that, despite the Charter's clear terms, domestic assemblies' decisions can affect the legality of military force under international law.

In empowering Parliament, David Cameron's administrations have been less concerned with enhancing oversight of the war prerogative, than with shifting the key governance point at which a conflict is legitimated away from the Charter's mechanisms. This shift allows ministers to take advantage of the factors which historically stymied effective Commons' oversight of foreign affairs, including their control of information, their ability to cast the issue in terms of national interest and their command of party loyalty. Whilst going to Parliament does not guarantee such success, as Cameron might have imagined it would, this approach does improve a government's chances of legitimating an action by comparison to the UNSC route. When Parliament rejected the motion to authorise the use of force<sup>211</sup> the Prime Minister accepted that the Government could not use the prerogative to involve the UK military in the Syrian conflict against Parliament's wishes.<sup>212</sup> After this chastening experience, however, ministers have been able to make even more persuasive claims as to the weight of Parliament's input.

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<sup>208</sup> See *Barcelona Traction, Light and Power Company, Limited*, Judgment [1970] ICJ Rep 3, para.60-63 (Separate Opinion of Judge Jessup) and J. Crawford, *Brownlie's Principles of Public International Law* (OUP, 2012) 24.

<sup>209</sup> See J.A. Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force' (2010) 32 *Mich J Intl L* 215, 241-252

<sup>210</sup> D. Bethlehem, 'Stepping Back a Moment' *EJIL: Talk!* (12 Sep 2013).

<sup>211</sup> HC Deb, vol.566, col.1551 (29 Aug 2013). The motion to intervene was defeated by 285 votes to 272.

<sup>212</sup> HC Deb, vol.566, col.1555-1556 (29 Aug 2013).

### (iii) 2014 Debate: Use of Force against ISIS in Iraq

In 2014 the conflict in Syria spilled into neighbouring Iraq as ISIS suddenly seized a swathe of territory in both countries. Unable to contain ISIS, and with Baghdad itself under threat, the Iraqi Government made a ‘specific request’ for air strikes by allied countries to support its efforts at self defence.<sup>213</sup> Intervention by invitation is anticipated by the Charter.<sup>214</sup> The UK could therefore respond to the Iraqi Government request for support without drawing upon any controversial legal basis for action and Parliamentary support for action against ISIS in Iraq was overwhelming.<sup>215</sup> Throughout the debate, however, the possibility of wider intervention was advanced, but held in check by the shadow of the Commons’ rejection of intervention in Syria a year earlier.

Even before the UK debate other states, led by the US, had responded to the Iraqi Government’s request and were already engaging ISIS targets in Syria. The UNSC had recognised ISIS as part of the broad threat terrorism posed to international peace and security,<sup>216</sup> and mandated, under Chapter VII, that states take action to prevent foreign fighters entering Syria, but it had not authorised the use of force against the group. Resolution 2178 therefore provided no basis for extending operations against ISIS targets within Syria and President Bashar al-Assad’s regime had not given authority for Coalition aircraft to operate within its airspace. The US Government therefore justified its airstrikes in Syria through a combination of Article 51, on the basis of its engagement in collective self defence of Iraq, and the claim that the Syrian Government was ‘unwilling or unable’ to deal with the threat ISIS posed to Iraq.<sup>217</sup> Although the US had previously employed the unwilling-or-unable doctrine to justify drone strikes and special operations in Pakistan and Somalia, few states endorse this approach. Many of the states involved in the Coalition expressed reservations with this legal basis for action in Syria,<sup>218</sup> although Canada in April 2015, Australia in September, and France in October, would subsequently extend their air

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<sup>213</sup> See D. Cameron, HC Deb, vol.585, col.1255 (26 Sep 2014).

<sup>214</sup> See K. Bannelier & T. Christakis, ‘Under the UN Security Council’s Watchful Eyes: Military Intervention by Invitation in the Malian Conflict’ (2013) 6 LJIL 855. C. Henderson, ‘Editorial Comment: The Use of Force and Islamic State’ (2014) 1 JUFIL 209, 210.

<sup>215</sup> The motion to intervene was approved by 524 votes to 43.

<sup>216</sup> UN Doc No S/RES/2178 (24 Sep 2014).

<sup>217</sup> Letter from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General UN (23 Sep 2014) UN Doc. S/2014/695.

<sup>218</sup> See R. Goodman ‘Australia, France, Netherlands Express Legal Reservations about Airstrikes in Syria’, *Just Security* (25 Sep 2014). Available at: <http://justsecurity.org/15545/australia-france-netherlands-express-legal-reservations-airstrikes-syria/>.



campaigns into Syria.<sup>219</sup> Turkey began airstrikes against ISIS and the PKK in Syria in July 2015, citing its own self-defence concerns.<sup>220</sup>

Despite the published summary of the UK Government's legal guidance on intervention being predicated upon the Iraqi Government's consent, and therefore disclosing no basis for the legality of using force against ISIS in Syria,<sup>221</sup> David Cameron explicitly told MPs that he saw no barrier in international law to extending the UK's support for the Iraqi Government into Syria.<sup>222</sup> The Leader of the Opposition, Ed Miliband accepted that there was 'a strong argument about the legal base for action in Syria under article 51 [UN Charter]'.<sup>223</sup> Nonetheless, the Government's decision to seek authority for airstrikes in Iraq alone demonstrated the impact of the 2013 debate. Although the Government did display a sudden aversion to intervention in the absence of clear legal grounds, David Cameron still set out some circumstances in which the UK might use force in Syria, even without explicit Commons' authorisation:

If there was the need to take urgent action to prevent, for instance, the massacre of a minority community or a Christian community, and Britain could act to prevent that humanitarian catastrophe – if I believed we could effectively act and do that – I am saying I would order that and come straight to the House and explain afterwards.<sup>224</sup>

The Prime Minister did not explain the legal basis for such an intervention beyond the vague need for 'urgent action' in the context of 'humanitarian catastrophe'. The former Attorney General, however, maintained that the extension to UK operations against ISIS into Syria would be both legal and legitimate notwithstanding the deadlock in the UNSC:

There is no doubt that [the UNSC] has an important role to play in issues concerning humanitarian necessity, but the Government will at least have to consider whether any

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<sup>219</sup> Marc Weller has noted that each of these actions 'stretches our understanding of self-defence a little bit'; Foreign Affairs Committee, 'Oral Evidence: The extension of offensive British military operations to Syria' (8 October 2015) Q63.

<sup>220</sup> Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council (24 Jul 2015) UN Doc. S/2015/563.

<sup>221</sup> Prime Minister's Office, 'Summary of the Government Legal Position on Military Action in Iraq against ISIL' (25 Sep 2014) para.4, available at: <https://www.gov.uk/government/publications/military-action-in-iraq-against-isil-government-legal-position/summary-of-the-government-legal-position-on-military-action-in-iraq-against-isil>.

<sup>222</sup> HC Deb, vol.585, col.1259 (26 Sep 2014).

<sup>223</sup> HC Deb, vol.585, col.1270 (26 Sep 2014).

<sup>224</sup> HC Deb, vol.585, col.1265 (26 Sep 2014).

application, if it were to come, to the UN for such a resolution has any prospect of success. The ability to intervene, I have no doubt, exists, even if no such resolution is present.<sup>225</sup>

Dominic Grieve may have been expanding upon a legal position he had set out a year earlier regarding intervention in Syria, but he was joined by parliamentarians who eagerly expressed their opinion that extending the intervention into Syria would be legal on humanitarian intervention grounds.<sup>226</sup> The impact of the successive UK Governments' efforts to build up Parliaments' role and marginalise the UNSC was therefore bearing fruit in terms of parliamentary support, even if such an intervention was in this instance theoretical.

As ISIS continued to gain territory and adherents in spite of the Coalition airstrikes the UK Government would employ the "urgent action" exception within the Young Convention not in the context of a humanitarian response, but on the basis of defending against threats to 'a critical British national interest'.<sup>227</sup> In early September David Cameron informed Parliament that the UK had indeed used force in Syria, through a drone strike which killed three ISIS members near Raqqa. The Prime Minister characterised the strike as an emergency response to the threat posed by Reyaad Khan, a UK citizen fighting with ISIS, without which 'we had no way of preventing his planned attacks on our country.'<sup>228</sup> The Prime Minister's argument that the drone strike was an imminent necessity to prevent an attack against the UK appears to be an effort to fit the action within Article 51 of the Charter. Indeed this was the basis on which the UK informed the UNSC of its action though notably these were not the terms by which Parliament was informed.<sup>229</sup> Whether a drone strike can be justified under Article 51 involves not simply a claim as to the extent of this provision of the Charter, but requires the UK to establish the legal and factual basis for this claim. Although the Attorney General maintained that such action is possible in response to a planned armed attack by a terrorist group,<sup>230</sup> the limits of self-defence against a terrorist group under of international law are contested and difficult to fulfil,<sup>231</sup> and parliamentary oversight of such

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<sup>225</sup> D. Grieve, HC Deb, vol.585, col.1319 (26 Sep 2014).

<sup>226</sup> See K. Clarke, HC Deb, vol.585, col.1279 (26 Sep 2014) and M. Campbell, col.1284.

<sup>227</sup> M. Fallon, HC Deb, vol.597, col.1671 (2 Jul 2015).

<sup>228</sup> HC Deb, vol.599, col.26 (7 Sep 2015).

<sup>229</sup> Letter from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council (7 Sep 2015) UN Doc. S/2015/688.

<sup>230</sup> Justice Select Committee, 'Oral Evidence: The Work of the Attorney General' (15 September 2015) HC 409, Q39.

<sup>231</sup> See C. Schaller, 'Using Force Against Terrorists "Outside Areas of Active Hostilities" The Obama Approach and the Bin Laden Raid Revisited' (2015) 20 JCSL 195, 201-204.

claims is all but impossible when MPs are not given access even to a document summarising his legal advice. The Government did not, moreover, provide Parliament with factual evidence indicating the imminence of Khan's threat. In the absence of such evidence the UK could well be characterised as employing the Bush Doctrine of pre-emptive self defence.<sup>232</sup> In this strike the Government was trying to gain advantages from all potentially-applicable legal paradigms. It wanted to present the incident as a use of force covered by Article 51 to attempt to avoid the application of international human rights law, but also sought to persuade Parliament that it was a one-off strike not warranting further scrutiny by MPs.

(iv) 2015 Debate: Use of Force against ISIS in Syria

Throughout 2015 UK Government maintained that its intention was to extend general military action against ISIS into Syria, and not simply to respond to specific threats to UK interests, but that it needed 'parliamentary authority' to do so.<sup>233</sup> Parliament's refusal to authorise military force against Assad in 2013 'loomed large' over official policy,<sup>234</sup> and ministers maintained that 'we will not bring a motion to the House on which there is not some consensus'.<sup>235</sup> There is no doubt that the Government felt bound by the Young Convention, in spite of persistent siren voices that it did not amount to a legal constraint upon action.<sup>236</sup> For all the attention paid to Parliament, however, the UK Government downplayed the significance of the UNSC. The Defence Secretary styled the UK's failure to undertake airstrikes in Syria as 'morally indefensible' alluding to the need to defend UK interests against ISIS.<sup>237</sup> Parliament's Foreign Affairs Committee remained unconvinced, maintaining that UNSC authorisation was 'desirable for more than simply legal reasons'.<sup>238</sup>

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<sup>232</sup> A. Peters, 'German Parliament decides to send troops to combat ISIS – based on collective self-defense "in conjunction with" SC Res. 2249' *EJIL: Talk!* (8 Dec 2015). Available at <http://www.ejiltalk.org/german-parliament-decides-to-send-troops-to-combat-isis-%E2%88%92-based-on-collective-self-defense-in-conjunction-with-sc-res-2249/>.

<sup>233</sup> Foreign Affairs Committee, 'Oral Evidence: Foreign Policy Developments' (9 Sep 2015) HC 381, Q67.

<sup>234</sup> Foreign Affairs Committee, 'The Extension of Offensive British Military Operations to Syria' (3 Nov 2015) HC 457, para.4.

<sup>235</sup> M. Fallon, HC Deb, vol.597, col.1671 (2 Jul 2015).

<sup>236</sup> See M. D'Ancona, 'Cameron has the power to order air strikes. He should' *The Guardian* (16 Nov 2015). Available at: <http://www.theguardian.com/commentisfree/2015/nov/16/isis-britain-david-cameron-air-strikes-armchair-generals>.

<sup>237</sup> BBC News, 'Michael Fallon: 'Morally indefensible' not to bomb IS in Syria' (6 Nov 2015). Available at: <http://www.bbc.co.uk/news/uk-34742361>.

<sup>238</sup> Foreign Affairs Committee, 'The Extension of Offensive British Military Operations to Syria' (3 Nov 2015) HC 457, para.19.

The downing of Metrojet Flight 9268 in October 2015, claimed by ISIS as retaliation for Russia's airstrikes in support of the Assad regime,<sup>239</sup> and the terrorist attacks on Paris two weeks later, which ISIS claimed were a response to French airstrikes in Iraq and Syria,<sup>240</sup> changed the terms of the debate on intervention. As the attribution of these attacks to ISIS was confirmed, the UK Government stepped up its claims that self defence provided a legal basis for extending the UK's strikes against ISIS into Syria:

Of course, it is always preferable in these circumstances to have the full backing of the UN Security Council, but what matters most of all is that any action we would take would be both legal and help protect our country and our people right here. As I said yesterday, we cannot outsource to a Russian veto the decisions we need to keep our country safe.<sup>241</sup>

The French Government treated the mass-casualty attacks as an act of war and immediately invoked the European Union's (EU) mutual assistance provision in response to an armed attack.<sup>242</sup> Rather than side-lining the UNSC, however, the French also reworked a Russian draft resolution into UNSC Resolution 2249.<sup>243</sup> Agreed unanimously, this Resolution broadens the scope of for military action against ISIS. The decision to not invoke Chapter VII, whilst nonetheless making a factual assertion as to the existence of a threat to international peace and security, is a singular development which means that the Resolution could be described as a half-way house towards the authorisation of force. Instead of explicitly authorising force, the Resolution recognises that ISIS constitutes an ongoing threat to peace and security that is not confined to Iraq and Syria and calls upon states to invoke self-defence, collectively and individually. In doing so, the UNSC is allowing states to claim self-defence under Article 51 when undertaking operations against ISIS targets in Iraq and Syria without having to establish a factual scenario warranting such a response. Resolution 2249 therefore cuts through the legal dispute over whether a non-state group can be responsible for an armed attack.<sup>244</sup>

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<sup>239</sup> BBC News, 'Could Islamic State have bombed Flight 9268?' (5 Nov 2015). Available at: <http://www.bbc.co.uk/news/world-europe-34730909>.

<sup>240</sup> BBC News, 'Paris Attacks: "Islamic State" claims Responsibility' (14 Nov 2015). Available at: <http://www.bbc.co.uk/news/world-europe-34819501>.

<sup>241</sup> D. Cameron, HC Deb, vol.602, col.669 (18 Nov 2015).

<sup>242</sup> Treaty on European Union, Article 42(7).

<sup>243</sup> UN Doc No S/RES/2249 (20 Nov 2015).

<sup>244</sup> See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment [2005] ICJ Rep 168, para. 146-147.

Even with Resolution 2249 in place, the UK Government spent nearly two weeks reinforcing its support within Parliament. First, under the auspices of replying to the Foreign Affairs Committee, the Prime Minister set out his case for action, ‘founded on the right of self-defence as recognised in article 51 of the United Nations [C]harter’,<sup>245</sup> on the basis that ISIS activity ‘has reached the level of an “armed attack”, such that force may lawfully be used in self-defence to prevent further atrocities being committed’.<sup>246</sup> Resolution 2249 merely ‘underscored’ this basis for action.<sup>247</sup> Having ascertained reaction in the House and the country to this opening gambit, and confident that a comfortable Commons majority in favour of military action was in hand, the Prime Minister announced a day long debate and vote.<sup>248</sup> In the course of this debate many MPs who had wavered over military action in the preceding months noted the impact of both the changed security situation and the ‘clear and unambiguous’<sup>249</sup> UNSC 2249 in persuading them to back the Government’s motion. Former Home Secretary Alan Johnson noted that whereas the House had been inhibited from supporting action against ISIS outside Iraq ‘by the absence of a specific UN resolution’, no such impediment remained.<sup>250</sup> Although the Leader of the Opposition, Jeremy Corbyn, maintained that Resolution 2249 did not give ‘unambiguous authorisation’<sup>251</sup> as it was not adopted under Chapter VII, other opponents of action (on non-legal grounds) adopted the more sophisticated legal argument that although ‘it does not authorise force ... it implies a reference to self-defence, which would be a lawful basis for action’.<sup>252</sup> Both this and the Government’s position underplay the significance of Resolution 2249 to the legality of UK intervention on self defence grounds. The Resolution means that states do not have to establish that they are responding to an armed attack as the UNSC accepts that this basis is fulfilled, a fact interwoven into any subsequent Article 51 claim.

In setting out the Government’s motion, David Cameron was at pains to emphasise his responsiveness to MPs’ concerns,<sup>253</sup> but some of the established shortcomings of Commons authorisation once again came to the fore. On the military grounds for intervention, despite David Cameron’s insistence that the ISIS ‘threat is very real’,<sup>254</sup> he

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<sup>245</sup> HC Deb, vol.602, col.1490 (26 Nov 2015).

<sup>246</sup> HC Deb, vol.602, col.1491 (26 Nov 2015).

<sup>247</sup> HC Deb, vol.602, col.1491 (26 Nov 2015).

<sup>248</sup> The Commons ultimately supported action by 397 votes to 223.

<sup>249</sup> Hilary Benn, HC Deb, vol.603, col.484 (2 Dec 2015).

<sup>250</sup> HC Deb, vol.603, col.367 (2 Dec 2015).

<sup>251</sup> HC Deb, vol.603, col.343 (2 Dec 2015).

<sup>252</sup> K. Starmer, HC Deb, vol.603, col.467 (2 Dec 2015).

<sup>253</sup> HC Deb, vol.603, col.326 (2 Dec 2015).

<sup>254</sup> HC Deb, vol.603, col.324 (2 Dec 2015).

provided little detail of the links between ISIS and the recent terror plots against the UK which he recounted. Even if many parliamentarians accepted the threat posed by ISIS as a given in light of its international terrorist attacks, and the support for the Prime Minister's analysis in Resolution 2249, MPs struggled to get much detail regarding the ground forces that the Government regarded as vital to the success of operations against ISIS. David Cameron's assertion that as many as 70,000 fighters could be available to seize territory currently held by ISIS was widely disputed as 'absurd',<sup>255</sup> but the Government continued to deflect criticism on the basis that this constituted the independent analysis of the Joint Intelligence Committee.<sup>256</sup> The Prime Minister's insistence in the Commons' Chamber that a vote either way on this issue was 'honourable',<sup>257</sup> could not disguise the efforts by Government whips to bring potential Conservative dissenters into line. The allegation that he had warned Conservative backbenchers off siding with 'a bunch of terrorist sympathisers',<sup>258</sup> indicates the degree to which jingoism and party loyalty can be used by the executive to garner support for military action. No summary of the Attorney General's legal advice was published in advance of the Commons vote, even though Jeremy Wright informed the Commons that 'the legal basis for action ... is not dependent on the presence of a Security Council resolution'.<sup>259</sup> For all of the discussion of Resolution 2249 in the debate, the motion for airstrikes merely welcomed the Resolution and drew instead upon the UN Charter as providing a 'clear legal basis to defend the UK and our allies'.<sup>260</sup> Few MPs displayed an appreciation for this distinction, with many instead wrapping themselves in the language of Resolution 2249. Some explicitly referenced the House of Commons' Library Briefing Paper<sup>261</sup> that had explained the relationship between the UNSC Resolution and Article 51.<sup>262</sup> Useful as this resource undoubtedly proved, like MPs the few legally-trained Library staff had no access to the Government's detailed legal advice and so could not analyse its reasoning.<sup>263</sup>

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<sup>255</sup> J. Nicolson, HC Deb, vol.603, col.440 (2 Dec 2015). See also J. Lewis, col.369.

<sup>256</sup> HC Deb, vol.602, col.1496 (26 Nov 2015).

<sup>257</sup> HC Deb, vol.603, col.330 (2 Dec 2015).

<sup>258</sup> HC Deb, vol.603, col.328 (2 Dec 2015).

<sup>259</sup> HC Deb, vol.602, col.1468 (26 Nov 2015).

<sup>260</sup> S. Doughty, HC Deb, vol.603, col.323 (2 Dec 2015).

<sup>261</sup> A. Lang, 'Legal Basis for UK Military Action in Syria' (1 Dec 2015). Available at: <http://researchbriefings.files.parliament.uk/documents/CBP-7404/CBP-7404.pdf>.

<sup>262</sup> HC Deb, vol.603, col.465 (2 Dec 2015).

<sup>263</sup> By contrast, see the briefing presented to German legislators by the Bundestag Scientific Service, 'Staatliche Selbstverteidigung gegen Terroristen' (30 Nov 2015). Available at: [http://thomas-hitschler.de/wp-content/uploads/2015/11/203\\_15\\_Staatliche-Selbstverteidigung-gegen-Terroristen-aktualisierte-Version.pdf](http://thomas-hitschler.de/wp-content/uploads/2015/11/203_15_Staatliche-Selbstverteidigung-gegen-Terroristen-aktualisierte-Version.pdf).

Parliament's response demonstrates a surprising waypoint in the past two decades of its developing role in authorising the use of force. MPs showed themselves to be resistant to attempts to put Parliament in the place of international legal processes on the use of force. The UNSC's intervention changed the dynamic at Westminster, supplying 'the reason for urgency and the reason why we have to take action'.<sup>264</sup> The UK Government's desire to contribute to collective security by stepping up operations against ISIS looked unlikely, of itself, to sway MPs towards accepting such action until Resolution 2249 recognised the threat ISIS posed to international peace and security and affirmed that self defence provided a legal basis for action. But the UK Government's refusal to publish even a summary of legal advice, and the evident shortcomings in the information Parliament received on the security situation in Syria point to risks remaining in Parliament's new role. The November 2015 debate evidences many MPs' heightened awareness of international law's precepts after a decade of UK interventions in the Middle East and the Maghreb. The consequences of those interventions have also led to heightened scrutiny of the UK Government's security claims. When the afterglow of these actions fade, the systemic weaknesses in parliamentary authorisation may return to limit this constraint on the war prerogative. Moreover, future UK Government ministers looking back at the precedent of the 2015 debate will likely emphasise that the action was justified on the basis of self defence. Once again, UK Government has protected its capacity for future uses of force without UNSC authorisation.

## **Conclusion**

At a time when the UNSC faces sustained criticism as a result of its perceived failure to address threats to international peace and security successive UK Governments have cultivated approaches to the use of force which further marginalise its role. First, they have set out to justify military actions on a myriad of grounds, including legally dubious doctrines such as humanitarian intervention and pre-emptive self defence. These doctrines, invoked on the basis of precedents which are either not applicable to the claims made or which are highly disputed, seek to loosen the Charter's strictures upon the use of force. Second, having used these grounds to shift the focus of use-of-force decision-making away from the UNSC, the UK Government has accepted a new constitutional convention enhancing Parliament's role in this process. Although this shift in practice might appear to enhance domestic oversight of the

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<sup>264</sup> N. Carmichael, HC Deb, vol.603, col.466 (2 Dec 2015).

war prerogative there is reason to suspect that ministers were not unduly troubled by the prospect of “democratic oversight”. Underpinning Commons’ authorisation on the UK Government’s stated grounds is the seductive idea that a domestic legislature, through its deliberative character and democratic nature, can provide a better basis for checking use-of-force proposals than the UN’s supposedly outmoded institutional arrangements.

David Cameron’s administrations have sought to substitute the flexibility of an appeal to MPs for the rigidity of UNSC processes. As we have shown, for all that Cameron’s ministers have made loud play of their respect for Parliament to draw legitimacy from its consultative votes, the Young Convention has not enhanced the tools at Parliament’s disposal for assessing whether a use of force is legal and in the UK’s national interest. Terse accounts of the legal grounds have often had to be extracted from the Prime Minister’s statements proposing an intervention. Without a dedicated legal service MPs can struggle to make sense of the myriad of legal justifications for military action advanced since the 2011 Libya intervention. Moreover, for security reasons, the UK Government has refused to share with Parliament the factual information necessary for MPs to assess whether grounds such as self-defence can indeed be invoked. Parliament has, nonetheless, been far from toothless. The Commons defeat on intervention against the Assad regime in Syria in 2013 was a severe reverse for UK foreign policy. A secure Commons’ majority in favour of action against ISIS in Syria in 2015 only coalesced following the passing of UNSC Resolution 2249. Notwithstanding such setbacks, the Government’s calculation remains in certain circumstances it will be more likely to succeed in the Commons than in the UNSC.

We do not claim that domestic assemblies ought not to be involved in use of force decisions, and indeed welcome meaningful additional scrutiny of proposed military action. But a domestic assembly’s vote can have no significance in international law or other states will increasingly draw upon the authority of their own domestic assemblies in use of force decisions, even when the character of such assemblies are neither truly deliberative nor democratically-elected. States subject to the proposed use of force, which have a voice within international institutions, are excluded from domestic decision-making processes. Democratic domestic assemblies should therefore be wary of becoming the predominant governance point for authorising military force, on the principled basis that doing so would undermine UN institutions and on the pragmatic basis that legislators are ill-equipped to assess whether a use of force is legitimate under the tests currently in circulation. Relying upon domestic assemblies to provide the sole necessary authorisation point for certain uses of force might appear to offer a means to unblock international institutional processes. This course,



however, turns away from international constraints upon the use of force and opens the door to new forms of unilateralism.