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***Parliament's Secret War*     Veronika Fikfak and Hayley J Hooper**

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When, in April 2018, the United Kingdom – in conjunction with the United States and France – carried out a series of missile strikes in Syria, the response of the legal community demonstrated a familiar bifurcation. On one hand there was frenzied consideration of the position under international humanitarian law; on the other, talk of what the failure of the UK government to seek Parliament's prior assent meant for the convention – recognised in the 2011 Cabinet Manual – that 'the House of Commons should have an opportunity to debate the matter' in advance. In *Parliament's Secret War*, Veronika Fikfak and Hayley Hooper give the fullest assessment yet of both the descriptive and normative elements of Parliament's involvement in decisions regarding the use of force. The key lesson of their work is that such bifurcation has important, even dangerous, consequences; that, rather, these two strands of argument, the domestic and the international, must be seen as aspects of a single whole by those who wish to understand or influence how such decisions are made. Though they do not quite say so, the authors give every reason to believe that the interrelation and interaction of the domestic and the international ultimately serves to undermine both normative frameworks, making military interventions of dubious legality and dubious wisdom more, rather than less, likely. The emergence of the convention, therefore, might have exactly the opposite effect than its proponents usually assume. Following from this, a second lesson of the book is that – notwithstanding the strong case made in the work's final third for reforms aimed at doing so – it will be difficult and perhaps impossible to overcome the limitations of the constitutional status quo. The convention has been acceptable to executive actors in large part because it preserves the flexibility they have traditionally enjoyed. It may in practice extend it. The reforms for which Hooper and Fikfak argue would, even they were achievable in practice, be unacceptable for precisely those reasons that the convention is not.

Two features of the book's format stand out. One is the co-authorship, with one of the two authors specialising in each of domestic constitutional law and public international law. As a result, both aspects are covered in the appropriate depth, and with equal skill. The second such feature, however, is that this is not traditional co-authorship. Instead, 4 of 6 chapters are attributed to one or the other author, with the remainder attributed to the two together. One of these co-authored chapters is the first, which lays the groundwork for what follows by placing the emergence of the convention in historical context and offering an account of the book's methodology, an 'evidence-based' consideration of the actual functioning (rather than bare concept) of the 'political constitution'. The book more than lives up to this promise in its detailed consideration of relevant practices, both in the recent and more distant past. This careful attention to the historical dimension of the relevant practice is one of the most valuable qualities of *Parliament's Secret War*, allowing an engagement with questions which are at times treated in the literature as if they were first asked post-9/11. At other points, what is notable is the consideration of issues which are often neglected by the existing literature. The key example is the international legal dimension, which (in chapter 2) is considered not only in its own right, but also – and more importantly – in terms of how it is selectively incorporated into domestic constitutional discourse: either by using the domestic constitutional process to legitimate an intervention which lacks a suitably solid basis in international law, or (where the international law position is stronger) by focusing upon the issue of legality at the expense of those other

considerations which might or should feed into a given decision as to whether or not to use force.

Against that background, the authors turn in chapter 3 to a direct consideration of the constitutional convention, recognised in a variety of ways in the years since 2010 and complied with on a number of occasions up to (and perhaps including) the Syria strikes of 2018. That convention is dismissed as a distraction here, with the impression which results most strongly from discussion of it being the convention's significant limitations even when considered on its own terms. So undermined is it by the rules as to when it applies (as recognised in the Cabinet Manual, the convention bites only where 'troops' are 'being committed') and the exceptions which exist (the most important being where there is 'an emergency' and it would not therefore be appropriate to have the Commons debate the matter), that the convention ends up doing very limited work in facilitating parliamentary oversight of the executive's military endeavours. Another exception – not explicit in the Manual – involves the deployment of Special Forces, who are relied upon with increasing frequency by the UK and whose operations are overseen neither by Parliament nor any other body. Recent calls for oversight by the Intelligence and Security Committee of Parliament would be an improvement on the status quo; for the reasons given here in relation to military action more generally, however, it would likely prove insufficient. And because, as the authors have already shown, the convention is prioritised within political discourse precisely when the international law basis for military action is at its most dubious, it is in those circumstances that its limitations are most significant. Where the legal footing is more solid, the political discourse shifts instead to that plane and the domestic constitutional practice is relegated to the sidelines. In such circumstances, the legitimating work is done elsewhere, and a warmongering executive need not bother to exploit the convention's various lacunae.

Chapter 4 considers the issue of secrecy. Much modern warfare is justified on the basis of secret intelligence, the sources and detail of which cannot – we are told – be made public without risk to national security. Key material is therefore known only to a small group in and around government, which has as things stand two options when proposing military action: to disclose only its conclusions and so create a stark asymmetry between those arguing for war and those opposing it, or to disclose a fuller body of intelligence selectively to certain political actors, whose use of it must then be restricted. In either case, there arises a risk of groupthink: those best placed, or most disposed to, challenge the conclusions drawn are excluded from playing a full role in the process, and an atmosphere of distrust is fostered. This discussion again works to demonstrate both the limits of the convention as it exists, and the difficulties of shoring it up within existing constitutional structures. Even if Parliament was always offered the opportunity to veto military action of whatever kind in advance of it taking place, without direct and general access to the underlying intelligence, it would be doing so with one hand tied behind its back.

These conclusions feed directly in to the book's final chapters, which offer an ambitious normative account of Parliament's involvement in decisions about the use of force: not only of how, at an institutional level, a fuller Parliamentary involvement might be facilitated (Ch. 6), but also how individual members of Parliament should approach decisions as to military action in order for the constitutional framework – *any* constitutional framework – to do the work asked of it (Ch. 5). The discussion of secrecy within the Parliamentary process in chapter 6 is one of the book's high points, offering a very valuable rebalancing of the focus, in the modern literature, on executive and curial secrecy. It demonstrates – based upon archival material, and in a comparatively-informed fashion – that the degree to which closed Parliamentary sessions have

been relied upon in the course of the twentieth century is greater than is usually appreciated. On this foundation is built a case for holding closed sessions of the House of Commons in which the all MPs (rather than some subset thereof) might debate the content of Joint Intelligence Committee reports relied upon in the case for war. But the formal aspects of the process do not suffice to remedy its current faults: given that the flaw is not merely parliamentary but more generally political, the book further argues that parties must, for the reforms to have the desired effect, allow their members a free vote. The case is made strongly, but relies on certain assumptions about the political process which may not hold, amongst them that the soundness of the case for military action is central to the decision of any individual MP. This point is addressed with a more ambitious – and less easily facilitated – account of how individuals MPs should think and act in assessing the question of military action. They should, the book argues, treat the question of military action as a matter of individual conscience, in which reason is privileged above rhetoric and the relationship between representative and constituents is actively reflected upon within the decision-making process. Only in this way, the authors argue, can political considerations re-enter a debate which tends to be dominated by law, and so ensure that military interventions are seen as wars of choice, which might be inadvisable even if lawful. Though this is in keeping with the sense of recent wars – most especially that in Iraq, whose shadow looms over every word of this text – as era-defining conflicts, of the highest moral importance, were the domestic constitutional order and its political actors truly amenable to such modes of reasoning, that war might not in fact have taken place. And, of course, *Parliament's Secret War* shows that the question of legality predominates where the legal basis is strong; where it is instead weak, a set of reforms which have the effect of increasing the political legitimacy of military action cannot make good that weakness. Indeed, a domestic process improved in the ways, and to the extent, for which Fikfak and Hooper argue would – if successfully navigated – be a powerful tool for those who wish to act in ways which effectively undermine the 'rules-based' international order.

The literature on Parliamentary control of military action has blossomed since the predictably ill-fated war in Iraq. *Parliament's Secret War* represents its clear high point. It is exceptionally well researched, intellectually well rounded, and responds fully to the challenge it sets itself, showing why the war powers convention falls short and making a compelling case for reforms which might remedy some of its current failings. In doing so, however, it also demonstrates the limits of using constitutional mechanisms to prevent acts which are politically popular, whether at the level of the electorate or amongst its representatives. Like much of the broader literature it emerges out of (and in turn transcends) it appears to reflect the assumption that the key effect of reform in this area will be that the UK will take military action less frequently. This is perhaps the case in relation to the sorts of wars the UK has fought in recent decades. But not all wars are Iraq, and though we should learn its lessons, we should not place too much faith in the constitution to prevent in the future misdeeds of a sort which, when they happened in the past, were not necessarily the constitution's fault: a reference at p. 178 to contemporary sentiment opposing the war in Iraq when the given source shows the contrary suggests that hindsight is at work here. The authors at one point suggest that the conflict of their book's title is that which Parliament 'has fought for meaningful involvement, accurate information, and to compel the Executive to present its case for armed conflict with integrity' (p. 20). This would seem to conflate the views of constitutional commentators with those of parliamentarians, or the views of a part of a latter with those of the whole. If there are fewer foolish wars in future, it seems as likely to reflect changing public sentiment as a reformed constitutional architecture. *Parliament's Secret War* offers a masterful treatment of the latter issue,

but it remains to understand how public sentiment is formed and shifts, and what, if any, role constitutional structures play in these processes.

**Paul F Scott, University of Glasgow**