HOUSE OF COMMONS

Political and Constitutional Reform Committee

Oral evidence: Parliament's role in conflict decisions: an update HC 649

Thursday 17 October 2013

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Written evidence from witnesses:

- Professor Philippe Sands
- Sebastian Payne
- Professor Nigel White

Watch the meeting

Members present: Fabian Hamilton (Chair); Paul Flynn; Sheila Gilmore; Mr Andrew Turner

Questions 1-21

Witness: **Professor Philippe Sands**, Professor of Law, University College London, gave evidence.

Q1 Chair: Good morning, Professor Sands, and thank you very much for coming. I apologise that you are not looking at the Chair of our Committee, Graham Allen. Unfortunately, he has had to go to a funeral this morning and I am standing in for him today. It is good to see you again. We met in a previous committee I used to sit on, the Foreign Affairs Committee, and you used to give us quite a bit of evidence on that.

Today we are discussing Parliament's role in conflict decisions. You are the Professor of Law at University College London and a practising barrister at Matrix Chambers. I think that is correct.

Is there anything you would like to say before we start asking questions? I know you have to be away around 10.30.

Professor Sands: No. Thank you very much for the invitation. I have submitted a written document, which I think summarises my views, and I am very happy to answer any questions you might have.

Q2 Chair: I will kick off, and I think a few of my colleagues will be asking you questions. I would like to start on the legal advice that has been provided to Parliament in the

past. In relation to past debates in the House of Commons on conflict decisions, do you think the House had had sufficient advice about the legality of any proposed conflict decision?

Professor Sands: As I set out in my background note, my answer to that question would have to be, no, Parliament has not had a sufficiently informed basis to properly debate the legal issues. I identified two recent conflicts within the past decade, Iraq in 2003 and Syria in 2013. In both cases, Parliament was basically presented with a single page of paper in which the respective Prime ministers of the day referred to it as advice or opinion. In neither case can it properly be characterised—and I speak here as a barrister—as advice. In both cases at best it was a summary of the best possible argument for going to war. It was not legal advice. It did not set out the kinds of considerations that one would normally associate with legal advice, and I conclude by expressing a certain regret that in both cases Parliament proceeded on a misconception as to what the legal advice truly was.

Chair: Thank you very much for that introduction.

Q3 Paul Flynn: I think we remember the occasions vividly, the MPs that were here at the time. You said in the recent case, the one on Syria, the Prime Minister said the Government had changed the long-standing convention for Governments not to publish any legal advice. Would you say there is a convention on this point, and was the publication of the advice on 29 August sufficient to inform the House?

Professor Sands: I think others with expertise in constitutional law will be better placed to comment on the existence of a convention. It is not my area of expertise. I do know that the practice has been not to offer Parliament detailed information as to legal advice. That began to change in 2003, and did so in circumstances that I think we now all know were not adequate, with the benefit of hindsight. Lessons were learned from that, which is why I—and I think many other international lawyers—was very surprised by what was put before the House on 29 August.

It was a single one-page document. I have listed it. You have it in your documents before you as one of the annexes to my document. It was striking because it was unsigned. It did not purport to come from the Attorney General, an individual for whom I have very great respect. I was surprised that on numerous occasions the Prime Minister referred to it as "legal advice" that he said would prove the legality of the use of force in Syria. It was not legal advice; it was a summary of the best possible argument, and an inadequate summary, for the essential reason that the principle on which it relied, humanitarian intervention—which might be said to be a third justification for the use of force, which I happen to be a supporter of—allows force to be used to prevent a fundamental and systematic massive breach of human rights.

The inadequacy relates to paragraph 4, and I think it came out in the debate. I was in America on 29 August, driving my daughter from the coast of Maine to Bangor bus station so she could take a plane back to start school on time. As I was telling Mr Hamilton, we switched on the World Service, which we could listen to in our rented car. We listened to the World Service, which carried the debate live. We listened to it for an hour and a half, and it was absolutely riveting to listen to, even for a 16-year-old who was studying politics for A level. I thought it was amazing. I think that the very first question was about the

legal advice, and the Prime Minister did not seem confident, she noticed—a 16-year-old—about what was being said.

If you turn to the actual note, which is described as "UK Government legal position", which are rather telling words, it is paragraph 4 that is the heart of the inadequacy. I am a supporter of humanitarian intervention, possibly not in a majority. What it does not deal with is the central question of, will the use of force actually prevent the humanitarian crisis from persisting or the fundamental violation? It just ignores that crucial question that many who spoke in Parliament noticed, on all sides of the House. As I explain in my note, I have to say that—knowing Dominic Grieve and the work he does pretty well—I have not seen the legal advice he gave the Prime Minister or that might have been put before Cabinet, but it would astonish me if this was indeed a summary of the legal advice that he gave, for that reason.

Q4 Paul Flynn: These are grave matters, and I am sure that that debate that you listened to on your journey to Maine is one that will live long in parliamentary history. But these matters are ones that Parliament has been divided on: the Iraq war, 139 Labour members voted against—a very strong feeling there, and the decision could have gone either way. One of the results of that is 179 British deaths, and we have had similar. Helmand Province resulted in 445 British deaths. Surely there must be a case for saying that Parliament needs to have the full advice on this, and not edited summaries that often give a false impression. Would you say that the advice on Iraq gave a false impression of what the situation was? We know that other things gave a false impression, the existence of weapons of mass destruction and so on. Do you think what Parliament should be doing now is insisting on the full text of legal advice that is provided?

Professor Sands: By way of preface, let me say that I think there is a certain similarity between Iraq and Syria. In both cases I think the House was misled about what the advice was. I think in Iraq it was knowingly misled by the individual who put it forward as legal advice. With Syria, it all happened so fast that it might be said the Prime Minister of the day possibly was not totally on top of everything, and he used words like "legal advice" without necessarily thinking it through. So there is a minor nuance in all of that, but the central question that arises from my perspective is that Parliament should be debating these issues. That is point one. Point two, if Parliament is going to debate these issues it needs to do so on an informed basis. Point three, that means it needs to have some information before it in relation to: (a) legal advice; and (b) the factual and evidential way on which the legal advice has been tendered. That takes us to the fourth point, which is complex. Any legal adviser is going to deal with matters that are sensitive, either for reasons of commercial confidentiality or for reasons of national security.

I have stepped back from saying Parliament should have all of the legal advice. Why have I stepped back from saying that? Because I can envisage circumstances, Syria may have been one, Iraq may have been one. I have never criticised the full legal advice given by Lord Goldsmith, because one may agree or disagree as to whether one agrees with what came out but it was a fair, full legal advice. It had to rely on material that was sensitive, and a full legal advice that puts out all of that material to Parliament necessarily is going to become public, and I don't think that is necessarily a sensible thing to do. There will be circumstances in which there will be factual material that should not be put into the full public domain, at least at that critical moment, because it might reveal things that ought

not to be revealed. I think we can all imagine circumstances. I act for a lot of Governments around the world. When I give legal advice I rely on the material that is given to me. I would not wish that factual information to be zipping around on the web all over the place, because it is sensitive.

The way that I have addressed it—and I think we are going in the same direction, although we may come out at a slightly different place—is that Parliament needs legal advice to inform its debate. I have identified three different ways of that happening. One of the central issues that I think the Committee needs to turn its mind to is, who is the Attorney's client? Is it the Prime Minister? No, we learned that from Iraq. Is it the Government? Probably, yes, although others who follow me will address that issue. Is it Parliament? No, the Attorney is not the legal adviser to Parliament. So it seems to me Parliament needs to explore ways of working with the Attorney, possibly through its own legally appointed legal adviser, to form a view on which it can then have a sensible debate.

What I would expect by "legal advice" is legal advice that summarises the pros and the cons. Then reasonable people can disagree as to which way they come out on a particular application of the law to the facts, so that the central key issue is not to have all of the legal advice but to have the main elements of the legal advice, including the issues of difficulty. I think that is what Parliament needs to home in on. That is what was missing in 2003 and 2013. I think the debate on 29 August restored public confidence for a lot of people, because it told members of the public that parliamentarians, to whichever party they happen to belong, are capable of having a sensible debate on matters of substance, and reasonable people could disagree as to the outcome.

The key issue is to understand the points of difficulty in the legal advice. To understand those points of difficulty you do not need to have all of the factual elements, and you need to preserve some degree of confidentiality in each case.

Q5 Mr Turner: What legal advice would the House of Commons need to ensure any deployment resulting from its decision was legal?

Professor Sands: Parliament needs to be satisfied, on the basis of the factual material available to it and the basic legal arguments, that it is taking a decision that is consistent with the United Kingdom's obligations, because the United Kingdom is a law-abiding, rule of law country. For each Member of Parliament it is an individual matter of conscience as to what she or he is satisfied with. If I were a Member of Parliament voting on this type of issue, and did not have a legal background, I would want to know that an independent legal adviser had fully considered the facts, had set out in his or her own mind the legal considerations in a balanced way and, in particular, homed in on the most difficult aspects.

To give an example, in relation to Syria, the key issue was not in this document: will the use of force in Syria have the effect of reducing the use of chemical weapons? That is the crucial question. If the answer to that is yes, then I could envisage the use of force to protect fundamental human rights. That is a mixed question of fact and law. You need to know whether the law allows the use of force to prevent a systematic, widespread massive breach of fundamental human rights. There are different views about it. One Attorney may say yes, another may say no. I happen to be a supporter of humanitarian intervention, so,

accepting that there is a principle, I then need to turn to the facts. The central fact for me is, would the use of force in late August/early September have more likely than not led to non-use of chemical weapons in Syria again? That issue was not addressed by this purported document, or indeed by the intelligence advice that was put forward in summary form. If I had been an MP, on that basis I would not have voted for the use of force. If the evidence had been put forward that showed they had the capacity to take out, in an appropriate and safe way, the sites where the chemical weapons were stored or were likely to be, in such a way that they would not be used again, then I might have voted in a different way. So you need to know both factual and legal elements to form a view. It comes back to the previous question, they necessarily raise sensitive issues. There is a real issue that I think is not insurmountable as to how one does that.

Q6 Mr Turner: Where would such advice come from?

Professor Sands: That is the $64 million question. Parliament is not the Government. Applying that first principle, the starting point is that Parliament needs to get its own advice. The Attorney is not Parliament's lawyer. The Attorney owes a duty to the Government. In this case he also happens to be a Member of Parliament and, therefore, has a certain duty to Parliament. When a foreign Government or a Government asks me for legal advice I am giving advice to the Government, not to the Parliament or Congress of that country. Starting from that principle, a way needs to be found to allow Parliament to retain its own legal adviser on matters where, as an entity, its decision turns on legal advice.

There are a number of different ways of dealing with that. It might be worth exploring a little more how different countries deal with this. One way is simply for Parliament, as an entity, to retain a legal opinion from one or more individuals who have expertise on the subject matter. Another way of dealing with it is for Parliament, through its own existing systems, whether committee or otherwise, to have an in-house counsel who is charged with forming a view on the legal advice. The third way, which is what seems to happen now, is that each Member of Parliament works out for himself or herself what the legal situation is. That is of course what happens, because every time—and happily it does not happen too often—there is use of force, international lawyers get requests from those Members of Parliament they happen to know across the political spectrum, "What is the answer here? What do we do?" Those are the three options that I have set out in my document.

If you were to ask me what would I do, I think that when these situations arise there ought to be a parliamentary committee that can move very quickly to retain independent legal advice to form its own view. Parliament can then decide what aspects of that advice it wishes to make public, either generally or more broadly, to the whole of Parliament, it seems to me—I am trying to be practical here—to respect the need for confidentiality on the one hand and the need for Parliament to proceed on an informed basis. Reasonable people can disagree as to how you get that legal advice. Another way is to throw back the question to you, sir, and to ask you, "What would make you comfortable?" Some people will say, "I am happy if the Attorney stood up and said, 'This is my legal advice'. Then that is the end of the matter." Other people may think the Prime Minister saying, "This is the legal advice," may be sufficient. Others may say, "No, I need more than that. I can

either go out and contact an international lawyer I happen to know, or I can could go to the parliamentary legal adviser and get a view." It is for your Committee, which has a very important role here because I think there is now an acceptance that Parliament has a role to play in all of this, as to how you go about doing that.

Q7 Mr Turner: First of all, as a Conservative, I would be expected to be in favour of war. I am not in favour of war, and I think quite a lot of Conservatives were not in favour of the last wars. In answering the earlier question, you suggested that your clients are Governments. There are no circumstances in which you have been called upon to give advice to a Parliament in contradiction to their Government?

Professor Sands: I have. I had to give advice on two occasions to the United States Congress, once to the Senate Judiciary Committee and once to the House of Representatives Judiciary Committee on interrogation techniques in relation to detainees. The Congress had a rather different approach from the Executive of the day, and there was a conflict between the House, the Senate and President Bush in relation to what the United States could and could not do. In the end the view of Congress prevailed, not the view of the Executive, and that was a complex and painful process. In other cases I have given legal advice to a Congress. I can think of one case in South America where I was asked by the Speaker of the Congress to give a legal opinion on a particular matter. I understood that was to Congress and not to the Parliament of the day.

I do want to respond to the first thing that you said. I don't think people like me make assumptions as to political affiliation and views pro and con war. I think we do treat each Member of Parliament as his or her own person, and you form your own view on the facts of a case. I would not say of myself that I am for or against war generally. Obviously one does not favour a lot of war, but I supported the use of force in Libya, which I thought was justified in law and on policy grounds. I think Mr Blair had five or six conflicts and the only one I had a difficulty with was Iraq. I thought it was very unfortunate that we had to use force in Kosovo. I thought it was unfortunate that force had to be used in Sierra Leone, but the factual circumstances and the legality of the situation meant that one could not criticise what had happened on legal grounds. So I think each conflict has its own particular factual and legal circumstance.

Q8 Sheila Gilmore: If Parliament is being asked to be consulted, or asked to approve, is there a different form of legal advice that would be appropriate in those two circumstances, or do you it is much the same?

Professor Sands: I think it might be much the same. My own personal hope would be that the situation we are moving to is one in which Parliament would routinely be involved in any situation in which British troops are to be committed to active engagement abroad. That means that the consultation of Parliament is most likely going to lead to some sort of a debate, in which case, each of our Members of Parliament is going to have to form a view. So the precise circumstance in which it arises is going to change.

In the case of Iraq, everyone had months to prepare. I think everyone knew by October 2002 this was going to happen. Reasonable people knew where this was going. Over a period of six months a lot of people spent a lot of time thinking through the intelligence

issues and the legal issues. I know from my experience then that a lot of parliamentarians were asking themselves very complex questions about what to do.

Syria came completely out of the blue in one sense. My understanding of that—I hinted at it in February—was that the Prime Minister received a call from the US President on a Saturday and he said, "Right, we want to move," and not unreasonably the PM was caught slightly unawares and had to convene Parliament very quickly. I think a lot of people did not have a chance to think through all of these issues. That is not an ideal situation. On the other hand, the world is as it is and people don't usually announce nine months in advance that they are going to use force starting on 17 March 2003, or whatever, so as parliamentarians you need to be able to move quickly in those circumstances.

Another scenario would have been that the weekend events happen in relation to Syria, and someone in Parliament, a committee, the Speaker—it is for Parliament to work out what is the best and most practical modality to do it—immediately takes steps to obtain an independent view as to the legal factors that come into play. What would then happen is that Parliament will either get an internal legal adviser to set out the pros and the cons or retain an independent legal opinion from one or more individuals who would, on the basis of publicly available information, then offer to Parliament an independent view. That independent view would set out all the issues.

That can happen very quickly. If a decent public international lawyer is asked on a Sunday night to prepare a preliminary advice on the legality of the use of force in Syria, premised on humanitarian intervention, you will have something by Tuesday morning. That will be a 15 to 20-page document, which will be caveated. It will say, "I don't have all of the facts. I don't have access to the intelligence but, yes or no, humanitarian intervention works. Here are the conditions that you need to turn your minds to, to form a view as to whether or not you could support it on the basis of the factual material you have available to you." You would have then gone into that debate on the basis of knowing what are the key legal issues to be asking oneself, rather than a piece of paper that is essentially an advocacy document and does not provide you with much assistance as to what are the real issues. These things can happen very, very quickly.

Q9 Sheila Gilmore: The Foreign Secretary said in March 2011 that the Government would enshrine in law the necessity to consult Parliament on military action. How would you like to see them take that forward?

Professor Sands: I welcomed what the Foreign Secretary said. I thought that was a wise and positive development. I am a strong believer in parliamentary democracy, and I think on these kinds of issues the parliament needs to be fully involved and engaged.

It would be necessary to enshrine in primary legislation a commitment that, if British troops are to be used in overseas activity, Parliament should be consulted under appropriate conditions. I don't know that it is the place of primary legislation to set out the precise conditions, including legal advice. I think that is a matter for the House or for Parliament to work out what it would then do.

The reason that I circulated the evidence I gave to Sir John Chilcot was that it addressed the issue of timing, which is very, very important. One of the issues that was a great surprise to many people across the spectrum, who are pro and con Iraq, was that the legal advice that was prepared by the then Attorney General was signed off on 7 March 2003. That is astonishing. For anyone who is actively involved in the giving of legal advice, you know that a Prime Minister and a Government that is turning his or her mind to the use of force will deal with that legal issue early on. We knew, without actually knowing, that in the summer of 2002 Mr Blair must have been getting legal advice as to the circumstances in which he could commit British troops. I think one of the things Parliament needs to do is to think through the issue of timing of forming its own view, so that you are not caught on the hop, so that, in your role as a proper central consultee in the whole process, your views can be inputted into the views of the Government sooner rather than later.

In some cases—Syria—these things come up out of the blue suddenly, and that is more difficult to address. In other cases, an Iraq-type scenario or perhaps Syria now going forward, it would be sensible if Parliament had a mechanism for already thinking through what are the factual issues, what are the legal issues, if only to help Members of Parliament form a view, when that moment comes when you have to debate it and when you have to vote. I don't think that is enshrined in primary legislation. It seems to me that is a practice of Parliament that will emerge for internal decision making, but that is the kind of practical consideration that arises. If I was a parliamentarian, I would want to know that someone in my Parliament was thinking about these issues sooner rather than later, so that our role in contributing to these decisions helps Government to make the right decision. So, sooner rather than later. Timing it seems to me is really important.

Chair: Talking of timing, we know you have to leave us, and I am very grateful indeed—we all are, Professor Sands—for your excellent evidence this morning and the paper that you submitted to us. Thank you for your very positive proposals. We wish you well on your way. We hope we will see you again soon.

Examination of Witnesses

Witnesses: **Sebastian Payne**, Lecturer in Constitutional and Administrative Law, University of Kent, and **Professor Nigel White**, Professor of Public International Law, University of Nottingham, gave evidence.

Q10 Chair: Next we have Sebastian Payne, Lecturer in Constitutional and Administrative Law at the University of Kent and a barrister at the Inner Temple, and Professor Nigel White, Professor of Public international Law at the University of Nottingham. Professor White, thank you for travelling down from Nottingham. I am sure that is not unconnected to the constituency that the Chair of this Committee represents, but it is good to have you here in Parliament.

I will kick off. I am sorry we are depleted in numbers. Apologies again, but as long as the three members are in this room we do have a quorum. I want to continue with what Professor Sands was discussing, the last question put by Sheila Gilmore, which is that in March 2011, the Foreign Secretary said that the Government would, "Enshrine in law for the future the

necessity of consulting Parliament on military action". I wonder if each of you could tell us what the main benefits of enshrining this convention in law would bring. If the role of Parliament in conflict decisions were formalised, do you think that there should be a requirement to consult Parliament or to gain approval from Parliament? Should it be Parliament or just the House of Commons, which is the elected chamber, or should both chambers have a say in this? Mr Payne, if you want to start.

Sebastian Payne: Thank you, Mr Chairman, and thank you for inviting me to come to speak to the Select Committee.

The first thing to say about William Hague's statement in Parliament is that it is very vague. Of course you have tried to add some clarification as to how it might work. Whether enshrining in law is a good thing or not would obviously turn on the details, which have not been supplied, either by the Foreign Secretary or any other member of the Government. The advantages of legislation—and I refer to this in my short written evidence—is that there should be some degree of clarification as to the obligations of the Government to come to the House. That again depends on what is in the Act. It would impose an absolute legal obligation, which as a consequence would ultimately be justiciable. Then there is a corresponding issue about whether an Act of Parliament, if it were to provide a meaningful role for Parliament rather than just a vague, generalised comment, would then bring in the courts. There are clear advantages, but there is also a potential downside. The downside is not necessarily what people might assume but, as I mentioned in my written evidence, it might be a problem of bringing the courts into an area that would not be an advantage, either for the courts or indeed for Parliament's role itself.

Q11 Chair: Professor White?

Professor White: Thank you for inviting me down from Nottingham.

I think the royal prerogative in this area is an anachronism. It is an unregulated vestige from former times. Over those years of those centuries, military efficiencies improved somewhat, but democratic accountability has not improved—or it has improved, there is consultation now, often a vote, but it has not improved significantly to balance that. It is about achieving a balance. It is not about one or the other, that military efficiency should be given priority over democratic accountability. I think you need to achieve that balance. To me, the current situation isn't doing that. Therefore, you either need a resolution or a statute. I would say either of those would have to incorporate approval rather than just consultation. I think we are at the consultation stage at the moment, with the Cabinet manual, for instance. That would be a meaningful exercise of democracy that Parliament is actually voting on these momentous decisions.

In an era where we are talking about very controversial uses of force—and that is the thing that strikes me about Syria, indeed Libya and Iraq, none of these were straightforward cases of self-defence against an armed attack; they all had nuances and debates surrounding them. It seems to me that that decision cannot be left to a handful of people and must be a decision made by representatives of the citizens of the country. For those reasons, that decision should rest with the House of Commons, although the House of Lords could be consulted on this. To achieve that balance between efficiency and

democracy, I would argue, therefore, the House of Commons is where that balance should be achieved. It would delay things if we had to have a vote in the House of Lords as well, for instance, but obviously it would be advisable to consult the House of Lords.

Sebastian Payne: I would like to add a couple of points to Nigel's comments. I also think Parliament should have a strong role. I also think Parliament should not be consulted but should also be in a position to approve. The only area where I might part company—and we have discussed this before, both here in this Select Committee and elsewhere—I would favour a resolution underpinned by a standing order. But as to the substance of the obligation on the Government, I agree with Nigel that it should be strong.

Q12 Chair: Do you agree with Nigel it should just be the House of Commons, or both Houses?

Sebastian Payne: Under the present constitutional arrangements, because the upper house has hereditary peers in it still and appointees, excellent and splendid though their work is, I think it is the House of Commons that should decide. I don't see any reason why an opinion could not be provided and a debate by the House of Lords—it is full of people with immense experience—but I think the actual vote should be with the House of Commons.

Briefly, even if it were elected, not in every country where there are two chambers do both houses have a say. For instance, in Germany it is the Bundestag, the lower house, that decides.

Chair: Thank you, that is very clear. Thank you both of you.

Q13 Sheila Gilmore: We had a draft resolution from the previous Government, which was in the *Governance of Britain* White Paper, which defined how the House of Commons could approve conflict decisions. Obviously there was a wording given in the previous documentation. Do you think that is still appropriate? Do you think it could be improved?

Professor White: This is the 2008 draft war powers resolution?

Sheila Gilmore: Yes.

Professor White: I think it is a start. For me it does not go that much further than the current conventions that we seem to be arriving at in practice, in that far too much discretion is left as to the matter of timing of debate and gaining that approval if possible. Under the draft that was put forward in 2008, you could still have the same situation we had in Iraq where the debate was very much left to the last minute, for no real reason because we knew it was coming. It was very difficult for Parliament as a whole to stop that momentum. The deployment had already occurred. We had already threatened to use force against Iraq. We had already entered into the realms of the UN Charter in terms of how force is regulated in international law. Therefore, I think it would have been very difficult for Parliament to have stopped that. Reading that resolution, that is the core of the problem. That is built in, and so the consultation and approval is very much under the control of the Government.

Q14 Sheila Gilmore: What action do you think the Government should now be taking to carry this forward in line with the commitments?

Sebastian Payne: If I could answer both your questions together, I would like to say I take my hat off to the last Government for taking constitutional reform seriously. The resolution is a serious attempt to deal with the issue. They built on the House of Lords Constitution Committee's proposals for a convention. I think it has some things that are good in it but, like Nigel, I agree that it leaves too much discretion in the hands of the Prime Minister. Clearly there has to be a discussion as to what discretionary powers the Prime Minister should have, but the way in which the resolution was drafted effectively gave opt-outs or exceptions for emergency, security and special forces. No approval was needed. The decision was taken when Parliament was dissolved. The timing, and indeed the whole question of whether to bring it to Parliament, was left in the hands of the Prime Minister. Although it covers many of the issues—there would have to be a security issue, an emergency issue, included in whatever form of regulation, be it an Act or a resolution—I think the way it was drafted was too broad.

I have been thinking, "How should you go about dealing with it?" I have looked at the German Parliamentary Participation Act 2005. As I understand it, that is one of the strictest of legislative arrangements. Obviously I have said I do not necessarily favour an Act, but I still think it provides a considerable set of ideas for the Committee, and the House more generally, to think about how to structure the powers. If I could briefly identify the way they have gone about it? It is a very strict regime, and there would have to be a discussion on how strict it should be. In essence, how they have approached it is that all deployments have to be approved by Parliament. That is why you refer to it as a parliamentary army. There are arrangements for retrospective approvals in emergencies, which again is important, but there is a simplified procedure for approvals, which governs military operations of low intensity. In other words, they have introduced a way of grading the different scenarios. I think that is very useful because, clearly, it might be problematic to get the House to approve every operation. The principle is that it has to be approved. There will be conditions for emergencies, but with some operations of low intensity, including low numbers of troops, there is a system of presumed consent. It is very interesting. In other words, Parliament is presumed to consent unless 5% of the MPs object and, therefore, insist on some form of control within seven days of being notified. I am not saying that is perfect but I think that is a very interesting way of looking at it, to throw more into the pot rather than taking everything out.

Chair: Very interesting, thank you.

Q15 Paul Flynn: Could we look at the balance now between the military imperatives and the need for accountability? You have mentioned the immense power of the Prime Minister, and there are two major factors—not always recognised—working when we take decisions to go to war. One of them is the Napoleon syndrome, where all Prime ministers suddenly see themselves as writing their great page in history. They dig out the Churchillian rhetoric, they stand, they strut in a different way, and unfortunately there are pages in history, often bloody pages, but they behave in a different way to what they would do when they are dealing with humdrum daily matters. The other one is the might of the military-industrial complex—particularly the industrial one—that has a very powerful interest in having

perpetual war. These people who lobby have their tentacles deep into all sections of life. Against that you have Parliament fighting for what the people want outside, and the general desire for war.

I don't know if we are ever going to get the publication of the Chilcot Inquiry. It has gone on and on and on, but I think most of us are pretty certain that it is going to say that it was entirely unnecessary for the United Kingdom to join Bush's war in Iraq. We could not stop the war, but we could have stopped Britain going into it. Where do you think that balance is now between these other policies, Napoleon syndrome, the military-industrial complex and Parliament expressing the will of the people?

Sebastian Payne: Could I make one comment? It may run counter to some of your assumptions, but if one looks at the evidence given in the House of Lords Constitution Committee report *Waging War*, many of the senior military figures, chiefs of defence staffs and so on, were in favour of Parliamentary approval. Of course I understand you might say the military-industrial complex is a different thing from the heads of the services, but the military themselves are not opposed to the idea of parliamentary approval. A number of chiefs of defence staff spoke in favour of it.

Your point about the Napoleon syndrome: I have read with great interest and entertainment David Owen's book *The Hubris Syndrome* where he effectively concludes that most Prime Ministers and leaders go slightly mad.

Paul Flynn: We question "slightly".

Sebastian Payne: Yes, hubris syndrome and Napoleon syndrome may be a very closely linked concept, but I suppose the point is at the moment, on this balance between the influences pushing for war and Parliament's control, more needs to be done. I think that is why Parliament is so important. If you are concerned that Prime Ministers go slightly mad as time goes on, then all the more reason for Parliament to have greater control.

Professor White: I think at the time of making the decision, the military efficiency side is premised on the fact that the Executive has to make quick decisions. In my submission I tried to suggest that in most cases it does not have to do that, which has a bearing on that limb of the military efficiency argument that you need a small group of people deciding these things. We are talking about the decision to deploy, not the day-to-day command and control of military activities. We are not questioning that—it is that initial trigger. I think there is often time for significant parliamentary debate and there could be a significant shift towards democratic accountability from an early stage, when the Government is thinking about deploying troops, rather than leaving it to this almost too late stage of deployment, where, as I have said, we have already entered into the threat of force.

I don't think allowing MPs a decision-making stage affects military efficiency; it just stops the military activity. There is no efficiency—but the whole debate should take place before we get into arguments about operational efficiency. Once the decision is made and Parliament has been convinced then, yes, it should be primarily handled by a small group, the War Cabinet or whatever, with some accountability to committees and to Parliament. But around that initial decision, I think the operational efficiency arguments are a little bit misleading.

Q16 Paul Flynn: I accept the points you are making. This is a crude simplification called a military-industrial complex, but are you aware of the role of the Kagan couple who were at the right-hand of General Petraeus in Afghanistan, constantly supporting military interventions and escalations and discouraging any peace initiatives. They wrote part of his report to the Secretary of State. They were immensely influential. They were not employed by General Petraeus, or the military or the Government. They were employed by the industrial military contractors in America, and the role of Adam Werritty in this country has never been investigated, because the Minister involved had absolution by resignation. But we do know there is this person who is being paid, being supported by someone else—we believe in America—and possibly again to foment war. These are two examples where there is an immense pressure that is pushing ahead to war, and relatively, we, the democratic voice of Parliament, are very weak. We do not have people lobbying for us in huge numbers, and we do not have our own legal advice as suggested in the last evidence. Isn't the balance wrong there?

Professor White: I certainly agree that the role of private corporations in military operations needs further consideration, and none of the debates or the draft resolution deals with that. We are dealing with Her Majesty's forces or directly supporting those. We are not dealing with the role of private corporations clearly, which might be an issue that should be covered by these debates because, for instance, in Afghanistan and Iraq the role of private military and security companies was huge, and the losses suffered by those companies was greater than the losses suffered by the regular forces on occasion.

I notice the draft resolution is confined to the regular forces or the reserve forces, where the move towards privatisation of force in the US and the UK is a problem, that we seem to be missing out on democracy. We do not look at the losses suffered by private corporations in Parliament. We generally focus on the losses, albeit geographical losses.

Chair: If I can ask Mr Payne to come in.

Sebastian Payne: Yes. As I understand your points, you are concerned by influences and possibly improper influences on decision making. One of the core issues is re-thinking the mindset of constitutional arrangements. I am concerned about the legitimacy of decision making and Parliament's role. In a sense, if you get that right that would answer some of your concerns. One of the problems has been that the Executive assumes that it has the absolute right to take the decision. As the Chair, Graham Allen, has said in Select Committees, when Parliament is involved it is involved by the grace of Government. I think that is the shift that has to be made—that in fact Parliament must have a significant role.

Q17 Paul Flynn: You mentioned David Owen. Have you read David Owen's theory as described by Peter Oborne, a distinguished journalist? Mr Oborne believes there has been a tacit agreement between David Cameron and Tony Blair in order to suppress the publication of the Chilcot Report until 2015, at which time Tony Blair will give support to David Cameron in the general election. That is what David Owen is claiming. Do you think this is a plausible explanation?

Sebastian Payne: I think it is entertaining speculation. It may or may not be true, but I feel that there is not much I could usefully add to the conversation.

Chair: Sorry, it is not a point we should ask our witnesses.

Sebastian Payne: No, I am delighted to reply, I mean all sorts of things can happen in the world. I have no information to say whether that is true or false.

Q18 Paul Flynn: We will find out who is right in 2015. The Deputy Prime Minister told us there was no division within Government on the principle that Parliament should be consulted on conflict decisions, but the difficulty was enshrining a convention in a way that is strong and meaningful but none the less flexible enough to deal with what are, by definition, unpredictable circumstances. I think we would all see the sense of that, the urgent decisions needed on Libya, Kosovo and possibly Sierra Leone. But do you not think there should be an overriding role, that we do consult Parliament and where it is possible there is parliamentary approval of any occasion when we are sending military troops out of the country?

Professor White: I would say yes, and going back to the 2008 draft resolution the trigger there is whether the use of force would be governed by the law of armed conflict. I think that is far too narrow. I think Sebastian argues this as well, that any significant deployment of troops, whether we know it is going to be for combat purposes or even for peacekeeping purposes, should be governed by this process that we are looking at, by the Government getting approval from the House of Commons. A peacekeeping force—I put this in my submission—nowadays would not be covered by this draft resolution because they are not governed by the law of armed conflict. They are not going there to fight. They are given a mandate now by the Security Council to fight in certain circumstances. We saw in Bosnia that UN forces can get dragged into conflicts. Again, it goes back to my earlier point that those decisions should be made at an earlier stage. A significant deployment of a peacekeeping contingent for me should be covered by any war powers resolution or statute.

Sebastian Payne: I certainly agree with Professor White. I think it would be unduly restrictive to limit it to armed conflict and, as the Public Administration Select Committee suggested, the Geneva Convention. So I think a broader language is appropriate.

There is a second issue that I think is important as well, which Professor Sands referred to, which is the legal advice. This is part of the equation, if the Committee are happy for me to refer to that briefly. I part company a little bit with Professor Sands, in terms of this question of client privilege. Essentially, what has to happen is there needs to be a re-thinking of the idea of legal privilege in relation to the Attorney General's advice. Professor Sands is practising as a barrister, and I think there is a mindset where people seem to think that, because the Attorney General is advising a Government, therefore, that advice in the context of war has to essentially be protected by client privilege.

Lord Morris of Aberavon, when he gave evidence to the House of Lords Constitution Committee, talked about this issue of privilege. He said, "You have to think of it as being like a family solicitor. The Attorney General is like a family solicitor and you wouldn't want your advice being circulated." Of course, that is the crucial issue. I don't think the Attorney General does bear the same relation to Parliament and the Government as a family solicitor. I think that is the model. Because of the actual legal structures of government embodied in the Crown, there is still a personalised idea of the role of the

Attorney General as a personal legal adviser. But the Government is a bearer of public power and I think different considerations apply. I also think there is something fundamentally preposterous about the Government saying, "The war is legal. We have legal advice but we cannot show it to you." That is not the same scenario as advising someone in the private and civil sphere. My suggestion is that, in fact, the Attorney General's advice should be published in full, save and except for those—and I agree with Professor Sands—elements that are clearly secret.

As to the substance of the legal advice, I can see no reason not to have that published. I would add that if that were the case, if that is the route you go down to publish the Attorney General's advice, then you avoid what I would see as a ridiculous scenario of people waving their different opinions at each other in Parliament and so on. I think we could add to the whole process of control.

Q19 Sheila Gilmore: First of all, I think we need to tie that into the question I am going to ask later. You are suggesting that we as Parliament do not need separate legal advice.

Chair: Is that what you are saying?

Sebastian Payne: I am saying that if the Government's case is that they have legal advice and the war or deployment they are proposing is lawful, that advice should be published. I am not happy with this model of Parliament having one opinion and the Attorney General having another—because it is a rhetorical thing as well, which is the Government says, "Our case is it is lawful and we have advice but we're not showing it to you." So I am saying, well, show it to Parliament.

Q20 Chair: Presumably the Attorney General could not make public advice that was based upon secret intelligence?

Sebastian Payne: That bit obviously not. As a refinement—I have thought about this—the only refinement would be that Parliament should have a legal adviser who could agree about those things, satisfy themselves and Parliament, so there were some elements that had to be excluded. If you are saying the SIS has identified a series of capabilities here, there and everywhere, and that is integral to the activity, then obviously there are certain secrets that might not be published. The fundamental issue relating to international law is in the interpretation of the law and saying, "Under these circumstances a conflict with country X if we do this it is lawful." That is what the Government was saying by definition. I see no reason why it should not be published.

Chair: Professor White. I will bring you back in a minute, Paul.

Professor White: I think Philippe was right in many ways that international law does not work in the way that we expect most legal systems to work, where we bottom out right and wrong answers. What Parliament needs is to get the nuances of the debate. For all of the interventions since 1945 there are arguments for and against, and they just need those arguments to be able to make an informed decision. What has been happening, certainly with the recent legal advice, is you are just getting one side of the argument. You are not getting both sides of the argument. Even the Libyan advice I thought was rather weak. It did say, "We have a resolution, therefore we have a legal basis," but it did not go into the

difficulties of understanding what the resolution was allowing, which became an issue as the intervention proceeded. It very much said, "We have a chapter 7 resolution, therefore it is lawful," but everybody at the time could see that this resolution was going to cause problems, because the protection of civilians paragraph was inserted very much at the last minute and was not thought through in terms of could that lead to a regime change, for instance.

I am sure the Attorney General in his original advice to the Government had all of these things in front of him, but Parliament was just presented with one side of the argument, the Government side of the argument, so I think there might be scope. If they are not prepared to put forward both sides of the argument then Parliament must seek advice on what the other side of the argument is.

Q21 Paul Flynn: The right to declare war is basically in the royal prerogative. The present monarch has been entirely inert on these issues and has not exercised any political influence, but in fact if a future monarch decided that they would disagree with Parliament, they could. We have had monarchs in the past who have been mad, bad, and sometimes both, and it is conceivable that future monarchs will not be as blameless as our present one. Do you think it should be enshrined in a modern constitution that the role of Parliament, the decision of Parliament, should override the royal prerogative on issues such as war?

Chair: This will be the last question, I am afraid. Professor White.

Professor White: I am going to leave the detail on this to Sebastian as a constitutional lawyer. My instinct is that you essentially have a choice. I think you could only do it by statute. You could only do it by an Act of Parliament. I would disagree with Sebastian, I do not think that would lead to the courts becoming involved with the legality of the war. I think if you look at the cases over the years, the CND case in particular, the courts have said, "Decisions about going to war are decisions for the Executive," and you could add in Parliament there if the reform took place. They are not decisions for the courts. They look at Human Rights Act issues, and things like that. The Smith case was referred to in the House of Lords Committee. Deciding that soldiers have human rights is not deciding about the legality of the war. They have put them there. I think it depends on the terms of the statute. If the statute was a very strong one it could effectively extinguish the prerogative powers, but I suspect for political reasons it may well just be clear in the preamble to the statute that it is just qualifying or regulating the prerogative. That might make it more acceptable to Parliament, but I would probably agree with you that it needs to be replaced.

Chair: Mr Payne, the last word is with you.

Sebastian Payne: Thank you very much. I will be concise. If you are asking me what do I think is the most appropriate outcome in principle, I think that the powers to go to war should be enshrined in law but enshrined in law in a written constitution. If you are asking me what is the next practical step, given the set of arrangements we have, bearing in mind that this discussion has been going on certainly since the Public Administration Select Committee in 2003, I think the most sensible next step would be to go for a resolution underpinned by standing order. I say that not merely because of my concern that the courts would come in, but also because I do not believe in piecemeal reform that might have not

merely unintended consequences but, at least to my interpretation, clear consequences that might be undesirable.

Chair: Gentlemen, thank you very much indeed. I am sorry we have run out of time. We are losing our quorum in a minute. I am very grateful to you for attending today to give evidence. It has been extremely valuable and useful to us. Thank you very much indeed.