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Act of State in the Grey Zone

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I Purpose and Scope

There is no common definition of *grey zone* activities and operations, for it is a relative term. Its relativity, in turn, is to the legal frameworks of the day. At best, a definition of 'grey zone' is one of a range of terms used to describe activities designed to coerce countries, in ways that seek to avoid military conflict.[1] Military conflict, in turn, is triggered when certain thresholds of international law are met. These thresholds are set rather high and hark back to Greco-Roman legal frameworks which recognised a distinct, and binary, state of international relations: peace and war.[2]

Campaigning in the grey zone is a strategic challenge that vexes most contemporary militaries: the role and evolution of *conventional* military troops (such as the infantry); the re-emergence of the importance of prohibited intervention and the meaning of coercion for grey zone operations; and the inevitable discussions around

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[1] 'Defence Strategic Update', Department of Defence, 1 July 2020) 1.4; 1.5.

[2] For more on the grey zone in this journal, see Samuel White, 'Colouring in the Grey Zone: Lawfare as a Lever of National Power' 21(2) 2021 *Journal of Military and Strategic Studies* pp. 77 – 106.

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what strategic frameworks operations should occur through. Countries – including Australia – are increasingly gravitating towards a minimalist deterrence model – making targets harder to access (denial) and retaliating when that does not work (punishment).

The *Defence Strategic Review* in Australia has made clear that Australia continues to adopt a deterrence model. Yet little seems to have been written on the legal authorities for these operations: the authors have written on the legal authorities for denial operations, but punishment operations are different. They are often external, rather than internal. They may involve some level of use of force, or at least have kinetic effects. It may be that a punishment operation, in order to de-incentivise a particular course of action, will focus on civilian targets. All of these courses of operations bring into the risk of committing an internationally wrongful act – but being a dualist State, Australia must be primarily concerned with its *domestic* legal authority. This paper seeks to address how the British common law doctrine of the *Act of State* or the externals security prerogative can provide valid justifications for military operations for Commonwealth countries, even in the face of conflicting international legal authority. It accepts that Article 3 of the *Articles for Responsibility of States for Internationally Wrongful Acts* (ARSIWA) notes that the "characterization of an act of a State as internationally wrongful is governed by international … and is not affected by the characterization of the same act as lawful by internal law."

This paper accordingly is split into three parts. Section II addresses the fundamental question of how a State can be deterred. Section III therefore addresses two potential sources of domestic constitutional authority for any punishment operation: the war prerogative and the external security prerogative, rather than the external affairs power as one jurist has remarked extra-curially to be of use.[3] This is because the Royal prerogative applies both externally and internally and therefore is of more fluid use. These two limbs of the Royal prerogative are an important, but complicated area.[4] Legal writing on the war prerogative often relies upon outlying, eclectic cases and debates what triggers its use. What is clear, however, is that it does exist. By comparison, writings on the external security prerogative question its validity. Some British authorities would

[3] Justice Logan, "Not A Suicide Pact'"– Judicial power and national defence and security in practice ' (22 July 2022, Speech) *National Administrative Law Conference.*

[4] George Winterton, *Parliament, The Executive and the Governor-General* (Melbourne University Press, 1983)p. 115

appear to support the concept that the Royal prerogative of external security exists outside of the war prerogative; others suggest it does not. Section IV then turns to discuss how international law is woven into any discussions of an Act of State.

II How Can You Deter a State?

States can deter and shape other States through a range of levers of national power – military (interventions and deployments), economic (debt traps), information (interference operations) and diplomatic (such as coercive diplomacy). This is the *means* of deterrence, but not the *strategy* of deterrence which this paper is concerned with. To deter is 'to discourage or turn aside or restrain by fear; to frighten from anything; to restrain or keep back from acting or proceeding by any consideration of danger or trouble'.[5] It is characterised by two limbs: denial and punishment.

Deterrence is a concept that has been practised throughout history[6] but has in recent history fallen into neglect. This is because, as Sir Laurence Freedman notes:

> A doctrine that is so associated with the continuity and the status quo, which occupies a middle ground between appeasement and aggression, celebrates caution above all else, and for that property alone is beloved by officials and diplomats, was never likely to inspire a popular following. Campaigners might march behind banners demanding peace and disarmament, and the media might get excited by talk of war and conflict, but successful deterrence, marked by nothing much happening, is unlikely to get the pulse racing. It has no natural political constituency.[7]

Effective measurement of deterrence is nearly impossible, and how to successfully note that a State has been deterred is a question that deterrence theory has grappled with since the advent of nuclear weapons. Glenn Snyder in 1958 undertook

[5] *Oxford English Dictionary*,
'Deter".
[6] Thucydides (n 16) 6.18. See also Samuel White, "Medieval Laws of War" in Samuel White (ed), *The Laws of Yesterday's Wars* (Brill, 2021)pp. 101, 109 and the act of *chevauchée* and siege warfare.
[7] Laurence Freedman, *Deterrence* (Polity Press,2004) p. 25.

the first comprehensive study of deterrence.[8] Snyder opined punishment is the less preferable manner of deterrence, on the observation that punishment places the onus on the target, and denial on the defender.[9] He concluded however that denial alone was insufficient, and canvassed the most effective combinations of denial and punishment. It was, however, at the onset of the Cold War and the advent of nuclear weapons that the concept gained a level of orthodoxy in strategic thinking.[10] The difficulty is therefore to navigate the maze of definitions and theoretical models applicable; for whilst the threat clearly has evolved from state vs state conflict, and from a focus on kinetic effects, the theories surrounding modern deterrence for the most part 'still rest upon nuclear and conventional forces to avoid escalation of conflict'.[11]

Robert Jervis helpfully outlined the three waves of deterrence theory.[12] The first wave (so-called minimalist theory in comparison to the complexity of other waves) includes the first half of the 20th century — from the advent of air power to the Soviet Union gaining mastery of thermonuclear weapons. George Quester has added to Jervis' examples the older example of maritime warfare as:

> For most of history, the imposition of damage on an adversary had entailed the prior defeat of his military forces … But the fluidity of the sea has offered an exception, and the third-dimensional innovation of the submarine, and then of various forms of aerial weapons, has compounded this exception so that it is now the rule.[13]

Air power however had two key features that distinguished it from land and sea warfare. The first was that the fight was unequal between aviators and their targets; the gap resulted in aviators 'who were neither excited … nor in any danger, pouring death and destruction upon homes and crowds below'.[14] They were thus difficult to deter

[8] Glenn Snyder, *Deterrence by Denial and Punishment* (Center of International Studies, 1958).
[9] Ibid, p. 44.
[10] Jeffrey W Knopf 'The Fourth Wave in Deterrence Research" (2010) 31(1) *Contemporary Security Policy* 1; Freedman, *Deterrence* (n 176).
[11] Media Ajir and Bethany Vailliant, "Russian Information Warfare: Implications for Deterrence Theory," (2018) *Strategic Studies Quarterly* pp. 71, 86.
[12] See Robert Jervis, "Deterrence Theory Revisited," (1979) 31(2) *World Politics* 289; George Quester, *Deterrence before Hiroshima: The Airpower Background to Modern Strategy* (Wiley, 1966).
[13] Ibid xiv.
[14] HG Wells, *War In the Air* (Wordsworth Classics, 1907) p. 84.

through fear of punishment. Second, air power was not a capability that could be absolutely deterred — a bomber could always get through the air defence.[15] Air power demonstrated the necessity to look beyond punishment, expanding strategic thinking into the realm of denial. This could be done through active and passive measures. Active denial included anti-aircraft guns; passive denial relied upon increasing social resilience.[16] Nuclear weapons however shifted this thinking into the second wave, which recognised that nuclear war could be threatened, not fought.[17] It accordingly looked to answer the question of the best methods to threaten without resorting to war.

With an emphasis placed back on punishment, the works of Jeremy Bentham underwent a revival. Bentham was the first to develop the concept that there should be both a degree of clarity and predictability in punishment. As Freedman explains of Bentham, '[a]s a utilitarian, he supposed that criminals, along with everybody else, were rational and self-interested, and could calculate when the costs of punishments would outweigh the potential benefit of the crime.'[18] Bentham wrote:

> In so far as by the act of punishment exercised on the delinquent, other persons at large are considered as deterred from the commission of acts of the like obnoxious description, and the act of punishment is in consequence considered as endued with the quality of DETERMENT. It is by the impression made on the will of those persons, an impression made in this case not by the act itself, but by the idea of it, accompanied with the eventual expectation of a similar EVIL, as about to be eventually produced in their own instances, that the ultimately intentional result is considered produced: and in this case it is also said to be produced by the EXAMPLE, or by the force of EXAMPLE.[19]

[15] United Kingdom, *Parliamentary Debates*, House of Commons, 10 November 1932, cols pp. 631–8 (Stanley Baldwin).
[16] Such as through bomb shelters and gas masks.
[17] Jervis (n 178) p. 289.
[18] Freedman, *Deterrence* (n 176) p. 8.
[19] Jeremy Bentham, *Principals of Penal Law: Volume II* (Harvard University Press, 1843) p. 383. Bentham used a term that was common at the time, determent, which the *Oxford English Dictionary* defines as 'the action or fact of deterring, a means of deterring; a deterring circumstance'. This remains a powerful word, as it describes a 'situation in which what was intended has been achieved': Freedman, *Deterrence* (n 176) p. 8.

Credibility requires technical attribution development, and an ability to signal. Signalling, in turn, required a nuanced understanding of the target audience — the rational state.[20] It further was underpinned by the logical requirement that the threat be able to be actioned. This was implicit under Bentham's theory, but the advent of nuclear weapons and concerns with first- and second-strike capabilities brought the issue of credibility to the fore.[21]

Third-wave deterrence theory, however, questioned the operational assumption of a rational actor. This was based on the foundations laid by emerging research from social psychologists,[22] and new vogue terms such as group think reinforced that there were no such things as rational actors. Third-wave theory was therefore concerned with the idea that rational actors, working with rewards and punishment, did not exist. Deterrence, and the theory underpinning it, was reinterpreted to be a strict term, inseparable from the threat of retaliatory punishment.[23] As Sir Laurence Freedman opines, in " circumstances where the possibility for denial is limited and a degree of vulnerability is unavoidable, then deterrence has to work through the threat of punishment".[24]

The extension of *everybody else* to States was the only methodology that allowed for nuclear planning to grow. Of course, States are not sentient beings– they are concepts and constructs. This was central to a growing academic discourse in the 1980s from social psychologists,[25] and the strategic implications of this were clarified under third-wave deterrence theory.[26] Third-wave theory has reinterpreted deterrence away from rationality (where costs could be instilled through denial operations) to irrationality (where costs could only be instilled by a combination with the threat of retaliatory

[20] Ajir and Vailliant (n 177) p. 85.
[21] Freedman, *Deterrence* (n 176) p. 114; Glenn H Snyder, *Deterrence and Defense: Towards a Theory of National Security* (Princeton University Press, 1961) p. 10.
[22] See Irving Janis, *Victims of Group-Think* (Houghton Mifflin, 1972); Graham Allison, *Essence of Decision: Explaining the Cuban Missile Crisis* (Longman, 1971).
[23] Thomas Schelling, *Arms and Influence* (Yale University Press, 1966) p. 71.
[24] Laurence Freedman, *Deterrence* (Polity Press, Cambridge) 2004, p. 60
[25] See Irving Janis, *Victims of Group-Think* (Houghton Mifflin, 1972); Graham Allison, *Essence of Decision: Explaining the Cuban Missile Crisis* (New York: 1971).
[26] Robert Jervis, 'Deterrence Theory Revisited' (1979) 31(2) *World Politics p.* 289

punishment).[27] It is an important point, that in deterring IOs and instilling costs on States, there must be an ability to punish. The question, then, is to what level?

The punishment of States, from a deterrence lens, is a complex topic. It is interwoven with questions of the appropriateness and level of responses, as well as assumptions around the rationality of States, State actors and responses. Criminological models often resort to the eighteenth-century Italian philosopher, Cesare Beccaria, who influenced Jeremey Bentham. Bentham, in turn, utilised deterrence theory for criminal punishment. Beccaria viewed punishment as requiring certainty, and celerity.[28] He further placed a strong emphasis on summary, rather than severe, justice. This was on the basis that severe punishments would lose their impact over time, requiring even tougher punishments, to the extent that the punishment would become wholly disproportionate to the crime.[29] These theories suggest that both speed and severity of punishment are important to deterrence. These required military capabilities and equipment, who have the ability to project power in an expeditionary manner, unlike civilian constabulary forces.

Some fourth-wave strategists examining cyberspace deterrence have argued that States should limit their responses to the domain that they are being targeted. Within cyberspace, therefore, some argue that punishment operations should be limited to *hackbacks* in order to avoid escalation.[30] Such a position would appear grounded upon rational State theory and seems inconsistent with the theory of the third wave – being that retaliatory punishment is all that is required, rather than proportionate.[31] For this reason, nuclear retaliation is still espoused by the United States of America as a viable punishment for any large-scale cyber-attack.[32] It also reflects a wider practice in military affairs that retaliation should not be confined to a single domain: for example, land warfare is often complimented by air and sea warfare. State deterrence should therefore not be limited to certain domains, and the ADF could strategically respond across a

[27] Thomas Schelling, *Arms and Influence* (New Haven, Yale University Press, 1966) p. 71.
[28] Laurence Freedman, *Deterrence* (Polity Press, Cambridge) 2004, p.61.
[29] Ref 1930s study by Jack Biggs; reintroduction of death penalty in Oklahoma made no difference.
[30] Media Ajir and Bethany Vailliant, "Russian Information Warfare: Implications for Deterrence Theory ' (2018) *Strategic Studies Quarterly* pp,71, 86
[31] Freedman, *Deterrence* (n 176)p. 114; Glenn H Snyder, *Deterrence and Defense: Towards a Theory of National Security* (Princeton University Press, 1961) p. 10.
[32] Department of Defence, "Nuclear Posture Review" (2018) p. 5.

variety of methods: through grey zone special forces operations; maritime interdictions on the High Seas; freedom of navigation operations that support political claims; or conventional military operations. Under deterrence theory, these are all plausible punishment operations, whose varying legality (under domestic and international law) add or reduce their credibility.

What then for the *level* of punishment? There is a strong argument that gradual increases in the level of force allow for the gradual hardening of the target. This element of deterrence theory became clearest with the advent of air power. As Italian air power theorist Giulio Douhet noted:

> The population can and must be inured to the horrors of war, but there is a limit to all resistance, even human resistance. No population can steel itself enough to endure aerial offensives forever. A heroic people can endure the most frightful offensives as long as there is hope that they may come to an end; but when the aerial war has been lost, there is no hope of ending the conflict until a decision has been reached on the surface, and that would take too long. People who are bombed today as they were bombed yesterday, who know they will be bombed again tomorrow and see no end to their martyrdom, are bound to call for peace at length.[33]

Cultivating a reputation for deterrence can actually add to credibility. In principle, every act of foreign or domestic policy has some significance for the creation of future expectations – how one deters now will have an impact on how one deters in the future. Jonathan Shimshoni made this case by looking specifically at Israel, holding that a reputation can be developed through repeated applications of force, serving a deterrent effect.[34] Earl Ravenal made an observation similar to Shimshoni, opining:

[33] Giulio Douhet, *The Command of the Air,* trans. Dino Ferrari (New York: Coward-McCann Inc., 1942) p. 188.

[34] Laurence Freedman, *Deterrence* (Polity Press, Cambridge) 2004, p. 38.

> In order to buttress its credibility, a nation should intervene in the least significant, the least compelling, and the least rewarding cases, and its reaction should be disproportionate to the immediate provocation or the particular interest at stake.[35]

Admittedly, this is an argument *reductio ad absurdum*. However, there is merit in it even from an international relations perspective, and potentially in possible signalling by the Australian government in attempting to deter IOs. Douhet's theory did not seem to be proven in World War Two. The use of strategic bombers that indiscriminately targeted civilian population centres, deemed important for the industrial capacity that underpinned the war effort, did not have its intended effect. Homefronts were more resilient than originally theorised, and even a loss of air superiority did not bring the collapse anticipated. So too did gradual increases in bombings in subsequent campaigns – particularly in Vietnam and Afghanistan – lead to a gradual hardening of the population. The application of this to OCOs is clear – if reprisal operations are slowly graduated, the target (be they individuals, corporations or States) will slowly begin to adapt to the new norm. From a strategic deterrence perspective, then, there is merit in aggressive responses. Emphasis is placed on plural (responses) as it is difficult to imagine an act so awesome and awe-inspiring (such as mutually assured nuclear responses) that it would be convincing.[36] Again, it is important to reiterate that this is through an international relations lens, rather than an international legal lens. Undertaking aggressive responses would, *prima facie*, constitute the crime of aggression. However, as is expanded upon below, this international legal obligation is of limited application when assessing **domestic** legal authorities. As British case law supports, the control and disposition of strategic bombers is wholly supported under the Royal prerogative.[37] It is necessary, therefore, to address the breadth and depth of domestic authority, even if the most effective deterrent may not be internationally lawful.

[35] "Counterforce and Alliance: The Ultimate Connection," *International Security* 6(4) (1982) p. 28.
[36] Martin C Libicki, *Cyber Deterrence and Cyberwar* (RAND, 2009) p. 11.
[37] *Re a Petition of Right* [1915] 3 KB 649, 666 (Warrington LJ)

III The External Security Prerogative

There may be situations where the Australian Government does not wish to declare an enemy, even without a declaration of war.[38] In these situations, Australia can rely upon the external security prerogative or *an Act of State*. Both are the one and the same, relating to "an exercise of sovereign power"[39] outside of municipal jurisdiction, thus constituting a part of the Crown's prerogative in relation to foreign affairs.[40] This Section will use the terms Act of State and external security prerogative interchangeably, although as most cases that deal with the legal authority and limits of this legal authority come from the 18th century, when discussing those cases will refer to the legal authority as an Act of State to avoid confusion

Moore notes that most external security operations other than war have been undertaken under the authority of United Nations Security Council resolutions or international agreements.[41] This might be so, but for operations solely conducted by Australia such as counter-interference operations, the deployment of ADF members and other officials overseas to engage in peacekeeping operations, training and support operations, or military operations would arguably also be supported by the Commonwealth's prerogative power with respect to external affairs.

Within Australia, it is well-recognized that the Commonwealth's non-statutory executive power extends to the conduct of relations with other countries, including entering into treaties and assuming international rights and obligations under those treaties.[42] The extent to which this relationship prerogative extends to external security, however, is not clear.[43] This is unsurprising, for what Acts of State constitute are anything but clear. For some, it is a lawful authority for coercive action taken under the

[38] Rusty Weapons – UQLR

[39] *Salaman v. Secretary of State for India*, [1906] 1 K. B. 613, 639, per Fletcher Moulton. L. J.

[40] William S. Holdsworth, "The History of the Acts of State in English Law*Columbia Law Review* 41, 8 " (1941): *pp.* 1313 – 1331.

[41] Cameron Moore, *Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force* (2016) pp 253-4.

[42] See, eg, *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 369; *Thorpe v Commonwealth (No 3)* (1997) 144 ALR 677; *Al-Jedda v Secretary of State for Defence* [2011] 2 WLR 225, 253; *Rahmatullah (No 2) v Ministry of Defence* [2017] UKSC 1, [15] (Lady Hale, with whom Lord Wilson and Lord Hughes agreed).

[43] *Habib v Cth* (2010) 183 FCR 62, 66 (Black CJ); Perram J at 77 similar.

Royal prerogative;[44] for others, it is a doctrine of immunity;[45] and for others, it is an aspect of non-justiciability.[46] The earlier interpretation is what is of focus for this paper.

A *Breadth*

The logical starting point in addressing Acts of State is to question when they apply, for the line between any operation of the war prerogative, and an external security prerogative would appear narrow at best. As A.V. Dicey aptly noted:

> an act done by an English military or naval officer in a foreign country to a foreigner, previously authorised or subsequently ratified by the Crown, is an Act of State but does not constitute any breach of the law for which an action can be brought against the officer in an English court.[47]

Informing Dicey's views were two key cases. Both relate to British naval operations and claims in tort arising from them, in the 18th century. The first case dates to 1807, that of *The Rolla*,[48] where an American ship was proceeded against for breaching a Pacific blockade of Monte Video (*Montevideo* as one word) established by the Royal Navy. This Pacific blockade was one that was arguably below the threshold of war and was exercised in accordance with the prerogative of foreign affairs. It was held that there was sufficient legal authority for the use of force by the Royal Navy because the Pacific blockade had been legitimised by the British government.

The second key case 40 years later, is the oft-cited *Buron v Denman*.[49] Commander Joseph Denman (as he then was) engaged in a policy of punishment operations against slave ships along the West African coast, blockading river entry points and destroying slave holding pens. An action was brought against Denman by the Spanish merchants who had owned the slave ships destroyed. Denman was acquitted by the relevant English court, who found that there was no case to answer for the legality of the action could not

[44] Jerry Dupont, iThe Common Law Abroad: Constitutional and Legal Legacy of the British Empire (Rothamn, 2001) xiii – xix; Campbell McLachlan, *Foreign Relations Law* (Cambridge University Press, 2014) pp. 14 – 16, 276 – 85.
[45] Harrison Moore, *Act of State in English Law* (Dutton, 1906, Rothman reprint 1987) pp. 93 –4.
[46] Moore, Crown and Sword p. 261
[47] AV Dicey, 10th ed, p. 306
[48] (1807) 165 ER 963, p. 6
[49] (1848) 2 Ex p. 167

be questioned as it was an Act of State. Importantly, although the actions taken were not done under a valid act of war, nor under any rule of international law at the time, the punishment operations were retrospectively supported by the British government.[50] The Crown was thus able to "'by virtue of its prerogative over foreign affairs… subject only to the risk of provoking war" have a free hand "in its dealings with aliens outside the jurisdiction of the English courts".[51]

But is it limited purely to actions against a foreign national? A majority of the case law would appear to fall under the Diceyian approach to Acts of State – that is, the lawful authority only extends to actions taken against those not subject to the relevant Crown. *Buron v Denman* makes clear that the act must be done to an alien:

> Courts of law are established for the express purpose of limiting public authority in its conduct towards individuals. If one British subject puts another to death or destroys his property by the express command of the King, that command is no protection to the person who executes it unless it is in itself lawful, and it is the duty of the proper courts of justice to determine whether it is lawful or not.[52]

Although the issue of an Act of State has never been raised within Australian case law, the High Court of Australia has emphasised the external affairs prerogative is limited in its breadth to the external. In the matter of *R v Burgess; Ex parte Henry*[53] Evatt and McTiernan JJ explained that the phrase *external affairs*' denotesthe whole series of relationships which may exist between States in times of peace or war,"including measures to promote friendly relations with other States.[54] They observed that" this sphere of government is characterised mainly by executive or prerogative action, diplomatic or consular".[55]

Later English case law also makes clear that the alien must be outside of the territory of the Crown, for those residing within the territory are argued to owe temporary allegiance and be owed temporary protection.[56] However, recent British case

[50] Holdsworth, Act of State, p. 1321.
[51] Holdsworth, Act of State, p. 1321.
[52] (1848) 2 Ex pp. 167, 169.
[53] (1936) 55 CLR p. 608.
[54] (1936) 55 CLR pp. 608, 648, see also pp. 643-4 (Latham CJ).
[55] Ibid, p. 649.
[56] *Johnstone v. Pedlar*, [1921] 2 A. C. p. 262.

law would suggest that this is not necessarily the case and that the external security prerogative can provide lawful authority for coercive action taken against subjects of the Crown.

The first relevant case is that of *Al-Jedda v Secretary of State for Defence* ('*Al-Jedda*'). Mr Al-Jedda was a dual Iraqi and British national, interned by British forces in Iraq in 2004. His internment, argued on the basis of security reasons, was without charge or conviction. Some members of the UK Court of Appeal believed that the operation, authorised under a United Nations Security Council Resolution, meant that the conduct was one done under an Act of State rather than the war prerogative. Relevantly, one member of the Court suggested that the Crown might be able to exercise its external security prerogative powers against its own subjects.[57]

This broad interpretation is not particularly persuasive unless it is to be argued on the basis that he was detained as an Iraqi citizen, rather than a British citizen. To interpret the external security prerogative otherwise would be dangerous on policy grounds and has not found support in the case law, and at risk of evolving the prerogative above and beyond its historical limits.

Having found that the prerogative thus only applies to actions against a foreign State and foreign national, a second issue arises as to whether or not it applies to all Acts of State, or just some. A suggested test is that which was advocated by the Court in *Sendar Mohammed v Secretary of State for Defence* ('*Sendar Mohammed'*). Again, the matter related to the internment and detention of Mr Mohammed by British military forces, this time in Afghanistan. The question turned directly to whether the detention of Mr Mohammed for over 96 hours, without any other legal foundation, could be justified as an Act of State. The Court found:

> Notwithstanding the fact that the subject matter may be justiciable, there will be circumstances in which it will be essential that our courts should have a residual power to bar claims founded on foreign law on grounds of public policy. **Thus, for example, if *Buron v Denman* fell for the decision today, the claim for compensation for the loss of the claimant's slaves and damage to his slaving activities would unhesitatingly be rejected, if on no other ground, on the basis**

[57] Al-Jedda [2011] 2 WLR 225, 274 (Elias LJ).

> **that property rights in slaves arising in foreign law should not be recognised and that to afford such a remedy in such circumstances would be offensive to the public policy of this country**. However, we would expect that, in circumstances in which the claim is justiciable, such a bar on the grounds of an act of state would be infrequently applied, and the absence of decided cases supports this view.[58]

> Relevantly, in supporting this *public policy test*, the Court then suggested that actions taken under the external security prerogative should be assessed:

> [W]hether, in the particular circumstances of each case, there are compelling considerations of public policy which would require the court to deny a claim in tort founded on an act of the Executive performed abroad.[59]

Although this test is one relating to justiciability, rather than canvassing the breadth of the prerogative, it is not difficult to apply the jurisprudential points from one point of law to the other.

This test is not applied as a rule within Australia (in contradistinction to Canada),[60] although there is an attraction to the simplicity of a *public policy* test. How then to quantify what really falls within the public policy of this country? Moore's application of this principle is that ADF members must exercise coercive action in accordance with applicable international legal authority for the operation, and should be in accordance with local law so long as it is not inconsistent with Australian public policy.[61] He goes on to state that Australia's legal obligations should inform this public policy,[62] presumably on the basis that international law regulates international relations. Moore's position therefore differs substantially from *Sendar Mohammed's*.[63] It has merit in reflecting and

[58] *Sendar Mohammed* [2015] EWCA Vic p. 843, [349]
[59] *Sendar Mohammed* [2015] EWCA Vic p. 843, [349].
[60] *Boardwalk Regency Corps v Maalouf* (1992) 51 OAC 64 (CA); See further Kenny Chng, "A Theoretical perspective of the public policy doctrine in the conflict of laws," *Journal of Private International Law* 14, 1 (2018): *pp.* 130 – 159.
[61] Moore, Crown and Sword, p. 275
[62] Ibid.
[63] *Sendar Mohammed* [2015] EWCA Vic p. 843.

confirming Australia's sovereignty, being bound only by international law insofar as it domestically ratifies it.

If international law is ratified, or if Australia wishes to rely upon international obligations to inform its public policy, then it is important to canvas what international obligations may inform counter-IO campaigns. A starting point is the *International Covenant on Civil and Political Rights* ('ICCPR') could provide a clear basis for deterrence ~~punishment~~ operations regarding interference operations.[64] Two particular articles are relevant: Art 19 and Art 25. Those two Articles read:

Article 19

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 25

[64] So too could Article 1 and the right to self-determination; Michael Schmitt, "Virtual isenfranchisement: Cyber Election Meddling in the Grey Zones of International Law," in *Information Warfare in the Age of Cyber Conflict* (Routledge, 2020) p. 186.Christopher Whyte, A Trevor Thrall and Brian M Mazanec (eds),

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
>
> (c) To have access, on general terms of equality, to public service in his country.

Article 19 has been discussed as a possible legal authority for countering foreign interference within some niche academic discussion, but has not been particularly engaged with elsewhere. It definitely sweepingly captures possible media choices for IOs. Article 3 equally provides a wide ambit for Australia to define what *reputation* may constitute and, clearly, subsection (b) would provide a useful international legal handrail for any counter IO operation. So too does Article 25(a) provide a rather large ambit for public policy arguments to be constructed. The freedom guaranteed under Articles 19 & 25 was clarified in a *2017 Joint Declaration on Freedom of Expression*, which reads:

> Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind.[65]

Manipulation is a wide, rather than precise, term and could inform public policy that an Act of State would authorise. This public policy could be supported by other relevant international legal documents and theories (such as the right to self-determination [66]) and relevant case law. Recently, in *Parti Nationaliste Basque – Organisation Régionale D'Iparralde v France* [67] the European Court of Human Rights accepted that prohibiting foreign States and foreign legal entities from funding national political parties pursued the legitimate aim of protecting 'institutional order'. [68] Specifically, a French branch of the Spanish Basque Nationalist Party was prohibited from

[65] 1996; point 19.
[66] Art 1, ICCPR
[67] no.71251/01, ECHR 2007-II, [43]-[44],
[68] [44]

collecting additional campaign funding. The Court placed particular emphasis on the potential for foreign interference and the right of a State to control its own elections.[69] This mirrors the international documents namely, the *1976 Declaration of Non-Interference in the Internal Affairs of States*[70] and the *1981 Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*.[71] The latter confirmed 'the right and duty of States to combat, within their constitutional prerogatives, the dissemination of false or distorted news which can be interpreted as interference in the internal affairs of other States'.[72] These would all serve to inform and shape Australia's public policy. It is important to reiterate that the lawful authority for these punishment operations is still constitutional executive power. The UKSC confirmed this in *Rahmatullah (No 2) v Ministry of Defence* [f]or the avoidance of doubt, the conduct and/or policy in question do not have to be lawful in international law'.[73] This has been interpreted as meaning that the application of the Act of State defence does not depend on establishing that the allegedly wrongful act or the wider military operation was lawful in international law.[74]

The High Court has previously held that United Nations Security Council resolutions would not provide a source of lawful authority for the Commonwealth executive government to undertake activities within Australia that would otherwise be unlawful.[75] However, that case did not consider executive actions undertaken outside Australia, which arguably raises different considerations.

Accordingly, even if the Commonwealth's executive power is not subject to any requirement to conform to international law,[76] international law (including agreements and resolutions of international bodies) may be relevant to the substance of the prerogative power with respect to external affairs. It may assist in demonstrating that a

[69] [48].
[70] UNGA Res 31/91 (14 December 1976), Non-Interference in the Internal Affairs of States, UN Doc A/Res/31/91.
[71] UNGA Res 36/103 (9 December 1981), *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of State*, UN Doc A/Res/36/103.
[72] Ibid para III(d).
[73] Order dated 12 April 2017.
[74] *Alseran v Ministry of Defence* [2017] EWHC 3289 (QB), [56].
[75] *Bradley v Commonwealth* (1973) 128 CLR pp. 557, 583.
[76] *Plaintiff S195/2016 v Minister for Immigration and Border Protection* (2017) 261 CLR 622, [20] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

particular overseas deployment involves an exercise of the prerogative power with respect to external affairs. So provides a basis for its exercise but not its scope?

B *Depth of power*

There are real questions about the extent to which the Commonwealth executive government could exercise coercive powers abroad in reliance on the prerogative power with respect to external affairs. This is likely to depend on the specific facts and circumstances.

It might be possible to argue that certain coercive actions are supported by the prerogative power with respect to external affairs. Justice Logan has written extra-crucially on the power and remarked it may provide the authority for extra-territorial, summary executions of suspected terrorists of Australian citizenship.[77] In this, His Honour seems to be in a minority of opinion. The external affairs prerogative would most likely be able to provide a wide depth of power if supported by some form of international agreement (even if it were a secret exchange of letters within a regional partnership). The only barrier to this would be challenged before the Court. The Australian Government be a requirement for evidence that surmounted the fatal difficulties in the *Australian Communist Party*.[78] The recent case of *Alexander* has highlighted that this evidentiary issue may be surmounted if a submission was made 'by a responsible government agency to a parliamentary inquiry, where Gageler J held that such material "cannot be dismissed as beyond the scope of the material which might properly inform judicial identification of the purpose of a law."[79] To this, as a matter of responsible government, surely can be added executive action.

For operations solely with Australia, and in contradistinction to the war prerogative, the ratio to be taken from *The Rolla* would suggest although operations can occur below the threshold of war, lethal force may only be used in self-defence.[80] For the

[77] Logan, Admin Law Speech, p. 44.
[78] *Australian Communist Part v Commonwealth* (1951) 83 CLR 1.
[79] *Alexander v Minister for Home Affairs* [2022] HCA 19, 42 [126] (Gageler J).
[80] (1807) 165 ER 963, p. 6

reasons above in discussing the use of lethal force against individuals under the war prerogative, this is not relevant to punishment operations.

The ratio to be taken from *Buron v Denman*[81] would not appear to alter the level of force that can be taken with respect to the destruction of property. It would therefore appear to authorise distributed denial of service attacks; data manipulation; and data destruction. The British decisions of *Al-Jedda* would suggest that it is viable to curtail individual liberties under the Act of State doctrine; whilst *Sendar Mohammed* would seem to suggest that so long as a relevant public policy was underlying the conduct, then non-lethal coercive action can be taken. These latter two decisions would also implicitly support that destruction of property – a lesser offence than curtailment of civil liberties – are valid actions under the external security prerogative.

However, in *Nissan v Attorney-General*,[82] several Judges expressed reservations about whether the Crown's prerogative power with respect to external affairs would enable it to interfere with other persons' legal rights in the context of a peacekeeping mission. This case concerned the acquisition by the British armed forces of a hotel in Cyprus for use as their headquarters. The House of Lords rejected an argument that this action was an *act of state*, but it was not necessary to determine issues regarding the scope of the Crown's prerogative powers.

Lord Reid stated that he saw "great difficulty in holding that the prerogative [with respect to taking property in the context of war] can operate in the foreign territory".[83] Likewise, Lord Wilberforce had difficulty in seeing how the taking or destruction of a British subject's property in an independent territory could be justified by the exercise of the prerogative, given that the United Kingdom executive government enjoyed no sovereignty in Cyprus.[84] Lord Pearce reached the view that the prerogative could apply, at least against British subjects.[85]

More recently, in *Rahmatullah (No 2) v Ministry of Defence*, Lady Hale (with whom Lord Wilson and Lord Hughes agreed) and Lord Sumption expressed doubt about

[81] (1848) 2 Ex 167.
[82] [1970] AC 179.
[83] *Nissan v Attorney-General* [1970] AC pp. 179, 213.
[84] *Nissan v Attorney-General* [1970] AC pp. 179, 236.
[85] *Nissan v Attorney-General* [1970] AC pp. 179, 229.

whether an appropriation of property, with or without compensation, could be an act of state outside the context of an active military operation.[86]

These English cases might suggest that, outside the context of war or warlike operations, it is questionable whether the prerogative with respect to external affairs provides a source of power to engage in executive actions that have a direct impact on civilians overseas. The external affairs prerogative is more properly interpreted as expanding the breadth, but not the depth, of executive power. In this respect, it is quite similar to nationhood power under Australian constitutional executive power.[87] This is in juxtaposition to the war prerogative, which has an almost unlimited depth of power. In this respect, it is the *sister* prerogative of the power to Keep the Peace of the Realm.

The clearest solution to the dearth of power with respect to the external affairs prerogative is to pass legislation that provides a depth of action to ADF actions, reliant upon the external affairs power of the *Constitution*.

IV How Does International Law Limit The Prerogative?

There is a wide range of actions that could be taken, subject to abridgement of the prerogative by domestic statute. When addressing the limits of any actions taken under the framework of the external security prerogative, an important difference between this paper (focused on punishment operations) and domestic denial operations is that the Australian *Constitution* does not necessarily limit any extraterritorial conduct of the ADF. Any limitations must arise therefore from domestic criminal law, rather than constitutional law. This is particularly so considering that the external security prerogative, as per above, is best interpreted as applying only to operations against foreign nationals and foreign States.

There are, of course, limits. Most legislation in Australia with respect to the military is, however, internally focused for the aforementioned reasons. Moore argues that legislation of general application, such as the cybercrimes legislation, should not apply to ADF actions carried out under the war prerogative because as a matter of

[86] [2017] UKSC 1, [36] (Lady Hale, with whom Lord Wilson and Lord Hughes agreed), [94] (Lord Sumption).
[87] CROSS REF TO CHAP 1

statutory construction, it is presumed that Parliament would not limit the prerogative powers of the Crown without express words.[88]

A similar argument is made with respect to external security operations conducted under the external affairs prerogative, though with less strength due to the difference in nature and scope between the war and external affairs prerogatives.[89] These interpretative arguments are weakened in the case of the cybercrime legislation, with specific exemptions provided to certain intelligence agencies for actions done in the performance of agency functions but not for the ADF. The relevant legislation here is *Criminal Code 10.6* – which applies to all external offensive cyber operations. The Australian Signals Directorate has immunities conferred under the *Intelligence Services Act 2001* (Cth).[90] The Australian Defence Force does not. This is particularly so due to the Government-initiated review of Australia's intelligence communities and the request for a more streamlined approach.[91] Whilst it might be open for the Australian Government to order the ADF to conduct these forms of operations externally despite the legislation to the contrary and to rely upon a *nolle prosquei* movement from the relevant public prosecutor, this carries high legal risk.

The externally focused legislation is concerned with conduct during armed conflict, arising from the ratification of the *Geneva Conventions* domestically.[92] These legislative provisions apply even when war is not declared, as recent alleged experiences (at the time of writing) of alleged breaches by Australian Special Forces in Afghanistan demonstrate.[93] It remains to be seen, however, if international law and international legal obligations constrain the breadth and/or depth of constitutional executive power.

1 *The English Position*

[88] Crown & Sword, p. 227. Moore relies upon Barton v Cth
[89] Crown & Sword, pp. 297-8.
[90] Section 7
[91] *Report of the Comprehensive Reivew of the Legal Framework of the National Intelligence Community* (4 December 2020, National Security Publications). See p 51, [3.103] for recommendations to do with ADF powers.
[92] See the *Criminal Code 1995* (Cth), Division p. 268.
[93] Inspector-General of the Australian Defence Force, *Afghanistan Inquiry Report* (2019)

English courts have held that even if the prerogative power with respect to war or external affairs is a source of legal authority, it does not provide a complete shield from legal liability or public law proceedings in light of international obligations. It remains to be seen if this is the Australian position.

In *Rahmatullah (No 2) v Ministry of Defence*, the United Kingdom Supreme Court considered that the Act of State Defence would be available in relation to acts done in the

> conduct of military operations which are themselves lawful in international law (which is not the same as saying that the acts themselves are necessarily authorised in international law).[94]

For example, English courts have stated that a detainee may be able to seek a writ of habeas corpus to challenge the lawfulness of their detention in certain circumstances.[95]

Further, there are comments in *Rahmatullah (No 2) v Ministry of Defence*[96] which suggests that certain types of coercive activities do not fall within the prerogative power, even in times of war and warlike operations. Lady Hale (with whom Lord Wilson and Lord Hughes agreed) and Lord Sumption considered that the Act of State defence under English common law does not apply to acts of torture or to the maltreatment of prisoners or detainees.[97] Lady Hale (with whom Lord Wilson and Lord Hughes agreed) considered that these types of activities are not 'governmental' in character, and therefore are not immunised by the Act of State defence.[98] Lord Sumption regarded these actions as beyond the scope of the prerogative power, stating:

> Given the strength of the English public policy on the subject, a decision by the UK Government to authorise or ratify torture or maltreatment would not as a matter of domestic English law be a lawful exercise of the Royal prerogative.[99]

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[94] [2017] UKSC 1, [37] (Lady Hale, with whom Lord Wilson and Lord Hughes agreed).
[95] See, eg, *Al-Jedda v Secretary of State for Defence* [2011] 2 WLR 225, [218]-[219], [222] (Elias LJ); *Mohammed v Secretary of State for Defence* [2017] HRLR 1, [101] (Lord Sumption and Lady Hale).
[96] [2017] UKSC 1.
[97] *Rahmatullah (No 2) v Ministry of Defence* [2017] UKSC 1, [36] (Lady Hale, with whom Lord Wilson and Lord Hughes agreed), [96] (Lord Sumption).
[98] *Rahmatullah (No 2) v Ministry of Defence* [2017] UKSC 1, [36] (Lady Hale, with whom Lord Wilson and Lord Hughes agreed).
[99] Ibid, p. 96

Torture is of course specifically prohibited by Australian statute,[100] so the issue as raised by Their Lordships would not appear in Australian courts. *Rahmatullah* however would seem to raise three different tests:

a) Was there torture?

b) Was the conduct *governmental*, and/or

c) Was the conduct consistent with a public policy test?

In the context of punishing States, and through the lens of aggressive deterrence theory outlined at the start of this paper, tests (b) and (c) are highly applicable. Assessments of what is 'governmental are likely to shift with society, similar to the role of the military in domestic operations. Arguably, protecting Australian interests through an Act of State will always be *governmental'* (if authorised) but the particulars of *Rahmatullah* and the alleged misconduct are accepted. To that end, some large generalities can be drawn that might limit punishment operations: deliberately attacking civilians and civilian infrastructure; prolonged detention of civilians, particularly women and children; and the use of prohibited weapons under international law (such as, through cyber means, releasing biological/chemical/nuclear material) are all likely to be held to fall outside the scope of the war prerogative.

This mirrors the reasoning of Legatt J in *Alseran v Ministry of Defence*.[101] His Honour suggested that there are limits to the scope of the Crown's prerogative powers to engage in conduct that would harm civilians, even in the context of military operations, finding that it would be "*most surprising* if the United Kingdom executive government had authorised British armed forces to detain people in circumstances that are not permitted by international law.[102] Justice Leggatt observed:

> acknowledging that a government decision to engage in a military operation abroad entails the use of lethal force and detention on imperative grounds of security does not require the courts to accept that, for example, such lethal force may be

[100] *Criminal Code* (Cth) Division pp. 268.13, 268.25, and 268.73.
[101] *Alseran v Ministry of Defence* [2017] EWHC 3289 (QB), [325].
[102] Ibid, [325].

deliberately targeted at civilians or that such detention is permissible when there are no imperative reasons of security capable of justifying it.[103]

2 *The Australian Position*

There is very limited Australian case law dealing with these issues. This provides an interesting question of law and legal positions. There is only one particularly relevant precedent that can be applied, which is the Federal Court in *Habib,* which related to the alleged complicity of Australian intelligence agents in the cruel and inhumane treatment of Habib after his capture in Afghanistan. The Federal Court emphasised that the Commonwealth's prerogative powers with respect to external affairs would not authorise the Commonwealth executive government to engage in crimes against humanity, or to breach Commonwealth legislation.[104]

The earlier situation would be in breach of a public policy test at any rate (although arguably completely legal under the war prerogative) and the latter is a matter for domestic law. *Habib* does not, therefore, provide much use in answering the Australian position. It is clear that Australia's approach to interpretations of the Royal prerogative (as opposed to the existence of an element of the Royal prerogative) can of course differ from the British approach – *Barton v Commonwealth*[105] (which is related to the test for abridgment) is a clear indicator of that. Currently, Australia's approach seems consistent with that of Moore's. Specifically, international law will inform public policy, but will not provide a definitive limit to constitutional executive power.

IV Conclusion

This paper has addressed the final, and most severe, form of deterrence that can occur with respect to interference operations: punishment. It looked to two elements of constitutional executive power to discuss how individuals, corporations or States could

[103] [71]
[104] *Habib v Commonwealth* (2010) 183 FCR 62, [114], [124], [128] (Jagot J, with whom Black CJ agreed).
[105] (1974) 131 CLR 477.

(through a domestic legal lens) be punished. It used the term punishment in its international relations meaning, as opposed to its legal meaning.

This paper accordingly first canvassed the theories around a rational State, which underpin the level of force that should be utilised by Australia when conducting punitive operations. It held that a reputation for summary, aggressive responses should be adopted so as to further increase costs around foreign interference. This was in keeping with the wider, strategic framework that this paper outlined in Section II.

Sections III & IV demonstrated that although the war and external security prerogatives are often noted to be plenary, there are some domestic and international legal limits. English jurisprudence has held that the external security prerogative – the power that essentially allows the Government to enact and enforce foreign relations – should as a matter of good public policy abide by international law. This has not been found to apply to the war prerogative. Section IV discussed that, through a deterrence perspective, if there is any question of credibility it is best to err on the side of caution. It is clear that in countering IOs international law can be of assistance (particularly in the international legal rights and obligations found within Articles 19 and 25 of the ICCPR). International law should also, as a matter of public policy, apply to counter-IO campaigns. The breadth and depth of operations the ADF could undertake then can be modelled on modern operations in Afghanistan and Iraq.