THE USE OF LETHAL FORCE BY MILITARY FORCES ON LAW ENFORCEMENT OPERATIONS — IS THERE A 'LAWFUL AUTHORITY'?

Rob McLaughlin*

> Now a person, whether a magistrate, or a peace-officer, who has the duty of suppressing a riot, is placed in a very difficult situation, for if, by his acts, he causes death, he is liable to be indicted for murder or manslaughter, and if he does not act, he is liable to an indictment on an information for neglect; he is, therefore, bound to hit the precise line of his duty: and how difficult it is to hit that precise line, will be a matter for your consideration, but that, difficult as it may be, he is bound to do.
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> *R v Pinney* (1832) 5 Car & P [254], [270] (Littledale J).

> A soldier is bound to obey any lawful order which he receives from his military superior. But a soldier cannot any more than a civilian avoid responsibility for breach of the law by pleading that he broke the law in *bona fide* obedience to the orders (say) of the commander-in-chief. Hence the position of a soldier is in theory and may be in practice a difficult one. He may, as it has been well said, be liable to be shot by a court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it.
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> A V Dicey, *Introduction to the Study of the Law of Constitution* (10th ed, 1959) 303.

I INTRODUCTION

Our comprehension of the legal means and methods by which military forces are employed, controlled and — where considered necessary — immunised, is incomplete. Some questions are — in a jurisprudential sense — well settled, or at least evolving along a logical, comprehensible, and generally linear course. Thus the scope of the defence power under the *Australian Constitution* has, on the whole, been relatively consistently interpreted over time as an elastic power — expanding in time of large-scale conflict, contracting in time of profound peace, variably waxing and waning between these two poles in situations of uncertainty less than war but short of settled peace.[1] There have certainly been some new developments in understanding the scope

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* Legal Officer, Royal Australian Navy, PhD (Cantab). The views expressed in this article are those of the author, and should in no way be inferred as representing the views of any part of the Australian Government. Although most fortunate to have received much constructive feedback from a number of colleagues — most notably Cameron Moore (University of New England), Bruce Oswald (University of Melbourne), Chris Gallavin (University of Canterbury), and the two anonymous reviewers — all errors are mine alone.

1 *Constitution* s 51(vi): 'The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth'. As Dixon J observed in *Stenhouse v Coleman* (1944) 69 CLR 457, 471, the

of the power — such as the High Court of Australia's decision in *Thomas v Mowbray*[2] (relating to the constitutional validity of the federal control order regime). In this case the majority held that components of the defence power are also exercisable through non-military organs such as the police.[3] But on the whole, our understanding of the power has developed along conceptually and chronologically coherent and logical lines. Similarly, there is no question in the Australian context that this evolution has also been more generally coherent in terms of its interaction with related constitutional questions. Thus *Thomas v Mowbray* is, in many ways, a belated cross-referral allowing police and intelligence agencies to access authority under the defence power. This merely reflects and accompanies the long established principle that the military forces can likewise be used for law enforcement purposes — as confirmed in *Li Chia Hsing v Rankin*.[4] It is perhaps justified to say that were we to apply a *jus ad bellum / jus in bello* approach (law of armed conflict based and thus formally inapplicable, but nevertheless useful) to the problem, the *jus ad bellum* issues — the when and why of use of military forces in law enforcement operations — are relatively settled, or at least evolving coherently and consistently with their history and precedent.

It is amongst the menagerie of issues within the *jus in bello* realm — the how of use of military forces in law enforcement operations — where disquiet is most commonly found. One of these problematic issues is our lack of clarity as to the occasions on which use of lethal force in law enforcement operations may be justified or excused. The fact that it is unsettled is counter-intuitive, as questions of justification or excuse in relation to use of lethal force by state agents must logically be of fundamental concern to any society underpinned and sustained by democratic traditions and the rule of law. This is especially so where the state agents in question are under a general, and legally enforceable, obligation to obey. One would be entitled, justly, to think that there

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defence power 'involves the notion of purpose or object', rather than (as with most of the other heads of Commonwealth power) being characterised by subject matter. This elasticity — in relation to personal freedoms, for example — was well described by Brennan J in *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 592–3: 'In times of war, laws abridging the freedoms which the law assures to the Australian people are supported in order to ensure the survival of those freedoms in times of peace. In times of peace, abridging of those freedoms … cannot be supported unless the Court can perceive that the abridging of the freedom in question is proportionate to the defence interest to be served. What is necessary and appropriate for the defence of the Commonwealth in times of war is different from what is necessary or appropriate in times of peace'. This elasticity has been repeatedly re-affirmed by the High Court since its early establishment in *Farey v Burvett* (1916) 21 CLR 433, and was most recently restated in *Thomas v Mowbray* (2007) 233 CLR 307 — the 'Jihad Jack' control order case. See, eg, Gleeson CJ at 324 [7]; Gummow and Crennan JJ at 359–64 [132]–[48]; Kirby J at 384 [220]–[1] (affirming this elasticity, although he dissented as to the scope on the facts of this particular case); Hayne J at 449–60 [411]–[45], 475–8 [504]–[13]; Callinan J at 503-6 [582]–[90]; Heydon J at 511 [611].

2 (2007) 233 CLR 307.

3 Ibid. See, eg, Hayne J at 457 [437]: 'It may be accepted that "naval and military defence" does point to kinds of threat with which the power is concerned. In particular, the reference to "naval and military defence" reveals that, as Dixon J said in the *Communist Party Case*, the central purpose of the legislative power is protection of the Commonwealth from external enemies. It by no means follows from this observation, however, that the only permitted subject matter of legislation made in reliance upon s 51(vi) is the provision for naval and military responses to such threats.' See also Callinan J at 504 [588].

4 (1978) 141 CLR 182.

should be nothing contentious left to discuss in respect of this most fundamental of issues. And yet, unsettled it is. Perhaps the best recent evidence is found in a piece by journalist Greg Sheridan, dated 14 February 2008, concerning operations in Timor-Leste. It should be noted that there is no armed conflict afoot in Timor-Leste (thus no legal basis for proactively targeting, with lethal force, persons taking a direct part in hostilities in a fighting role), and that the International Security Force's operations are of a law enforcement nature.

> It isn't very often that a meeting of the Australian cabinet's National Security Committee ['NSC'] authorises the killing of anybody. But that's what happened in February last year when the NSC, under the Howard government, met to consider the case of Alfredo Reinado … [I]n February last year, the NSC authorised the Australian Defence Force ['ADF'] to kill Reinado. Of course, the order was to capture him. There was not a specific order to kill him as such. But the NSC was very specific that the ADF could use lethal force.[5]

Clearly, left unanalysed, this report by a respected journalist with acknowledged access would leave one with the impression that either the NSC broke the law by ordering, tacitly, an assassination, or alternatively that the law provides for the NSC (and/or others) to authorise such use of lethal force. Neither would appear to be correct, but the report does serve to illustrate, starkly, that uncertainty as to legal authorisations for use of lethal force by state agents persists.

This uncertainty is based in two grounds. The first, more readily ascertainable ground, is that in the one analogous jurisdiction where the issue has come in for occasional judicial consideration — the United Kingdom ('UK') — there are a plethora of contradictory precedents. Many are in fact diametrically opposed, and the two main strands of authority appear to exhibit little linearity either conceptually or chronologically. Indeed, it is clearly arguable that the decision of Bayley J in *R v Thomas*[6] on the legal position of a sentry who shoots and kills is — and has always been — much more consistent with the underpinning legal norms than similar sentry case decisions such as *His Majesty's Advocate v Sheppard*[7] ('*Sheppard*') and *Hajdamovitz v Attorney-General*[8] ('*Hajdamovitz*'). In the latter two cases, the accused were acquitted; in the former, the accused was found guilty, with a recommendation for mercy. As Dicey approvingly observed of Bayley J's decision:

> The judgment of the court rests upon and illustrates the incontrovertible principle of the common law that the fact of a person being a soldier and of his acting strictly under

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5 Greg Sheridan, 'Our role in East Timor is long term', *The Australian*, 14 February 2008 <http://www.theaustralian.news.com.au/story/0,25197,23209044-25377,00.html> at 17 November 2009.

6 (1816) (Bayley J) in D R Bentley (ed), *Select Cases from the Twelve Judges' Notebooks* (1997) 114 (Notebook 4).

7 *HM Advocate v Sheppard* [1941] JC 67.

8 *Hajdamovitz v Attorney General* (1944) 11 *Palestine Law Reports* 140. Both were markedly similar cases to *R v Thomas* in that they involved sentries shooting people — in *Hajdamovitz*, a Polish sentry in Palestine shooting a suspected arms black-marketeer he was guarding in a laundry, as the suspect attempted to escape; and in the *Sheppard*, in the UK, a soldier escorting a deserter back to his Regiment, shot and killed the prisoner as he attempted to escape at a railway station.

> orders, does not of itself exempt him from criminal liability for acts which would be crimes if done by a civilian …[9]

The second, less provable, ground is the fact that a discussion of this issue is felt to be necessary at all. Some will likely argue that there is nothing to discuss, that the issue is well settled, and that there is, or alternatively is not, a non-self-defence based authority for use of lethal force. Others will argue that individual facets of this issue are well settled. Thus there is no clear unanimity, nor even anything approaching a consensus view on the issue at the core of this article.[10] We have not, arguably, come very far since Justice Hope noted in the 1979 *Protective Security Review*, that the complex question of reconciling the requirement to obey with the legal status of being — in essence — a civilian in uniform

> has not been satisfactorily resolved, and that the general question involves issues of international as well as national importance. The lack of clarity has resulted from the rarity of the question being before the courts.[11]

The 'dilemma', evidenced in the two statements at the outset of this article and made more than a century apart, remains.

A Outline

To fully explore the issue of non-self-defence based alternative justifications or excuses — 'lawful authorities' — which might operate to protect a military member who uses lethal force on a law enforcement operation, is a wider remit than can be dealt with in a single short study. Consequently, the purpose of this article is to explore one of the potential alternatives: the non-self-defence based 'reasonable and necessary force' excuse.[12] To achieve this, a four-step approach is adopted. The first step is to explain

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9 A V Dicey, *Introduction to the Study of the Law of Constitution* (10th ed, 1959) 302–3 fn 4. See *R v Thomas* (1816) (Bayley J) in D R Bentley (ed), *Select Cases from the Twelve Judges' Notebooks* (1997) 114 (Notebook 4). This case concerned the murder conviction of a Naval sentry guarding HMS *Achilles*, then in the process of decommissioning. The sentry's orders were to keep 'all Boats off except under Orders from the Officer on Deck or Boats with Officers in Uniform …' He was provided with a musket, powder, and ball for the purpose. The sentry repeatedly warned an approaching boat to stay clear, but on 'seeing the deceased nearly under the Ship he fired at him and killed him upon the spot'. The jury, under the judge's direction, found the sentry guilty of murder, but 'they believed that the prisoner acted under the mistaken impression that it was his duty as Sentinel to fire as he did …' The judge recommended mercy for the sentry on the basis of this belief.

10 This said, there are a very few published analyses of the human side of this uncertainty. In particular, see G J Cartledge, *The Soldiers' Dilemma: When to Use Force in Australia — An Examination of the Laws which are Likely to Affect Australian Soldiers Operationally Deployed in Australia* (1992) ch 3, [320]–[349].

11 R M Hope, *Protective Security Review Report (Unclassified Version)* (1979) 168.

12 I will not deal in this paper with a number of other possible alternative defences: 'sudden and extraordinary emergency' (as a successor defence to the general concept of 'necessity'); and the (questionable) possibility that the executive power, or Crown prerogative, still harbours some vestigial authorisation for State agents to use lethal force both outside of self-defence and separate from the prosecution of an armed conflict. Similarly, I will deal only tangentially with the possible alternative of 'reasonably' following orders that do not appear to be manifestly unlawful. On various aspects of use of the executive power when employing state agents on certain types of operations (including military forces in domestic law enforcement contexts), see *A v Hayden* (1984) 156 CLR 532; *Ruddock v Vadarlis* (2001) 110 FCR 491 (corrigenda issued 4 January 2002); Hope, above n 11; Parliament of Australia

the scope, limitations and assumptions underpinning this examination. Following this, a brief description of the fundamental issue at play in any analysis focussed on the availability to military forces of a 'reasonable and necessary' defence to use of lethal force is required. This will establish the stepping-off point for the analysis. The article will then progress to exploring in some detail the possible nature and limits of a 'lawful authority' defence of 'reasonable and necessary force', focussing on use of lethal force for a statutory purpose. With the aim of drawing out the issues and problems inherent with any such asserted defence, the argument will focus heavily upon the UK experience (the most closely associated jurisdiction in which the issue has been adequately debated), and to this end will analyse three particular cases of relevance — the *Attorney-General for Northern Ireland's Reference (No 1 of 1975)*[13] ('*A-G's Reference*'), *Hajdamovitz*, and *Sheppard* — as touchstones for identifying issues. At this point, some preliminary conclusions will be offered. The article will then compare this analysis to the context in which defences of a similar nature are embedded in Australia, looking specifically at four statutory 'reasonable and necessary' provisions relevant to Australian Defence Force ('ADF') members — the *Migration Act 1958* (Cth), the *Customs Act 1901* (Cth), the *Fisheries Management Act 1991* (Cth), and Part IIIAAA of the *Defence Act 1903* (Cth). The article will then conclude with some brief thoughts on the implications of this analysis for the issue of use of lethal force by military forces on law enforcement operations, outside of situations of self-defence. It should be noted at the outset that the concept of 'self-defence', as applied in the course of this article, takes defence of self and defence of others to be sub-categories of the same unitary defence of 'self-defence'. This is the approach adopted in the most relevant statutory formulation of the defence for ADF personnel operating offshore — *Criminal Code Act 1995* (Cth) s 10.4.[14]

B Scope and assumptions

The first limitation applied in this study is one of scope, in that the analysis is focussed on law enforcement and stabilisation operations — that is, operations that are overseas

Research Paper 8 (1997–98), *Call Out the Troops: An Examination of the Legal Basis for Australian Defence Force Involvement in 'Non-Defence' Matters*, (Elizabeth Ward); John Goldring, 'The Impact of Statutes on the Royal Prerogative: Australasian Attitudes as to the Rule in *Attorney-General v De Keyser's Royal Hotel Ltd*.' (1974) 48 *Australian Law Journal* 434; H V Evatt, *The Royal Prerogative*: *Commentary by Leslie Zines* (1987); Hoong Phun Lee, *Emergency Powers* (1984); Cameron Moore, '"To Execute and Maintain the Laws of the Commonwealth": The ADF and Internal Security — Some Old Issues with New Relevance' (2005) 28 *University of New South Wales Law Journal* 523. On associated constitutional issues relating to the defence power (including comments on use of the military forces in domestic law enforcement related tasks), see *White v Director of Military Prosecutions* (2007) 231 CLR 570, 592 [37]–[38] (Gummow, Hayne and Crennan JJ), 621–625 [142] (Kirby J); Peter W Johnston, '*Re Tracey*: Some Implications for the Military-Civil Authority Relationship' (1990) 20 *University of Western Australia Law Review* 73; Michael Head, 'The Military Call-Out Legislation — Some Legal and Constitutional Questions' (2001) 29 *Federal Law Review* 273; Michael Head, 'Australia's Expanded Military Call Out Powers: Causes for Concern' (2006) 3 *University of New England Law Journal* 125.

13 [1977] AC 105.

14 *Criminal Code Act 1995* (Cth) s 10.4: '… to defend himself or herself or another person…' It should be noted, however, that this unified approach to self-defence, indivisibly covering defence of both self and others, is not consistent through all common law jurisdictions. See, eg, Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 302–4.

but are not taking place within the context of an armed conflict, whether international or non-international. Australian and New Zealand International Security Force ('ISF') operations in Timor-Leste are one example of such operations. The RAMSI (Regional Assistance Mission to the Solomon Islands) operation is another, and New Zealand and Australian military support to Tonga is a third.[15] The major implication of this contextual limitation is that the deployed military force will have no access to the offensive components of the Law of Armed Conflict ('LOAC'). Certainly, military forces will often employ the non-offensive aspects of LOAC as a matter of policy (rather than legal obligation) for a range of reasons. One of these reasons is that this is what military forces train for, and if the application of (for example) aspects of LOAC relating to civil detention regimes or dealing with the local legal system, are not fundamentally deleterious within the local context, then this doctrinal, experiential, and training platform is a sensible place to start in terms of adapting to local conditions. Another reason is because the crisis prompting such deployments will most usually have developed swiftly, leaving little time to analyse and adapt procedures to reflect local legal processes and nuances. In such situations, applying an internationally recognised regime as a starting point is better than applying nothing at all. However, when operating in a law enforcement context — or to be more paradigmatically explicit, a non-armed conflict context — the offensive use of lethal force in deliberate, planned targeting operations against certain categories of people is not available. Indeed, it would likely be murder.

The second limitation is that the analysis is underpinned by two basic, yet fundamental, assumptions. The first relates to the fact that most of the law, precedent, reports of inquiries, and commentary on the issue of use of military forces in law enforcement roles is related either to domestic incidents and domestic jurisdictions (such as Northern Ireland for the UK, the 'Bowral Call Out' in Australia and so on), or dates from the period of empire when places such as Palestine, Australia, New Zealand, South Africa, and India shared a greater formal legal affinity. However, this is not necessarily as problematic as may seem, because Commonwealth military forces, as a general rule, take their domestic law — and particularly many aspects of their domestic criminal law — with them on operations. This happens in a variety of ways, but the end result is that the little jurisprudence and analysis that exists is a reliable guide to how the same issues would likely play out, judicially, in a similar situation offshore. This said, in the last decade there has been a trickle of new jurisprudence on incidents which are partially LOAC and partially human rights law governed, and which will prove useful in analysing the law applicable in law enforcement operational contexts. Most notable perhaps are a number of recent cases in the UK — such as *R (Al-Skeini) v Secretary of State for Defence* [16] ('*Al-Skeini*') and *R (Al-Jedda) v Secretary of State for Defence* [17] ('*Al-Jedda*') — and the ongoing Canadian cases[18] concerning detention

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15 On the similar UK contextual appreciation applicable in Bosnia in 1994, see Peter Rowe, 'The United Nations Rules of Engagement and the British Soldier in Bosnia' (1994) 43 *International and Comparative Law Quarterly* 946, 954.

16 [2008] 1 AC 153 (13 June 2007).

17 [2006] EWCA Civ 327; and in the House of Lords, *R (Al-Jedda) v Secretary of State for Defence* [2008] 1 AC 332 (12 Dec 2007).

18 *Amnesty International Canada v Chief of Defence Staff for the Canadian Forces* [2008] FC 336; and *Amnesty International Canada v Chief of Defence Staff for the Canadian Forces* [2008] FC 162. On 17 February 2009, Amnesty International Canada and the British Civil Liberties Association

operations in Afghanistan. But on the whole, the reference point has to be the domestic experience.

The second fundamental assumption is a consequence of the great paucity of precedent on this issue in Australian jurisprudence. This necessitates taking the UK experience as a starting point. It is acknowledged that this is a potentially flawed assumption in that UK authorities are persuasive but not binding, and that despite a common legal heritage there are points of departure between Australian and UK law — including in related areas such as self-defence — which may erode (in the eyes of an Australian court) the relevance of the UK experience generally. However, if a claim by an ADF member of a non-self-defence based defence of 'reasonable and necessary' use of lethal force in a law enforcement scenario were ever to arise before the High Court of Australia, it is difficult to believe that the UK experience would not feature strongly in the search for jurisprudential guidance — at least, as a minimum, with respect to the broader philosophical–legal issues at play in any such claim. Certainly, codification will impact interpretation, but where formulations such as 'reasonable and necessary' carry a long common law tail as to their precise parameters, it would be sound to assume some reference to precedent based upon analogous statutory formulations and contexts — such as the *Criminal Law Act (Northern Ireland) 1967* (NI) c 18, s 3(1). The significant degree of cross-referral in Australian, UK, and Canadian jurisprudence in the 1950s – 1980s in relation to the concept of 'excessive self-defence' as a means of mitigating murder down to manslaughter, is a case in point,[19] as is the appreciation of UK precedent evident in Sir Victor Windeyer's 13 November 1978 opinion for the Hope Royal Commission.[20]

II THE FUNDAMENTAL ISSUE

Given that military forces engaged in deployed law enforcement operations may not avail themselves of the offensive components of LOAC, the logically apposite implication is that the situations in which these military forces might lawfully employ lethal force are limited to the envelope established by domestic legal authorisation. Clearly, use of lethal force in self-defence of self or others is the primary 'standard' occasion on which such force may legitimately, or excusably, be employed. The question, therefore, is whether there are any other justifications or excuses available, and it is one such possibility — a statutory defence of reasonable and necessary force for a prescribed purpose — that this article examines.

Arguably, the most coherent starting point is an often reiterated axiom — in this case, by Dicey — to the following effect: 'the noticeable point is that in England the

applied to the Supreme Court of Canada for leave to appeal the Federal Court of Appeal's 17 December 2008 decision. Leave was denied.

19 See the line of Australian, UK, and Canadian cases which analysed and drew upon each other — both with approval and in dissent — including (Australia) *R v McKay* [1957] VR 560; *R v Howe* (1958) 100 CLR 448; *Viro v R* (1978) 141 CLR 88; *Zecevic v Director of Public Prosecutions (Victoria)* (1987) 162 CLR 645; (UK) *Palmer v The Queen* [1971] AC 814; *A-G's Reference* [1977] AC 105; and *R v Clegg* [1995] 1 All ER 334; (Canada) *R v Barilla* [1944] 4 DLR 344; *R v Gee* (1983) 139 DLR (3d) 587; and *Brisson v R* (1983) 139 DLR (3d) 685.

20 'Opinion of Sir Victor Windeyer, KBE, CB, DSO on Certain Questions Concerning the Position of Members of the Defence Force when Called Out to Aid the Civil Power' (13 November 1978) Appendix 9 to the Hope *Protective Security Review Report* (1979).

rights of citizens as against each other are (speaking generally) the same as the rights of citizens against any servant of the Crown.'[21] From this fundamental — and conceptually significant — axiom, Dicey was able to express the legal position of members of the military in the following terms:

> Thus the position of a soldier is in England governed, as we shall see, by the principle, that though a soldier is subject to special liabilities in his military capacity, he remains while in the ranks, as he was when out of them, subject to all the liabilities of an ordinary citizen.[22]

Dicey arrived at this conclusion via a 'strict insistence' on two principles. The first was 'equality before the law' which 'negatives exemption from the liabilities of ordinary citizens or from the jurisdiction of the ordinary courts …' The second was 'personal responsibility of wrongdoers' which 'excludes the notion that any breach of law on the part of a subordinate can be justified by the orders of his superiors …'[23] Admittedly, the Diceyan paradigm has been subject to some justifiable criticism and review over the course of the last century, however his succinct and powerful expression of his view on the general legal position and liabilities of members of military forces 'at home' still remains fundamentally correct. As Peter Rowe — with echoes of Dicey — observed in 1987 of the legal position of the soldier as 'a citizen in uniform': 'Unless he is given statutory powers greater than those possessed by a civilian, his authority and his immunities are no different'.[24] And similarly, in the High Court of Australia, Mason CJ, Wilson and Dawson JJ directly and approvingly cited Dicey's axiom in *Re Tracey; Ex parte Ryan*.[25] Thus the Diceyan view forms the most relevant, and arguably most accepted, point of departure in any analysis of the issue of use of lethal force by military forces on deployed law enforcement operations.[26]

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21 Dicey, above n 9, 285.

22 Ibid 286. It should be noted, however, that Dicey's strict insistence on this principle led him to the conclusion, essentially, that the (then) *Riot Act* could allow use of lethal force, but only because the *statute permitted* — that is, there was a clear statutory authority — not because of a pre-existing Crown prerogative (at 290). In this context, Dicey (at 304–6) approvingly quotes Stephen J's analysis in the *Report of the Committee Appointed to Inquire into the Circumstances Connected with the Disturbances at Featherstone on 7th of September 1893* (1893) (Lord Bowen, Sir Albert Rollit, and R B Haldane).

23 Dicey, above n 9, 287.

24 Peter Rowe, *Defence: The Legal Implications — Military Law and the Laws of War* (1st ed, 1987) 39.

25 (1989) 166 CLR 518, 546.

26 For further discussion of the legal issues surrounding use of military forces in UK 'home' affairs, see Steven C Greer, 'Military Intervention in Civil Disturbances: The Legal Basis Reconsidered' (1983) *Public Law* 573 (especially on civil decision-making authority, the statute versus prerogative debate, and the legal history of the assertion of an independent military 'duty' to intervene); Rowe, above n 24 (especially ch 4, where he discusses military powers and liabilities in relation to public disorder, the supposed 'duty to intervene', and use of weapons); Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (2006); and Anthony Babington, *Military Intervention in Britain: from the Gordon Riots to the Gibraltar Incident* (1990) (a good general history). For related discussions on the evolution (and possible future) of parliamentary control of UK military forces, see B S Markesinis, 'The Royal Prerogative Re-Visited' (1973) 32 *Cambridge Law Journal* 287, 299–307 (on the interrelationship of statute and prerogative); UK Ministry of Justice, *The Governance of Britain — War Powers and Treaties: Limiting Executive Powers*, Consultation Paper CP26/07, published 25 October 2007 [33]–[37] (on the current constitutional position), [96]–[110] (on

A 'Use of reasonable and necessary force' to prevent the commission of a crime, or to carry out a prescribed law enforcement task

The House of Lords decision in *A-G's Reference*[27] has undoubtedly been the most significant recent attempt to judicially describe and defend a non-self-defence based 'reasonable and necessary' defence for use of lethal force. The case is often referred to as the *McElhone Case*, after the individual whose circumstances of death loosely formed the hypothesised context in which the Attorney-General's Reference was cast. That particular case resulted in an acquittal for the soldier who killed McElhone. There is perhaps no better way to trace flirtation with a non-self-defence based 'reasonable and necessary force' justification for use of lethal force than to examine this case, and its jurisprudential hinterland.

B The *A-G's Reference*

The actual McElhone trial was heard before MacDermott J, sitting without a jury at the Belfast City Commission on 10 March 1975. The case concerned a British soldier who shot and killed an unarmed young man — McElhone — who had run away when challenged during a search operation. The soldier shot him in the honest and reasonable, but mistaken, belief that the man was a terrorist, and in the belief that there was no other option available to prevent escape but to engage with his Self-Loading Rifle ('SLR'). The legislative defence asserted was the *Criminal Law Act (Northern Ireland) 1967* (NI) c 18, s 3, which provided that

> 3(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.
>
> (2) Subsection (1) shall replace the rules of the common law as to the matters dealt with by that subsection.

In responding to the A-G's Reference, the House of Lords returned a series of ambiguous speeches. The sum result, however, was that they held the question as to whether the use of lethal force was reasonable and thus lawful in the situation posed — noting that it was in a context outside the bounds of self-defence — to be one of fact, not of law.[28] As Lord Diplock asserted:

> My Lords, to kill or seriously wound another person by shooting is prima facie unlawful. There may be circumstances, however, which render the act of shooting and any killing which results from it lawful; and an honest and reasonable belief by the accused in the

options for more formal regularisation of parliamentary control over deployments). More generally, see Oren Gross and Fionnuala Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (2006).

27 *A-G's Reference* [1977] AC 105, 136 (Lord Diplock).

28 The majority of the Court of Criminal Appeal in Northern Ireland, in considering the Reference, had similarly concluded that the issue should be left to the trier of fact — *Attorney-General for Northern Ireland's Reference (No 1 of 1975)* [1976] NI 169. Lord Justice McGonigal registered a strong dissent, being particularly concerned that this could sanction the shooting of people who run away after challenge from security forces simply because they were suspected of being members of the IRA: 'Does that mean that the man who is a known sympathiser but not a member of the Provisional IRA may also be shot and killed if he runs away because in the future his sympathies may crystallise and he may become a card-carrying member and be required for questioning or arrest?' (at 192).

> existence of facts which if true would have rendered his act lawful is a defence to any charge based on the shooting.[29]

The House of Lords was therefore unequivocally stating that shooting the challenged, but fleeing, individual was excusable at law. Further, that the Law Lords were affirming that this defence existed independent of self-defence is absolutely clear. In the core speech, Lord Diplock clearly stated that the lawfulness of such a shooting rested in grounds other than self-defence. Indeed, he noted explicitly that the deceased appeared to the accused to be unarmed, and was running away, and confirmed that '[t]he facts to be assumed for the purposes of the reference are not capable in law of giving rise to a possible defence of "self-defence".'[30]

The first — and primary — problem with the *A-G's Reference* decision is that the apparently clear legal distinction between self-defence and the 'reasonable and necessary' statutory defence, as asserted by Lord Diplock, is far from obvious in his actual reasoning. Indeed, Lord Diplock seems to reintroduce the self-defence nexus as he explains why lawfulness needs to be examined 'in the circumstances in which the army is currently employed in the aid of the civil power in Northern Ireland.'[31] To explain why this is so, it is worth quoting Lord Diplock's reasoning at length:

> The jury would have also to consider how the circumstances in which the accused had to make his decision … might affect the judgment of a reasonable man. In the facts that are to be assumed … there is material upon which a jury might take the view that the accused had reasonable grounds for *apprehension of imminent danger* to himself and other members of the patrol if the deceased were allowed to get away and join armed fellow-members of the Provisional IRA who might be lurking in the neighbourhood, and that the time available to the accused to make up his mind what to do was so short that even a reasonable man could only act intuitively.[32]

And again, one paragraph later, as he discussed the balance to be struck as against the reasonableness of assuming that any SLR round aimed at a person was likely to kill or seriously injure, Lord Diplock expressed the counter-balance thus:

> In the other scale of the balance it would be open to the jury to take the view that it would not be unreasonable to assess the kind of harm to be averted by preventing the accused's escape as even graver — *the killing or wounding of members of the patrol by terrorists in ambush*, and the effect of this success by members of the Provisional IRA in encouraging the continuance of the armed insurrection and all the misery and destruction of life and property that terrorist activity in Northern Ireland has entailed.[33]

The link to immediacy and self-defence is unmistakable. Lord Diplock's assertion of a non-self-defence based, fully independent, lawful grounds for reasonable and necessary use of lethal force, and his reasoning as to how a jury might apply this ground, do not marry up.

C The broader jurisprudential context

When it comes to examining and assessing any proposition that an independent, non-self-defence based, 'reasonable and necessary force' justification for use of lethal force exists — at least as far as UK law goes — the *A-G's Reference* decision continues to be of

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29 *A-G's Reference* [1977] AC 105, 136 (Lord Diplock).
30 Ibid.
31 Ibid.
32 Ibid 138 (emphasis added).
33 Ibid (emphasis added).

primary concern. Yet despite their high pedigree, the implications of the *A-G's Reference*, and also a number of subsequent cases dealing with use of lethal force by UK forces in Northern Ireland (such as *Farrell v Secretary of State for Defence*[34]) have seen these decisions roundly criticised.[35] As Stephen Livingstone noted in 1994 of the 'balance' struck in the *A-G's Reference* in particular:

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34 *Farrell v Secretary of State for Defence* [1980] 1 All ER 166. This case involved a civil action relating to the killing of three men who ran away, after challenge by UK soldiers, during a planned operation to foil what a tip-off had alleged would be an IRA bombing operation at a bank. When the three men were challenged by soldiers, who were concealed on the roof of a building across the road, they ran off. The soldiers then shot them as they were running away. For comment on *Farrell* as a 'missed opportunity' to both clarify the legal position and reassert the required legal control of military operations, see Greer, 'Legal Control of Military Operations — A Missed Opportunity' (1980) 31 *Northern Ireland Legal Quarterly* 151; and CP Walker, 'Shooting to Kill — Some of the Issues in *Farrell v Secretary of State for Defence*' (1980) 43 *Modern Law Review* 591. Greer succinctly summed up the reason that *Farrell* was widely perceived to have been this 'missed opportunity': '[T]he extraordinary conditions in Northern Ireland surely require more precision in the law relating to the use of deadly force' (at 152). See also Colin Greenwood, 'The Evil Choice' [1975] *Criminal Law Review* 4; and J E Stannard, 'Lethal Force in Self-Defence' (1980) 31 *Northern Ireland Legal Quarterly* 173. Stannard discusses *R v Bohan and another* [1979] 5 NIJB (4 July 1979) (the 'Boyle Case' after the victim, John Boyle). This case concerned the killing of a young man at a graveyard arms cache in Northern Ireland, where the defence of self-defence was successfully pleaded by the two soldiers involved. In this case the soldiers, waiting in observation of the cache, claimed that the young man had picked up the weapon and was turning towards them, and that they shot him in the (mistaken) belief that he was about to shoot at them. Stannard, citing Greenwood, argued that self-defence should not be considered in such cases: 'The police, or any other branch of the security forces for that matter, do not act to save themselves. Their aim is to prevent crime. Where they find it necessary to kill in the course of their duty, any defence of justification should be based fairly and squarely where it belongs, which is on s 3 of the *Criminal Law Act (Northern Ireland) 1967*' (at 176). Greenwood's argument was that self-defence 'should never be considered [in] any attempt to justify the use of firearms, or of any lesser degree of force, by the police' (at 7). However, it is submitted that this argument was based upon a premise that is no longer applicable — that the right of 'private self-defence' contained a pre-requisite duty to retreat.

35 See, eg, Stephen Livingstone, 'The House of Lords and the Northern Ireland Conflict' (1994) 57 *Modern Law Review* 333, 334, 337–8; Brice Dickson, 'The House of Lords and the Northern Ireland Conflict — A Sequel' (2006) 69 *Modern Law Review* 383, 384, 388; Colm Campbell and Ita Connolly, 'A Model for the 'War Against Terrorism'? Military Intervention in Northern Ireland and the 1970 Falls Curfew' (2003) 30 *Journal of Law and Society* 341, 370. For detailed analysis of the issues surrounding *Criminal Law Act (Northern Ireland) 1967* (NI) c 18, s 3, see Rowe, above n 24, 49–54.

> The so-called balance would appear to be clearly on one side and this view appears to come dangerously close to licensing exactly what McGonigal LJ [who strongly dissented at the Court of Criminal Appeal stage of the Reference] feared, the shooting dead of any suspected IRA member … Lord Diplock's remarks provided little reassurance that the higher judiciary would prevent the security forces from acting beyond the rule of law.[36]

Brice Dickson, looking at the issue with fresh eyes in 2006, offered a kinder but still critical assessment of the Law Lords' post-1994 decisions. But he still could only agree with Livingstone's assessment of the deference — to the government, and to the admittedly difficult task imposed upon the security forces in Northern Ireland — explicit in the decisions up until 1993.[37] As Dickson rightly observes of the one clearly apposite case which the House of Lords dealt with post-1994 — *R v Clegg*[38] — the Law Lords avoided direct application of the consequences of the *A-G's Reference* decision. They achieved this by finding that there was no evidence that Clegg believed the driver of the car to be a terrorist or that the occupants of the car, if they escaped, would carry out terrorist offences in the future.[39] However, both the Court of Appeal and the House of Lords were 'clearly unhappy'[40] with the *A-G's Reference* principle that the *Criminal Law Act (Northern Ireland) 1967* (NI) c 18, s 3(1) could be a complete defence to murder, and should be 'interpreted in such a way as to exonerate a soldier who shot in the back a man who had refused to stop when ordered to do so.'[41] This was, it will be

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36 Livingstone, above n 35, 337–8. Similarly, in 1994, Rowe was also of the view that 'a soldier may use force reasonable in the circumstances to protect himself or those for whom he has responsibility' was what *Criminal Law Act (Northern Ireland) 1967* (NI) c 18, s 3(2) protected — see Rowe, 'The United Nations Rules of Engagement and the British Soldier in Bosnia', above n 15, 954.

37 Dickson, above n 35, 388. Dickson argues, however, that the cases between 1994 and 2005 indicate that the 'Lords are deciding cases in accordance with the rule of law, rather than with government preferences' at 415. There were two cases during that time frame where the House of Lords dealt with the use of lethal force by UK Forces: *R v Clegg* [1995] 1 All ER 334, and *Re McKerr* [2004] 1 WLR 807.

38 *R v Clegg* [1995] 1 All ER 334 (House of Lords).

39 Ibid 338. In the House of Lords, Lord Lloyd of Berwick approved that the Court of Appeal of Northern Ireland had determined that even if the *Criminal Law Act (Northern Ireland) 1967* (NI) c 18, s 3 defence of 'reasonableness' had been raised (which it was not at the trial at first instance), it would have failed as 'any tribunal of fact would have been bound to find that the force used was unreasonable' (at 338). Indeed, in commenting upon the Rules of Engagement (ROE) 'Yellow Card' employed by Private Clegg, Lord Lloyd noted that in the Court of Appeal of Northern Ireland, Hutton LCJ had recommended that the card be redrafted as it was capable of giving the impression that it was lawful to open fire against a person 'if you know that he has just killed or injured any person by such means [weapon, explosive device, or deliberately driving a vehicle at a person] and he does not surrender if challenged and there is no other way to make an arrest', irrespective of the 'injury' caused by 'deliberately driving a vehicle at a person' (at 338-9). The court was clearly concerned that the orders apparently extended to authorising the use of firearms even after the infliction of minor injury.

40 Dickson, above n 35, 390.

41 Ibid. See, eg, *R v Clegg* [1995] 1 All ER 334, 343 (Lord Lloyd), in disagreeing with Lord Diplock's view: 'I do not think it possible to say that a person who uses excessive force in preventing crime is always, or even generally, less culpable than a person who uses excessive force in self-defence; and even if excessive force in preventing crime were in general less culpable, it would not be practicable to draw a distinction between the two defences, since they so often overlap. Take, for example, the facts of the present case. The

recalled, precisely the issue at the core of the *A-G's Reference* decision. Similarly, the Law Lords were clear that there is no general defence of acting in obedience to superior orders known to English law, and the House of Lords specifically cited *R v Thomas*[42] with approval, noting that the principle to be drawn from this case was 'that a sentry who fired in the belief that it was his duty to do so had no defence to a charge of murder' .[43] On this point, the Law Lords referred to the 'emphatic' view on the issue put forward by the High Court of Australia in *A v Hayden*[44] as followed by the Privy Council in *Yip Chiu-cheung v R*. This view was well summarised by Lord Griffiths in *Yip Chiu-cheung v R*, where he cited, most approvingly, the High Court's decision in *A v Hayden*:

> The High Court of Australia … declared emphatically that there was no place for a general defence of superior orders or of Crown or Executive fiat in Australian criminal

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trial judge held that Pte Clegg's first three shots might have been fired in defence of Pte Aindow. *But he could equally well have held that they were fired in the prevention of crime, namely to prevent Pte Aindow's death being caused by dangerous driving*' (emphasis added). This reasoning clearly indicates that even use of lethal force in 'prevention of crime' in such situations where there is an apprehension of imminent harm is actually characterisable as an exercise of the right of self-defence of another.

42 (1816) (Bayley J) in D R Bentley (ed), *Select Cases from the Twelve Judges' Notebooks* (1997) 114 (Notebook 4).

43 *R v Clegg* [1995] 1 All ER 334, 344 (Lord Lloyd). Lord Lloyd was of the view that the Court of Appeal had been well entitled to apply the *Criminal Law Act (Northern Ireland) 1967* (NI) c 18, s 3 such that 'the use of lethal force to kill or wound the driver of the car in order to arrest him was, in the circumstances, so grossly disproportionate to the mischief to be averted as to deprive him' of the defence (at 344–5).

44 *A v Hayden* (1984) 156 CLR 532. See, eg, Gibbs CJ, at 540: 'It is fundamental to our legal system that the executive has no power to authorize a breach of the law and that it is no excuse for an offender to say that he acted under the orders of a superior officer'; Mason J, at 550: 'It is possible that the promise was given, and the arrangements for the training exercise made, in the belief that executive orders would provide sufficient legal authority or justification for what was done. … *For the future, the point needs to be made loudly and clearly, that if counter-espionage activities involve breaches of the law they are liable to attract the consequences that ordinarily flow from breaches of the law*' (emphasis added); Murphy J, at 562: 'The executive power of the Commonwealth must be exercised in accordance with the Constitution and the laws of the Commonwealth. The Governor-General, the federal Executive Council and every officer of the Commonwealth are bound to observe the laws of the land… *I restate these elementary principles because astonishingly one of the plaintiffs asserted through counsel that it followed from the nature of the executive government that it is not beyond the executive power, even in a situation other than war, to order one of its citizens to kill another person. Such a proposition is inconsistent with the rule of law. It is subversive of the Constitution and the laws. It is, in other countries, the justification for death squads*' (emphasis added); Brennan J, at 580: 'The incapacity of the executive government to dispense its servants from obedience to laws made by Parliament is the cornerstone of a parliamentary democracy. … The principle, as expressed in the *Act of Settlement*, is that all officers and ministers ought to serve the Crown according to the laws. It is expressed more appropriately for the present case by Griffith CJ in *Clough v Leahy* (1904) 2 CLR 139, 155–6: "If an act is unlawful — forbidden by law — a person who does it can claim no protection by saying that he acted under the authority of the Crown". This is no obsolete rule; the principle is fundamental to our law, though it seems sometimes forgotten when executive governments or their agencies are fettered or frustrated by laws which affect the fulfilment of their policies.'

law. Gibbs CJ said (at 540): 'It is fundamental to our legal system that the executive has no power to authorize a breach of the law and that it is no excuse for an offender to say that he acted under the orders of a superior officer.' This statement of the law applies with the same force in England and Hong Kong as it does in Australia.[45]

Part of the confusion surrounding this issue may be related to an argument, ventilated in the 1970s, regarding the precise jurisprudential nature of the right of self-defence. Harlow, for example, argued that one way to understand the actual scope of the *Criminal Law Act (Northern Ireland) 1967* (NI) c 18, s 3 was to refer back to the concepts of 'private defence' ('defence of the person or property against robbers or burglars') and 'public defence' ('force inflicted in the advancement of justice').[46] To some extent, it appears that an approach advocating separation of the two forms of 'defence' was relevant to the issue of a duty to retreat being applicable only in 'private defence' — a factor in a number of decisions contemporary at the time.[47] Indeed, for Greenwood, this was precisely the issue that separated the two concepts — the right of 'private defence' entailed (at that time) a specific assessment of efforts to avoid a confrontation as a component of reasonableness, whilst this component was not a part of the right of 'public defence'.[48] And yet, as Harlow demonstrates, even if one adopted this approach, it remained very unclear that the legal envelopes and principles relevant to each were at all different. It would be interesting to know

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45 *Yip Chiu-cheung v R* [1994] 2 All ER 924, 928. In this case, the appellant had met with 'N' in Thailand and arranged for N to carry five kg of heroin from Hong Kong to Australia. N was a US DEA agent (Phillip Needham), and authorities in Hong Kong and Australia had agreed to the operation in the hope of breaking the drug ring of which the appellant was a member. The plan was not carried through, but the appellant was arrested in Hong Kong and convicted of conspiracy with N to traffic in heroin. He appealed to the Privy Council claiming that N (as a state agent acting on state orders) could not be a co-conspirator, and therefore there was no conspiracy. The Privy Council, citing *A v Hayden* (1984) held: 'There was no general defence of superior orders or of Crown or Executive fiat in English or Hong Kong criminal law and the Executive had no power to authorise a breach of the law' (at 925) (headnote). As N intended to traffic in heroin, the fact that he would not be prosecuted did not mean that there was no offence with the requisite mens rea (of N), and thus there was indeed a conspiracy. The Privy Council distinguished this situation from that described by Lord Bridge in *R v Anderson* [1985] 2 All ER 961, 965, which related to there being no mens rea in state agents who 'pretend to join a conspiracy in order to gain information about the plans of the criminals, with no intention of taking any part in the planned crime but rather with the intention of providing information that will frustrate it' (Lord Griffiths, 928). In *Yip Chiu-cheung*, however, the plan was to actually export the heroin, even though the plan was not ultimately carried through. Lord Griffiths, was clear on this point: 'Neither the police, nor customs, nor any other member of the executive have any power to alter the terms of the Ordinance forbidding the export of heroin, and the fact that they may turn a blind eye when the heroin is exported does not prevent it from being a criminal offence' (at 928).

46 Carol Harlow, 'Self-Defence: Public Right or Private Privilege' [1974] *Criminal Law Review* 528, 529.

47 See, eg, *R v Julien* [1969] 2 All ER 856, 858 (Widgery LJ): For a person to claim the right of self-defence, 'what is necessary is that he should demonstrate by his actions that he does not want to fight. He must demonstrate that he is prepared to temporise and disengage and perhaps to make some physical withdrawal' cited with approval in *R v McInnes* [1971] 1 WLR 1600, 1607-8 (Edmund Davies LJ).

48 Greenwood, above n 34, 6–7.

whether this debate influenced Lord Diplock and the House of Lords in their 1975 decision.

But for all its problems, the *A-G's Reference* decision was neither orphan nor aberration. In *Hajdamovitz*, a case concerning a Polish soldier in Palestine shooting a fleeing suspect whom he had been ordered to guard, the UK Court of Criminal Appeal held that Hajdamovitz

> was not criminally responsible for the act he committed, because he was ordered by his superiors to guard the deceased … and there was nothing manifestly unlawful in the order given to him … and that the appellant [Hajdamovitz] was entitled and, in fact, bound, to obey it, and he was therefore in the position of any other sentry, properly and duly appointed, that is to say he (the appellant) had to perform the duties and was entitled to the immunities of any other person similarly appointed.[49]

In this case, the Court looked to another potentially unlimited statutory 'lawful authority' as a complete defence to murder — in this case, *Criminal Code Ordinance* 1936 (Palestine) s 19(b), which provided that:

> A person is not criminally responsible for an act or omission done in obedience to the order of a competent authority which he is bound by law to obey, unless the order is manifestly unlawful.[50]

In assessing whether the order — which was not clearly articulated, but which they agreed did involve an apparent authorisation to shoot, if necessary, to prevent escape[51] — was manifestly unlawful or not, the Court placed great stock in 'the usual immunities' of sentries in like situations. In this regard, the three judges referred approvingly in their joint judgment to an earlier decision of the same Court in *Mansell v Attorney-General*[52]:

> Putting it generally, a police constable (that would apply in this case to a duly appointed sentry) is entitled to use all reasonable means to prevent the escape of a prisoner who has been charged with a serious offence … and if firing is the only means or reasonable means available to him, then he is entitled to fire — but the means must be reasonable — circumstances must be such that if this last resort of firing is not taken then there is a reasonable probability of the prisoner escaping … *Justification as to firing is entirely a question of law to be considered on the circumstances surrounding each case*, taking into account inferences to be drawn from facts and the facts proved.[53]

This allowed the Court to determine that:

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49 *Hajdamovitz* (1944) 11 *Palestine Law Reports* 140.

50 Ibid 143.

51 A Polish officer, in the presence of the accused (Hajdamovitz) had told the detained suspects that 'if you try to escape arms will be used'.

52 (1876) 6 *Palestine Law Reports* 44 cited in *Hajdamovitz* (1944) 11 *Palestine Law Reports* 140, 145–6.

53 *Hajdamovitz* (1944) 11 *Palestine Law Reports* 140, 145–6.

> on the picture accepted by the Court, this sentry was entitled to shoot, not being able, or reasonably thinking that he was not able, to stop the deceased in any other way. And if he was entitled to shoot in order to stop the deceased, and by misfortune he killed, he would not be liable for that.[54]

The Court concluded that 'there is no ground for saying that the appellant acted unjustifiably or in excess of his duties as a sentry in firing at and killing this unfortunate man Shuster on this night.'[55]

Hajdamovitz may appear to be a useful and worthy precedent for the reasoning in the *A-G's Reference* decision. However, there are two significant problems with this view. First, and fundamentally, *Hajdamovitz* is authority for the issue of 'justification' being 'entirely a question of law to be considered on the circumstances surrounding each case'. [56] In contrast, the *A-G's Reference* decision is dogmatic that the issue of reasonableness in the circumstances is one for the jury alone.[57] Second, the *A-G's Reference* decision — on the hypothetical facts as communicated in the reference — found exculpation in relation to the soldier's belief that he was authorised to shoot to prevent escape. As Lord Diplock held:

> In the circumstances postulated, the soldier had no choice as to the degree of force to use. It was a case of all or nothing. He could aim a bullet at the suspect with his rifle or use no force at all and let the suspect escape … [58]

Although the Law Lords spent some effort elaborating on the reasonableness of a number of beliefs in the circumstances — including that the deceased was a member of a terrorist organisation, that the deceased, if he was such a member, might warn his fellow PIRA members and lay an ambush for the patrol, etc — they did not appear to address the issue of the reasonableness of a soldier's belief in the manifest lawfulness of his orders. This was despite the issue being squarely raised in argument before the Law Lords by Hutton — referring to *R v Thomas*[59]: 'A sentry who fired in pursuance of his orders could not rely on that as constituting a defence.'[60] Indeed, the closest Lord Diplock appeared to come to this issue was a tangential reference to a soldier in Northern Ireland being 'under a duty, enforceable under military law, to search for criminals *if so ordered by his superior officer* … For the performance of this duty he is armed with a … self-loading rifle, from which a bullet, if it hits the human body, is almost certain to cause serious injury if not death.'[61]

The Court in *Hajdamovitz*, however, was clear that the warning by the Polish officer — to the detained suspects but in hearing of the guards — that arms would be used if they attempted to escape, whilst unobjectionable as a warning, was not a lawful order:

> In so far as [the warning] was intended as an instruction to the sentry, we are of the opinion that it would not avail the sentry as a defence to a prosecution for manslaughter.

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54 Ibid 149.
55 Ibid 150–1.
56 Ibid 145–6.
57 See, eg, *A-G's Reference* [1977] AC 105, 133 (Lord Diplock): 'as to whether the conduct of the accused fell short of the standard to be expected of the reasonable man it does not seem to me that a decision on that issue can ever be a point of law.'
58 Ibid 139 (Lord Diplock).
59 (1816) (Bayley J) in D R Bentley (ed), *Select Cases from the Twelve Judges' Notebooks* (1997) 114 (Notebook 4).
60 *A-G's Reference* [1977] AC 105, 113.
61 Ibid 137 (Lord Diplock) (emphasis added).

> We agree on that matter with the learned trial Judge that that would be an order that is manifestly unlawful, *in that a reasonable sentry must be presumed to know that an order to shoot at sight at a person escaping is an unlawful order*.[62]

The saving grace for Hajdamovitz, the Court determined, was that 'the order was not acted upon at all' and that that the sentry's defence was rather that he 'acted in accordance with the general rule which a sentry should follow in such circumstances'.[63] But, as we have seen, this 'general rule' was that the sentry was 'entitled to use all reasonable means to prevent the escape of a prisoner who has been charged with a serious offence … and if firing is the only means or reasonable means available to him, then he is entitled to fire'.[64] The distinction, if it exists, is so fine as to be useless in practice and certainly non-existent in terms of outcomes. It is clearly arguable, consequently, that although *Hajdamovitz* and the *A-G's Reference* appear to share a common judicial outcome, it is not safe to say that they represent a clear, coherent, consistent line of authority for a unified legal principle underpinning that outcome. At this point, it is therefore prudent to bring *Sheppard* — where a soldier guarding a deserter shot and killed the deserter as he attempted to escape at a railway station — into this jurisprudential melee.

In *Sheppard*, the deceased — a fleeing deserter — was shot and killed by the guard who was in sole custody of the man at the time. The deceased had twice previously attempted to flee the escort, both occasions being while both he and his escort detachment had been watching a soccer match, and afterwards sharing a 'considerable quantity of beer'[65] in some local public houses as they awaited the train. Although there was no certainty as to the formal orders given to the escort detachment as a whole, the guard was armed with live rounds, and had been told by the Corporal in charge — as he temporarily left the guard alone with the prisoner whilst he exchanged a warrant for a train ticket for the prisoner — 'to stand no nonsense and to shoot if necessary.'[66] Lord Robertson, in the High Court of Justiciary in Scotland, distilled the question for the jury to be: '[w]as this shooting, in a proper sense, in the line of [his] duty as reasonably understood by him or … an act which, while falling short of murder [but possibly rising to the level of the lesser charge of culpable homicide], [was] yet proved to have been of such gross and wicked recklessness that [his conduct] must properly be regarded as criminal conduct'.[67]

In *Sheppard*, the issue of whether an order to shoot was given or not was expressly raised. Lord Robertson, in his directions to the jury, indicated that 'the question for you on the facts will be to say, on the charge of culpable homicide, whether there was an order to shoot given or whether there was not an order to shoot given …'[68] However — as with the *Hajdamovitz* decision, and later with the *A-G's Reference* decision — the issue of the manifest illegality or otherwise of such express orders to shoot was once

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62 *Hajdamovitz* (1944) 11 *Palestine Law Reports* 140, 145 (emphasis added).

63 Ibid.

64 It is interesting, however, that in *Hajdamovitz* (1944) 11 *Palestine Law Reports* 140, the Court allowed itself a concluding observation to the effect that they were 'sure that it is unnecessary to state the fact that the appellant may (we express no opinion on the matter) have been fortunate to escape a conviction of murder on one set of facts …' (at 151).

65 *Sheppard* (1941) JC 67, 68.

66 Ibid 67.

67 Ibid 72.

68 Ibid 70.

again lost within, or obscured by, a tendency to focus on the more general (and less specific, in relation to use of lethal force) 'duties of a sentry'. As Lord Robertson explained to the jury (which returned a unanimous verdict of not guilty):

> The accused was on duty, and his immediate duty was to keep in custody, and to deliver up, the man whom he was escorting. In such a case it is obviously not impossible by any means for a jury to take the view that, if the circumstances were such as to require the accused, for the due execution of his duty, to shoot in order to keep the man in custody, then the homicide was justifiable, and so acquit the accused entirely … In considering [guilt], it will be right for you to keep in view the situation in which the accused was placed. He was a soldier on duty in charge of a deserter and under obligation to deliver up the body of the deserter to headquarters. It would be altogether wrong to judge his actings, so placed, too meticulously — to weigh them in fine scales. If that were to be done, it seems to me that the actings of soldiers on duty might well be paralysed by fear of consequences, with great prejudice to national interests.[69]

Again, therefore, the issue of a probably manifestly illegal specific order such as 'shoot him if he tries to escape' — which, as noted above, the Court in the *Hajdamovitz* case explicitly indicated would be manifestly illegal and provide no defence — becomes blurred, and overcome, by reference to the more imprecise and general 'duties of a sentry', or 'duties of a soldier'. In this connection, *Sheppard* also exhibits a further, most un-Diceyan, approach to the privileges attaching to that duty. Quoting an 1844 treatise by the noted Scottish criminal lawyer, Baron Hume, Lord Robertson explained that it was important 'to attend to the nature of a soldier's privilege, when opposed or assaulted in the execution of his duty.'[70] For both Hume and Robertson, the nature of this privilege stemmed from the nature of the soldier's training, duty, and subjection to discipline, things which 'serve to separate the soldier from the mass of other citizens, and to nourish a peculiar character in him, and a higher jealousy of disgrace or affront.'[71] As a consequence, the nature of the soldier's apparently legal privilege, was that

> justice require[s] a higher allowance of his forwardness in maintaining his service, whatsoever it is for the time; and they are withal a warning to everyone, not to molest or meddle with him therein.[72]

Ultimately, as the privilege was applied, the question thus became: 'was [the] shooting, in a proper sense, in the line of the accused's duty as reasonably understood by him …'[73] The jury unanimously held that it was.

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69 Ibid 71.

70 Ibid 72, quoting Baron Hume, *Commentaries on the Law of Scotland Respecting Crimes* (1844) 205.

71 Ibid 72.

72 Ibid 72, quoting Baron Hume, *Commentaries on the Law of Scotland Respecting Crimes* (1844) 205. Baron Hume, rightly, felt that he could not define the 'precise boundaries' of the privilege, but he did feel secure enough to lay out one fundamental principle:

> This, however, in a general way, the judgments of the Court enable me to say, that an invasion with mortal weapons … or an actual and immediate danger of death, is not necessary to entitle a soldier to use the arms which the State has given him; and therefore given him, that he and his duty may be secure, and in no danger of surprise, or material hinderance (at 205) cited in *Sheppard* [1941] JC 67, 72.

73 Ibid 72.

D Is this a viable line of authority?

So where does the apparent sponsorship of an autonomous defence of 'reasonable and necessary' use of lethal force in *Sheppard*, *Hajdamovitz*, and the *A-G's Reference* leave us? How does this line of authority balance up against not only its various internal case-specific incoherencies, and its collective inconsistencies, but also against the alternative, but stricter, line of authority that links *R v Thomas* with *R v Clegg*, with strong resonances in the High Court of Australia in *A v Hayden* and the Privy Council in *Yip Chiu-cheung v R*? It is significant that Windeyer in his 1978 opinion advised that Lord Diplock's observation that self-defence is 'quite different [from the] defence of the use of reasonable force in the prevention of crime'[74] was a sound proposition for Australian law, concluding that:

> If in subsequent proceedings, the question arises of what kind of force and in what degree the necessity of the particular occasion required, this must be measured by what opposition was known or was reasonably expected at the time. Deadly force … may be needed sometimes but not if lesser means will attain the object. Batons may be better than bullets.[75]

Yet it is quite clear (to this author, at least) that an autonomous, non-self-defence based, defence of 'reasonable and necessary' use of lethal force is far from legally certain or secure. Indeed, in view of the need to avoid the potential consequences (for the sailor, soldier or airman) of the 'judicial roulette' which any advocacy of such a defence would involve, it should never form a principle underpinning legal advice in relation to law enforcement operations.

It is also arguable that the primarily UK line of authority which might be said to underpin any assertion of such a 'reasonable and necessary' defence has perhaps been further weakened, or at the least confused to the extent of making reliance upon it inadvisable, as EU and UK law continue to evolve at least partially in tandem.[76] European jurisprudence — for example, the European Court of Human Rights (ECtHR) decision on the legality of use of lethal force in preventing the flight of unarmed escapees in *Nachova v Bulgaria* ('*Nachova*')[77] — will be increasingly influential in UK jurisprudence, and will (inevitably) lead to further problems with the *A-G's Reference* precedent. Indeed, the principles and concepts underlying, and now expressed in, the *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*[78] — which was specifically cited in *Nachova* — have been regularly referred to in ECtHR jurisprudence involving UK security forces — such as *McCann v United*

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74 *A-G's Reference* [1977] AC 105, 139.

75 Opinion of Sir Victor Windeyer, in Hope, above n 20, [46]–[47].

76 Under the *Convention for the Protection of Human Rights and Fundamental Freedoms,* opened for signature 4 November 1950, 213 UNTS 2889 (entered into force 3 September 1953) ('*European Convention on Human Rights and Fundamental Freedoms*'), the use of lethal force must be an 'absolute necessity', which in turn requires a determination of whether the use of force was 'strictly proportionate', and an assessment of the planning and organisation of the operation, of training, communications, and tactical procedures, of legal and policy safeguards, and so on.

77 (2005) VII Eur Court HR 1.

78 Adopted on 7 September 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

Kingdom ('*McCann*'),[79] *Jordan v United Kingdom* ('*Jordan*'),[80] and *McKerr v United Kingdom* ('*McKerr*').[81]

The relative security of this assessment, however, is subject to one very important apparent counter-argument which must be addressed. This is the fact that art 2(2) of the *European Convention on Human Rights and Fundamental Freedoms* (applicable to the UK) permits use of lethal force in three situations:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

ECtHR jurisprudence is clear that such use of lethal force must be an 'absolute necessity', and assessments of specific incidents against this high threshold include determinations as to: whether the use of force was 'strictly proportionate'; the planning and organisation of the operation; the training and equipping of the state agents conducting the operation; and the relevant domestic laws and policies.

However, it is arguably not at all clear — when dealing with use of lethal force — that each of these three justifications is ultimately separate and distinct from the defence of self-defence. Indeed, it is certain that the ECtHR sees *Criminal Law Act (Northern Ireland) 1967* (NI) c 18, s 3 as including at least in part a self-defence based defence — a very different perspective from those earlier judges, justices, and other analysts who argued that s 3 was entirely separate to, and distinct from, self-defence, with no overlap:

> The *Criminal Law Act (Northern Ireland) 1967* (NI) c 18, s 3 provides, inter alia:
>
> '1. A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting the arrest or assisting in the lawful arrest of offenders or suspected offenders or persons unlawfully at large.'
>
> Self-defence or the defence of others is contained within the concept of the prevention of crime (see e.g. Smith and Hogan on Criminal Law).[82]

Applying art 2(2) of the *European Convention on Human Rights and Fundamental Freedoms* to the facts in *Kelly v United Kingdom*,[83] however, the ECtHR noted that:

> It is undisputed that the nine men at Loughgall were shot and killed by SAS soldiers. Three of the men at least were unarmed: Antony Hughes who was a civilian unconnected

79 (1996) 324 Eur Court HR (ser A).

80 (2001) Appn No 24746/94 (Judgment 4 May 2001, finalised version 4 August 2001) [87]–[91] (on the UN Basic Firearms Principles, and UN guidelines on investigation of extra-judicial killings), [110]–[111] (on self-defence).

81 (2001) III Eur Court HR 475, 509-10 (on the UN Basic Firearms Principles, and UN guidelines on investigation of extra-judicial killings) 518-19 (self-defence), 523-4 (on the criminal trial and acquittal of the three Royal Ulster Constabulary ('RUC') police officers in relation to the killing). The Jordan and McKerr ECtHR judgments were part of a series of decisions on UK security operations in Northern Ireland, all delivered on the same day (4 May 2001). The other cases were *Shanaghan v United Kingdom* (2001) Appn No 37715/97 (Judgment 4 May 2001, finalised version 4 August 2001) and *Kelly v United Kingdom* (2001) Appn No 30054/96 (Judgment 4 May 2001, finalised version 4 August 2001).

82 *Kelly v United Kingdom* (2001) Appn No 30054/96 (Judgment 4 May 2001, finalised version 4 August 2001) [47].

83 (2001) Appn No 30054/96 (Judgment 4 May 2001, finalised version 4 August 2001).

> with the IRA, as well as the IRA members Declan Arthurs and Gerard O'Callaghan. This use of lethal force falls squarely within the ambit of Article 2, which requires any such action to pursue one of the purposes set out in the second paragraph and to be no more than absolutely necessary for that purpose. A number of key factual issues arise in this case, in particular whether any warnings could have been given; whether the soldiers acted on an honest belief perceived for good reasons to be valid at the time but which turned out subsequently to be mistaken, *namely, that they were at risk from the men who were shot*, and whether any of the deceased were shot when they were already injured and on the ground in circumstances where it would have been possible to carry out an arrest.[84]

The ECtHR ultimately held that there had been 'a violation of Article 2 of the Convention in respect of failings in the investigative procedures concerning the deaths of the applicants' relatives'.[85] Also implicit within the judgment was a *McCann* based critique relating to the justifiability, or otherwise, of allowing such incidents to progress to a stage where use of lethal force became almost inevitable. However, there was no indication that the actual actions of the UK soldiers, in self-defence, appeared to be unjustified, and the recitation of facts at the commencement of the judgment makes it quite clear that the soldiers shot and killed the nine deceased after the IRA attack on the manned RUC police station at Loughgall had begun. Indeed, the judgment recites a number of specific instances of soldiers shooting because they apprehended imminent harm to themselves or their colleagues.[86]

But what of the second and third limbs, which appear to provide non-self-defence based justifications for state agent use of lethal force? The ECtHR has recently specifically dealt with art 2(2)(b) — to effect an arrest or prevent escape — in *Nachova*.[87] This case involved the 1996 killing of two Bulgarian conscripts (of Roma origin) after they had fled from a construction site near the prison in which they were serving detention for repeated absence without leave. The Military Police located the men at a relative's house, and the two deceased then fled the house. During the chase to apprehend, both were killed by the Military Police. Neither was armed, and there was no apprehension of violence.[88] One issue the ECtHR was called upon to determine was whether the killing in the course of effecting an arrest could be justified in accordance with *European Convention on Human Rights and Fundamental Freedoms* art 2(2)(b). What is clear from the judgment is that this particular authorisation is to be read in a manner that would, for most common law jurisdictions, actually transform it into a contextual nuance relating — ultimately — to self-defence, rather than as an independent, non-self-defence based, defence. In a passage, which could not make more stark the chasm separating *Nachova* from the *A-G's Reference* decision, the ECtHR held:

> the legitimate aim of effecting a lawful arrest can only justify putting human life at risk in circumstances of absolute necessity. The Court considers that in principle there can be no such necessity where it is known that the person to be arrested *poses no threat to life or limb*

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84 Ibid [99] (emphasis added).

85 Ibid [44].

86 Ibid [11]–[25]. For specific details on individual situations of apprehended imminent harm see [19], [21], [23].

87 *Nachova* (2005) VII Eur Court HR 1. See also 'Recent Cases' (2006) 119 *Harvard Law Review* 1907.

88 *Nachova* (2005) VII Eur Court HR 1, 9-13.

> and is not suspected of having committed a violent offence, even if a failure to use lethal force may result in the opportunity to arrest the fugitive being lost …[89]

Again, what appears at first glance to be a non-self-defence based defence to use of lethal force could actually, and fundamentally, be described as a contextual nuance on what is ultimately still a self-defence based justification.

The third limb of art 2(2) — to quash a riot or insurrection — is also, it may be argued, fundamentally a self-defence based justification. However, ECtHR jurisprudence on this issue is less plentiful and less on point. In *McShane v United Kingdom*[90] the ECtHR — noting that the facts of the particular incident were still in dispute under UK domestic processes — did not comment upon the application of art 2(2)(c) to a death resulting from an Armoured Personnel Carrier ('APC') pushing and driving over a protective hoarding behind which rioters (in Northern Ireland) were sheltering. The riot was of a large scale, and had involved petrol bombs being thrown at security forces personnel. McShane was trapped beneath the hoarding and killed by being crushed beneath the APC.[91] In *Stewart v United Kingdom*[92] the European Commission of Human Rights dealt with the admissibility of an action relating to the death of a 13-year-old boy (Brian Stewart), who was participating in a serious riot. He was hit in the head by a baton round and died six days later as a result of the injuries. There was no issue of intentional killing of Stewart — it was unintentional as the soldier who fired the round was hit in the shoulder and leg by rocks or other missiles at the moment of firing, thus throwing off his aim. However, there was no question that the soldier had intended to fire the baton round at one of the riot leaders, next to whom Stewart was standing.[93] The UK maintained that the riot (approximately 150 rioters facing an eight man Army patrol) was such that the soldiers were in significant danger — 'namely [from] the risk of serious injury from direct contact [by the thrown missiles] and the risk of sniper attack'.[94] All had been hit by missiles, and the situation was further deteriorating. The Commission, in rejecting admissibility, commented that in relation to *all three* of the art 2(2) exceptions, '[i]n assessing whether the use of force is strictly proportionate, regard must be had to the nature of the aim pursued, *the*

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89 Ibid 26 (emphasis added). The ECtHR referred approvingly to its 1996 decision in *McCann* (1996) 325 Eur Court HR (ser A) 45–6, 56–62. In this case, the ECtHR was focused more specifically on the relationship of art 2(2) to the planning and organisation of domestic security operations insofar as they 'in effect, rendered inevitable the use of lethal force' (at 59). See also *Aytekin v Turkey* (1998) VII Eur Court HR 2807; *Makaratzis v Greece* (2004) XI Eur Court HR 195, 231 (in this case the ECtHR roundly criticised the archaic relevant law (dating to WW II) and the chaotic Greek Police response to what began as a traffic incident and ended with serious gunshot wounds); and *Bubbins v United Kingdom* (2005) II Eur Court HR 169, where the Court held that a siege which ended abruptly and tragically with the death of the hostage-taker had not violated art 2; that the Police (in Bedford) had engaged in appropriate planning and control given the short notice and quickly progressing nature of the incident; and that UK domestic law and training was adequate.

90 *McShane v United Kingdom* (2002) Appn No 43290/98 (Judgment 28 May 2002, finalised 28 August 2002).

91 Ibid [99]–[105].

92 *Stewart v United Kingdom* (1984)Appn No 10044/82 (Decision 10 July 1984).

93 Ibid 163–6.

94 Ibid 171.

dangers to life and limb inherent in the situation and the degree of the risk that the force employed might result in loss of life.'[95]

On this basis, it would seem that the likely consequence of both recent UK and ECtHR tendencies to look for self-defence markers in cases involving use of lethal force by state agents, is that UK courts will continue to seek to avoid the implications of the *A-G's Reference* decision. In preference, the UK courts will arguably continue a tendency to assert a practical principle along the lines that it is difficult to envisage a situation of 'reasonable necessity' that will excuse the use of lethal force in situations such as arrest, recapture of detainees, or prevention of crime, where the individual poses no threat to life or limb — that is, effectively, where there was no element of self-defence at play.

III THE SITUATION IN AUSTRALIA

Noting the apparently broad and statutory nature of defences relating to use of reasonable and necessary force to effect a law enforcement purpose — such as the *Criminal Law Act (Northern Ireland) 1967* (NI) c 18, s 3 — it is instructive to examine the Australian situation. In line with the constitutional starting point of state-based criminal jurisdiction, there is no broad federal defence of quite the same extent and nature as existed in Northern Ireland. Whilst there is an equivalent general federal defence of self-defence,[96] perhaps the closest general federal defence to 'reasonable and necessary' use of lethal force lies in a combination of the defence of 'lawful authority'[97] with a cross-reference (for specificity) to the power of arrest.

The lawful authority defence is actually a reflective, or perhaps symbiotic, defence in that it only removes criminal liability for offences specifically where 'the conduct constituting the offence is justified or excused by or under [another] law'.[98] Thus if an offence is committed in the course of effecting an arrest, the defence would need to cross-refer to, for example, the federal statutory provisions relating to arrest — such as the *Crimes Act 1914* (Cth) s 3ZC(1).[99] This authority provides two of the three heads of power supplied by the *Criminal Law Act (Northern Ireland) 1967* (NI) c 18, s 3 (the prevention of crime being provided for elsewhere).[100] However, there is no Australian jurisprudence that would support an interpretation of the *Criminal Code Act 1995* (Cth)

95 Ibid 171 (emphasis added).

96 *Criminal Code Act 1995* (Cth) s 10.4.

97 *Criminal Code Act 1995* (Cth) s 10.5.

98 *Criminal Code Act 1995* (Cth) s 10.5. See also Revised Explanatory Memorandum, Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 2000 (Cth) [13]. The example used to demonstrate the envisaged ambit of the defence of lawful authority was that of where a 'law enforcement officer is *authorized by law* to physically restrain a person and does so within the scope of his or her authority, then the officer cannot be charged for harming that person' (emphasis added). The essential point, as expressed in the Revised Explanatory Memorandum, is as follows: 'The main thing to keep in mind here is that the defence will not apply if there is no clear justification or excuse provided for by or under another law of the Commonwealth' at [13].

99 *Crimes Act 1914* (Cth) s 3ZC(1): 'A person must not, in the course of arresting another person for an offence, use more force, or subject the other person to greater indignity, than is necessary and reasonable to make the arrest or to prevent the escape of the other person after the arrest'.

100 See, eg, *Crimes Act 1914* (Cth) s 3W (power of arrest without warrant).

s 10.5 and the *Crimes Act 1914* (Cth) s 3ZC acting in concert to excuse a non-self-defence based use of lethal force for a law enforcement purpose. Indeed, as s 3CZ(2) makes clear, use of lethal force in the conduct of an arrest is only permissible where the constable 'believes on reasonable grounds that doing that thing [anything that is likely to cause the death of, or grievous bodily harm to, the person] is necessary to protect life or to prevent serious injury to another person (including the constable) … '[101] Self-defence is the only excuse for police killing people in the line of duty. There is no public defence / private defence split apparent in this approach.

However, the constitutional division of responsibilities between the Commonwealth and the States has also resulted in a number of federal subject-matter specific defences of the 'reasonable and necessary' category. There are four which are very broadly drafted and which are most relevant to Australian Defence Force members. The first two are essentially the same — the *Migration Act 1958* (Cth) s 245F(10), and the *Customs Act 1901* (Cth) s 185(3B). Both of these sections provide authority as follows: 'An officer may use such force as is necessary and reasonable in the exercise of a power under this section.' The types of powers referred to are those such as: moving people; detaining people, vessels, or aircraft; boarding vessels; and searching stowages and compartments. Each authorisation is then accompanied by two additional provisions: a further statutory protection (indeed, an ouster clause) from certain proceedings (but in relation to the powers to move people);[102] and (most relevantly for the purposes of use of force) an amplification as to levels of force. Indeed, as ss 185(3D) (detaining) and 185(3E) (arrest of fleeing person) of the *Customs Act 1901* (Cth) make clear, the limitations on use of force are essentially those that apply generally to arrest:

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101 *Crimes Act 1914* (Cth) s 3ZC(2)(a). Section 3ZC(2)(b), relating to use of force in arrest of a person attempting to escape arrest by fleeing, requires — in addition to the requirement that such use of force be 'necessary to protect life or to prevent serious injury to another person (including the constable)' — that 'the person has, if practicable, been called on to surrender and the constable believes on reasonable grounds that the person cannot be apprehended in any other manner.' Importantly, the reference to 'constable' enlivens the definition of 'constable' in *Crimes Act 1914* (Cth) s 3 ('constable means a member or special member of the Australian Federal Police or a member of the police force or police service of a State or Territory'). Under the *Australian Federal Police Act 1979* (Cth) s 40E, the Commissioner may appoint special members, and these members have, during the period of their appointment, inter alia, 'any powers and duties that are expressly conferred or imposed on special members under a provision of this Act or of any other Act …' — thus enlivening for such special members the powers under *Crimes Act 1914* (Cth) s 3ZC. Australian Protective Service Officers also enjoy the same powers via the *Australian Federal Police Act 1979* (Cth) ss 14A, 14B.

102 *Migration Act 1958* (Cth) s 245F(9B)/*Customs Act 1901* (Cth) s 185(3AB). These provisions provide that:

> Proceedings, whether civil or criminal, may not be instituted or continued, in respect of any action taken under subsection (9A)/(3AA) [the power to move people], against the Commonwealth, an officer or any person assisting an officer if the officer or person who took the action acted in good faith and used no more force than was authorised by subsection (10)/(3B) [use of necessary and reasonable force].

(3D) In arresting or detaining a person found on the ship or aircraft, an officer:

(a) must not use more force, or subject the person to greater indignity, than is necessary and reasonable to make the arrest or detention or to prevent the person escaping after the arrest or detention; and

(b) must not do anything likely to cause the person grievous bodily harm *unless the officer believes on reasonable grounds that doing the thing is necessary to protect life or prevent serious injury of another person* (including the officer).[103]

The limitation on use of lethal force to situations of self-defence is thus clear, and is further reinforced by the amplification at the end of the subsection: 'This subsection has effect despite paragraph (2)(d) [arrest without warrant] and subsection (3B) [use of necessary and reasonable force].'

The third statutory 'reasonable and necessary' defence is as provided in the *Fisheries Management Act 1991* (Cth) s 87J. This provision is couched in terms that appear to emphasise limitation:

Force to be used only in limited circumstances

(1) An officer must not use force in the exercise of the officer's powers … [under s 84 and a number of related sections] … unless it is necessary to do so:

(a) to ensure the safety of an officer; or

(b) to overcome obstruction of an officer in the exercise of that officer's powers.

Force used must be reasonable

(2) The force used must not be more than is reasonably required for the relevant purpose described in paragraph (1)(a) or (b).[104]

Again, this grant of authority is accompanied by a further ouster clause, although in broader terms than for the *Customs Act 1901* (Cth) and the *Migration Act 1958* (Cth) in that it is not limited to powers relating to moving people, but covers 'anything done in good faith or omitted to be done in good faith in the exercise or purported exercise of any power conferred by this Act or the regulations.'[105] Undoubtedly, the *Fisheries Management Act 1991* (Cth) prohibition is less explicit and direct than the specific references to self-defence (in terms of use of force likely to cause death or serious injury) that appear in the *Customs Act 1901* (Cth) and the *Migration Act 1958* (Cth). However, the tenor of the provision in relation to use of force likely to result in such serious consequences, and the distinction between the two 'purposes' for which force may be used at all, arguably make it clear that the more serious uses of force are only 'reasonable and necessary' for personal safety — that is, in self-defence.

The fourth statutory provision of relevance is found in the 'call out' provisions of Part IIIAAA of the *Defence Act 1903* (Cth).[106] Under Division 2A (powers to protect

103 *Customs Act 1901* (Cth) s 185(3D) (emphasis added).

104 *Fisheries Management Act 1991* (Cth) s 87J.

105 *Fisheries Management Act 1991* (Cth) s 90:

> An officer or a person assisting an officer in the exercise of powers under this Act or the regulations, is not liable to an action, suit or proceeding for or in respect of anything done in good faith or omitted to be done in good faith in the exercise or purported exercise of any power conferred by this Act or the regulations.

106 *Defence Act 1903* (Cth) pt IIIAAA — Utilisation of Defence Force to protect Commonwealth interests and States and self-governing Territories. For some general comments on the

designated critical infrastructure) of Part IIIAAA, where the appropriate call out order has been made, and the infrastructure has been appropriately designated by the Authorising Minister(s),[107] a member of the Defence Force may use force to:

> (i) prevent, or put an end to, damage or disruption to the operation of the designated critical infrastructure;
>
> (ii) prevent, or put an end to, acts of violence … [108]

The level of force permitted is 'such force against persons and things as is reasonable and necessary in the circumstances.'[109] Importantly, however, whilst this use of reasonable and necessary force is generally subject to the same self-defence based caveats as the analogous powers under the *Customs Act 1901* (Cth), *Migration Act 1958* (Cth), and *Fisheries Management Act 1991* (Cth), and the power of arrest under the *Crimes Act 1914* (Cth),[110] there is specific authorisation for doing 'anything that is likely to cause the death of, or grievous bodily harm to' another person, where this is believed to be necessary to 'protect, against the threat concerned, the designated critical infrastructure in respect of which the powers are being exercised … '[111] As the Explanatory Memorandum, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 (Cth) made clear, the purpose of this scheme was to provide an authorisation to use reasonable and necessary force, up to and including lethal force, to protect certain critical and specifically designated, but uninhabited, infrastructure.

> No provisions currently exist that allow the use [sic] lethal force where this is necessary to protect uninhabited infrastructure from attack, even if the consequences of that attack would have secondary effects resulting in the [sic] death or serious injury to others.[112]

At first glance, this appears to be a departure from the traditional statutory tendency to ensure that any use of lethal force in accordance with a 'reasonable and necessary' authorisation is fundamentally and ultimately still a self-defence based excuse. But this is not the case. As the Explanatory Memorandum further details:

> A primary concern is the authority to use force to protect *uninhabited* infrastructure, where the loss of that infrastructure is likely to have cascade effects directly resulting in serious injury or the loss of life. Within the current Commonwealth, State and Territory criminal law frameworks, force can only be used if an attack against infrastructure is likely to cause immediate death or serious injury to persons (such as the inhabitants of infrastructure targeted for attack).[113]

The precondition for Ministerial authorisation, therefore, is that the Minister believes 'on reasonable grounds' both that there is 'a threat of damage or disruption to

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'original' (2000) pt IIIAAA — which was focused primarily on land-based anti-terrorism operations — see Head, 'The Military Call-Out Legislation — Some Legal and Constitutional Questions', above n 12. For his more recent comments on the 'new' Part IIIAAA, see Head, 'Australia's Expanded Military Call Out Powers: Causes for Concern', above n 12, 137–8 on the use of lethal force.

107 *Defence Act 1903* (Cth) ss 51A, 51AA, 51B, 51C, 51CB, 51D, on orders and designation.

108 *Defence Act 1903* (Cth) s 51IB(a).

109 *Defence Act 1903* (Cth) s 51T(1).

110 *Defence Act 1903* (Cth) s 51T(2).

111 *Defence Act 1903* (Cth) s 51T(2A)(ii).

112 Explanatory Memorandum, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 (Cth) [78].

113 Explanatory Memorandum, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 (Cth) [77] (emphasis added).

the infrastructure' and that this damage or disruption 'would or [sic] directly or indirectly endanger the life of, or cause serious injury to, other persons.'[114] This is clearly a species of self-defence — perhaps with the requirement for immediacy of consequence (death or serious injury) replaced by one of inevitability of consequence, despite the lack of immediate geographical and temporal proximity.[115]

IV CONCLUSION — SELF-DEFENCE AND ONLY SELF-DEFENCE

It is in no way safe to assume that UK precedent clearly supports the availability of a non-self-defence based 'reasonable and necessary' defence to use of lethal force, where the wellspring of those defences is assumed to be clearly of a separable and distinct 'reasonable and necessary' character. The consequence is that apart from self-defence of people, there is no clear, unambiguous, repeatedly re-confirmed, alternative justification or excuse, based in reasonable necessity, which could operate to excuse the use of lethal force by military forces engaged in law enforcement operations overseas. Further, it seems justified to strongly assert that were the issue of use of lethal force by ADF members in a deployed law enforcement operation to arise before an Australian court, the indigenous statutory tendency to limit use of lethal force to situations of self-defence would likely incline that court to read any claimed 'reasonable and necessary' defence as either an aspect of self-defence, or — in relation to lethal force — as non-existent. The one potentially persuasive wellspring for such a defence — the line of UK authority culminating in the *A-G's Reference* decision — is far too contested and internally incoherent, and should not be relied upon in any way unless and until some clear contemporary Australian judicial consideration is given to the issue.

It is, therefore, relatively clear that the only lawful justification / excuse for the use of lethal force by military forces employed on law enforcement operations overseas is self-defence of self or others. Apart from the legal reasoning as to why this is so, there are arguably three further reasons for adopting this view. The first is ethical, the second practical, and the third philosophical.

The ethical reason is simple — sailors, soldiers, and airmen should be entitled to rely on their orders and legal advice, and to expect that their rules of engagement and

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114 Explanatory Memorandum, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 (Cth) [82]. The examples cited in the Explanatory Memorandum include 'damage or destruction to pipelines that supply gas and power to hospitals, or damage or destruction to power plants that could reasonably be said to indirectly endanger life or cause serious injury' at [85].

115 It is important to note, however, that the critical statement at [77] of the Explanatory Memorandum, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 (Cth) — 'Within the current Commonwealth, State and Territory criminal law frameworks, force can only be used if an attack against infrastructure is likely to cause immediate death or serious injury to persons (such as the inhabitants of infrastructure targeted for attack)' — does not neatly square with the assertion in Commonwealth Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) < http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~GuideforPractitioners.pdf/$file/GuideforPractitioners.pdf> at 1 October 2009 — in relation to the fundamentally separate defence of 'sudden and extraordinary emergency' (*Criminal Code Act 1995* (Cth) s 10.3) — that both this defence, and the defence of 'duress' (s 10.2), are general defences 'available even to a charge of murder or attempted murder' (at 225, 227).

orders for opening fire are legally sound. It is neither operationally sound nor ethically or morally right to use sailors, soldiers and airmen as test cases for novel, expansive, or uncertain legal views — most particularly in relation to use of lethal force where the consequences for the victim and the (trusting) perpetrator are so acute. Thus legal advice should be provided — where possible — with clarity, setting out the defensible envelope of action as clearly as possible, rather than attempting to stretch this envelope in line with overly experimental interpretations. And where clarity is not simple, an issue should be pursued as far as it can be, so as to — at a minimum — reduce the uncertainties to a manageable level. As one British Army Officer involved in operations in Northern Ireland in the 1970s observed of the parlous state of legal understanding at that time: 'Such ambiguities and equivocations are useless as a guide to an eighteen-year-old "kid" of modest intelligence in uniform in Northern Ireland or anywhere else … '[116]

The practical reason is that it is difficult to believe that an Australian court today would arrive at similarly 'lenient' or obfuscated decisions as was occasionally so, in a number of UK cases, in the past. Many of the UK cases that underpin the supposed existence of an independent, non-self-defence based, defence of 'reasonable and necessary' use of lethal force by state agents, exhibit a degree of internal inconsistency and mixed ratio which — whilst perhaps explicable within their particular contexts — would be subject to scathing and warranted criticism today (as indeed many were at the time). In particular, Lord Diplock's reasoning in the *A-G's Reference* decision appears to blur the line between the issues of response to a perceived immediate threat, and doing an act that is 'reasonable and necessary' on other grounds. Similarly, the incoherence as to the 'duties and immunities of a sentry' which shine through in *Hajdamovitz* and *Sheppard* — two cases that are supposed to be mutually reinforcing — provides little certainty and less legal comfort. Additionally, the dichotomy between the *A-G's Reference* line of authority and the near 200 year essential consistency exhibited between *R v Thomas* and *R v Clegg* speaks well of the alternative, self-defence only, line of authority. And finally, the tendency of Australian statutes with 'reasonable and necessary' defences to limit use of lethal force to situations of self-defence would seem to offer the coup de grâce to any assertion that an Australian court might look with favour upon a 'reasonable and necessary' form of defence to use of lethal force. When dealing with killing, the likelihood of a repeat in the UK, or the adoption in Australia, of the clear and obvious judicial deference to the executive, and to the military when confronted by insurrection and riot, exhibited by the House of Lords and other superior courts in the past, is much less certain today.

Finally, and ultimately, this author holds a strong philosophical aversion to the contention that there should be any occasion for military forces on law enforcement operations to use lethal force beyond self-defence. This philosophical aversion relates to a personal view as to the interaction between the proper role and use of military forces by the executive, and a concern as to whether the executive should ever be understood as having the capacity to 'excuse' the use of lethal force by its state agents

116 In Walker, above n 34, 593, quoting R Evelegh, *Peace-keeping in a Democratic Society* (1976) 77. Sir Victor Windeyer, in Hope above n 20, [59], made a similar comment at the conclusion of his 1978 opinion: '[I]t is important to remember that the Regulations and Instructions are not addressed to lawyers. They are there for the guidance of officers of the Defence Force in the discharge of a duty that is responsible and serious and may be distasteful. Regulations governing it should be clearly, briefly and simply stated'.

outside of self-defence. It is difficult to not always end up back at *A v Hayden*, and the unanimous concern — perhaps expressed most polemically and starkly, but nonetheless correctly, in Murphy J's 'death squads' reference — that the executive not be unfettered. Each justification for killing that goes beyond self-defence — particularly if it is accorded to a state agent — carries with it the normatively fracturing potential to overwhelm what is arguably a standing democratic injunction. This is a place democracies should not go, and their military forces should never be used to get there.