

RUSTY WEAPONS IN A DIGITAL BATTLESPACE

SAMUEL WHITE*

This article explores the evolving landscape of foreign interference in domestic affairs, particularly in the context of 'information operations' facilitated by the internet. The primary focus of the article is on the lawful authority to respond to external information operations, and how this authority may be shaped by international law. Specifically, the article explores the royal prerogative in two manifestations — the war prerogative, and external affairs prerogative — as a potential source of authority. In doing so, the article employs an analytical framework by Winterton, distinguishing between the 'breadth' and 'depth' of constitutional executive power. The article acknowledges the limited case law and debates surrounding these prerogatives' scope and triggers, and slight nuances between British and Australian jurisprudence. It discusses the relationship between the war prerogative and the existence of armed conflict and touches on how international law can support the exercise of the war prerogative through the 'public policy test'. Drawing from international legal perspectives, the article references United Nations resolutions from 1976 and 1981 that emphasise the importance of domestic legal remedies against information operations. It stresses the duty of states to combat the dissemination of false or distorted news that interferes with other states' internal affairs. In sum, the article concludes that, while countering IOs is a matter requiring domestic legal authority, international law can likely extend the ambit of the royal prerogative and should also, as a matter of public policy, apply to such campaigns.

As Themistocles sailed along the coasts, wherever he saw places at which the enemy must necessarily put in for shelter and supplies, he inscribed conspicuous writings on stones, some of which he found to his hand there by chance, and some he himself caused to be set near the inviting anchorages and watering-places. In these writings he solemnly enjoined upon the Ionians, if it were possible, to come over to the side of the Athenians who were risking all in behalf of their freedom; but if they could not do this, to damage the Barbarian cause in battle, and bring confusion among them.¹

* Inaugural Cybersecurity Postdoctoral Research Fellow, University of Adelaide. RUMLAE Associate Researcher, Adelaide Law School. Adjunct Senior Research Fellow, University of New England. Many thanks to Professor Matthew Stubbs and Professor Cameron Moore, as well as the anonymous peer reviewers, for their helpful comments. All errors and views remain the author's alone, and do not reflect those of any affiliate organisations.

¹ Plutarch, 'Life of Themistocles', in *The Lives of Noble Grecians and Romans*, tr John Dryden (Encyclopaedia Britannica, 1st ed, 1952) 98.

From operational experience, we find that we can often achieve the greatest cognitive effect by affecting the functionality and effectiveness of an adversary's systems over a period of time, rather than denying them entirely (as in some cases they can be quickly replaced).²

I INTRODUCTION

Foreign State and non-State actors attempting to interfere in the domestic affairs of others is not a new phenomenon; nor, too, is the use of information as a resource, environment and weapon in warfare.³ From the Hellenes along the coast of Ionia to British signals intelligence, the act of trying to shape a target audience to affect its functionality and effectiveness remains a cost-effective grey-zone tactic. It is an increasingly open domain in which the spectrum of competition, conflict and crisis occurs,⁴ and one in which new tactics, techniques and procedures are evolving behind opaque doors.

The United Nations has consistently emphasised the importance of domestic legal remedies to respond to the flow of information — in the 1976 *Resolution on Non-interference in the Internal Affairs of States*⁵ and the 1981 *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*.⁶ Both made clear and explicit references to information operations ('IOs') conducted through the technology of the time, such as broadcast media, which attempted 'campaigns of vilification' and 'subversion and defamation' in 1976,⁷ as well as 'any defamatory campaign, vilification or hostile propaganda for the purpose of intervening or interfering in the internal affairs of other States' in 1981.⁸ The Declaration, importantly, confirmed 'the right and duty of States to combat, within their constitutional prerogatives, the dissemination of false or distorted news which can be interpreted as interference in the internal affairs of other States' in a similar but distinct analogy to intelligence operations (with espionage not per se illegal under international law).⁹

It is these constitutional prerogatives — the residual powers left to the Crown by Parliament since 1688, and modified by Australia's constitutional framework¹⁰ — with which this article is concerned. Although foreign IOs may occur *within* the State, these prerogatives can operate both domestically and externally. The author has discussed domestic prerogative authorities elsewhere,

² Ministry of Defence, *Responsible Cyber Power in Practice* (Report, 2023) 15–16.

³ John Keegan, *Intelligence in War* (Hutchinson Press, 2003).

⁴ See Samuel White, 'Digital Payback' (2022) 4(2) *Australian Journal of Defence and Strategic Studies* 235.

⁵ *United Nations General Assembly Resolution on Non-interference in the Internal Affairs of States*, GA Res 31/91, UN Doc A/RES/31/91 (14 December 1976).

⁶ *United Nations Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*, GA Res 36/103, UN Doc A/RES/36/103 (9 December 1981).

⁷ United Nations General Assembly (n 5) preambular para 6.

⁸ *Ibid* annex, para II(j).

⁹ *Ibid* para III(d).

¹⁰ William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765–69) vol 1, 239.

in some depth.¹¹ However, little to nothing has been written from an Australian perspective on the lawful authority to respond to IOs that originate extra-territorially. While statute may provide some authority in some situations, it is always useful to look to the nebulous but often relied upon non-statutory executive power. Accordingly, this article looks from a Commonwealth perspective, on an oft-cited but oft-misunderstood lawful authority to respond to external threats — the royal prerogative. Such an analysis requires some historical exploration, as the prerogative is recognised by the common law but not created by it. The use of the prerogative — in particular the war prerogative — has its critics; as Lord Sumner stated about the war prerogative, ‘to those who had to inspect the rusty weapons of the war prerogative in the summer of 1914 it must or should have appeared that some of them had become permanently unreliable.’¹² By using the most current threat of modern warfare to explore the oldest creature of the common law, the viability of Lord Sumner’s statement can be assessed.

The scope of this article is therefore wide in one sense but narrow in another. It is wide in its discussion of non-statutory executive power, of which the war prerogative constitutes one recognised limb. It is narrow, however, in that it does not address how this aspect of the royal prerogative — which applies across the Commonwealth — is modified or abridged by separate constitutional or legislative provisions. At any rate, there is no statute that regulates the triggering of the war prerogative, or defines its ambit. The closest statutory abridgement is div 268 of the *Criminal Code* (Cth), which codifies war crimes. Nor does the paper engage with the critical question of when IOs may breach international law, and in particular whether they constitute coercion.¹³

The article utilises an Australian methodology for the analysis of executive power, designed by Winterton. It has become common practice to adopt the distinction, drawn by Winterton, between the ‘breadth’ and ‘depth’ of constitutional executive power.¹⁴ This practice was adopted by Gageler J, who explains ‘breadth’ to relate to ‘the subject-matters with respect to which the Executive Government of the Commonwealth is empowered to act having regard to the constraints of the federal system’,¹⁵ whereas depth denotes ‘the precise actions which the Executive Government is empowered to undertake in relation to those subject matters’.¹⁶ Interwoven in the above examples of the royal prerogative are matters that have a wide breadth but limited depth (such as the ability to grant honours), or matters with limited breadth but exceptional depth

¹¹ See Samuel White, *Keeping the Peace of the Realm* (LexisNexis, 2021).

¹² *Burmah Oil Co v Lord Advocate* [1965] AC 75, 122 (‘Burmah Oil’).

¹³ See for an expert analysis Marko Milanovic, ‘Revisiting Coercion as an Element of Prohibited Intervention in International Law’ (2023) *American Journal of International Law* (forthcoming).

¹⁴ George Winterton, *Parliament, The Executive and the Governor-General* (Melbourne University Press, 1983) 21.

¹⁵ *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 130 (Gageler J) (‘Plaintiff M68/2015’).

¹⁶ *Ibid.*

(such as the war prerogative). Depth can moreover be understood to limit the Commonwealth executive government's ability to undertake coercive activities. The reference to 'coercive activities' in turn reflects a number of fundamental constitutional principles, many of which derive from English case law and core constitutional documents such as the *Magna Carta* of 1215, *Petition of Right* of 1628, *Habeas Corpus Act* of 1640, *Bill of Rights* of 1689 and *Habeas Corpus Act* of 1816. As Brennan J observed in *Re Bolton; Ex parte Beane*:

Many of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which evokes their contemporary and undiminished force.¹⁷

These fundamental constitutional principles were developed in the context of historical struggles between the Crown and the Parliament in England, which resulted in the Parliament establishing limits on the executive government's non-statutory power in the Glorious Revolution of 1688 (an important and recurring touchpoint throughout this work). Critically, these limitations are most severe when it comes to the 'internal', rather than 'external', aspects of society. Focusing on domestic constitutional enablers and limitations is particularly important in this article. As discussed in more depth, international law offers guiding principles with respect to the exercise of constitutional executive power. It is not binding, however.¹⁸

Section II therefore addresses two potential sources of domestic constitutional authority for States 'to combat within their constitutional prerogatives': the war prerogative and the external security prerogative, rather than the external affairs power (as one jurist has remarked extra-curially to be of use).¹⁹ This is because the royal prerogative applies both externally and internally and is therefore of more utility. These two limbs of the royal prerogative are important, but complicated. There is very limited case law on their breadth or depth (utilising Winterton's framework).²⁰ Legal writing on the war prerogative often relies upon outlying, eclectic cases and tends to focus on what triggers the war prerogative. What is clear, however, is that it does exist. By comparison, writings on the external security prerogative question its validity. Some British authority would appear to support the idea that the royal prerogative of external security exists outside of the war prerogative; others suggest it does not. Section

¹⁷ (1987) 162 CLR 514, 520–1.

¹⁸ *Horta v Commonwealth* (1994) 181 CLR 183; *Polities v Commonwealth* (1942) 70 CLR 60.

¹⁹ Justice John Logan, 'Not A Suicide Pact: Judicial Power and National Defence and Security in Practice' (Speech, National Administrative Law Conference, 22 July 2022).

²⁰ George Winterton, *Parliament, The Executive and the Governor-General* (Melbourne University Press, 1983) 115.

III of this article therefore represents one of the few written academic analyses of the breadth and depth of the external security prerogative in Australia.²¹

Section IV then addresses the critical question of whether, and to what extent, applicable international legal frameworks might limit the range of actions permissible under constitutional executive power. Here, British and Australian jurisprudence differ. Section IV necessarily covers both jurisdictions, highlighting that the use of the war prerogative does not mean that a state of armed conflict (with consequential international obligations) exists. It also does so to demonstrate how some international law can actually support an exercise of the war prerogative by applying the ‘public policy test’, and ultimately posits that the war prerogative can provide ample constitutional authority to empower Australia to respond to IOs without statute.

II THE WAR PREROGATIVE

The war prerogative is one of the oldest (if not the oldest), yet least understood and least discussed royal prerogatives. This is perhaps because the war prerogative is primarily *external*, and only affects the civil liberties of citizens (such as by allowing the government to prohibit trading with the enemy) in limited circumstances.²² Most individuals affected by the war prerogative are foreign nationals, with limited access to Commonwealth courts.²³ This analysis must therefore rely upon limited sources and benefits from a comparative methodology with Commonwealth nations.

A *Breadth of the War Prerogative*

Within the Australian context, federalism is a critical lens through which the exercise of constitutional executive power must be interpreted. Luckily for any discussion of the war prerogative, the issue of federalism is not in contention. Although the duty to defend the country is not exclusive to the Commonwealth,²⁴ the constitutional framework and corresponding authority for an exercise of the war prerogative lies solely with the Commonwealth — in part because the Commonwealth holds the authority for use of the military, and in part because the war prerogative in the United Kingdom has historically fallen under the

²¹ The only other being Cameron Moore, *Crown & Sword* (ANU Press, 2018).

²² *Donohoe v Schroeder* (1916) 22 CLR 362.

²³ This problem was shared within the Courts of Chivalry, from which some of the war prerogative is descended: see Samuel White, ‘The Late Middle Ages in Northern Europe’ in Samuel White (ed), *The Laws of Yesterday’s Wars* (Brill, 2022) 101.

²⁴ *Carter v Egg and Egg Pulp Marketing Board for the State of Victoria* [1942] 66 CLR 557, 572 (Latham CJ), which overtook the original position in *Joseph v Colonial Treasurer of New South Wales* (1918) 25 CLR 32 (‘*Colonial Treasurer*’).

authority of the Prime Minister.²⁵ This is complemented by the constitutionally consigned position of Commander in Chief of the Australian Defence Force ('ADF') to the Governor-General, as the King's representative.²⁶

The first major question with respect to the war prerogative (as the threshold for its enactment has never been authoritatively discussed) is whether a war is required in order to utilise its power. There is no clear case authority on the matter. As HV Evatt noted in his doctoral thesis, the right to declare war and peace was regarded as limited in Australia after Federation.²⁷ The wording of s 61 of the *Constitution* was ambiguous when it came to Australia's ability to take independent steps, and accordingly a declaration of war by the King on behalf of the British Empire in 1914,²⁸ and again in 1939,²⁹ was sufficient for Australia to also be at war. In 1939, Prime Minister Menzies remarked: 'Great Britain has declared war ... [and] as a result, Australia is also at war.'³⁰ Australia, through the Governor-General, only declared war during World War Two.³¹ All other external military operations since then, even if falling under the war prerogative, have been without a formal declaration. The High Court of Australia has consistently affirmed that constitutional executive power includes the power to declare peace or war.³² It has not, however, addressed when it is enlivened.

Chitty's *A Treatise on the Law of the Prerogatives of the Crown* provides the starting point for a discussion of when the war prerogative is triggered. He wrote that

What is termed the war prerogative of the King is created by the perils and exigencies of war for the public safety, and by its perils and exigencies is therefore limited. The King may lay on a general embargo, and may do various acts growing out of sudden emergencies; but in all these cases the emergency is the avowed cause, and the act done is as temporary as the occasion.³³

²⁵ *Colonial Treasurer* (n 24) 47.

²⁶ *Australian Constitution* s 68. See Samuel White, 'Taking the King's Hard Bargain' (2022) 96 *Australian Law Journal* 666.

²⁷ Herbert Vere Evatt, *The Royal Prerogative* (Law Book, 1987).

²⁸ Commonwealth, *Gazette*, No 50 (3 August 1914) 1335.

²⁹ Commonwealth, *Gazette*, No 63 (3 September 1939) 184.9.

³⁰ Robert G Menzies, 'Wartime Broadcast' (Speech, Australian War Memorial, 3 September 1939).

³¹ Commonwealth, *Gazette*, No 251 (8 December 1941) 184.9 (Finland, Hungary and Romania); No 252 (9 December 1941) 2727 (Japan); No 14 (14 January 1942) 79 (Bulgaria); No 198 (20 July 1942).

³² See, eg, *Farey v Burvett* (1916) 21 CLR 433, 440 (Griffiths CJ), 452 (Isaacs J, Powers J agreeing); *Colonial Treasurer* (n 24) 45–6 (Isaacs, Powers and Rich JJ), 51 (Higgins J); *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 442 (Isaacs J); *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2007) 233 CLR 259, 269 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Williams v Commonwealth [No 1]* (2012) 248 CLR 156, 342 (Crennan J); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 596 [260] (Kiefel J), 649 [484] (Keane J); *Plaintiff M68/2015* (n 15) 106 [164] (Gageler J); *A-G (NSW) v Butterworth & Co (Australia) Ltd* (1938) 38 SR (NSW) 195, 238 (Long Innes CJ).

³³ Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (Garland, first published 1820, 1978 ed) 49.

Chitty's position has been cited in previous Australian and British judgments in relation to the scope of this power.³⁴ However, British case law has also suggested that the war prerogative will be enlivened by the 'outbreak or imminence of war, provided that it carri[es] with it the threat of imminent invasion or attack'.³⁵ War need not be an *actual* state of affairs. Yet that is about the extent of the jurisprudence on the war prerogative. There is a requirement then to undertake a legal historical analysis, to understand the breadth of the war prerogative.

1 *Historical Basis*

The search begins at the fall of the Western Roman Empire, AD 395. The collapse of the empire led to its division amongst successive Germanic tribal kingdoms. These kingdoms in turn applied their local, customary Germanic law to their new fiefdoms. For much of the Early Middle Ages, the lack of any centralised authority meant that there was something akin to the 'state of nature', as suggested by Hobbes.³⁶ Most means and methods of warfare, therefore, 'emanated in the Germanic custom of settling judicial disputes through *Blutrache* (vendetta) and *Farida* (feud)'.³⁷

There are states of armed conflict that fall outside of 'war' as a construct because they are *prima facie* just — such as defence against an attack (an inherent right) or suppression of revolts. Central to this, however, is the definition of the concept of war.

In feudal Europe, when the English Crown had centuries of land ownership on the continent, public war was declared by the display of a prince's banner, spoils were allowed and captives could be taken for ransom.³⁸ Public warfare was operationalised through tactics designed to compel the other party to accept the validity of the claim. Such means and methods included forced contributions, arson, plunder, injuries against certain individuals, destruction of property, ransom and use of lethal force. As noted by Girt, Duke of Burgundy and an independent sovereign, discussing the use of burning and plundering around him:

If my neighbour starts a quarrel with me,
With fire burns my lands to cinders;
And I, his, on all sides;
If he steals my castles or keeps,

³⁴ For Australia, see *Farey v Burvett* (1916) 21 CLR 433, 452 (Isaacs J, Powers J agreeing); *Shaw Savill and Albion Co v Commonwealth* (1940) 66 CLR 344. For the United Kingdom, see *Crown of Leon (Owners) v Admiralty Commissioners* [1921] 1 KB 590, 603–4; *Burmah Oil* (n 12) 135 (Lord Hodson), 146 (Lord Pearce).

³⁵ *Burmah Oil* (n 12) 115, 119 (Viscount Radcliffe).

³⁶ Thomas Hobbes, *Leviathan*, ed Richard Tuck (Cambridge University Press, 1991) 89: life without government being 'solitary, poor, nasty, brutish, sharp'.

³⁷ Udo Heyn, *Peacemaking in Medieval Europe: A Historical and Bibliographical Guide* (Regina Books, 1997) 21.

³⁸ *Ibid* 87.

Then so it goes until we come to terms,
Or he puts me or I put him in prison.³⁹

Procession through hostile territory — a *chevauchée* — demonstrated the justice and moral superiority of one's claim, and further undermined the position of an impotent noble unable to defend what they claimed to be theirs. The authority for this punishment operation fell under the right of the Crown to wage war.

Although the nature of warfare has changed — from the *chevauchée* to digital IOs — 'there is no particular authority that requires a declaration of war from the Crown for the war prerogative to operate'.⁴⁰ Moore holds that the question of whether or not the war prerogative applies as a legal framework for action taken is, at its highest, a domestic question.⁴¹ In this, he is supported by the United Kingdom Parliament's Joint Committee on Human Rights, which concluded that it is clear that the war prerogative lawfully extends to situations outside of 'traditional armed conflict' (in this case, terrorism). Pertinently, it held that 'human rights law may even impose a duty to use such lethal force in order to protect life. How wide the Government's policy is, however, depends on the Government's understanding of its legal basis.'⁴²

This is a realistic approach, which should be promoted for a few reasons. First, it is clear that war as the sole construct for the authorisation of violence is no longer applicable. The High Court has reinforced this point through its constructions of the constitutional power to legislate with respect to 'defence' to include a domestic counter-terrorism measure in *Thomas v Mowbray*.⁴³ Second, although Government practice is not indicative of legality, Australia's engagement of troops overseas in war-like operations has occurred without a declaration of war for nearly 80 years.

The second reason to support the proposition that there is no need for a declaration of war is that the prerogative power is one that is amenable to evolution.⁴⁴ Thus, in situations where warfare is no longer declared but simply done, and where sporadic, large-scale violence has been replaced with consistent, non-kinetic harassment, it would be perverse that the war prerogative be frozen to a form and level of conflict that does not apply absent clear parliamentary intent.

The plenary nature of the war prerogative was central to the discussion in *Burmah Oil Co v Lord Advocate* ('*Burmah Oil*').⁴⁵ There, the House of Lords discussed the actions taken by the British forces in destroying oil fields, not in the heat of

³⁹ Quoted in Richard W Kaeuper, *Chivalry and Violence in Medieval Europe* (Oxford University Press, 1999) 177.

⁴⁰ Moore (n 21) 219.

⁴¹ *Ibid.*

⁴² Joint Committee on Human Rights, 'The Government's Policy on the Use of Drones for Targeted Killing' (HL Paper 141, 27 April 2016) [2.40].

⁴³ (2007) CLR 307.

⁴⁴ George Winton, 'The Prerogative in Novel Situations' (1983) 99(3) *Law Quarterly Review* 408.

⁴⁵ [1965] AC 75.

battle, but as a strategic decision upon the expected fall of Rangoon. The question turned on whether the war prerogative required compensation, and the House of Lords found, in a 3:2 judgment, that, outside of direct combat, it did.

Lord Reid noted the medieval origins of the war prerogative, highlighting that '[i]n time of war the commander of the armed forces on the spot conducts a campaign as if it were being conducted by the prince in the medieval sense'.⁴⁶ Necessarily Lord Reid opined that '[t]he foundation of the prerogative right is a state of affairs (for example, imminent invasion) which gives rise to extreme necessity'.⁴⁷ There was thus:

difficulty in relating the prerogative to modern conditions. In fact no war which has put this country in real peril has been waged in modern times without statutory powers of an emergency character ... it would be impracticable to conduct a modern war by the use of the prerogative alone ... a relic of a past age, not lost by disuse, but only available for a case not covered by statute.⁴⁸

But Lord Reid was in the minority in this respect. Lord Pearce, with whom Lord Radcliff and Upjohn agreed,⁴⁹ opined:

It is not possible that the war prerogative of the warrior King should dwindle to the right and duty of 'every man in a brown coat' (as Lord Thurlow expressed it) and should come into effect only when things are so desperate that the citizen may use his own initiative in improvising defences and burning stores. It would, indeed, be an odd state of affairs if the Crown had no power to blow up these oil wells at a damage of some millions of pounds for strategic reasons which demanded a knowledge of secret information and a consideration of the whole future conduct of the war, unless and until things had reached a pass at which the man in the street was entitled to blow them up [under the common law doctrine of necessity].⁵⁰

There is much merit in this line of thinking. That the war prerogative only becomes empowered through necessity fails to accept the sui generis nature of warfare. To limit the war prerogative to instances where the enemy is at the gates fails to accept that the only reason they are stopped is because the gates were constructed; or, in other terms, a good offence requires a good defence. The war prerogative necessarily extends to preparation for, and response to, instances of war, rather than being enlivened during war. This is similar to the reasoning in High Court jurisprudence around s 51(vi) of the *Constitution*.⁵¹

⁴⁶ Ibid 79–80 (Lord Reid).

⁴⁷ Ibid 81 (Lord Reid), citing with approval *Crown of Leon (Owners) v Admiralty Commissioners* [1921] KB 595, 597, 602–3.

⁴⁸ *Burmah Oil* (n 12) 101 (Lord Reid).

⁴⁹ Ibid 115 (Viscount Radcliffe), 166 (Lord Upjohn).

⁵⁰ Ibid 144 (Lord Pearce).

⁵¹ *Lloyd v Wallach* (1915) 20 CLR 299, 304–5 (Griffiths CJ), 308 (Isaacs J); *Farey v Burvett* (1916) 21 CLR 433, 453 (Isaacs J); *Welsbach Light Company of Australasia v Commonwealth* (1916) 22 CLR 268; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 222 (Williams J) ('*Australian Communist Party Case*'); *Thomas v Mowbray* (2007) 233 CLR 307.

B *Depth of Action*

The war prerogative provides a potentially deep source of non-statutory power to undertake coercive activities. By its nature, a declaration of war would enable the Commonwealth executive government to direct ADF members and other defence officials to engage in conduct that would otherwise contravene ordinary civil and criminal laws, up to and including the use of lethal force against enemy combatants.⁵² As per *Burmah Oil*, it is possible to split the war prerogative's depth into two sub-branches: depth of power with respect to persons, and depth of power with respect to property. It is clear that the war prerogative authorises the use of lethal force against combatants and individuals. This article, however, does not intend to cover the use of the war prerogative to authorise the application of lethal force to an individual, in order to punish a state for conducting non-kinetic IOs. Plainly, it is an unsafe course of action to take and, while altering any cost-benefit analysis undertaken when planning operations against Australia, also carries a huge risk of escalation.

This article will instead focus upon operations against property — either acquiring property or destroying it. Quite relevantly for counter-IOs, with a specific focus on cyber-enabled operations, British courts have held that the war prerogative includes a limited right to acquire, destroy or otherwise interfere with private property.⁵³ However, this prerogative power is subject to two caveats.

First, British courts have held that the prerogative power to requisition private property has largely been displaced by legislation.⁵⁴ This is important, but not particularly relevant in responding to IOs. Legislation in the United Kingdom has authorised the taking of property for defence purposes since at least the beginning of the 18th century, although this acquisition has occurred within the United Kingdom.⁵⁵ British courts have described any residual prerogative power to acquire private property as a 'right to take and pay', and not an unfettered 'right to take'.⁵⁶ In Australia, this would be mirrored by the constitutional requirement that property be acquired by the Commonwealth government on 'just terms' both internal and external to Australia.⁵⁷

⁵² See, eg, *Rahmatullah [No 2] v Ministry of Defence* [2017] AC 649, 812 [81] (Lord Sumption), [101], [104] (Lord Neuberger, Lord Hughes agreeing) ('*Rahmatullah*'); *A v Hayden* (1984) 156 CLR 532, 562 (Murphy).

⁵³ *Burmah Oil* (n 12); *R (on the application of Miller) v Prime Minister* [2019] UKSC 41, [40]. See also *Johnston, Fear & Kingham & The Offset Printing Company Pty Ltd v Commonwealth* (1943) 67 CLR 314, 318–9 (Latham CJ).

⁵⁴ *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508, 528 (Lord Dunedin), 539–40 (Lord Atkinson), 549, 554 (Lord Moulton), 575 (Lord Parmoor) ('*De Keyser's Royal Hotel*').

⁵⁵ *Ibid* 527 (Lord Dunedin), 539 (Lord Atkinson), 553 (Lord Moulton); *Burmah Oil* (n 12) 101 (Lord Reid), 121 (Viscount Radcliffe).

⁵⁶ *Nissan v Attorney-General* [1970] AC 179, 227 (Lord Pearce); *De Keyser's Royal Hotel* (n 55) 563 (Lord Sumner); *Burmah Oil* (n 12); *R (on the application of Miller) v Prime Minister* [2020] AC 373, 404 [40].

⁵⁷ See *Australian Constitution* s 51(xxxi); see also George Winterton, 'The Concept of Extra-constitutional Executive Power in Domestic Affairs' (1980) 7(1) *Hastings Constitutional Law Quarterly* 1, 10.

For example, in *Burmah Oil*, the House of Lords held that the United Kingdom executive government was required to pay compensation to the appellant company whose property was destroyed in Burma. Burma was a colony at the relevant time and the Court applied English common law when resolving these questions. The Court accepted that the demolition of the appellant's property by British armed forces was lawfully carried out in the exercise of the Crown's prerogative powers in order to prevent the property falling into enemy hands.⁵⁸ However, the Court found that this prerogative power was subject to a requirement to pay compensation. The Court noted that it appeared that, for at least 300 years, the Crown had not asserted a right to take the property of its subjects without compensation.⁵⁹ This reflected the view that the burden of war should no longer be borne by individuals and should instead be borne by the state through the payment of compensation.⁶⁰ Lord Reid concluded that:

even at the zenith of the royal prerogative, no one thought that there was any general rule that the prerogative could be exercised, even in times of war or imminent danger, by taking property required for defence without making any payment for it.⁶¹

The Court stated that there this is an exception to this principle where property is destroyed in the course of actual fighting operations or for the necessities of the battle.⁶² This exception appears to align with the concept of combat immunity in international law.

C Conclusion

The war prerogative is thus both a lawful authority to undertake lethal force, destroy property and to interfere with civil liberties as well as a power that provides the *right* to exercise violence against combatants and property, in accordance with just norms and restrictions of the era. It is unclear how applicable *Burmah Oil* really is with respect to property that does not belong to a subject. However, the preceding analysis makes clear that the requirement for compensation and legislation is with respect to subjects and citizens, internally, rather than externally. *Burmah Oil*, alongside other case law, confirms that there exists a royal prerogative for war. It remains to be seen whether there is such clear authority for the external security prerogative, for operations against an undeclared enemy.

⁵⁸ Ibid 99, 104 (Lord Reid), 113–14, 116 (Viscount Radcliffe), 137 (Lord Hodson), 143 (Lord Pearce), 165 (Lord Upjohn).

⁵⁹ Ibid 153 (Lord Pearce), 167–8 (Lord Upjohn). See also *De Keyser's Royal Hotel* (n 55) 525 (Lord Dunedin), 537 (Lord Atkinson), 573 (Lord Parmoor).

⁶⁰ *Burmah Oil* (n 12) 104 (Lord Reid); *De Keyser's Royal Hotel Ltd* (n 55) 553 (Lord Moulton).

⁶¹ *Burmah Oil* (n 12) 102.

⁶² Ibid 103, 110 (Lord Reid), 149, 162 (Lord Pearce).

The United Kingdom Supreme Court has characterised these military operations against an undeclared enemy as a ‘sovereign act’, ‘the sorts of things that governments properly do’.⁶³ Lord Sumption explained:

The deployment of armed force in the conduct of international relations, or the threat of its deployment (express or implicit) is one of the paradigm functions of the state. The law vests in the Crown the power to conduct the UK’s international relations, including the deployment of armed force in support of its objectives.⁶⁴

A *chevauchée* against real property is no longer acceptable by modern international law and norms, but to proceed through hostile digital territory as a manner of retaliation, in order to demonstrate the justice and moral superiority of one’s claim, remains a viable option to deter states. It would also seem in keeping with the manner in which the prerogative can evolve, consistent with *Re a Petition of Right*.⁶⁵ In that case, the suppliants were the owners of land used for the practice of aviation.⁶⁶ The Crown took possession of their land.⁶⁷ The issue was whether the suppliants were entitled to compensation for the possession of their land.⁶⁸ They submitted on several grounds that they were entitled to compensation, and the Crown submitted on various grounds that they were not entitled to compensation. One of those grounds included whether the prerogative could adapt to the novel situation that was in dispute in this matter — and specifically whether the prerogative could be used to take possession of an aerodrome free from any compensation, even though aerodromes were non-existent prior to the 1900s.⁶⁹ Warrington LJ phrased the question as whether the prerogative is limited to circumstances where the enemy is against the ‘soil’ of the country.⁷⁰

It was held that the Crown had a prerogative right to take possession of any man’s land for the defence of the Commonwealth free from any compensation,⁷¹ and could be used to take possession of an aerodrome, even though aerodromes were non-existent prior to the 1900s.⁷² Warrington LJ stated that the prerogative must vary with the ‘advance of military science’,⁷³ noting that to limit the prerogative to the soil of the country would be to render it practically useless for the *purpose* for which it was entrusted to the King.⁷⁴ Warrington LJ also stated that the only condition that must be satisfied to exercise the prerogative is that the act must be necessary for the public safety and defence of the realm, and that view

⁶³ *Rahmatullah* (n 52) 799 [37] (Lady Hale, Lords Wilson and Hughes agreeing).

⁶⁴ *Ibid* 88.

⁶⁵ *Re a Petition of Right* [1915] 3 KB 649, 661 (Pickford LJ) (*‘Re a Petition of Right’*).

⁶⁶ *Ibid*.

⁶⁷ *Ibid*.

⁶⁸ *Ibid*.

⁶⁹ *Ibid* 660 (Lord Cozens-Hardy M.R.).

⁷⁰ *Ibid*.

⁷¹ *Ibid* 666 (Warrington LJ).

⁷² *Ibid* 660 (Lord Cozens-Hardy M.R.).

⁷³ *Ibid*.

⁷⁴ *Ibid*.

must be formed in good faith.⁷⁵ Similarly, Lord Cozens-Hardy MR held that the prerogative must change with the advancement of technology.⁷⁶ His Lordship noted that the prerogative applied to what is reasonably necessary for preventing and repelling an invasion at the present time.⁷⁷

There is clear legal historical authority for the evolution of the war prerogative in this manner, without a requirement for declared war. So too would the power appear unabridged by any relevant Acts of Parliament. Its breadth and depth might be most analogous with the defence power — enlivened and at its full zenith with a declaration of war, but still functional without such.

III THE EXTERNAL SECURITY PREROGATIVE

There may be situations in which the Australian Government wishes to treat a target as an enemy, even without a declaration of war.⁷⁸ In these situations, Australia can rely upon the external security prerogative, also known as ‘an act of state’. This is ‘an exercise of sovereign power’⁷⁹ outside of municipal jurisdiction, thus constituting a part of the Crown’s prerogative in relation to foreign affairs.⁸⁰ This section will use the terms act of state and external security prerogative interchangeably.

Moore notes that, since 1945, most external security operations other than war have been undertaken under the authority of United Nations Security Council resolutions or international agreements.⁸¹ This might be so, and provides international legal authority for those operations in a similar way to reciprocal access agreements, or Status of Forces Agreements (which are unlikely to erode the prerogative, as discussed further below). It is nevertheless important to highlight the domestic legal authority for these operations, noting Australia’s dualist approach to international law. As such, sending officials overseas to engage in peacekeeping operations, training and support operations, or military operations, would arguably also be supported by the Commonwealth’s prerogative power with respect to external affairs.

Within Australia, it is well recognised that the Commonwealth’s non-statutory executive power extends to the conduct of relations with other countries, including entering into treaties and assuming international rights and

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ See Dutch Minister of Foreign Affairs, *Letter to the Parliament on the International Legal Order in Cyberspace* (5 July 2019).

⁷⁹ *Salaman v Secretary of State for India* [1906] 1 KB 613, 639 (Fletcher Moulton LJ).

⁸⁰ William S Holdsworth, ‘The History of the Acts of State in English Law’ (1941) 41(8) *Columbia Law Review* 1313.

⁸¹ Moore (n 21) 253–4. The exception here is of course espionage and counter-espionage operations.

obligations under those treaties.⁸² The extent to which this prerogative extends to external security, however, is not clear.⁸³ This is unsurprising, for the actual breadth and depth of an act of state is anything but clear. For some, it is a lawful authority for coercive action taken under the royal prerogative;⁸⁴ for others, it is a doctrine of immunity;⁸⁵ and for others, it is an aspect of non-justiciability.⁸⁶ The earlier interpretation is the focus for this article.

A Breadth

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

an act done by an English military or naval officer in a foreign country to a foreigner, previously authorised or subsequently ratified by the Crown, is an Act of State, but does not constitute any breach of law for which an action can be brought against the officer in an English court.⁸⁷

Informing Dicey's views were two key cases. Both relate to British naval operations, and claims in tort arising from them, in the 18th century. The first case, *The Rolla*,⁸⁸ dates to 1807 and involved proceedings that were brought against an American ship for breaching a pacific blockade of Montevideo established by the Royal Navy. This pacific blockade was arguably below the threshold of war and was exercised in accordance with the prerogative of foreign affairs. It was held that there was sufficient legal authority for the use of force by the Royal Navy because the pacific blockade had been legitimised by the British government.

The second key case, the oft-cited *Buron v Denman* ('*Buron*'), was decided 40 years later.⁸⁹ Commander Joseph Denman engaged in a policy of punishment operations against slave ships along the West African coast, blockading river entry points and destroying slave markets. An action was brought against Denman by the Spanish merchants who had owned the slave ships destroyed. Denman was acquitted by the relevant English court, which found that there was no case to answer because the legality of the action was an act of state, which

⁸² See, eg, *Re Diftfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 369; *Thorpe v Commonwealth* [No 3] (1997) 144 ALR 677; *Al-Jedda v Secretary of State for Defence* [2011] 2 WLR 225, 253 ('*Al-Jedda*'); *Rahmatullah* (n 53) 792 [15] (Lady Hale, Lords Wilson and Hughes agreeing).

⁸³ *Habib v Commonwealth* (2010) 183 FCR 62, 66 (Black CJ), 77 (Perram J) ('*Habib*').

⁸⁴ Jerry Dupont, *The Common Law Abroad: Constitutional and Legal Legacy of the British Empire* (Rothman, 2001) xiii–xix; Campbell McLachlan, *Foreign Relations Law* (Cambridge University Press, 2014) 14–16, 276–85.

⁸⁵ Harrison Moore, *Act of State in English Law* (Rothman, 1987) 93–4.

⁸⁶ Moore (n 21) 261.

⁸⁷ AV Dicey, *An Introduction to the Study of the Law of the Constitution* (Palgrave Macmillan, 10th ed, 1959) 306.

⁸⁸ (1807) 165 ER 963, [6] ('*The Rolla*').

⁸⁹ (1848) 2 Ex 167 ('*Buron*').

could not therefore be questioned. Importantly, although Denman's actions were not done under a valid act of war, nor under any rule of international law at the time, the punishment operations were retrospectively supported by the British government.⁹⁰ The Crown was thus able, 'by virtue of its prerogative over foreign affairs ... subject only to the risk of provoking war', to have a free hand 'in its dealings with aliens outside the jurisdiction of the English courts'.⁹¹

But are acts of state limited to actions against a foreign national? Most of the case law would appear to adopt the Diceyan approach to acts of state — that is, the lawful authority only extends to actions taken against those not subject to the relevant Crown. *Buron* makes clear that the act must be done to an alien:

Courts of law are established for the express purpose of limiting public authority in its conduct towards individuals. If one British subject puts another to death, or destroys his property by the express command of the King, that command is no protection to the person who executes it unless it is in itself lawful, and it is the duty of the proper courts of justice to determine whether it is lawful or not.⁹²

Although the issue of an act of state has never been raised in Australian case law, the High Court of Australia has emphasised that the external affairs prerogative is limited in its breadth to geographically external acts and matters. In the matter of *R v Burgess; Ex parte Henry*,⁹³ Evatt and McTiernan JJ explained that the phrase 'external affairs' (in the context of the constitutional external affairs power) denotes 'the whole series of relationships which may exist between States in times of peace or war', including measures to promote friendly relations with other states.⁹⁴ They observed that 'this sphere of government is characterised mainly by executive or prerogative action, diplomatic or consular'.⁹⁵

British case law also made clear that the alien must be outside of the territory of the Crown, for those residing within the territory are argued to owe temporary allegiance and be owed temporary protection.⁹⁶ However, recent British case law would suggest that this is not necessarily the case, and that the external security prerogative can provide a lawful authority for coercive action taken against subjects of the Crown.

The first relevant case is *Al-Jedda v Secretary of State for Defence* ('*Al-Jedda*').⁹⁷ Mr Al-Jedda was a dual Iraqi and British national, interned by British forces in Iraq in 2004. His internment, purportedly imposed for security reasons, was without charge or conviction. Some members of the United Kingdom's Court of Appeal believed that the operation, authorised under a United Nations Security

⁹⁰ Holdsworth (n 80) 1321.

⁹¹ *Ibid.*

⁹² *Buron* (n 89).

⁹³ (1936) 55 CLR 608.

⁹⁴ *Ibid* 648. See also 643–4 (Latham CJ).

⁹⁵ *Ibid* 649.

⁹⁶ *Johnstone v Pedlar* [1921] 2 AC 262.

⁹⁷ *Al-Jedda* (n 82).

Council Resolution, meant that the conduct was done under an act of state rather than the war prerogative. Relevantly, one member of the Court suggested that the Crown might be able to exercise its external security prerogative powers against its own subjects.⁹⁸

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

Having found that the prerogative thus only applies to actions against a foreign state and foreign national, a second issue arises as to whether it applies to all acts of state, or to just some? One possible test was advocated by the English Court of Appeal in *Serdar Mohammed v Secretary of State for Defence* ('*Serdar Mohammed*').⁹⁹ Again, the matter related to internment and detention by British military forces, this time in Afghanistan. The question turned directly on whether the detention of Mr Mohammed for over 96 hours, without any other legal foundation, could be justified as an act of state. The Court found:

Notwithstanding the fact that the subject matter may be justiciable, there will be circumstances in which it will be essential that our courts should have a residual power to bar claims founded on foreign law on grounds of public policy. Thus, for example, if *Buron v Denman* fell for decision today, the claim for compensation for loss of the claimant's slaves and damage to his slaving activities would unhesitatingly be rejected, if on no other ground, on the basis that property rights in slaves arising in foreign law should not be recognised and that to afford such a remedy in such circumstances would be offensive to the public policy of this country. However, we would expect that, in circumstances in which the claim is justiciable, such a bar on grounds of act of state would be infrequently applied, and the absence of decided cases supports this view.¹⁰⁰

Relevantly, in supporting this 'public policy test', the Court then suggested that actions taken under the external security prerogative should be assessed to determine 'whether, in the particular circumstances of each case, there are compelling considerations of public policy which would require the court to deny a claim in tort founded on an act of the Executive performed abroad'.¹⁰¹ Although the case related to entitlements to certain remedies, rather than canvassing the breadth of the prerogative, it is not difficult to apply the jurisprudential points from one point of law to the other — certain *jus cogens* (like slavery, torture, war crimes, the crime of aggression and crimes against humanity) will be excluded from the lawful authority of an act of state.

⁹⁸ Ibid 274 (Elias LJ).

⁹⁹ [2015] EWCA Vic 843 ('*Serdar Mohammed*').

¹⁰⁰ Ibid [349].

¹⁰¹ Ibid.

This test is not applied as a rule within Australia (in contradistinction to Canada),¹⁰² although there is an attraction to the simplicity of a ‘public policy’ test. How then to quantify what really falls within the public policy of this country? In Moore’s application of this principle, ADF members must exercise coercive action in accordance with applicable international legal authority for the operation, and should be in accordance with local law in doing so provided that it is not inconsistent with Australian public policy.¹⁰³ He goes on to state that Australia’s legal obligations should inform this public policy,¹⁰⁴ presumably on the basis that international law regulates international relations. Moore’s position therefore differs substantially to *Serdar Mohammed*, which may reflect a deep anti-slavery tradition in British jurisprudence that has not factored into Australian jurisprudence.¹⁰⁵ It has merit in reflecting and confirming Australia’s sovereignty, which is only bound domestically by international law insofar as it is implemented in Australian domestic law.

If international law is implemented, then, or if Australian courts wish to rely upon international obligations to inform a public policy decision, it is important to canvas what international obligations may inform counter-IO campaigns. A starting point is the *International Covenant on Civil and Political Rights* (‘ICCPR’), which could provide a clear basis for deterrence punishment operations in response to IOs.¹⁰⁶ The extent to which the ICCPR applies extraterritorially is open to debate, but it is a useful starting point.¹⁰⁷ Two particular articles are relevant: arts 19 and 25:

Article 19

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

¹⁰² *Boardwalk Regency Corps v Maalouf* (1992) 51 OAC 64 (Ontario Court of Appeal). See further Kenny Chng, ‘A Theoretical Perspective of the Public Policy Doctrine in the Conflict of Laws’ (2018) 14(1) *Journal of Private International Law* 130.

¹⁰³ Moore (n 21) 275.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Serdar Mohammed* (n 99).

¹⁰⁶ So too could art 1 and the right to self-determination: Michael Schmitt, ‘Virtual Disenfranchisement: Cyber Election Meddling in the Grey Zones of International Law’ in Christopher Whyte, A Trevor Thrall and Brian M Mazanec (eds), *Information Warfare in the Age of Cyber Conflict* (Routledge, 2020) 186.

¹⁰⁷ See Beth Van Schaak, ‘The United States’ Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change’ (2014) 90 *International Law Studies* 20.

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

Article 19 sweepingly captures possible media choices for IOs. Article 19(3) equally provides a wide ambit for Australia to define what ‘reputation’ may constitute and, clearly, sub-s (b) would provide a useful international legal handrail for any counter-IO operation. So too art 25(a) provides a rather large ambit for public policy arguments to be constructed. The freedom guaranteed under arts 19 and 25 was clarified in a 2017 *Joint Declaration on Freedom of Expression*, which reads: ‘Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind.’¹⁰⁸ Overriding this, again, are necessary limitations by reference to (national) security.

Manipulation is a wide, rather than precise, term and could inform interpretations of public policy against interference, which an act of state would authorise. This public policy could be supported by other relevant international legal documents and theories (such as the right to self-determination)¹⁰⁹ and relevant case law. Recently, in *Parti Nationaliste Basque — Organisation Régionale D’Iparralde v France*,¹¹⁰ the European Court of Human Rights accepted that prohibiting foreign states and foreign legal entities from funding national political parties pursued the legitimate aim of protecting ‘institutional order’.¹¹¹ Specifically, a French branch of the Spanish Basque Nationalist Party was prohibited from collecting additional campaign funding. The Court placed particular emphasis on the potential for foreign interference and the right of a state to control its own elections.¹¹² This mirrors the 1976 *Declaration of Non-*

¹⁰⁸ Human Rights Committee, *General Comment No 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art 25)*, UN HRC, 57th sess, UN Doc CCPR/C/21/Rev.1/Add.7 (12 July 1996) [19].

¹⁰⁹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1.

¹¹⁰ (European Court of Human Rights, First Section, Application No 71251/01, 7 June 2007) [43]–[44].

¹¹¹ *Ibid* [44].

¹¹² *Ibid* [48].

Interference in the Internal Affairs of States,¹¹³ and the 1981 *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*,¹¹⁴ outlined above. These would all serve to inform and shape Australia's public policy. It is important to reiterate that the lawful authority for these punishment operations is still constitutional executive power. The United Kingdom Supreme Court confirmed this in *Rahmatullah [No 2] v Ministry of Defence* ('*Rahmatullah*').¹¹⁵ This has been interpreted as meaning that the application of the act of state defence does not depend on establishing that the allegedly wrongful act or the wider military operation were lawful in international law.¹¹⁶

The High Court has previously held that United Nations Security Council resolutions would not provide a source of lawful authority for the Commonwealth executive government to undertake activities within Australia that would otherwise be unlawful.¹¹⁷ However, that case did not consider executive actions undertaken outside Australia, which arguably raise different considerations. Accordingly, even if the Commonwealth's executive power is not subject to any requirement to conform to international law,¹¹⁸ international law (including agreements and resolutions of international bodies) may be relevant to the substance of the prerogative power with respect to external affairs. It may assist in demonstrating that a particular overseas deployment involves an exercise of prerogative power with respect to external affairs. Accordingly, it might provide a basis for its exercise but not its scope.

B Depth of Power

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

It might be possible to argue that certain coercive actions are supported by the prerogative power with respect to external affairs. Justice Logan has written extra-curially on the power and remarked that it may provide the authority for extra-territorial, summary executions of suspected terrorists of Australian citizenship.¹¹⁹ The external affairs prerogative would most likely be able to provide a wide depth of power if supported by some form of international agreement (even if it were a secret exchange of letters within a regional

¹¹³ United Nations General Assembly (n 5).

¹¹⁴ *United Nations Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*, GA Res 36/103, UN Doc A/RES/36/103 (9 December 1981)..

¹¹⁵ *Rahmatullah* (n 52) [5] (Lady Hale, Lords Wilson and Hughes agreeing).

¹¹⁶ *Alseran v Ministry of Defence* [2017] EWHC 3289 (QB), [56].

¹¹⁷ *Bradley v Commonwealth* (1973) 128 CLR 557, 583.

¹¹⁸ *Plaintiff S195/2016 v Minister for Immigration and Border Protection* (2017) 261 CLR 622, 634 [20].

¹¹⁹ Logan (n 19) 44.

partnership), which in turn could only be subject to challenges before the High Court of Australia. If questioned on which international legal framework it is relying upon, the Australian Government would at most be required to provide some form of affidavit.¹²⁰ The recent case of *Alexander v Minister for Home Affairs* has highlighted that this evidentiary issue may also be surmounted if a submission was made ‘by a responsible government agency to a parliamentary inquiry’. In that case, Gageler J held that such material ‘cannot be dismissed as beyond the scope of the material which might properly inform judicial identification of the purpose of a law’.¹²¹ A report from the Australian Security Intelligence Organisation to the recent Select Senate Committee on Foreign Interference through Social Media would possibly suffice.¹²²

For operations solely within Australia, and in contradistinction to the war prerogative, the ratio to be taken from *The Rolla* would suggest that,¹²³ although operations can occur below the threshold of war, lethal force may only be used in self-defence.¹²⁴ The ratio of *Buron* would not appear to alter the level of force that can be applied with respect to the destruction of property.¹²⁵ It would therefore appear to authorise distributed denial of service attacks, data manipulation and data destruction. The United Kingdom decision of *Al-Jedda* would suggest that it is viable to curtail individual liberties under the act of state doctrine,¹²⁶ while *Serdar Mohammed* would seem to suggest that, so long as a relevant public policy is underlying the conduct, then non-lethal coercive action can be taken.¹²⁷ These latter two decisions would also implicitly suggest that destruction of property — a lesser offence than curtailment of civil liberties — is a valid action under the external security prerogative.

However, in *Nissan v Attorney-General*,¹²⁸ several judges expressed reservations about whether the Crown’s prerogative power with respect to external affairs would enable it to interfere with other persons’ legal rights in the context of a peacekeeping mission. This case concerned the acquisition by British armed forces of a hotel in Cyprus for use as their headquarters. The House of Lords rejected an argument that this action was an ‘act of state’, but it was not necessary to determine issues regarding the scope of the Crown’s prerogative powers.

Lord Reid stated that he saw ‘great difficulty in holding that the prerogative [with respect to taking property in the context of war] can operate in foreign

¹²⁰ This surmounts the evidential issues in the *Australian Communist Party Case* (n 51).

¹²¹ *Alexander v Minister for Home Affairs* [2022] HCA 19, 42 [126] (Gageler J).

¹²² Senate Select Committee on Foreign Interference through Social Media, Parliament of Australia, *Select Committee on Foreign Interference through Social Media* (Report, August 2023) app 1, specifically: Submission 2 (Australian Security Intelligence Organisation) and Submission 5 (Australian Signals Directorate).

¹²³ *The Rolla* (n 88).

¹²⁴ (1807) 165 ER 963, [6].

¹²⁵ *Buron* (n 89).

¹²⁶ *Al-Jedda* (n 82).

¹²⁷ *Serdar Mohammed* (n 99).

¹²⁸ [1970] AC 179.

territory'.¹²⁹ Likewise, Lord Wilberforce had difficulty in seeing how the taking or destruction of a British subject's property in an independent territory could be justified by the exercise of the prerogative, given that the United Kingdom executive government enjoyed no sovereignty in Cyprus.¹³⁰ Lord Pearce reached the view that the prerogative could apply, at least against British subjects.¹³¹

More recently, in *Rahmatullah*, Lady Hale (with whom Lord Wilson and Lord Hughes agreed) and Lord Sumption expressed doubt about whether an appropriation of property, with or without compensation, could be an act of state outside the context of an active military operation.¹³²

These British cases might suggest that, outside the context of war or warlike operations, it is questionable whether the prerogative with respect to external affairs provides a source of power to engage in executive actions that have a direct impact on civilians overseas. The external affairs prerogative is more properly interpreted as expanding the breadth, but not the depth, of executive power. In this respect, it is quite similar to the nationhood power under Australian constitutional executive power.¹³³ This is in juxtaposition to the war prerogative, which has an almost unlimited depth of power. In this respect, it is the 'sister' prerogative power to 'keep the peace of the realm'.¹³⁴

IV DOES INTERNATIONAL LAW LIMIT THE PREROGATIVE?

There are a wide range of actions that could be taken to counter IOs, subject to abridgement of the prerogative by domestic statute. When addressing the limits of any actions taken under the framework of the war prerogative, an important difference between this article (concerned with externality) and the domestic operations under prerogative power is that the *Australian Constitution* does not necessarily limit any extraterritorial conduct of the ADF. Any limitations must therefore arise from domestic statute law, rather than constitutional law. This is particularly so considering that the external security prerogative, as explained above, is best interpreted as applying only to operations against foreign nationals and foreign states.

¹²⁹ Ibid 213.

¹³⁰ Ibid 236.

¹³¹ Ibid 229.

¹³² *Rahmatullah* (n 52) 799 [36] (Lady Hale, Lords Wilson and Hughes agreeing), [94] (Lord Sumption).

¹³³ Samuel White and Cameron Moore, 'Calling Out the ADF Into the Grey Zone' (2022) 42(1) *Adelaide Law Review* 479.

¹³⁴ The prerogative of keeping the peace of the realm, which authorises domestic operations in the United Kingdom and Australia (to some extent) was held to be the same breadth and depth as the war prerogative: see *R v Home Secretary; Ex parte Northumbria Police Authority* [1989] 1 QB 26 at 55 per Purchas LJ.

There are, of course, limits. Executive prerogative powers can be, and are, abridged by statute.¹³⁵ Most legislation in Australia with respect to the military is, however, internally focused.¹³⁶ Moore argues that legislation of general application, such as cybercrime legislation, should not apply to ADF actions carried out under the war prerogative because, as a matter of statutory construction, it is presumed that Parliament would not limit the prerogative powers of the Crown without express words.¹³⁷

A similar argument is made with respect to external security operations conducted under the external affairs prerogative, though with less strength due to the difference in nature and scope between the war and external affairs prerogatives.¹³⁸ These interpretative arguments are weakened in the case of the cybercrime legislation, because specific exemptions are provided to certain intelligence agencies for actions done in the performance of agency functions but not for the ADF. The relevant legislation here is *Criminal Code Act 1995* (Cth) pt 10.6, which applies to all external offensive cyber operations. The Australian Signals Directorate have immunities conferred under the *Intelligence Services Act 2001* (Cth),¹³⁹ which the ADF do not currently enjoy. The lack of immunity may change soon.¹⁴⁰ While it might be possible for the Australian Government to order the ADF (as opposed to members of the National Intelligence Community, who are constrained by statute) to conduct these forms of operations externally despite the legislation to the contrary, and to rely upon a *nolle prosequi* movement from the relevant public prosecutor, this carries high legal risk.

The externally focused legislation is concerned with conduct during armed conflict, arising from implementation of various international humanitarian law conventions domestically.¹⁴¹ These legislative provisions apply even when war is not declared, as contemporary discussions of alleged breaches by Australian Special Forces in Afghanistan demonstrate.¹⁴² These provisions have only created criminal offences for conduct during warfare; they have not abridged the lawful authority to *conduct* warfare. It remains to be seen, however, if international law and international legal obligations constrain the breadth or depth (or both) of constitutional executive power.

¹³⁵ White (n 11) 44.

¹³⁶ See the *Defence Act 1903* (Cth) generally.

¹³⁷ Moore (n 21) 227. Moore relies upon *Barton v Commonwealth* (1974) 131 CLR 477.

¹³⁸ Moore (n 21) 297–8.

¹³⁹ *Intelligence Services Act 2001* (Cth) s 7.

¹⁴⁰ *Comprehensive Review of the Legal Framework of the National Intelligence Community* (Report, 4 December 2020). See 51 [3.103] for recommendations to do with ADF powers.

¹⁴¹ See *Criminal Code Act 1995* (Cth) div 268.

¹⁴² Inspector-General of the Australian Defence Force, *Afghanistan Inquiry Report* (Final Report, November 2020).

A *The United Kingdom Position*

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

In *Rahmatullah*, the United Kingdom Supreme Court considered that the act of state defence would be available in relation to acts done in the ‘conduct of military operations which are themselves lawful in international law (which is not the same as saying that the acts themselves are necessarily authorised in international law)’.¹⁴³ For example, British courts have stated that a detainee may be able to seek a writ of habeas corpus to challenge the lawfulness of their detention in certain circumstances.¹⁴⁴

Further, there are comments in *Rahmatullah* which suggest that certain types of coercive activities do not fall within the prerogative power, even in times of war and warlike operations. Lady Hale (with whom Lord Wilson and Lord Hughes agreed) and Lord Sumption considered that the act of state defence under English common law does not apply to acts of torture or to the maltreatment of prisoners or detainees.¹⁴⁵ Lady Hale also considered that these types of activities are not ‘governmental’ in character, and therefore are not immunised by the act of state defence.¹⁴⁶ Lord Sumption regarded these actions as beyond the scope of the prerogative power, stating:

Given the strength of the English public policy on the subject, a decision by the UK Government to authorise or ratify torture or maltreatment would not as a matter of domestic English law be a lawful exercise of the Royal prerogative.¹⁴⁷

Torture is of course prohibited by Australian statute,¹⁴⁸ so the issue raised by their Lordships would not appear in Australian courts. However, *Rahmatullah* would seem to raise three different tests:

- (a) Was there torture?
- (b) Was the conduct ‘governmental’?
- (c) Was the conduct consistent with a public policy test?

In the context of punishing states, and through the lens of aggressive deterrence theory outlined at the start of this article, tests (b) and (c) are highly applicable. Assessments of what is ‘governmental’ are likely to shift with society. Arguably,

¹⁴³ *Rahmatullah* (n 52) 799 [37] (Lady Hale, Lords Wilson and Hughes agreeing).

¹⁴⁴ See, eg, *Al-Jedda* (n 82) [218]–[219], [222] (Elias LJ); *Mohammed v Secretary of State for Defence* [2017] HRLR 1, [101] (Lord Sumption and Lady Hale).

¹⁴⁵ *Ibid* 799 [36] (Lady Hale, Lords Wilson and Hughes agreeing), [96] (Lord Sumption).

¹⁴⁶ *Ibid* 799 [36].

¹⁴⁷ *Ibid* 817 [96].

¹⁴⁸ *Criminal Code Act 1995* (Cth) ss 268.13, 268.25, 268.73.

protecting Australian interests through an act of state will always be 'governmental' (if authorised) but the particulars of *Rahmatullah* and the alleged misconduct are accepted as the only authority in the area. To that end, some broad generalities can be drawn that might limit punishment operations: deliberately attacking civilians and civilian infrastructure; prolonged detention of civilians; and the use of prohibited weapons under international law (such as, through cyber means, releasing biological, chemical or nuclear material) are all likely to be held to fall outside the scope of the war prerogative by falling foul of consistency with public policy.

This mirrors the reasoning of Legatt J in *Alseran v Ministry of Defence*.¹⁴⁹ His Honour suggested that there are limits to the scope of the Crown's prerogative powers to engage in conduct that would harm civilians, even in the context of military operations, finding that it would be 'most surprising' if the United Kingdom executive government had authorised British armed forces to detain people in circumstances that are not permitted by international law.¹⁵⁰ Legatt J observed:

acknowledging that a government decision to engage in a military operation abroad entails the use of lethal force and detention on imperative grounds of security does not require the courts to accept that, for example, such lethal force may be deliberately targeted at civilians or that such detention is permissible when there are no imperative reasons of security capable of justifying it.¹⁵¹

B *The Australian Position*

There is very limited Australian case law dealing with these issues. This provides an interesting question of law. Although there is an argument to be made that the principle of legality could arguably incorporate international legal rights into domestic law,¹⁵² this is not the place for its discussion.

There is only one particularly relevant precedent that can be applied, which is the Federal Court decision in *Habib v Commonwealth* ('*Habib*'). That case involved the alleged complicity by Australian intelligence agents in the cruel and inhumane treatment of Habib after his capture in Afghanistan. The Federal Court emphasised that the Commonwealth's prerogative powers with respect to external affairs would not authorise the Commonwealth to engage in crimes against humanity, or to breach Commonwealth legislation.¹⁵³ The earlier situation would be in breach of a public policy test at any rate (although arguably completely legal under the war prerogative) and the latter is a matter for domestic law. *Habib* does not, therefore, provide much guidance in determining the

¹⁴⁹ [2017] EWHC 3289 (QB), [325].

¹⁵⁰ *Ibid* [325].

¹⁵¹ *Ibid* [71].

¹⁵² Jamie Blaker, 'The Constitutional Principle of Legality' (2022) 44(4) *Sydney Law Review* 559.

¹⁵³ *Habib* (n 83) [114], [124], [128] (Jagot J, Black CJ agreeing).

Australian position. It is clear that Australia's approach to interpretations of the royal prerogative (as opposed to the existence of an element of the royal prerogative) can differ from the British approach — *Barton v Commonwealth*¹⁵⁴ (which related to the test for abridgment) is a clear indicator of that. Currently, Australia's approach seems consistent with Moore's. Specifically, international law will inform public policy, but it will not provide a definitive limit to constitutional executive power.

How, then, should this power operate with respect to counter-IO campaigns? In the 1970s, the United Nations believed that responding to foreign interference is a matter for the constitutional prerogatives of States, but of course international law has developed since then. There is nothing prohibiting dual legal authorities for responding to foreign interference, but the focus of this paper has been on domestic law. It is clear that the war prerogative, and external affairs prerogative, both provide sufficient breadth and depth to respond to foreign interference. Some possible organs of the State — such as members of the National Intelligence Community — operate under the *Intelligence Services Act* and this statute necessarily abridges many of the prerogatives discussed in this paper. For the ADF, however, the non-statutory authority is much wider.

V CONCLUSION

This article has addressed the royal prerogative in its external aspects, rather than domestic (such as the power to keep the peace of the realm). In so doing, it has canvassed the thresholds for an exercise of the war prerogative as well as external security. The article was particularly concerned with the impact of international law on constitutional executive power. It found that Australia's and Britain's approaches to international law differ considerably. This was posited as being the difference between a written and unwritten constitution. Australian jurisprudence has been quite clear that international law can be a relevant consideration for matters of public policy, but has no binding impact on interpretations or exercises of the royal prerogative.

Sections II and III demonstrated that, although the war and external security prerogatives are often noted to be plenary, there are some domestic and international legal limits. British jurisprudence has held that the external security prerogative — the power that essentially allows the government to enact and enforce foreign relations — should as a matter of good public policy abide by international law. This has not been found to apply for the war prerogative. Section IV discussed that, through a deterrence perspective, if there is any question of credibility it is best to err on the side of caution. It is clear that international law can be of assistance in countering IOs (particularly in the

¹⁵⁴ (1974) 131 CLR 477.

international legal rights and obligations found within Articles 19 and 25 of the ICCPR, and relevant security exceptions). International law should also, as a matter of public policy, apply to counter-IO campaigns.