External Security

I Introduction

[The federative (external affairs) power] is much less capable to be directed by antecedent, standing, positive laws than the executive, and so must necessarily be left to the prudence and wisdom of those whose hands it is left in, to be managed for the public good.'1

External security operations other than war have been the most extensive ADF operations in recent decades and, despite the extensive coercive powers exercised, there is even less positive legal authority to support them than there is for war. The main distinction between such operations and war is that they do not involve combat against an enemy, the war prerogative is not applicable and there is no doctrine of combat immunity. The use of force is that required for self-defence and mission accomplishment, essentially a law enforcement approach.2 For the most part, external security operations other than war have occurred under the international law authority of United Nations Security Council resolutions and include the naval presence in the Middle East since 1990, the 1993 Somalia operation and operations in East Timor since 1999.

(There have been numerous other operations under the authority of the United Nations or other international agreements which this book does not consider because of their essentially noncoercive nature.3) There have also been operations of a coercive nature under other international agreements such as the France–Australia Maritime Co-operation Agreement in respect of the Southern Ocean,4 as well as piracy operations off Somalia since 2009.5 This chapter will not address the Solomon Islands mission in any detail because the use of force in that case relied upon Solomon Islands statutory authority.6

Act of State doctrine would most likely be the principal plea in response to claims against the Crown arising from exercises of the external affairs prerogative, such as to enforce United Nations Security Council Resolutions. Harrison Moore’s 1906 book Act of State in English Law defined Act of State against aliens in this way:

To make an act of State which will oust the jurisdiction of the Court the act must be made clearly the act of the Crown, the actor being made the representative of the Crown’s authority, and this requires some real and unmistakable assumption of responsibility by the Crown. Subject to this condition being satisfied, it would appear that the nature of the act is immaterial; that the essential feature of this immunity is the authority

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6 The Facilitation of International Assistance Act 2003 (Solomon Islands) enacts the Agreement between Solomon Islands, Australia, New Zealand, Fiji, Papua New Guinea, Samoa and Tonga Concerning the Operations and Status of the Police and Armed Forces and Other Personnel Deployed to Solomon Islands to Assist in the Restoration of Law and Order and Security, (opened for signature 24 July 2003) [2003] ATS 17 (entry into force 24 July 2003) (‘Regional Assistance Mission to Solomon Islands Agreement’) art 6(4) grants to members of the participating armed forces ‘the powers, authorities and privileges of the Solomon Islands Police Force’. This could attract the defence of lawful authority under s 43 of the Criminal Code Act 2002 (ACT), because the Solomon Islands legislation meets the definition of a law under the Dictionary to the Criminal Code 2002 (ACT). The legislation is also an Act of State of Solomon Islands in its own jurisdiction and cannot be questioned in an Australian court, based upon Petrotimor Companhia de Petroleos SARL v Commonwealth (2003) 126 FCR 354, 368–9, in which the Federal Court lacked jurisdiction to determine the exercise of a power by a foreign government within its territory, in that case the Portuguese Government in respect of its then colony in East Timor. (Please note that Solomon Islands is the official name, not the Solomon Islands, Constitution of Solomon Islands 1978.)
from which it emanates; and that the Crown can throw its shield over every act done against aliens so as to protect the actor in all proceedings, civil or criminal.\footnote{W Harrison Moore, *Act of State in English Law* (Dutton, 1906, Rothman reprint 1987) 93–4.}

Dicey had a similar view, stating that

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.\footnote{A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 306 n 3.}

This chapter will discuss Act of State doctrine at length as an immunity doctrine to protect ADF actions under the foreign affairs prerogative, which would be a companion to the combat immunity doctrine for ADF operations in war as discussed in Chapter 5. Much uncertainty attends Act of State doctrine however, including, as for combat immunity, whether it renders matters nonjusticiable, or justiciable but providing a defence.


Such operations are a type of naval constabulary operation. Naval constabulary operations are coercive operations for a national or international law enforcement purpose.\footnote{Royal Australian Navy, *Australi i Maritime Doctrine: RAN Doctrine 1 2000* (Defence Publishing Service, 2000) 65–9.}

They are quite distinct from the conduct of naval warfare. In the international law of the sea, the right of a State to enforce United Nations Security Council Resolutions, or national laws, balances against the rights afforded to states by the *Law of the Sea Convention*\footnote{For the majority of States which are party to it, *Law of the Sea Convention*, (opened for signature 10 December 1982) 1833 UNTS 3 (entered into force 16 November 1994), arts 19, 110 (‘Law of the Sea Convention’).} to have their vessels exercise innocent passage\footnote{Innocent passage is a limited right of surface navigation for foreign ships in the territorial sea, which extends up to 12 nautical miles from the coast, *Law of the Sea Convention*, arts 3, 17.} in territorial seas and freedom.
of navigation\textsuperscript{13} in international waters.\textsuperscript{14} While Australia has extensive national legislation for enforcing its coastal State rights,\textsuperscript{15} until the \textit{Maritime Powers Act 2013} the Parliament had been virtually silent on enforcement of United Nations Security Council Resolutions and like international instruments at sea. Such operations could only have relied upon executive power for their authority. Such Australian authorities as exist that might support this\textsuperscript{16} do not address the modern international law of the \textit{Charter of the United Nations} and international enforcement operations that are not war.\textsuperscript{17} This leaves a question as to what authority there really is in Australian law to enforce international law instruments like United Nations Security Council Resolutions at sea.

The other key type of external security operation is the exercise of martial law in occupied foreign territory. Whilst closely related to martial law exercised internally, martial law in foreign territories usually arises for different reasons and does not have the same limitations. Australian military forces have exercised civilian government functions, mainly restoring or maintaining law and order in German New Guinea between 1914 and 1921, in Somalia in 1993 and in East Timor in 1999 and 2000.\textsuperscript{18} Even though the exercise of martial law outside the realm relates closely to the war prerogative, it is functionally quite different to the conduct of war. A more accurate description might be that it is the conduct of external affairs.

Before considering these historical examples, this chapter will first consider the work of writers and the relevant authorities on the prerogative with respect to external affairs. It will then turn to an analysis of the possible sources of and limitations upon the power for the ADF to conduct external security operations. ADF external security operations are subject to contrary statutes and local law. In the face of contrary statutes, it is

\textsuperscript{13} Freedom of navigation is the freedom to navigate in, under and over international waters subject mainly only to the requirement to give due regard to other users. In the international law of the sea, there is a limited list of grounds upon which a State may interfere with freedom of navigation upon the high seas, such as for piracy, slavery and being without nationality, \textit{Law of the Sea Convention}, arts 87, 90, 110.

\textsuperscript{14} See, eg, \textit{Law of the Sea Convention}, arts 19, 110.

\textsuperscript{15} See, eg, \textit{Maritime Powers Act 2013} (Cth); \textit{Fisheries Management Act 1991} (Cth); \textit{Customs Act 1901} (Cth); \textit{Migration Act 1958} (Cth).

\textsuperscript{16} Discussed below at section 3 of part II this chapter.

\textsuperscript{17} For an early appreciation of this issue see Robert Wilson, \textit{International and Contemporary Commonwealth Issues} (Duke University Press, 1971) 182–91.

\textsuperscript{18} All discussed below in Part III.
possible to argue that ADF external security operations are lawful through statutory interpretation; essentially the same argument as Chapter 5 made with respect to the war prerogative. As there is no Australian authority for a coercive use of the external affairs prerogative however, this chapter will argue that external operations other than war may really only be arguable as lawful by reference to English case law on Act of State doctrine and the prerogative power for external affairs. Such arguments still may not be sufficient, given the approach of Williams to the text and structure of the Constitution and the need to find authority for executive action, as well as the principle of legality more generally, as discussed in Chapter 1.

II The Authority for and Theory of External Security

A Prerogative Power

1 Legal History

Some part of the explanation for the authority to use the ADF for external operations must lie in the fact that the 17th-century compromise did not purport to limit the Crown’s prerogatives beyond the realm. Prerogative power provided much of the authority for the development of the British Empire in the 17th to 19th centuries, including acquisition of territory and the establishment and operation of Crown Charter Companies such as the British East India Company. It was also the authority to govern many colonies, as in the early years of the settlement in New South Wales. It may make sense, therefore, to see external operations as a continuation of this form of power. Notably, Brennan J in Mabo v Queensland No 2 (‘Mabo’) saw the Crown’s assertion of sovereignty over

19 Sir Matthew Hale, The Prerogatives of the King (Selden Society, written between 1640 and 1664 but unpublished, D E C Yale (ed) 1976 ed) 42–4.
20 Harrison Moore, Act of State in English Law, above n 7, 103–7, discusses a number of cases in which the British East India Company had immunity for its sovereign acts of state as a Crown Charter Company, as opposed to its commercial activities as a trading company.
22 An order-in-council of 6 December 1786 designated New South Wales as a penal colony, Dupont, The Common Law Abroad, 318, but there was no legislative basis for government in the colony until the Act 4 Geo IV 1823 (the New South Wales Act 1823 (Imp)).
parts of Australia as nonjusticiable. A different historical example of the exercise of the external or foreign affairs prerogative is the unsettled and now almost certainly obsolete concept of pacific blockade. Pacific blockade was a naval blockade imposed in circumstances outside of war in order to assert diplomatic pressure. Such coercive naval operations were then for the purpose of achieving a foreign affairs objective rather than being the conduct of war. Therefore, historically, the exercise of the Crown’s prerogative in respect of external affairs generally has been extensive.

2 Writers

As to the writers traditionally quoted on prerogative power, Hale only addressed the extent of the King’s power outside the realm of England in terms of colonies and other possessions, stating that ‘the English laws were gradually introduced by the king without the concurrence of an act of parliament’. This indicates that before 1689 the Crown’s power beyond the realm was not subject to the law of England, except where English settlers brought the common law with them. Nothing in the constitutional settlement of 1689 did anything directly to limit the Crown’s power beyond the realm, other than to make it subject to any applicable Act of Parliament. Dicey stated that ‘the conduct of negotiations with foreign powers and the like, are exempt from the direct control or supervision of parliament’. Blackstone stated that ‘[w]hat is done by the royal authority, with regard to foreign powers, is the act of the whole nation’, for which the only accountability was to Parliament rather than the courts. He devoted ten pages to the extent of prerogative power in respect of foreign affairs. Chitty devoted a chapter to colonies and another to foreign matters and stated that ‘the constitution … with regard to foreign affairs … has invested his Majesty with the supreme exclusive

23 Mabo v Queensland (No 2) (1992) 175 CLR 1, 31–2, (‘Mabo’).
25 Hale, above n 19, 43.
26 Ibid 44.
27 Dicey, above n 8, 464.
28 Blackstone’s Commentaries with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia (1803, Hein Online reproduction) 260.
29 Ibid 251–60.
power of managing them …’ 30 H A Smith wrote that the conduct of foreign affairs relied mainly upon prerogative power because ‘the Courts regard foreign policy as being for the most part a matter with which they have no jurisdiction to interfere’. 31 Clode made observations on the Army beyond the realm, rather than just foreign affairs, in stating that:

No doubt when the Army is beyond the Realm of England and the Mutiny Act has not been made specially applicable, then Martial Law – as it existed prior to the Petition of Right – prevails. In Barwis v Keppel, 32 the Court held that when the Army is out of the National Dominions, the Crown acts by virtue of its Prerogative and not under the Mutiny Act and the Articles of War. 33

Consistent with the legal history, English writers traditionally have recognised then a broad prerogative with respect to external affairs generally.

As to earlier writers on the Australian law on external affairs, Evatt states that ‘[t]he peculiar rights of the King in relation to foreign affairs are fully recognised by the authorities’, although he does not cite those authorities but rather quotes Dicey on this point. 34 Evatt’s discussion gives examples of sending ambassadors, the making of treaties and making war and peace. 35 His main concern however, writing in 1924, was with the extent to which the dominions exercised the external affairs prerogative independently of the imperial government rather than the substance of that prerogative. 36 Renfree says little on the topic of executive power with respect to external affairs although he does quote R v Burgess; Ex parte Henry in which Latham CJ stated that ‘[u]nder s 61 of the Constitution, the Executive government of the Commonwealth can deal administratively with the external affairs of the Commonwealth …’ 37 Evatt and Renfree

30 Joseph Chitty, A Treatise on the Law of the Prerogatives of the Crown; and the Relative Duties and Rights of the Subject (Butterworths, 1820) 40.
32 (1766) 95 ER 831; 2 Wilson, KB 314.
36 Ibid 142–69.
do not really add much to the English writers, therefore, other than to recognise that Commonwealth executive power extends to external affairs to some extent.

As to Act of State and the use of the external affairs prerogative coercively, in addition to Moore and Dicey, quoted above, Holdsworth addressed the issue directly in his 1941 article ‘The History of Acts of State in English Law’. He considered various aspects of Act of State doctrine, including that relevant to this chapter, stating ‘acts done outside the jurisdiction of the English courts and previously authorized or subsequently ratified by the Crown, which have damaged an alien, are acts of state’.

Holdsworth identifies the authority for such acts as the Crown’s prerogative in relation to foreign affairs. He cites the 1807 case of *The Rolla* as the earliest example of this principle, in which an American ship breached a British pacific blockade of Monte Video. In response to an argument that the British naval commander did not have authority to impose the blockade, the court found that the British government had legitimated the blockade action insofar as it affected subjects of other countries. Holdsworth also cites *Buron v Denman*, discussed below, to make the point that Acts of State may occur outside of war, stating the traditional view that:

The Crown, by virtue of its prerogative over foreign affairs, has a free hand, subject only to the risk of provoking war, in its dealings with aliens outside the jurisdiction of the English courts; and that therefore its acts done in the course of those dealings are acts of state.

Lindell directly addresses the issue but in the context of war rather than external security operations. He makes clear that the traditional position is that matters of external affairs are traditionally nonjusticiable, although he notes, as discussed above, that the traditional deference of the courts in this area may be diminishing. He states:

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39 Ibid 1320.
40 (1807) 165 ER 963, 6 C Robinson 364.
42 (1848) 2 Ex 167; 154 All ER 450.
[Act of State doctrine] relates to the immunity from legal liability for the exercise of prerogative powers in relation to foreign affairs … The scope of the doctrine and the resulting immunity were uncertain even before the House of Lords established in 1985 that prerogative powers were not immune from judicial review … and it is even more uncertain now. But I have suggested before that to the extent that any such immunity still exists, it would operate in Australia as part of the ‘executive power of the Commonwealth’ under s 61 of the Australian Constitution.45

It is not clear if Lindell is hinting at nationhood power being the more appropriate aspect of executive power when it comes to external affairs. It would be consistent with French J’s view of executive power as ‘measured by reference to Australia’s status as a sovereign nation’, rather than through prerogative power.46 For the reasons put in Chapter 1 however, prerogative power in the context of the use of coercive powers by the ADF is arguably more consistent with the principle of legality.

It is worth noting at this point that, between Harrison Moore, Dicey, Holdsworth and Lindell, Act of State can appear to be a term synonymous with a coercive exercise of the external affairs prerogative (that is, a power in itself), a doctrine of immunity to protect such exercises of prerogative power from liability or an aspect of the nonjusticiability doctrine, which means that a court should not hear a matter. Act of State doctrine can even appear to be all three of these things together in this writing. As Cane states:

> It would be helpful if the term ‘Act of State’ were used in only one sense. In the preceding discussion, I have followed the suggestion of Lord Reid in using the term to refer only to a certain class of non-justiciable acts, namely those done in the course of foreign affairs.47

More recently, McLachlan limited a plea of Act of State to exclude the jurisdiction of the courts to two situations only. The first is where the matter is one of interstate relations, which can only be resolved on ‘the plane of

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international law’. This is consistent with the authorities discussed below and a preferable approach to matters which are not suitable for domestic adjudication. The second is the combat immunity doctrine discussed in Chapter 5. As much as this book argues that Act of State doctrine should be a companion doctrine to that of combat immunity, given the legal and operational distinction between having an enemy and not having an enemy, there is too much potential for confusion to make the doctrines synonymous.

In this sense, the writers reflect the ambiguity of the authorities and it comes then to place this discussion in the context of those authorities.

3 Authorities

The legal authority of the executive to engage in external security operations which use force and yet are not war has not been questioned in an Australian court. The High Court case of Thorpe v Commonwealth is authority for the conduct of foreign affairs being nonjusticiable, but was a single judge decision which did not concern coercive action. Kirby J referred to the single judgment of Gummow J in the Federal Court in Re Ditfort; Ex parte DCT, which dealt at length with nonjusticiability of external affairs, although Gummow J did leave open the possibility of some matters of external affairs potentially being justiciable by virtue of s 75(v) of the Constitution. Notably, Thorpe v Commonwealth did not distinguish between claims in tort or other claims in deciding that the conduct of foreign relations is nonjusticiable. This would be consistent with McLachlan’s view, discussed above, of some matters being nonjusticiable as they are matters of interstate relations which can only be resolved on the plane of international law.

50 The Tampa Case essentially concerned a national naval constabulary operation which relied more on a power to exclude aliens than the prerogative to conduct foreign affairs. Tampa Case (2001) 110 FCR 491, 542.
51 Thorpe v Commonwealth (No 3) (1997) 144 ALR 677, 681, citing R v Burgess; Ex parte Henry (1936) 55 CLR 608, n 60. See discussion in Horan, above n 45, 561 on this case concerning policy and not having immediate legal consequences and, therefore, not actually giving rise to a ‘matter’ over which the court could exercise jurisdiction.
52 (1988) 19 FCR 347.
54 (1997) 144 ALR 677.
55 For a discussion of the distinction see Cane, above n 47.
(a) The Relationship between International Law and Australian Law

Is a United Nations Security Council resolution enough to authorise coercive action outside Australia, such as interference with freedom of navigation in international waters or occupation of foreign territory and, if so, how? There is actually no Australian authority directly on this point. In *Bradley v Commonwealth*56 the Commonwealth Government had sought to cut mail and telephone services to the Rhodesia Information Office in Sydney. Barwick CJ and Gibbs J rejected the view that Security Council resolutions which had not been given legislative recognition in Australia justified such executive action within Australia which would otherwise have been unlawful.57 The case did not address the issue of the authority of United Nations Security Council Resolutions outside of Australia, however.

International law essentially involves obligations between nation states. Australia’s international treaty obligations, therefore, are not a direct part of Australian law unless incorporated into legislation.58 Unless required to do so by Australian law then, an ADF commander is also not personally legally bound nor empowered to observe Australia’s international legal obligations. Parliament can legislate contrary to Australia's international legal obligations as well, provided that it does so with words which clearly express this intention.59 There is no explicit general requirement in Australian law for operations authorised under prerogative power to conform to Australia's international legal obligations either.60

Act of State doctrine relates to the conduct of external affairs so, while international law cannot directly authorise or limit an ADF external security operation, it might inform the substance of the external affairs.

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56 (1973) 128 CLR 557.
prerogative and the extent to which Act of State doctrine might protect actions under it. This chapter will, therefore, consider the way in which international law might for this purpose be a ‘source’ or ‘a legitimate and important influence on the common law, especially when international law declares the existence of universal human rights’. This is because international law enforcement instruments authorising Australia’s action in a particular operation, such as United Nations Security Council Resolutions, are the clearest indicator of what the foreign policy purpose of an ADF mission is.

(b) Act of State Doctrine

It comes now to consider the authorities on Act of State doctrine. There are a number of aspects to the doctrine, such as concerning the acts of foreign sovereigns within their own jurisdiction, but this chapter is primarily concerned with prerogative acts against aliens beyond the realm. It is important because, much as with the war prerogative, it is where international law meets prerogative power. The most cited case of *Burron v Denman* is on point because it concerned a Royal Navy torching of a Spanish-owned slaving business in West Africa and the liberation of its slaves. This was not an act of war. The British government ratified this action as an Act of State and so no action could be maintained against the Royal Navy captain, meaning that the matter was nonjusticiable.

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63 See Lindell, ‘Judicial Review of International Affairs’, above n 60, 190–1.
64 See generally Harrison Moore, *Act of State in English Law*, above n 7.
65 *Petrotimor Companhia de Petroleos SARL v Commonwealth* (2003) 126 FCR 354. For a failure on the part of the Commonwealth to have a matter dismissed as concerning nonjusticiable Acts of State of foreign governments see *Habib v Commonwealth* (2010) 183 FCR 62 (‘Habib’). This is also the aspect of the doctrine with which *Plaintiff M68 v Minister for Immigration and Border Protection* [2016] HCA 1 (‘M68’) was concerned, being the validity of the laws of Nauru and which none of the judgments would address, although the case did not use the term ‘Act of State’ except in the headnote.
67 (1848) 154 All ER 450, 459. See discussion in Lindell, ‘Judicial Review of International Affairs’, above n 60, 90–1 as well as Lindell, *The Coalition Wars*, above n 44, 33–7 and in McLachlan, above n 21, 281–5, who strongly doubts the contemporary value of this case.
The 2007 case of *Hicks v Ruddock* indicated that Act of State doctrine in Australia today is not so certain, although it was a single judge decision on an application for summary judgment. It concerned Mr Hick’s internment without trial by the United States in the notorious Guantanamo Bay Naval Base in Cuba after having been captured in Afghanistan. The United States’ view was that he was fighting for the Taliban, the military organisation with whom United States and Australian forces were fighting there. Mr Hicks sought an order of habeas corpus and judicial review of the Commonwealth’s decision not to request his release. The Commonwealth argued that the actions of the United States were Acts of State, being sovereign acts of a foreign government, a different aspect of Act of State doctrine than this chapter considers. The Commonwealth also argued that the matter was nonjusticiable as it concerned foreign relations. Tamberlin J did not accept the Commonwealth’s arguments in support of its application for summary judgment, stating:

The modern law in relation to the meaning of ‘justiciable’ and the extent to which the court will examine executive action in the area of foreign relations and Acts of State is far from settled, black-letter law … There are no bright lines which foreclose, at this pleading stage, the arguments sought to be advanced in the present case. 

This case was an interlocutory matter and primarily concerned the Acts of State of a foreign government outside of Australia, rather than the Acts of State of Australia outside of Australia. Nonetheless, it did see the area of foreign relations as potentially justiciable and Act of State doctrine as unsettled generally, not just in respect of the aspect of the doctrine before the court.

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68 (2007) 156 FCR 574; see Marley Zelinka, ‘*Hicks v Ruddock versus The United States v Hicks*’ (2007) 29(3) Sydney Law Review 527.
70 Ibid 577.
71 Ibid 576.
72 Ibid 576.
73 Ibid 576.
74 Ibid 600.
The 2004 case of *Ali v Commonwealth* had also earlier questioned whether Act of State doctrine was a part of Australian law. It concerned an interlocutory step in the Supreme Court of Victoria in a claim for false imprisonment in Nauru by agents of the Commonwealth. It is the only case known to the author which concerns coercive action by the Commonwealth pursuant to its prerogative to conduct foreign relations. Bongiorno J declined to accept immediately that Act of State doctrine provided immunity from suit:

*Buron v Denman* has been accepted as correct by English courts … although not for the proposition contended for in this case. There is, therefore, no authority directly binding upon this Court which would compel its being applied in this case with respect to the act of state doctrine with which it is concerned. Mr Burnside QC’s submissions on behalf of the plaintiffs have focused on a number of matters which he contends lead to the conclusion that it does not represent the common law of this country at this time. He submitted that at the time it was decided notions of Crown immunity from suit were, as yet, unaffected by later statutory reforms so that redress in respect of actions which would have constituted torts if committed by a private citizen went unredressed when committed by the Crown. More importantly he referred to the different constitutional position of the Crown in Australia in 2004 compared to that of the Crown in England almost 160 years earlier by reference to the joint judgment of Gummow and Kirby JJ in *The Commonwealth v Mewett* in which their Honours said at 545:

‘What then was the consequence of the introduction of Ch III of the Constitution? The establishment of the judicial power of the Commonwealth as an essential element in the federal system meant that doctrines of executive immunity from curial process which had been developed in England could not be carried immediately into the federal system. Chapter III required adjudication upon “matters” of a nature unknown in England. It also required that in Australia the common law be informed by the structure of and institutions established by the Constitution. This, by covering cl 5 thereof, was made binding on the courts, judges and people of every State and of every part of the Commonwealth “notwithstanding anything in the laws of any State”.’

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77 As opposed to *M68* [2016] HCA 1, which concerned executive power to expel aliens.
78 (1848) 2 Ex 167.
6. EXTERNAL SECURITY

If Act of State doctrine did apply, it could render a Commonwealth action immune from liability but the court would need to hear evidence and argument to determine if that was the case, hence making it justiciable. For reasons unknown to the author, there is no record of Ali v Commonwealth proceeding further.81

Turning to the 2010 case of Habib v Commonwealth (‘Habib’) discussed in Chapter 1, while Black CJ stated that ‘it was not in contention that [Act of State doctrine] forms part of the common law of Australia’, he did say that its scope is in dispute.82 Habib was also concerned with the justiciability of acts of state of foreign governments, and the extent of the complicity of Commonwealth officers in alleged acts of torture. Torture is an offence against Australian law for which any public official anywhere in the world is liable to prosecution in an Australian court without any particular connection to Australia.83 Jagot J said that it reflected Parliament’s ‘extreme revulsion’ for torture.84 Given the necessary implication of the purpose of the statute, there is no scope to argue that acts of torture could ever be justified as lawful exercises of the foreign affairs prerogative. As Jagot J stated, ‘[A]ct of state doctrine yields to any contrary Parliamentary intention’.85 In approving of Habib generally, in the 2014 case of Belhaj v Straw the Court of Appeal of England and Wales (Civil Division), described Habib as a case having ‘facts which bear a striking resemblance to those in the present case’ and stated that ‘we should add that we find the judgment of Jagot J compelling’.86

In dealing with the extreme and clearly unlawful act of torture the case does not therefore really clarify the extent to which Act of State doctrine could apply to coercive, yet lawful, exercises of executive power by the Commonwealth outside of Australia pursuant to the foreign affairs prerogative. Perram J, however, was forceful in stating:

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81 Ibid.
83 Criminal Code Act 1995 s 274.2, other sections on torture are referred to below.
85 Ibid 98.
86 [2014] EWCA Civ 1394 [96]–[102]. The UK Supreme Court dismissed the government’s appeal in this in Belhaj v Straw; Rahmatullah (No 1) v Ministry of Defence [2017] UKSC 3 (the appeals being heard together). Again, this case arose before publication but after the date which this book reflects the law until, being 28 March 2016.
To the extent that act of state doctrine would confer immunity from suit on the Commonwealth it is inconsistent with the constitutional orthodoxy of this country and its application is to be rejected in a fashion as complete as it is emphatic.\textsuperscript{87}

It is quite likely that this statement does reflect the law with respect to immunity from suit but not necessarily with respect to immunity from liability. It might also not extend to matters more of a policy nature which do not directly impact upon individuals and which do not give rise to a ‘matter’, such entering into a treaty as in \textit{Thorpe v Commonwealth} discussed above.\textsuperscript{88}

The Australian cases indicate a divergence between Australian and English law on this point. The United Kingdom does not have a written or federal constitution nor does it have an equivalent of Chapter III concerning judicial power. Nonetheless, it is significant that even without these constitutional elements, the United Kingdom Attorney-General was also unsuccessful in a plea of Act of State in \textit{Nissan}\textsuperscript{89} before the House of Lords in 1970 in relation to the British Army’s acquisition of a hotel in Cyprus, which was owned by the British subject who brought the action.\textsuperscript{90} Lord Morris stated the conceptual difficulty with Act of State doctrine:

\begin{quote}
I do not view with favour a rule which can give immunity if wrongful acts are done abroad but no immunity if such acts are done in this country and even if done to a resident foreigner. The general principle has been that if a wrong is of such a character that it would have been actionable if committed in England and if the act is not justifiable by the law of the place where it was committed then an action may be founded in this country.\textsuperscript{91}
\end{quote}

Lindell also refers to the 2004 case of \textit{Bici v Ministry of Defence} (‘\textit{Bici’})\textsuperscript{92} in which the United Kingdom did not rely on the doctrine in relation to negligent shooting of Kosovan civilians by British forces operating under a United Nations Security Council Resolution.\textsuperscript{93} Notably Elias J was the sole judge in this matter and later gave judgment in \textit{Al-Jedda v Secretary of State for Defence} (‘\textit{Al-Jedda’}),\textsuperscript{94} discussed below.

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\textsuperscript{87} Ibid 74.  \\
\textsuperscript{88} (1997) 144 ALR 677, 681.  \\
\textsuperscript{89} [1970] AC 179; see Lindell, ‘Judicial Review of International Affairs’, above n 60, 191.  \\
\textsuperscript{90} \textit{Attorney-General v Nissan} [1970] AC 179, 179 (‘\textit{Nissan’}).  \\
\textsuperscript{91} Ibid 195; see R J Whittington, ‘Case Comment: Act of State – \textit{Attorney-General v Nissan}’ (1970) 3 Adelaide Law Review 522.  \\
\textsuperscript{92} \textit{Bici v Ministry of Defence} [2004] EWHC 786.  \\
\textsuperscript{93} Lindell, \textit{The Coalition Wars}, above n 44, 37.  \\
\textsuperscript{94} [2011] 2 WLR 225.
\end{flushleft}
The 2000 United Kingdom Court of Appeal case of *R v Secretary of State; Ex parte Thring* (‘Thring’), concerning Royal Air Force enforcement of a no-fly zone over Iraq in the 1990s, did give clear support to Act of State doctrine in English law.95 The judgment cited *Burron v Denman*96 and the *CCSU Case*97 in deciding that the matter was nonjusticiable.98 It should be treated with some caution however as the plaintiff was a British taxpayer who objected to taxes being spent on an operation that he argued violated the law of armed conflict. The lack of a clear cause of action meant that the case was likely to have been decided differently than if it was brought by a person who had suffered loss or damage directly as a result of the bombing.

There is a distinction however between *Bici*99 and *Nissan*100 on one hand and *Thring*101 on the other. *Bici*102 concerned negligent acts and *Nissan*103 concerned incidental acts, whereas *Thring*104 concerned deliberate acts directly pursuant to Britain’s foreign policy. As this chapter will discuss, this indicates that Act of State doctrine could operate to protect actions for the purpose of achieving the foreign policy objective—that is, the mission—whether justiciable or not, and not negligent actions or incidental acts insufficiently connected to the mission, which should be justiciable. This is consistent with Cane’s view, who argued in his analysis of *Nissan* that Acts of State are exercises of prerogative power in relation to foreign affairs.105 An Act of State is both a defence to a claim in tort and a doctrine of nonjusticiability when seen as a lawful exercise of this prerogative.106 Where an act does not have the character of an exercise of the foreign affairs prerogative, then it should not attract Act of State immunity and should be justiciable.107 Lord Wilberforce illustrated the problem in *Nissan* in a way that points to the potential significance of the relevant

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95 *R v Secretary of State; Ex parte Thring*, Court of Appeal (Civil Division) (Unreported, Pill, Clarke, Bennett LJJ, 20 July 2000) per Pill LJ (‘Thring’).
96 (1848) 2 Ex 167.
97 *Council of the Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 405–406.
98 Thring, Court of Appeal (Civil Division) (Unreported, Pill, Clarke, Bennett LJJ, 20 July 2000) Pill LJ, 4, Bennett J, 6.
101 *Court of Appeal (Civil Division)* (Unreported, Pill, Clarke, Bennett LJJ, 20 July 2000).
104 *Court of Appeal (Civil Division)* (Unreported, Pill, Clarke, Bennett LJJ, 20 July 2000).
106 Cane, above n 47, 681–2.
107 Ibid 694–700.
international law instrument,\textsuperscript{108} in this case the agreement between the British and Cypriot governments, as informing the application of Act of State doctrine:

Between these acts and the pleaded agreement with the government of Cyprus the link is altogether too tenuous, indeed it is not even sketched out; if accepted as sufficient to attract the description of act of state it would cover with immunity an endless and indefinite series of acts, judged by the officers in command of the troops to be necessary, or desirable, in their interest. That I find entirely unacceptable.\textsuperscript{109}

Importantly, obiter dicta in \textit{Al-Jedda} took up this point.\textsuperscript{110} Mr Al-Jedda was a dual British and Iraqi national. The issue of his internment by British forces in Iraq from 2004 for security reasons, without charge or conviction, was the subject of a number of actions and appeals. The 2007 case in the House of Lords turned on the application of the \textit{Human Rights Act 1998} (UK).\textsuperscript{111} It considered the extent to which the United Kingdom’s obligations under \textit{United Nations Security Council Resolution 1546} in relation to Iraq displaced obligations under that Act up until the commencement of the \textit{Constitution of Iraq} in May 2006.\textsuperscript{112} A 2011 case in the European Court of Human Rights turned on international human rights law questions and found that Mr Al-Jedda’s ongoing internment was a breach of his right to liberty as it could not be indefinite.\textsuperscript{113}

The case which this chapter will consider went before the Court of Appeal in England in 2010 and concerned Mr Al-Jedda’s internment after the commencement of the \textit{Constitution of Iraq} in May 2006.\textsuperscript{114} As a result of the operation of the \textit{Private International Law (Miscellaneous Provisions) Act 1995} (UK), Iraqi law applied to Mr Al-Jedda’s internment, and the court found that Iraqi law authorised that internment.\textsuperscript{115} The statute

\textsuperscript{108} [1970] AC 179.
\textsuperscript{109} Ibid 210; see discussion in Peter Rowe, \textit{Defence: The Legal Implications: Military Law and the Laws of War} (Brassey’s, 1987) 4.
\textsuperscript{110} [2011] 2 WLR 225.
\textsuperscript{111} \textit{R (On the Application of Al-Jedda) v Secretary of State for Defence} [2008] 1 AC 332.
\textsuperscript{113} \textit{Al-Jedda v United Kingdom} (2011) 53 EHRR 23.
\textsuperscript{114} There were also other proceedings involving the UK Home Secretary taking away Mr Al-Jedda’s British citizenship, \textit{Al-Jedda v Secretary of State for the Home Department} [2012] EWCA Civ 358.
\textsuperscript{115} \textit{Al-Jedda} [2011] 2 WLR 225.
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law in question is not directly relevant to this chapter but two of the judgments gave notable obiter dicta consideration to Act of State doctrine, prerogative power and the international law issues.

Arden LJ did not see the occupation of Iraq post the invasion of 2003 as an extension of the war prerogative but, due to a relevant United Nations Security Council resolution, as an Act of State pursuant to the international obligations of the United Kingdom:

Firstly, in my judgment, Al-Jedda (No 1) established that the United Kingdom was entitled and bound under its obligations under article 103 of the UN Charter to intern persons where this was necessary for the internal security of Iraq. Internment for this purpose would clearly qualify as an act of state. My conclusion that act of state is a defence here does not go wider than this. It applies, in my judgment, because of the overriding force of UNSCR 1546. If courts hold states liable in damages when they comply with resolutions of the UN designed to secure international peace and security, the likelihood is that states will be less ready to assist the UN achieve its role in this regard, and this would be detrimental to the long-term interests of the states.\(^\text{116}\)

In this judgment, Act of State was a defence rather than a doctrine of nonjusticiability. Further, Act of State immunity could apply even to actions against a British national:

Secondly, the fact that Mr Al-Jedda is a British national is not, in my judgment, a bar to the raising of the defence of act of state in respect of acts done abroad as part of a general policy of internment carried out under the authority of the UN for imperative reasons of security.\(^\text{117}\)

Arden LJ also distinguished Nissan in this way:

\[\text{T}he \text{ Nissan case [1970] AC 179 is in my judgment clearly distinguishable. It was no part of the peacekeeping function of the troops to take property without paying for it. In the present case, internment was part of the role which the British contingent of the MNF [multi-national force] were specifically required to carry out. The acceptance and carrying out of those obligations was an exercise of sovereign power. It is inevitable that a detainee would suffer the loss of his liberty while he was detained.}\(^\text{118}\)

\(^{116}\) Ibid 253.
\(^{117}\) Ibid 254.
\(^{118}\) Ibid.
Dyson JSC declined to address the Act of State issue. Elias LJ did agree that the internment of Mr Al-Jedda was an Act of State for the reasons which Arden LJ gave but did not agree with Arden LJ on the point of Act of State doctrine creating immunity even with respect to British nationals abroad.119 The Act of State argument on behalf of the Crown therefore failed but Elias LJ gave a considered suggestion on the issue of whether the Crown could exercise prerogative powers against its own subjects abroad:

An alternative approach, more in line with current concepts of the relationship between the courts and the Crown, may be to recognise that whilst the state in pursuance of its treaty obligations may have the power to detain as an exercise of prerogative power, none the less the court can question the way in which that power is exercised as it can any other exercise of prerogative power, at least where, as here, the act is in principle amenable to the court’s jurisdiction. I see no reason in principle why the courts ought not to be able to review an act of the executive interfering with personal liberty in order to test whether its actions have been lawful by the appropriate application of traditional judicial review principles. The court could, for example, satisfy itself that detention is proportionate to the risks at stake, and ensure at least elementary principles of fairness in the detention process.120

Elias J, therefore, saw the action as justiciable, although the court may still find it a lawful exercise of prerogative power.

The judgments of Arden and Elias LJJ together actually appeared to offer a way forward for the law of both England and Australia on Act of State doctrine and prerogative power. However, Rowe was of the view that Act of State doctrine is unlikely to authorise the detention of foreign nationals in foreign territory. He only cited Elias J on detaining a British national121 and Nissan122 to support this view however, and his paper was also primarily concerned with international law but nonetheless showed some prescience in respect of the later decision in Serdar Mohammed.123

119 Ibid 274.
120 Ibid.
122 Rowe, ibid, n 61 citing Nissan [1970] AC 179, Lord Reid at 213.
123 Serdar Mohammed v Secretary of State for Defence [2015] EWCA Civ 843 [217] (‘Serdar Mohammed’).
As mentioned in Chapter 1, *Serdar Mohammed* was a 2015 decision of the England and Wales Court of Appeal (Civil Division) concerning the detention of Mr Mohammed by the British Army in Afghanistan in 2010.124 The case also joined other claims relating to detention by the British Army in Afghanistan and Iraq.125 As in *Al-Jedda*, it turned primarily on the application of the *Human Rights Act 1998* (UK) in respect of public law claims but also considered *Act of State* doctrine in respect of private law claims in tort for false imprisonment.126 As opposed to the obiter dicta of *Al-Jedda*, the judgment in *Serdar Mohammed* gave extensive consideration to *Act of State* doctrine after hearing full argument.127 For this reason it is worthy of full consideration as a recent and persuasive common-law authority.

The issue most relevant to this discussion was whether the Secretary of State could justify detention of Mr Mohammed beyond 96 hours by the defence of *Act of State*, given that there was no authority in Afghan, international or English law for the detention.128 The Court determined that ‘Crown’ or ‘domestic’ *Act of State*, as opposed to the *Act of State* of a foreign government, had two aspects.129 The first aspect concerned justiciability; that is to say whether the matter is suitable for a decision by the court. The second aspect of *Act of State* was a defence to a claim in tort. As to the first aspect, the Court determined that ‘there is no requirement here to adjudicate on questions of policy in the absence of “judicial and manageable standards” suitable for application by the courts’ and it would ‘not be required to rule on the legality or otherwise of high level policy decisions such as whether to participate in the multi-national force.’130 Instead,

[o]n the contrary, the court is well equipped to deal with such issues, albeit arising under the law of a foreign state. As the [trial] judge observed, determining whether an individual has been unlawfully deprived of his liberty is quintessentially a matter for a court131

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124 [2015] EWCA Civ 843 [1]–[5].
125 Ibid [11]–[27].
126 Ibid [8]–[10].
127 Ibid [299]–[376].
128 Ibid [300]–[301].
129 Ibid [310]–[311].
130 Ibid [323].
131 Ibid.
and that justiciability ‘must be determined by the court on the basis of the subject matter in dispute’. The Court therefore rejected an argument that the nonjusticiability aspect of Act of State doctrine barred the private law claim in tort of Mr Mohammed. In so doing, the Court also stated that ‘the observations in Al-Jedda on the applicability of the act of state principle cannot be justified on grounds of non-justiciability’. This position is consistent with the argument made in Chapter 5 of this book, and also in relation to Habib above, with respect to nonjusticiability. The remaining issue then is Act of State as a defence to a claim in tort.

As a matter of principle, the Court saw that there are important public policy reasons for maintaining the defence of Act of State, even if only on a very limited basis, stating:

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.

The Court preferred a more nuanced rule, asking instead:

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

This is a more realistic rule which favours the principle of legality and eschews arbitrariness, while still retaining scope for a court to recognise that some coercive acts in external security operations may actually uphold the international rule of law. It is worth noting that the Court acknowledged that Act of State could be a defence to a criminal act as well.

132 Ibid [324].
133 Ibid [330].
134 Ibid [331].
135 Ibid [349].
136 Ibid [359].
137 Ibid [311], [337].
In applying this rule to Mr Mohammed’s claim, the Court considered that the British detention policy was outside and contrary to that set by the International Security Assistance Force, under authority granted by the relevant United Nations Security Council Resolutions. The British policy was also contrary to Afghan law and, despite the purpose of the mission being to assist the Afghan Government which retained responsibility for law and order, the Secretary of State did not seek alteration to provisions of the United Kingdom/Afghanistan Memorandum of Understanding nor Afghan law. Further, notably, the Secretary of State did not put proposals for relevant legislation to the United Kingdom Parliament. The Court could therefore see no compelling considerations of public policy which prevent reliance on Afghan law as the basis of the claims in tort brought in these proceedings.

In applying this rule to the other claimants detained in Iraq the Court drew a different conclusion in that United Nations Security Council Resolutions applicable to Iraq created an obligation on the United Kingdom to detain or intern ‘for imperative reasons of security’. In providing guidance to the tribunal which would subsequently deal with the Iraq claims, noting that this was an appeal on a question of law only, the Court stated:

The existence of such an obligation would, at the very least, be support for the view that the court is here concerned with policy in the conduct of foreign relations. Moreover, this would, in our view, be a highly relevant consideration, notwithstanding that the relevant obligations in international law have not been given effect in domestic law within the United Kingdom.

The lesson for the ADF appears to be then, should an Australian court apply this precedent, that any coercive action under the external affairs prerogative must be in accordance with the applicable international law authority for the operation, such as a United Nations Security Council Resolution, and should also be in accordance with local law except where compelling considerations of public policy prevent reliance upon that law. Australia’s international human rights obligations should

138 Ibid [363].
139 Ibid.
140 Ibid.
141 Ibid [364].
142 Ibid [368]. Al-Waheed v Ministry of Defence; Mohammed v Ministry of Defence [2017] UKSC 2 moved back from this position only in that the UNSCR gave an authorisation to detain even if it did not create an obligation (Lord Sumption) [20].
143 Ibid [363].
inform these policy considerations. Further, the government may need to seek authority from Parliament for such action. Noting the strong statements against executive detention outside war in *CPCF v Minister for Immigration and Border Protection* and *M68* discussed in Chapter 1, this appears to be a realistic application of Act of State doctrine and one which ADF operations in Somalia and East Timor may have satisfied, although there may be some equivocation in respect of seeking the authority of Parliament.

It is interesting that the Court in *Serdar Mohammed* did not state the basis upon which British forces could have targeted and killed Mr Mohammed, a Taliban commander, although it did acknowledge that it could have been lawful for British forces to do so. It did not state that it was the war prerogative, even though the international law with respect to noninternational armed conflict applied. The Court therefore either did not address this point because it did not need to or because the implicit basis was actually the foreign affairs prerogative, for which the defence of Act of State would be available. Given that the Court itself notes the lack of authority since *Buron v Denman* for such coercive action, as quoted above, it is preferable that the offensive use of lethal force against Mr Mohammed would instead be a matter for the war prerogative and the combat immunity doctrine. This approach would also be consistent with the decision in the ‘Commando Court Martial’, which applied the combat immunity doctrine to operations in Afghanistan in 2009.

This chapter will return to questions of Act of State doctrine after considering its Australian constitutional setting and Australia’s practice on the coercive use of the external affairs prerogative. It might help to draw conclusions on the doctrine after discussing the extent of the ADF’s coercive use of the external affairs prerogative in operations.

144 Ibid [213], [237], [240], [243], [252].
145 Ibid. *Al-Wahed* [2017] UKSC 2 likewise did not address this point.
146 Ibid [349].
B Australian Constitutional Considerations

Before discussing the Australian practice of external security operations, it is worth noting that, in the Australian constitutional context, external security operations being outside the realm arguably do not intrude directly upon the limits imposed by the Constitution as discussed in Chapters 1 to 4 of this book. The conduct of military operations beyond the realm does not interfere with civilian government functions within Australia. There is also a presumption that legislation does not apply extraterritorially without express words.¹⁴⁸ At the same time, the power of the Commonwealth Parliament to legislate extraterritorially does not interfere directly with the States¹⁴⁹ and it follows that neither does the extraterritorial application of executive power. The presumption against extraterritorial application of legislation also reflects that external executive action does not intrude upon the sphere of Parliament.

Within the theory of the separation of powers, in determining whether there is scope for the prerogative to operate outside the realm, necessity is less of a factor. Geographic externality is usually enough because there is less direct competition between the executive and legislative branches in the external sphere.¹⁵⁰ If Parliament does legislate for an external matter then

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¹⁴⁸ *Jumbunna Coal Mine NL v Victorian Coal Miner’s Association* (1908) 6 CLR 309, 363.
¹⁴⁹ *Seas and Submerged Lands Case* (1975) 135 CLR 337, 373.
¹⁵⁰ It is notable that externality alone is a sufficient basis for the exercise of Commonwealth legislative power under s 51 (xxix) of the Constitution, *Polyukhovich v R* (1991) 172 CLR 501, 531 (Mason CJ), 599 (Deane J), 632–4 (Dawson J), 713 (McHugh J), 696 (Gaudron J), applied in *Horta v Commonwealth* (1994) 181 CLR 183, 194 (per curiam). In respect of the legislative aspect of the power, Rothwell states that ‘The power has extensive application in regard to matters, things, events, or persons physically external to Australia’, in Donald Rothwell, ‘The High Court and the External Affairs Power: A Consideration of its Inner and Outer Limits’ (1993) 15 Adelaide Law Review 209, 237. Murray said of *XYZ v Commonwealth* (2006) 227 CLR 532 that ‘The XYZ case has only confirmed the breadth of the “geographic externality” aspect [of the external affairs power]’ in Sarah Murray ‘Back to ABC after XYZ: Should We Be Concerned About “International Concern”?’ (2007) 35(2) Federal Law Review 315, 326. Edson, on the other hand, argues that ‘the decision [XYZ] cast fresh doubt upon the principle of geographic externality’ on the basis that three justices dissented on the extent (Kirby J) or existence (Callinan and Heydon JJ) of the principle, in Elise Edson ‘Section 51(xxix) of the Australian Constitution and “Matters of International Concern:” Is There Anything to be Concerned About?’ (2008) 29(2) Adelaide Law Review 269, 313. However, Twomey, despite also raising ‘serious questions about its cogency’ concludes that ‘XYZ was another re-endorsement of the geographical externality interpretation of s 51(xxix)’ in Anne Twomey ‘Geographic Externality and Extraterritoriality: *XYZ v Commonwealth*’ (2006) 17 Public Law Review 253, 263. If externality is a sufficient basis for the exercise of the legislative power with respect to external affairs under s 51 (xxix) it is relevant in considering the extent of the prerogative with respect to external affairs which, to be consistent with *Williams v Commonwealth* (2012) 248 CLR 156 (‘Williams’), cannot be assumed to be as extensive as the legislative power and therefore cannot be more extensive.
the executive is bound, subject to the requirement for express words with respect both to extraterritoriality and limiting prerogative power. Where there is no applicable legislation there need be no determination as to the necessity for responding to a particular issue in order for there to be room for the executive to exercise prerogative power. The main legal constraint on external exercises of power, therefore, is whatever statutory law applies extraterritorially, such as the **Defence Force Discipline Act 1982** (Cth), the **Criminal Code Act 1995** (Cth) and the **Crimes at Sea Act 2000** (Cth). The ADF also remains subject to the jurisdiction of Australian courts as discussed in Chapter 2. This is not to argue that if there is a prerogative with respect to foreign or external affairs that, therefore, the Commonwealth executive may do anything outside of Australia any person could do or which the Commonwealth might legislate upon. To be consistent with the principle of legality, and particularly **Williams**, it is still necessary to argue that the prerogative authorises the action in question. This is the task of the remainder of this chapter. The judgments in **CPCF** and **M68** only emphasise this concern. As Gageler J stated in **M68**:

> The Executive Government and any officer or agent of the Executive Government acting in the ostensible exercise of his or her de facto authority is always amenable to habeas corpus under s 75(iii) of the Constitution. Habeas corpus is in addition available as an incident of the exercise of the jurisdiction of the High Court under s 75(v) of the Constitution in any matter in which mandamus, prohibition or an injunction is bona fide claimed against any officer of the Commonwealth. That inherent constitutional incapacity of the Executive Government of the Commonwealth to authorise or enforce a deprivation of liberty is a limitation on the depth of the non-prerogative non-statutory executive power of the Commonwealth conferred by s 61 of the Constitution [emphasis added].

With this theoretical background, it comes now to analyse the practice of ADF external security operations.

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154 **CPCF v Minister for Immigration and Border Protection** [2015] HCA 1 (’**CPCF**’), [45] (French CJ), [96] (Hayne and Bell JJ), [196], [218] (Crennan J), [380] (Gageler J); [453] (Keane J).
156 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 90–1.
157 **M68** [2016] HCA 1 [161]–[162].
III External Security Operations

A Naval Constabulary Operations

1 International Enforcement Instruments and Legislation

The RAN has conducted operations in the Middle East intermittently since 1990 to enforce *United Nations Security Council Resolution 665* and *United Nations Security Council Resolution 1546*, as well as in support of coalition counterterrorism operations.\(^{158}\) Where Commonwealth legislation has incorporated United Nations Security Council Resolutions, there has been no provision for enforcing them at sea.\(^{159}\) Section 6 of the *Charter of the United Nations Act 1945* (Cth) grants a power to the Governor-General to make regulations to give effect to United Nations Security Council Resolutions. This section specifically states, however, that it is only ‘in so far as those decisions require Australia to apply measures *not* involving the use of armed force [emphasis added]’. None of the various United Nations Security Council Resolutions for which the Governor-General has made regulations have powers for enforcement at sea.\(^{160}\)

Notably, the *Law of the Sea Convention* also permits enforcement action by all States in international waters for piracy and to a lesser extent slavery.\(^{161}\) Australia has provided statutory enforcement powers at sea for piracy and there are criminal offences in Australian legislation for slavery.\(^ {162}\) Enforcement powers for both offences are available under the

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\(^{158}\) SC Res 665, UN SCOR, 2938\(^{th}\) mtg, S/Res 665 (25 August 1990); SC Res 1546, UN SCOR, 4987\(^{th}\) mtg UN Doc S/Res/1546 (8 June 2004) as currently extended at various times; see also Royal Australian Navy, above n 10, 67. There was also, arguably, some limited maritime enforcement power in East Timor under *United Nations Security Council Resolution 1264*, which does not appear to have been exercised, SC Res 1264, UN SCOR, 4045\(^{th}\) mtg UN Doc S/Res/1264 (15 September 1999). This is on the basis that operative para 3 gave authority to ‘restore peace and security in East Timor’, which presumably extended to its immediate maritime environment, see Felicity Rogers, ‘The International Force in East Timor – Legal Aspects of Maritime Operations’ (2005) 28(2) *University of New South Wales Law Journal* 566, 578–9.

\(^{159}\) The *Charter of the United Nations Act 1945* (Cth) s 5 implemented aspects of the *Charter of the United Nations*.

\(^{160}\) Eg *Charter of the United Nations (Sanctions – Iraq) Regulations 2006*.

\(^{161}\) *Law of the Sea Convention*, art 110. The Convention also has enforcement provisions for illegal broadcasting but only for ships of states which are particularly connected to the broadcasts, arts 109, 110.

\(^{162}\) *Crimes Act 1914* (Cth) ss 51–6 and also *Maritime Powers Act 2013* (Cth) s 17.
Further, Australia and France have a mutual obligation to assist each other in enforcement at sea under the *France Australia Maritime Co-operation Agreement.*

Naval constabulary operations can involve a range of coercive activities. These include stopping and diverting commercial vessels and possibly firing at or into them in order to compel them to stop. Naval constabulary operations can also involve ADF personnel boarding a vessel without permission of the master, detaining and searching the crew or others on board, searching the vessel, breaking open compartments to effect the search, seizing weapons or evidential material and taking control of the vessel or its equipment. Even without being fired upon, delays and diversions are potentially expensive for the various commercial interests, such as the owner, operator, cargo owner or crew agent, of a merchant or fishing vessel. Without lawful authority, any of these activities could be criminal offences under the *Crimes at Sea Act 2000* or the *Defence Force Discipline Act.*

Until recently, Australia’s practice appeared to have been to legislate for enforcement powers at sea where such powers served a domestic law enforcement purpose, rather than being primarily the conduct of foreign affairs. This included legislating for a range of international maritime law enforcement instruments such as the *Torres Strait Treaty,* the *United
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Nations Fish Stocks Agreement\textsuperscript{168} and the Pacific Fisheries Treaty.\textsuperscript{169} Where there was really no domestic law enforcement purpose, such as with the enforcement of United Nations Security Council Resolutions\textsuperscript{170} or the agreement with France, the domestic legal authority for international naval constabulary operations rested primarily upon executive power. Since the enactment of the Maritime Powers Act 2013 there have been comprehensive statutory powers to enforce international agreements and decisions.\textsuperscript{171} There is a risk that these statutory powers will not provide for every eventuality and Fortuna may find them wanting. The powers are effectively the same for both domestic and international law enforcement however,\textsuperscript{172} and the tasks of stopping vessels, boarding, searching and seizing are common to many maritime law enforcement operations. The risk of Fortuna finding the powers wanting therefore is lower than for land-based operations seeking to restore a functional government to a foreign territory and people, as discussed below, where issues of necessity and emergency, and Fortuna, are more likely to arise.

2 The Contrast between the Law of Naval Constabulary Operations and the Law of Naval Warfare

It is worth noting at this point the significant contrast between the regulation of naval constabulary operations prior to the Maritime Powers Act and the law of naval warfare. Naval operations in war, or armed conflict, are in fact relatively well regulated by the law of naval warfare,\textsuperscript{173} in particular with regard to the law of prize, which provides some judicial


\textsuperscript{170} See Andrew Forbes (ed), Australia’s Response to Piracy: A Legal Perspective (Sea Power Centre Australia, 2011).

\textsuperscript{171} s 19.

\textsuperscript{172} ss 31, 32, 33.

Prize law regulates the capture of merchant ships and cargos during naval warfare and serves as a means of protecting trade to some extent in spite of the disruption of war. Notably, it actually directly incorporates international law into national law as prize courts are national courts applying international law. This illustrates the relative paucity of the law relating particularly to international naval constabulary operations and raises the question of why war should be more regulated and ‘peace’ operations less. This lends some weight to the argument that international law, including human rights law, should inform any consideration of the limits of prerogative power in external security operations generally and particularly where the application of Act of State doctrine is in issue.

B Martial Law in Foreign Territories

As to taking over territories under foreign jurisdiction, this first occurred with the previously German territories of Nauru and New Guinea in 1914. Australia subsequently placed New Guinea under civilian control in 1921 as it became the administering power under a League of Nations mandate. It is worth noting that Nauru apparently surrendered to HMAS Melbourne in 1914 without fighting and, although under military occupation, then had a civilian administrator responsible to the Colonial Office. The ADF presence in Somalia in 1993 under authority of a United Nations Security Council Resolution amounted effectively to an occupation of the area around Baidoa given the extent to which it substituted for a civil administration. Martial law also effectively occurred when Australia intervened in East Timor in 1999 under the

174 Naval Prize Act 1864 (Imp), 27 and 28 Vic c 25; Naval Prize (Procedure) Act 1916 (Imp), 6 and 7 Geo 5 c 2; Prize Act 1839 (Imp), 2 and 3 Geo 6 c 65; Prize Courts Act 1894 (Imp), 57 and 58 Vic c 39; Prize Courts Act 1915 (Imp), 5 and 6 Geo 5 c 57; Prize Courts (Procedure) Act 1914 (Imp), 4 and 5 Geo 5 c 13 in force through the Australian Capital Territory Self-Government Act 1989 (Cth) s 34, sch 2, pt 3 ‘Imperial Acts in Force in the Territory’; see Lord Stowell, ‘Address to the Maritime Law Association’ (Speech to the Annual General Meeting of the Maritime Law Association of Australia and New Zealand–Queensland Branch, November 1998).

175 See Colombos, above n 24, 795–825.


177 Fink, above n 166, 21 also makes this point.


179 Ibid.

180 Michael Kelly, Peace Operations: Tackling the Legal, Military and Policy Challenges (AGPS, 1997), 8–6–8–7. (NB pages in this book are numbered by page within chapters, in ADF style, rather than sequentially from the beginning to the end of the book.)
authority of a United Nations Security Council resolution. 181 In each of these cases, the Commonwealth’s military forces were the effective government of the territory until it handed over to civilian authorities. 182 The term martial law appears to have been eschewed but military control nonetheless amounted to a form of martial law. This chapter will not consider the Australian occupation of Japan post 1945, Iraq post 2003 or Australia’s military presence in any other conflict because Australian forces did not actually displace the local civilian governments, even if United States forces did.

The legal basis for the Australian military occupations of German New Guinea, Somalia and East Timor can only have been prerogative power as there was no legislative authority for the takeover of each of these territories. In the case of the former German territories in 1914, although not the conduct of warfare, martial law was clearly a consequence of the exercise of the war prerogative—even if it subsequently became an exercise of the external affairs prerogative once combat operations against the enemy ceased. The King had declared war against Germany on behalf of the British Empire and the occupation and control of the territories occurred as a result of this. 183

In the cases of Somalia and East Timor it is a little more unclear. There was no declaration of war against Somalia or Indonesia. Australia sent an armed force to Somalia as part of a larger coalition under the authority of a United Nations Security Council Resolution, which engaged in only low-level uses of force in order to maintain control. 184 Australian sent a much larger armed force as the leader of a coalition to occupy East Timor, which engaged in only limited fighting to secure and maintain control there. 185 In Somalia and East Timor the fighting therefore did not amount to armed conflict in factual terms of scale and intensity. Australia at no stage acted or indicated that it viewed itself as being engaged in

182 Noting the ADF did not exist as such in the First World War. The force which formed to occupy German possessions in the Pacific was the Australian Naval and Military Expeditionary Force, which was separate to the Australian Imperial Force, which formed to serve in the Middle East and Europe, see Peter Dennis, Jeffrey Grey, Ewan Morris and Robin Prior, The Oxford Companion to Australian Military History (Oxford University Press, 2nd ed, 2008) 62–4, 66, 234–5.
183 Commonwealth Gazette, No 50, 3 August 1914, 1335, 30.
an armed conflict in either place, so the operations appear to have been an exercise of the external affairs prerogative.186 This would be consistent with the analysis of Arden LJ in Al-Jedda,187 Lord Carnwath in Smith,188 and Holdsworth,189 to the effect that once combat operations have ceased, or if there were no combat operations as in Bicât,190 occupation becomes an exercise of the external affairs prerogative rather than the conduct of war.

As to what constitutes occupation of a foreign territory, Kelly reviewed the international law, literature and practice on this in his book dealing with the ADF’s involvement in Somalia, Peace Operations: Tackling the Legal, Military and Policy Challenges.191 Key to his analysis is the concept of effective control.192 Kelly referred to the first modern statement of the laws of war in the Lieber Code. It has had an enduring influence on the international laws of war. Dr Lieber drafted it for the United States in 1863 during the American Civil War.193 It was meant, therefore, to apply to circumstances of both internal insurrection and war between nation states. Article 1 of the Code addresses martial law in occupied territories directly, which Kelly quotes as follows:

A place, district or country occupied by an enemy stands, in consequence of the occupation, under Martial Law of the invading or occupying army, whether any proclamation declaring Martial Law, or any public warning to the inhabitants, has been issued or not. Martial Law is the immediate and direct effect and consequence of occupation or conquest. The presence of a hostile army proclaims its martial law.194

188 [2013] UKSC 41 [187].
190 [2004] EWHC 786, [98]–[101].
192 Ibid 3–6. Note also the use of the test of ‘effective control’, as a question of fact, by the European Court of Human Rights in determining the human rights obligations of the United Kingdom in Iraq in Hassan v United Kingdom [2014] (Application No. 29750/09), 39, citing its own judgment in Al-Skeini v United Kingdom [2011] [138]–[139].
193 United States Adjutant General’s Office, Correspondence, Orders, Reports, and Returns of The Union Authorities From January 1 To December 31, 1863 – General Order No 100, ‘The Lieber Code of 1863’.
194 Kelly, Peace Operations, above n 180, 3-8.
Civil and criminal laws were to remain in effect unless altered by order of the commander although all governmental functions—administrative or legislative—ceased unless continued by the commander. On martial law in such situations, Holdsworth stated that:

When martial law is a fact of international law, the existence and duration of the state of war are matters of state which the Crown alone can determine; and the acts done in the exercise of martial law in an enemy’s country are a series of acts of state.

He then quotes the United States *Opinions of the Attorney-Generals*, cited in Chapter 3, thus:

The commander of an invading, occupying, or conquering army rules the invaded country with supreme power, limited only by international law and the orders of the sovereign government he serves or represents.

1 The Historical Examples

The historical examples bear this out. In the case of German New Guinea between 1914 and 1921, Somalia in 1993 and in East Timor between 1999 and 2000, the scope of military control in these territories was wider than the military control exercised in areas under Australian jurisdiction between 1942 and 1946. Australian laws did not apply to those territories upon occupation even if Australian forces themselves were subject to some Australian laws.

(a) German New Guinea in the First World War

In the case of the German territories, German law continued in force until the *Laws Repeal and Adopting Ordinance 1921* (New Guinea) and the *Laws Repeal and Adopting Ordinance 1922* (Nauru) respectively came into effect. These ordinances ceased the application of German law, whilst preserving the legal status of any acts already done or in progress under that law, and applied various statute laws of the Commonwealth, Queensland and Papua as well as the principles and rules of the common law and equity of England. Prior to that time, however, it appears that

197 Ibid.
198 Both the German colonial and Australian military administrations administered Nauru as part of New Guinea. Nauru entered into separate administration upon the granting of the League of Nations Mandate in 1920, Charteris, above n 178, 137–8; Dennis et al, above n 182, 234–5.
Australian forces issued ordinances, and three Australian Army legal officers sat as Judges of the Imperial District Court, later known as the Central Court, presumably applying German law. They dealt with a full range of matters including crime, probate, debts, guardianship, marriage and divorce and native labour regulation. As Australian law did not apply to the territory however, with respect to Australian legal authority, the military judges could only have operated under the authority of British imperial prerogative power effected by the Australian military presence. In this case there does not seem to have been the same reticence with respect to the administration of justice occurring under military authority as was later the case under the National Security (Emergency Control) Regulations 1941 (Cth) discussed in Chapter 3 on martial law.

The other important point here is the extent of administrative activity exercised under military control, as reflected in the records held in the National Archives of Australia. It included regulating taxation and public expenditure, property transactions, running a government store, native affairs, labour recruitment, shipping and customs, receivership of businesses, liquor licensing and immigration as well as dealing with the German population. This list is not exhaustive but indicative of the range of routine governmental functions which the military administration took control of as well as being an occupying force. This provides another interesting contrast to the National Security (Emergency Control) Regulations 1941 regime in that there was no sense of emergency in these arrangements post 1914. The local German military forces were defeated and other German forces posed only a negligible further threat. The situation in the German territories seems, then, to have been one of transition, with military control filling the governmental vacuum until the postwar status of the territory became clear.

199 Dupont, above n 21, 413 n 14.
202 Ibid.
204 As to the details of the granting of the postwar mandates over the former German colonies, see Charteris, above n 178, 138–9.
(b) Somalia in 1993

In 1992, United Nations Security Council Resolution 774 empowered the Unified Task Force Somalia (UNITAF) ‘to secure the environment for the distribution of humanitarian relief’.\(^{205}\) Under this authority, in January 1993 the ADF took control of a Humanitarian Relief Sector (HRS) which was essentially a province of Somalia known as the Bay area, based around the major regional centre of Baidoa. UNITAF was the sole occupying military force. The only other armed forces were unofficial militia and bandit groups which did not represent the then-collapsed former Somali government. The ADF was, therefore, the sole authority capable of enacting government functions and proceeded on this basis.\(^ {206}\) The Commanding Officer of the 1st Battalion, Royal Australian Regiment group, Lieutenant Colonel Hurley,\(^ {207}\) was the HRS Commander and stated: ‘In the absence of any form of civil government at any level and the failure of the UN to provide resident local UN political officers, HRS commanders became military governors’.\(^ {208}\)

The Army legal officer on this deployment, Major Kelly,\(^ {209}\) focused on the occupation regime under the law of armed conflict but in doing so indicated that the ADF effectively exercised martial law in its sector by virtue of the defined area of control and lack of any other governmental authority within it.\(^ {210}\)

As to the extent of martial law in Australia’s sector in Somalia, the ADF’s control extended well beyond the direct protection of humanitarian relief. The ADF acted on the basis that establishing conditions for relieving the humanitarian crisis required reestablishing the rule of law.\(^ {211}\) To this end, it created a new Somali police force for the sector and reestablished a functioning judiciary, court and prison system.\(^ {212}\) These new institutions operated under the authority of Somali law as it stood in 1962 on the advice of Somali jurists that the Somali government and laws after this

\(^{205}\) SC Res 774, UN SCOR, 3145\(^ {\text{th}}\) mtg, UN Doc S/RES/774 (3 December 1992).
\(^{206}\) Kelly, Peace Operations, above n 180, 8-2–8-3, 8-6.
\(^{207}\) Subsequently General Hurley, Chief of the Defence Force and then Governor of New South Wales.
\(^{208}\) Kelly, Peace Operations, above n 180, 8-6 n 24.
\(^{209}\) Subsequently Member for Eden-Monaro and Parliamentary Secretary for Defence in the Commonwealth Parliament.
\(^{211}\) Kelly, Peace Operations, above n 180, 8-5.
\(^{212}\) Ibid 8-11–8-22.
date were unconstitutional. This system dealt with criminal, civil and family matters. An appeal court even sentenced one warlord, Gutaale, to death. The Somali police carried out his execution in the prison grounds virtually immediately in accordance with Somali law. Whilst these were Somali institutions relying upon Somali law, it is apparent that the ADF instigated, funded and directed their creation or revival as part of its control of the Bay area.

There is no Australian case law to support an assertion that these actions were lawful under prerogative power. There might have been some criticism of the ADF supporting the execution of Gutaale contrary to Australia’s position on international abolition of the death penalty. There has been debate as to whether the law of occupation regime under the international law of armed conflict was applicable de facto or de jure. Despite this, there has been little serious questioning of whether the ADF’s actions in exercising martial law were regulated in any direct way by Australian, as opposed to international or local, law. In the exercise of martial law in occupied foreign territories, it might arguably be lawful, as well as being an international law obligation, to establish a system of law and order where none is operating based upon the existing laws and legal institutions of the foreign territory, but this is certainly not clear.

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213 Ibid 8-15–8-16.
214 Ibid 8-18.
216 Kelly, Peace Operations, above n 180, ch 8.
218 There is an international law debate as to whether the Fourth Geneva Convention on occupation applies in such situations de jure (Kelly’s view, Peace Operations, above n 180, 8-6) or whether occupations under authority of a United Nations Security Council Resolution are not belligerent and therefore incapable of attracting the application of the Fourth Geneva Convention, (opened for signature 12 August 1949), 75 UNTS 287 (entered into force 21 October 1950), schs 1 to 4 of the Geneva Conventions Act 1957 (Cth). International human rights law would be the applicable international law instead, Boss, above n 3, 340–4; see also Oswald, ‘The Law of Military Occupation’, above n 2, 316. It is not necessary for this book to prefer a view on this but it is relevant to note that the nature of the obligations in occupation of foreign territory under UN authority is disputed in international law also.
The Somalia precedent was significant for subsequent operations in East Timor however, particularly as Kelly had a key role as a legal adviser in both operations.219

(c) East Timor in 1999–2000

The more recent example of military control by the ADF is similarly one of filling a governmental vacuum during the INTERFET period in East Timor (now Timor-Leste). As stated above, this period was from late September 1999 until February 2000.220 The ADF intervened as the lead of a UN-authorised military coalition, a first for Australia, to restore peace and security in East Timor under United Nations Security Council Resolution 1264.221 There had been widespread violence and destruction once it became clear that the East Timorese had voted overwhelmingly to reject an Indonesian offer of special autonomy within the Republic of Indonesia, which effectively meant secession.222 Indonesian military-sponsored militias were responsible for most of the chaos.223 Whilst Indonesia agreed to the deployment and was meant to have continuing responsibility for peace and security, by early October the Indonesian police had effectively withdrawn from the territory.224 The judiciary and court system collapsed.225 Most other civil governmental services ceased and much infrastructure suffered damage.226 Indonesia formally renounced sovereignty over East Timor on 20 October 1999.227

INTERFET needed to assume the responsibilities of civil government in order to achieve its mission.228 The United Nations Transitional Administration in East Timor was meant to assume some very limited governmental functions relatively early in the intervention, such as through the United Nations Civilian Police, but this was practically constrained by the security situation and the lack of United Nations resources in East

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219 See Kelly et al, above n 181.
220 Ibid, see also Felicity Rogers, above n 158, 566.
222 Ibid.
224 Kelly, et al, above n 181, at nn 12, 13; Oswald, ibid 350–1.
225 Oswald, ‘The INTERFET Detainee Management Unit in East Timor’, above n 223, 350–1.
226 Felicity Rogers, above n 158, 569.
227 Declaration of the People’s Consultative Assembly of Indonesia, 20 October 1999, cited in Rogers, ibid 571.
Timor at that stage. Reportedly, there were only two United Nations civilian police officers in East Timor when INTERFET arrived. Many matters, therefore, clearly required the control of the military force. General security was a priority and, within hours of arrival, INTERFET detained people carrying weapons. There were other less obvious, but still important, functions which sovereign governments normally perform but which only INTERFET could perform in this situation. These included control of the port for naval and civilian shipping, the control of the airports as well as control of the land border with West Timor.

(i) The Detainee Management Unit

Perhaps the most significant action of the ADF in East Timor from a martial law perspective was the exercise of legislative and judicial power in the establishment of the Detainee Management Unit (DMU). In the absence of any judiciary or legislature, the Commander of INTERFET, Major General Cosgrove, promulgated an ordinance establishing the unit and the rules under which it would function. Significantly, the ordinance applied the law of Indonesia as it had applied to East Timor, with some exceptions. This was controversial but arguably necessary. It was controversial because Australia was one of very few countries which recognised Indonesian sovereignty over East Timor. Most nations saw Indonesia’s occupation of East Timor from 1975 to 1999 as unlawful. Australia’s main partner in INTERFET, New Zealand, among others, therefore took the view that Portuguese law as it applied to East Timor in 1975 should still apply. It became practically necessary to apply Indonesian law as it had been the de facto applicable law in the territory for the previous 24 years.

The Commander of INTERFET’s Ordinance was therefore a significant legislative act which has had an enduring effect. The United Nations Transitional Administration in East Timor in its Regulation 1 of 1999 (27 November 1999) applied the law as it stood in East Timor on 25 October 1999, thereby accepting the Ordinance as law as well as

232 Oswald, ‘The INTERFET Detainee Management Unit in East Timor’, above n 223, 352.
233 Felicity Rogers, above n 158, 571–3.
234 Oswald, ‘The INTERFET Detainee Management Unit in East Timor’, above n 223, 353.
continuing the application of Indonesian law. This regulation is still part of the law of Timor-Leste and, with it, effectively the Commander of INTERFET’s Ordinance. As an exercise of prerogative power in a situation of martial law this legislative act has not been questioned.

The DMU itself exercised judicial power. In the absence of a judiciary there was a need to provide a substitute form of due process for those arrested for serious crimes. The DMU acted effectively as a bail court. Where INTERFET detained a person for alleged criminal behaviour, there was a process whereby such persons came before the DMU. There was a military judicial officer, a military prosecuting officer and a military defending officer. After taking paper submissions, the military judicial officer could order continued detention of the person for handing over to the future civilian judicial system, or for a fixed period of time, conditional release (akin to bail) or unconditional release. The DMU heard matters against 60 persons, of whom it released 21 without conditions. INTERFET also ran a Force Detention Centre, for which the DMU exercised an oversight role in the form of a Visiting Officer. This was effectively the East Timorese prison system for the duration of INTERFET and its detainees subsequently became the detainees of the civil judicial system at the end of the INTERFET period. As an exercise of prerogative power, this form of martial law also has not been questioned.

(ii) East Timor Post INTERFET
The ADF retained a role in maintaining security after the INTERFET period, which continued until 2013. It is unclear the extent to which this has extended at various times beyond exercising powers like any ordinary citizen could exercise in Australia, such as self-defence, arrest and so on as discussed in Chapter 4. The prerogative for the control and

235 Ibid 352.
239 Ibid 351, 358.
241 Department of Defence, Timor-Leste <www.defence.gov.au/operations/pastoperations/timorese/>. 242 These powers could be available by virtue of Timor-Leste’s own law or by virtue of Defence Force Discipline Act’s 61 applying the criminal law of the Jervis Bay Territory to the conduct of ADF members. Although, as discussed in Chapter 4, this would not be the same as an ordinary citizen exercising these powers.
disposition of the forces would have authorised the armed presence of the ADF on the streets in Timor-Leste.243 The maintenance of vehicle checkpoints would have had to rely upon the external affairs prerogative, possibly together with the authority of local law, as it would have been beyond the power of any ordinary citizen to do this. Other than that, the ADF does not appear to have exercised coercive powers, so this chapter will not address this period any further.

2 Observations on the Limits of Martial Law in Occupied Foreign Territories

In some respects the DMU represents a modern form of martial law court martial in that it was a military means of affording due process to civilian detainees in a foreign territory where no other system of justice existed. The Duke of Wellington’s comments would have been equally applicable to the DMU:

Martial law is neither more nor less than the will of the general who commands the army. In fact martial law means no law at all, therefore the general who declares martial law, and commands that it should be carried into execution, is bound to lay down distinctly the rules and regulations and limits according to which his will is to be carried out.244

On one view, as far as prerogative power is concerned, the history of the ADF’s practice of martial law in foreign occupied territories could suggest that there are relatively few limits on powers of the ADF in such circumstances. Statute law, as discussed above in the form of the Defence Force Discipline Act and the Criminal Code, for example, will primarily provide a distinct limit to the powers exercisable but does not purport to regulate explicitly the conduct of a military occupation or martial law. Prerogative power could, arguably, authorise any act that is related to the mission of the ADF in the foreign territory. The application of martial law in territories outside of Australia, whether so called or not, would appear from even recent history to be virtually unchallenged. So long as the ADF’s actions relate to its mission, its assumption of civilian government functions overseas is arguably not directly restricted by Australian law. There are alternative possibilities however, to which this chapter will return.

It is important to note that the ADF operations in Somalia and East Timor were less than six months. There was local law which the ADF sought to apply, even if there was no functioning government. In this sense, unlike the situation in *Serdar Mohammed* where British forces did not directly apply Afghan law, ADF actions arguably relied for their authority upon the local law. The exception to this is that ADF members were not officials appointed under that law. Given the collapse of government in both situations, arguably the external affairs prerogative as informed by the relevant United Nations Security Council resolution remedied this deficiency for the purposes of Australian law. General Cosgrove’s ordinance creating the DMU was the only means of legislating within East Timor at that time. If the operations had extended into years rather than months, the requirement stated in *Serdar Mohammed* for the government to seek legislative authorisation from the Australian Parliament may have been a consideration.

The ADF experience is quite unlike the contemporaneous scrutiny which British forces have undergone in the English courts as discussed above. This seems to have a connection to jurisdiction under the *Human Rights Act 1998* (UK), which was a central concern in *Al-Jedda*, *Smith* and *Serdar Mohammed* and also possibly to the greater extent of British involvement in external security operations generally, which might explain *Nissan*, *Thring* and *Bici*. It is only if comparable cases come before Australian courts with respect to the ADF that it can really be seen if the practice does reflect the law. This chapter will argue below that, should a comparable case arise, Australian courts should follow the approach in *Serdar Mohammed*.

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245 [2015] EWCA Civ 843. This was not a direct issue in *Al-Waheed* [2017] UKSC 2 but did arise in *Rahmatullah (No 2)* v *Ministry of Defence; Mohammed v Ministry of Defence* UKSC 1 (‘*Rahmatullah (No 2)*’), in which the Government successfully argued Act of State doctrine.

246 *Serdar Mohammed* [2015] EWCA Civ 843, [363].


249 [2015] EWCA Civ 843.


251 Court of Appeal (Civil Division) (Unreported, Pill, Clarke, Bennett LJJ, 20 July 2000).

252 [2004] EWHC 786. Adam Tomkins, ‘The Struggle to Delimit Executive Power in Britain’, in Paul Craig and Adam Tomkins (eds), *The Executive and Public Law: Power and Accountability in Public Perspective* (Oxford University Press, 2006) 16, 47 speculated that the *Human Rights Act* may have this effect. Thomas Tugenhadt and Laura Croft, *The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power* (Policy Exchange, 2013) 14–21, attribute this to the *Human Rights Act*. They describe a state of ‘legal siege’ and express concern that the military values upon which operational success rely are being replaced by legal values which derive from human rights instruments originally intended for application in ‘stable European contracting states’ and not military operations in countries ‘far beyond its original design’.

IV Limitations

A Occupation of Foreign Territories as Martial Law

It seems fairly clear that when Australian forces take over a foreign territory that the traditional factors for the imposition of martial law, discussed in Chapter 3, are in place. These are that the military exercises some or all of the executive, legislative or judicial functions in part or all of that territory. This could be the case even if some elements of the previous administration remain effective, such as was initially the case in German New Guinea,254 but the sovereign authority has been displaced and with it the authority for the residual elements of the previous administration to act. Martial law applies as a matter of fact, if not law. Two further questions arise, then. One question is the substance of that law, which this chapter will address below. The other question is the duration of martial law.

1 Duration

To deal first with duration, as stated in the case of East Timor, this was for as long as it took to establish a civilian administration under United Nations authority.255 In the case of the occupied German territories, this lasted for the duration of the war and for some time afterwards, until the League of Nations mandates clarified the postwar status of those territories.256 The continuing state of war with Germany appeared to be enough to justify maintaining military control for that period rather than establishing a civilian administration, even though Nauru had Colonial Office civilian administration during the same period.257 The situation was not apparently subject to legal challenge. The much shorter occupations in Somalia and East Timor were both less than six months and there was no legal challenge to the Australian occupation of these territories at any stage. As a matter of policy, the duration of martial law in occupied foreign territories would appear to be until a civilian administration can take over. It is not possible to discern from these diverging examples that this is a rule of law though, nor that there is a limitation of necessity as there would be in a case of martial law within the realm.

254 Nagle, above n 201, 6.
256 Charteris, above n 178, 137–8.
257 Ibid.
2 What is the Substance of Martial Law Applied outside Australia?

As discussed in Chapter 5 on war, historically and currently, the doctrine of extraterritoriality means that only limited Australian law applies to the conduct of operations by the ADF outside Australia and the most relevant statutory regime since 2002 is div 268 of the *Criminal Code Act 1995* (Cth) together with the *Defence Force Discipline Act*. The regulatory aspects of the international law of occupation do not apply by force of statute though. There are some specific offence provisions of the *Criminal Code Act 1995* which might relate to occupation, such as not unjustifiably appropriating property, forcibly transferring the population or torture but most of the *Fourth Geneva Convention*, which might regulate an occupation, and which only applies de jure after an armed conflict to which the occupier is a party, remains in the realm of international law only.

Interestingly, although a property law case, *Mabo*, has some bearing on the question of the applicable law in foreign territories which come under the control of the Crown. Reflecting the same concern which appears to underlie s 268.29 (unjustifiably appropriating property) of the *Criminal Code Act 1995*, Brennan J considered the significance of private property rights in such situations and stated:

> [T]he true rule as to the survival of private proprietary rights on conquest to be that ‘it is to be presumed, in the absence of express confiscation or of subsequent exproprietary legislation, that the conqueror has respected them and forborne to diminish or modify them.’

His Honour also considered that the authorities meant that this applied to situations of cession as well as conquest. The significance for this book is that in situations where there is no purported acquisition of sovereignty, as in East Timor and Somalia, there would appear to be less of a basis to argue that the Crown could disregard local private property rights. This is consistent with the view of the House of Lords in *Nissan* discussed above. It is also consistent with the position discussed in Chapter 5 that executive

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258 s 268.29.
259 s 268.11.
260 ss 274.2, 268.13, 268.25, 268.73.
262 *Mabo (No 2)* (1992) 175 CLR 1.
264 Ibid 55.
power could not acquire property on other than just terms if it is beyond the power of the Commonwealth Parliament to do so. Section 51 (xxxi) of the Constitution is not on its face limited to actions within Australia as it refers to acquisition from ‘any State or person for any purpose in respect of which the Parliament has power to make laws’. In the case of conquest, as in German New Guinea, even though de jure sovereignty was ultimately subject to a League of Nations mandate, it appears that the Crown respected private local property rights through its conduct of property cases and land administration.266 This is a limitation upon the prerogative power of the Crown in an occupation. It would not prevent acquisition or requisition of property in the occupied territory but this would have to be done with due regard to local property law and on just terms.

Arguably this reasoning extends beyond private property rights to all existing law within the occupied territory, which would apply until such time as the military commander explicitly changed it. Clode was of this view, stating:

With regard to such Crown Colonies as are acquired by conquest, except in so far as rights may have been secured by any terms of capitulation, the power of the Sovereign is absolute … Such possessions keep, it is true, their own laws for the time; but subject to … the absolute power of the Sovereign … to alter those laws in any way …267

This would be consistent with international law and Australian practice in each of the historical examples. The emphasis in Serdar Mohammed268 on the significance of local law discussed above, and the need for compelling public policy considerations to justify not relying upon that law,269 point strongly towards a requirement generally to respect all local law and also to take into account Australia’s international human rights obligations.270 The emphasis on the principle of legality in Williams, CPCF and M68 also discussed above would support this. As to whether there is a common-law obligation on the Crown to enforce law and order, through martial law, in an occupied territory is another question again.271

266 Nagle, above n 201, 13–19.
267 Clode, Military Forces of the Crown, above n 33, 175.
269 Ibid [364].
270 On this point and its uncertainty in 1906, see Harrison Moore, above n 7, 78–83.
While the ADF remains accountable to the Parliament and the courts in Australia for its actions overseas, as far as the local jurisdiction is concerned, as discussed above, Australia’s constitutional arrangements for subordination of the military to civilian control, the separation of powers and the responsibility of the States for general policing have no direct application. This is a matter for international law and whatever arrangements might be made between the Commonwealth Executive and the local jurisdiction. This means, effectively, that the ADF is less constrained in its lawful activities overseas. There is no impediment in Australian law then to the ADF becoming the de facto government of East Timor in 1999, for example. A similar action in the future would not directly offend div 268 of the Criminal Code Act or the Defence Force Discipline Act. There would appear however to be a specific requirement to respect local property law and a more general obligation to assume the application of all local law unless explicitly changed by a legislative act, taking into account Australia’s international human rights obligations.

B Use of Force and Contrary Statutes

As discussed above, some ADF actions in external security operations could amount to offences against persons, such as through arrest, detention and so on, and there is applicable statute law which would proscribe such action. As discussed in Chapter 5, the Defence Force Discipline Act and the Crimes at Sea Act 2000 apply to ADF operations outside of Australia. The Criminal Code Act 1995 also applies, although, as discussed above, fewer of its provisions are relevant to ADF operations outside of an armed conflict. With respect to the use of force, the operations considered above indicate that ADF external security operations essentially have a law enforcement character. The force required is that necessary for mission accomplishment, such as stopping, searching and detaining people, vehicles and vessels, as well as self-defence. While actions in self-defence are consistent with the applicable statutes, the absence of statutory authority for the use of force for mission accomplishment actions raises similar questions as those relating to the use of force in war discussed in Chapter 5. It is arguable that, as with war, as a matter of statutory interpretation, the Parliament would not legislate to abolish the prerogative with respect

272 Crimes at Sea Act 2000 (Cth) s 6; Defence Force Discipline Act 1982 (Cth) s 9.
273 See Oswald, ‘Detention of Civilians on Military Operations’, above n 112, 532 on the relevance of domestic criminal law to detention in military operations and, generally, on issues with detention in international law.
to external affairs without express words. The applicable statutes are of general application and do not explicitly regulate the use of force under the external affairs prerogative, apart from relevant sections of div 268 of the Criminal Code (relating to crimes against humanity such as torture, and forcibly transferring the population). Therefore an ADF use of force clearly pursuant to an exercise of the external affairs prerogative could be lawful, but this would have to be despite the existence of a contrary statute.

1 The State of the Authorities

The difficulty is that the war prerogative, while having virtually no authority for its substance, is well recognised. However, the authority to conduct coercive external security operations has very little authority to support it. The authorities most on point are Buron v Denman, Thring, Al-Jedda and Serdar Mohammed. As discussed above, there are Australian cases which create some uncertainty as to the strength of these authorities. With this in mind, as for war, it is still possible to argue on the basis of statutory interpretation that apparently contrary statutes do not proscribe the use of force in ADF external security operations. This argument cannot be made as strongly as it can be for the war prerogative, however, given the state of the authorities. Still, there does not appear to be any other way to reconcile the practice of ADF external security operations with the existence of apparently contrary statutes. This is problematic.

There is a problem with relying upon practice alone to determine the legality of ADF operations. As Heydon J firmly stated in Pape:

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275 ss 274.2, 268.13, 268.25, 268.73.
276 s 268.11.
277 (1848) 2 Ex 167; 154 All ER 450.
278 Court of Appeal (Civil Division) (Unreported, Pill, Clarke, Bennett LJJ, 20 July 2000).
280 [2015] EWCA Civ 843. Lady Hale is more emphatic however in Rahmatullah (No 2) [2017] UKSC 1, ‘We are left with a very narrow class of acts: in their nature sovereign acts – the sorts of things that governments properly do; committed abroad; in the conduct of the foreign policy of the state; so closely connected to that policy to be necessary in pursuing it; and at least extending to 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)’ [37].
Executive and legislative practice cannot make constitutional that which would otherwise be unconstitutional. Practice must conform with the Constitution, not the Constitution with practice. The fact that the executive and legislative practices may have generated benefits does not establish that they are constitutional …

In the absence of any specific authority, practice may provide a guide as to what is accepted as lawful. If a matter is not a subject of legal controversy or specific statutory regulation then this may indicate lawfulness. This is not in any way conclusive, merely indicative. The High Court considered practice as a guide in Williams and Pape so it might be appropriate to look to practice when there is no law that is specifically applicable. Past practice however does not justify any past unlawfulness by the ADF in external security operations. It merely prompts a consideration of what justification there may be in law for such practice. The alternative is that the practice is unlawful. If there is no authority for the use of coercive measures under the external affairs prerogative then practice will not make it lawful. As Kiefel J stated in Williams, consistent with the principle of legality, ‘actions of the Executive must fall within the confines of some power derived from the Constitution’.

Given the emphasis on the principle of legality emerging from Williams, CPCF and M68, an argument based only upon past practice, statutory interpretation and an uncertain prerogative is unlikely to be enough. This needs to be taken together with the considerations in Serdar Mohammed regarding not relying upon local law, such as the direct authority of a United Nations Security Council Resolution or the objectionable nature of local law allowing a practice such as slavery. The effect is that the use of force in external security operations should find authority in local law, Australian law or an international law instrument such as a United Nations Security Council Resolution. The external affairs prerogative may justify the high-level policy decisions to commit the ADF to an operation with

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281 Pape v Commissioner of Taxation (2009) 238 CLR 1, 230, (‘Pape’).
283 (2009) 238 CLR 1, 24–25 (French J on parliamentary appropriations practice) 74 (Gummow, Crennan and Bell JJ on parliamentary appropriations practice) 122 (Hayne and Kiefel JJ on delineation of roles of executive and legislature).
285 Serdar Mohammed [2015] EWCA Civ 843 [364]. Al-Wahaed [2017] UKSC 2, even though giving more scope to the authority of sovereign acts in the conduct of the foreign policy of the state (Lady Hale) [37], does not change this conclusion in respect of Australia.
the intention of using force. Beyond that, authority should be sought in
directly applicable law. This is because actions involving the use of force are
likely to be justiciable in an Australian court, both because the executive
is always subject to the jurisdiction of Australian courts as discussed, and
also because a court would likely be quite capable of adjudicating on
such actions as if they had occurred in Australia. The defence of Act of
State in such a proceeding may well rest only upon a directly applicable
United Nations Security Council Resolution. This position is consistent
with McLachlan’s argument in Foreign Relations Law that such questions
fundamentally concern choice of law, whether it be local law, the law of the
nation sending the armed force, or international law.286

(a) Use of Lethal Force

This raises a key difference between external security operations and war,
which is the presence of an enemy and, therefore, when it is lawful to
use lethal force. If there is no enemy in an external security operation
then there can be no basis to use lethal force for the purpose of the
operation, unless it becomes an armed conflict as a question of fact and
then a question of the war prerogative. This does not affect the right to use
force in self-defence or the defence of others, as the applicable statute law
provides for this. This is consistent with the principle of legality in Shaw
Savill Albion & Co Ltd,287 in that members of the ADF enjoy combat
immunity only when engaged in actual operations against an enemy.288
If there is no enemy, there is no combat immunity, and so the use of
lethal force is subject to the ordinary law applicable to the ADF which
limits the use of lethal force to situations of self-defence. The concept of
mission essential property advanced by Kelly and others, which is that it
is lawful to use lethal force to protect certain mission essential property
even without a direct threat to life, is not sustainable on this view.289 Any
other, nonlethal, use of force would have to be consistent with the external
affairs purpose of the ADF operation, which would most likely be that
required only to enforce or carry out a United Nations Security Council
Resolution or bilateral or regional agreement. Even then, the authority for
even nonlethal uses of force is scant.

286 McLachlan, above n 21, 278, and more broadly 276–93.
287 Shaw Savill Albion & Co Ltd v Commonwealth (1940) 66 CLR 344, 354 (‘Shaw Savill Albion &
Co Ltd’).
288 Rob McLaughlin, ‘The Use of Lethal Force by Military Forces on Law Enforcement Operations
289 See Kelly et al, above n 181, 9. See Oswald, ‘The Corps on operations: 1987–2000’ in Oswald and
Waddell, above n 422, 423–4, which outlines the arguments, and their protagonists, for and against.
As to contrary statutes and the dearth of authority overall, it is open to consider whether this is a situation which requires further regulation by statute. The Court in *Serdar Mohammed* strongly indicated to the Parliament that it should look at legislation,\(^2^9^0\) and it is a matter that has been under consideration by the House of Commons as indicated by its Defence Committee report titled *UK Armed Forces Personnel and the Legal Framework for Future Operations.*\(^2^9^1\) It is not the direct aim of this book to explore statutory reform as it is to find the limits of executive power as it relates to the ADF. However, it is worth considering briefly whether there are alternatives to the current uncertain state of the authorities. From the perspective of the Commonwealth seeking to maintain maximum flexibility in highly uncertain situations outside Australia, which do not directly intrude upon the limitations upon executive power within Australia discussed above, it could likely be attractive to keep external security operations on an executive power basis. This could avoid unintentionally constraining the powers available. This still leaves ADF members in an uncertain position, an issue to which the conclusion to the book will return. This approach may also not provide much protection to those foreigners subject to the coercive use of power by the ADF in external security operations either. The operation of the *Human Rights Act* (UK) has provided an example of how statute might provide greater protection. It was not drafted for the purpose of regulating external security operations by British forces however and, given the concerns raised by Tugenhadt and Croft on this point, there could be better ways of approaching the issue.\(^2^9^2\) This is a point worthy of further exploration, although not here.

### C Act of State Doctrine

It comes now to return to Act of State and this chapter’s argument for its place in the law relating to ADF external security operations. As discussed, as opposed to war, there is no combat immunity in external security operations and any interference, loss or damage could give rise to a claim against the Commonwealth. For example, a ship or cargo owner or a crew member could have sued the Commonwealth for loss or damage, much as occurred in *Shaw Savill & Albion Co Ltd,*\(^2^9^3\) arising from

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\(^2^9^0\) [2015] EWCA Civ 843 [363].  
\(^2^9^2\) Above n 252, 31–2.  
\(^2^9^3\) (1940) 66 CLR 344, 354.
a boarding operation by the RAN to enforce a United Nations Security Council Resolution. This could have been the case, for example, even if a detained vessel was clearly engaged in ‘inward and outward maritime shipping’ from the country in question in the terms of a United Nations Security Council Resolution. The remedy is likely to be a diplomatic one but it is possible that the ship owner could have commenced proceedings against the Commonwealth over the delay caused to the vessel. The Commonwealth could then have pleaded Act of State doctrine.

The question is whether an Australian court would accept this plea and determine the matter to be nonjusticiable or, alternatively, justiciable but subject to immunity. Following Habib and M68, it is unlikely that an Australian court now would apply Buron v Denman or Thring and state that actions in accordance with the mission are nonjusticiable. It could apply Bici, Nissan, the reasoning in Ali as well as the reasoning in Al-Jedda and Serdar Mohammed and see the actions of the ADF as justiciable and scrutinise them for consistency with the relevant international law instrument. The latter approach of justiciability subject to a defence of Act of State is perhaps more likely given the approach taken in Hicks, Habib and Ali, as well as Williams, CPCF and M68. This is, arguably, preferable in international law enforcement operations to an approach which would relieve such operations of the scrutiny of the courts. It would serve to support the purpose of such operations as themselves supporting the international rule of law. This

294 Possible claims under admiralty jurisdiction may be limited as most actions for loss or damage arise under contracts, the main exception being for collisions—an occurrence unlikely to be authorised by an enforcement treaty or United Nations Security Council Resolution, see Martin Davies and Anthony Dickey, Shipping Law, (Lawbook, 3rd ed, 2004) 409–42.
297 [2016] HCA 1.
298 (1848) 2 Ex 167; 154 All ER 450.
299 Court of Appeal (Civil Division) (Unreported, Pill, Clarke, Bennett LJJ, 20 July 2000).
300 [2004] EWHC 786.
305 (2007) 156 FCR 574.
308 (2012) 248 CLR 156.
310 [2016] HCA 1.
is not to argue that an exercise of the external affairs prerogative is only lawful if it conforms to international law. As discussed earlier in this chapter this is not necessarily required. However, consistency with the international law instrument, including Australia’s relevant international human rights obligations, could inform a consideration of whether an action by the ADF is actually a lawful exercise of the prerogative with respect to external affairs. If the ADF’s actions were consistent with the relevant international law instrument, the court could determine that they were a lawful exercise of the prerogative and, therefore, protected by the defence of Act of State. It could also find them to be negligent or intentionally wrongful actions, whether under local or Australian law, or actions inconsistent with the relevant international instrument and, accordingly, not protected by this defence. It would be consistent with Shaw Savill Albion & Co Ltd to take this approach and make Act of State a companion doctrine for external security operations to the combat immunity doctrine for operations in war.

V Conclusion

United Nations Security Council Resolutions and other international enforcement instruments should inform the content of Act of State doctrine. Even though the doctrine is uncertain, if it is to have worthwhile meaning, the relevant international law instruments should provide some substance to it. They could limit the defence which Act of State doctrine provides or define the authority protected by that defence. From a policy perspective, it is undesirable that any coercive action in a United Nations or other peace operation by the ADF, of itself, should ground a claim against the Commonwealth. To repeat Arden LJ’s point in Al-Jedda:

If courts hold states liable in damages when they comply with resolutions of the UN designed to secure international peace and security, the likelihood is that states will be less ready to assist the UN achieve its role in this regard, and this would be detrimental to the long-term interests of the states.

311 (1940) 66 CLR 344, 354.
312 Lindell notes the connection between the two doctrines, The Coalition Wars, above n 44, 37 n 140; Renwick sees the answer to these questions lying in Act of State doctrine and nonjusticiability (without elaborating further as to the extent of that nonjusticiability), James Renwick, ‘Detention Without Trial – The Relevance for Australia of the US Supreme Court Decisions in Hamdi, Rasul and Rumsfeld’ (Speech to Judicial Conference of Australia, 3 September 2005) 10.
Where actions within an external security operation do have a clear link to the authorising treaty or Security Council Resolution and other relevant international law, the common law could recognise such international law as being the lawful limits of an Act of State, where it is contrary to local law, and so give greater certainty to the doctrine. It could be a form of international law being a ‘source’ or ‘a legitimate and important influence on the common law,’ especially when international law declares the existence of universal human rights. Although the Australian authorities simply do not extend this far at present, the relevant international law is the only place to look for the substance, and therefore the limits, of the prerogative with respect to external affairs and the extent to which Act of State doctrine might provide a defence to actions under it. It would be consistent with the principle of legality at both international and national levels. Should a suitable case come before it, an Australian court should follow Serdar Mohammed and find actions directly pursuant to the international law authority which prevent reliance on local law, or an Australian statute, protected by the defence of Act of State to the extent to which the relevant international law requires action contrary to that law.

Despite this uncertainty, there has been a clear preference in Australian practice for external security operations to remain under the authority of executive power. Except recently under the Maritime Powers Act 2013 (Cth), there has been no attempt to place such operations on a statutory footing, which stands in contrast to the detailed statutory arrangements for ADF domestic security operations. Another interesting feature of such operations is that they are a product of the post Charter of the United Nations world which Australian law has not incorporated to anything like the same extent it has incorporated the international law of war. For example, the lack of applicable law stands in contrast to the elaborate constraints in the law of prize, which provided some protection for commercial shipping interests from the vicissitudes of naval warfare prior to the United Nations era. What does this say about the limits of this external prerogative power? Outside of Australia, the limits to prerogative power would appear to be applicable statute law, arguably interpreted.
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in accordance with the purpose of the particular exercise of that power, local law, particularly property law, and the defence of Act of State. This is uncertain but international law, such as a United Nations Security Council Resolution, should provide a guide as to whether a particular action is protected by this defence or not. Until there is clear authority to support this proposition however, it remains only arguable.
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