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Australian Court Permits Damages Claim for Torture by former Guantánamo Bay Detainee to Proceed

By Dr. Stephen Tully

I. Introduction

The Federal Court of Australia recently ruled that allegations by Mamdouh Habib, alleging that Australian law enforcement and intelligence officials were complicit in his torture on foreign soil by agents from Pakistan, Egypt, and the United States, can proceed to trial.[1] While this outcome complements recent jurisprudence from Canada and the United Kingdom on comparable issues, it contradicts U.S. case law dismissing similar claims.[2] This *Insight* presents an overview of the *Habib* case and briefly discusses its legal implications and its broader international significance.

II. Factual Background and Procedural History

Habib, a dual Australian-Egyptian citizen, was captured by U.S. forces in Afghanistan and then transferred to and detained in Pakistan during 2001.[3] Australian intelligence and law enforcement officials were informed of his arrest and interviewed Habib in Pakistan. Habib alleged that he had been kidnapped and abused. Moreover, he claimed that Australian officials were present when he was interrogated by U.S. personnel. Habib was then transferred to Egypt in November 2001, notwithstanding objections by Australian officials. Habib claims that he was tortured for six months on the basis of information provided by Australian authorities and that an Australian official was present on at least one occasion. Australian intelligence officials, however, have only acknowledged that they suspected Habib was in Egypt and, notwithstanding objections, requested permission to interview him; they deny, however, that Habib was tortured.

In May 2002, Habib was transferred to the U.S. controlled Guantánamo Bay Naval Base in Cuba. Australian officials were aware of this transfer and interviewed Habib, who again claimed that he had been tortured in Egypt and was being mistreated at Guantánamo Bay. Although Australian officials concluded that he was being treated well, they referred his claims of torture by U.S. authorities for investigation and accepted U.S. assurances that he was being treated humanely. In 2005, Habib was repatriated to Australia without charge. Australia indicated that his torture allegations would be treated seriously and admitted that it was possible that Habib may have been abused in Egypt. While generally acknowledging that it knew of Habib's whereabouts and arranged interviews with him, the Commonwealth has always denied Habib's torture claims.

In December 2005, coinciding with administrative[4] and defamation proceedings,[5] Habib sought damages against the Commonwealth of Australia, claiming that it negligently failed to fulfill a justiciable duty of care owed its citizens abroad to take all reasonable steps to ensure that, when in the custody of foreign governments, they are treated lawfully, fairly, and humanely. He alleged that Australian officials were authorized to be present during his detention and interrogations in Pakistan, Egypt, and at Guantánamo Bay, but failed to investigate his complaints or provide any assistance, although ill-treatment must have been apparent.[6] During the initial proceedings, Habib also alleged that in 2001 he informed an Australian intelligence officer in the Australian High Commission in Islamabad that he had been mistreated, had visible signs of injury, and requested assistance. The Commonwealth acknowledged that Habib was interviewed by Australian

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Habib v. Commonwealth of Australia

officials, but at “safe houses” controlled by Pakistan. The Court concluded that, while “there is little reason to doubt that his arrest and imprisonment were accompanied by measures of more active physical abuse,” no meeting between Habib and Australian officials occurred at any location under Australian control.[7]

Several of Habib’s claims against the Australian government were partly stricken; others were the subject of leave to enable further amendment of the statement of claim.[8] Two of the claims permitted to proceed concern the torts of misfeasance in a public office and intentional infliction of indirect harm. These grounds assert that Commonwealth officers intentionally harmed Habib, knowingly acted outside lawful jurisdiction or authority, or were recklessly indifferent to those limits. In particular, Habib alleges that Commonwealth officers involved in his interrogation in Pakistan, Egypt, Afghanistan, and Guantánamo Bay aided, abetted, counseled, or procured the commission of offences by Pakistani, Egyptian, and U.S. officials.

The relevant law is the Crimes (Torture) Act 1988 (“CTA”)—Australian legislation which partly implements the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[9] and the Third and Fourth Geneva Conventions as implemented in Australia.[10] In particular, the CTA requires Habib to establish that the alleged acts of torture and other inhumane treatment were committed by persons acting at the instigation, or with the consent and acquiescence of public officials, or persons acting in an official capacity outside Australia. According to the Commonwealth, Australian courts will inevitably have to adjudge the acts of agents of foreign states, contrary to the act of state doctrine as originally enunciated in *Underhill v. Hernandez*.[11]

The Full Court of the Federal Court of Australia had to determine whether it was precluded from reviewing Habib’s claims—the establishment of which required the Court to judge the lawfulness of acts of agents of foreign states on their own territories—under the common law act of state doctrine. The Court unanimously held that the act of state doctrine did not preclude an assessment of Habib’s torture claims.

III. The Decision in *Habib v. Commonwealth*

Justice Jayne Jagot, with whom Chief Justice Michael Black agreed, concluded that the Commonwealth’s invocation of the act of state doctrine, if accepted, would preclude adjudication of Habib’s allegations. Justice Jagot considered that Anglo-American jurisprudence had developed in tandem with international law, such that the doctrine did not exclude judicial determination of alleged acts of torture constituting grave breaches of human rights, serious violations of international law, and conduct made illegal under Australian laws of extra-territorial effect.[12] According to Justice Jagot, limiting the jurisdiction of Australian courts could not be reconciled with Australian constitutional and legislative requirements, which demonstrate a parliamentary intention to proscribe torture and war crimes, irrespective of those involved or the locus of the crime. As to non-justiciability, Justice Jagot emphasized that international comity would not be undermined.[13] In relation to the submission that there were no clear and identifiable judicial standards against which Habib’s claims could be assessed, Justice Jagot concluded the alleged conduct of the Commonwealth officers could be judged against “the requirements of the applicable Australian statutes and the international law which they reflect and embody.”[14]

Chief Justice Michael Black agreed, stating that Australian common law “should develop congruently with emphatically expressed ideals of public policy, reflective of universal norms,” namely the prohibition against torture.[15] Furthermore, the policy of Australian law was directed at the conduct of public officials and persons acting in official capacity, irrespective of citizenship and identity of their government.

Justice Nye Perram concluded that the act of state doctrine, “whatever it might be – has no application where it is alleged that Commonwealth officials have acted beyond the bounds of their authority under Commonwealth law.”[16] His Honour noted that, consistent with the principle enunciated in *Marbury v. Madison*,[17] the limits of executive action raised a justiciable question which courts exercising federal jurisdiction were obliged to scrutinize as a basic element of the rule of law.

Arar v. Ashcroft Case Information

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Crimes (Torture) Act 1988

Criminal Code Act 1995

Geneva Convention relative to the Treatment of Prisoners of War

Geneva Convention relative to the Protection of Civilian Persons in Time of War

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United Nations Committee Against Torture

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IV. The Significance of the Decision

The Federal Court's decision is an important Australian reaction to recent jurisprudence concerning the alleged complicity of officials from Canada and the United Kingdom in the torture of their nationals detained by other states.[18] The efforts adopted to address international terrorism, including the conditions of detention at Guantánamo Bay, continue to occupy the attention of scholars, non-governmental and governmental organizations, and numerous others concerned with current detention policies.[19] In relation to Australia, one UN Special Rapporteur has already concluded that the "[e]vidence proves that Australian, British and United States intelligence personnel have themselves interviewed detainees who were held incommunicado by the Pakistani ISI in so-called safe houses, where they were being tortured."[20] The UN Committee against Torture has indicated that Australia "might have failed to establish its jurisdiction in some cases where Australian nationals have been victims of acts of torture abroad," especially given "allegations against law enforcement personnel in respect of acts of torture and other cruel, inhuman or degrading treatment or punishment."[21] However, to date, Habib's claims remain untested allegations.

Although not the first Australian judgment to explore the claims raised in *Habib*, the most recent decision in the ongoing *Habib* litigation clearly signals that his allegations are amenable to judicial resolution. The judgment also strongly affirms the prohibition against torture as a peremptory norm of international law[22] and the Parliament's intention to eliminate the practice. The decision is moreover noteworthy for thoroughly considering Anglo-American jurisprudence on the contemporary scope and application of the act of state doctrine. In this regard, Justice Perram observed that "[b]eyond the certainty that the doctrine exists there is little clarity as to what constitutes it" in Australia.[23]

Assessed in light of previous jurisprudence in Australia and other common law jurisdictions, the judgment in *Habib* is the first to suggest the possibility of compensation in tort for former Guantánamo Bay detainees. English courts, for example, have thus far only considered such questions when dealing with the permissibility of using information collected for intelligence-gathering purposes and allegedly obtained through torture, and the scope of a state's duty to intervene in cases where a risk of torture exists and the state lacks authority or control.[24]

In respect of Australians detained in Pakistan and denied access to legal assistance, Australian courts are prepared to quash convictions where involuntary admissions result from ill-treatment, inducements, and threats, without determining whether torture had in fact occurred.[25] However, there is to date no indication that, aside from Habib, any Australian, who may have experienced ill-treatment amounting to torture while detained by foreign states, is also contemplating legal action. Even if there are new legal proceedings, the implications for U.S. detention policy are few as the question raised in *Habib* is limited to determining the liability of Australian public officials under Australian law.[26]

The availability of damages arising from alleged complicity for violating the Geneva Conventions and the prohibition against torture is a question also being considered by U.S. courts.[27] As far as Australia is concerned, the proceedings may prompt a reevaluation of the operational practices employed by Australian law enforcement and intelligence-gathering agencies to ensure that routine activities, such as information exchange or attending of interviews, does not give rise to potential liability for complicity in torture.

V. Conclusion

Habib's prospect for success remains slim. Among the many challenges is the requirement to establish, under the civil standard, that the agents of foreign states committed the principal offence, even if they have not been prosecuted.[28] The broader question, whether the Convention against Torture and customary international law contemplate civil remedies against foreign states for acts of torture committed abroad, also remains uncertain.[29] Discovery is likely to require considerable time and money. It is also unlikely that the Australian officers implicated in these proceedings will be prosecuted.[30] Nevertheless, the Federal Court's judgment is an

influential contribution for clarifying the circumstances in which former detainees may be able to secure compensation from their state of nationality for claims of torture committed by agents of another state.

About the Author

Dr. Stephen Tully is a Sydney lawyer to whom all views are attributable. The author wishes to thank Djurdja Lazic and David Kaye for their very helpful contributions to previous drafts.

Endnotes

[1] *Habib v. Commonwealth of Australia* [2010] No. NSD 956 (Fed. Ct. Austl. Feb. 25), *available at* http://www.austlii.edu.au/au/cases/cth/FCAFC/2010/12.txt/cgi-bin/download.cgi/download/au/cases/cth/FCAFC/2010/12.rtf [hereinafter *Habib*].

[2] *See*, *e.g.*, Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009).

[3] *See* Australia's Compliance with the Convention against Torture, *Rep. to the UN Committee against Torture* (Human Rights Law Resource Centre) (Apr. 22-23, 2008), *available at* http://www.hrlrc.org.au/files/4M6OEL69DU/HRLRC%20Report%20to%20CAT.pdf; Amnesty International, *Australia: A Briefing for the Committee against Torture*, ASA/12/001/2007 (Oct. 2007), *available at* http://asiapacific.amnesty.org/library/pdf/ASA120012007ENGLISH/$File/ASA1200107.pdf; New South Wales Council for Civil Liberties, *Shadow Report Prepared for the United Nations Committee Against Torture on the Occasion of its Review of Australia's Third Periodic Report under the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* 36-38 (2007), *available at* http://www.nswccl.org.au/docs/pdf/CAT%20shadow%20report.pdf.

[4] Habib's Australian passport was revoked upon his return to Australia. The then-Minister for Foreign Affairs and Trade concluded that under the Australian Passports Act 2005 (Cth) Section 14(2) there were reasonable grounds to believe that if a passport were issued, Habib would likely engage in conduct that might prejudice the security of Australia or another state. Habib challenged this decision, but it was affirmed by the Administrative Appeals Tribunal. However, the Tribunal also expressed concern that there was no evidence contradicting Habib's account of abuse in Pakistan, Egypt, and Guantánamo Bay, which "could only be described as torture" and conveyed the "ring of truth." *See Re Habib and Minister for Foreign Affairs & Trade*; and *Re Habib & Dir.-Gen. of Sec.* [2007] AATA 1908, ¶¶ 14, 60. Habib challenged the Tribunal's decision, which was subsequently upheld by the Federal Court in *Habib v. Dir.-Gen. of Sec.* [2009] FCAFC 48, ¶ 80 (Black CJ, Ryan J & Lander JJ, Apr. 24). This decision has been appealed to the High Court of Australia.

[5] Habib has also separately pursued defamation proceedings against an Australian newspaper, which asserted that he was a terrorist. The New South Wales Supreme Court observed that Habib "knowingly made false claims" and was "prone to exaggerate," such that his claimed mistreatment in Pakistan and Egypt could not be sustained. *See Habib v. Nationwide News Pty Ltd.* [2008] 181 NSWSC ¶ 55 (McClellan CJ at Common Law, Mar. 7). This decision was overturned in *Habib v. Nationwide News Pty Ltd*. [2010] 34 NSWCA (Hodgson, Tobias & McColl JA, Mar. 16).

[6] Habib alleged that during one interview in Guantánamo Bay, at which Australian authorities were present, he was shackled to the floor. In this regard, a United Nations Special Rapporteur has suggested that active participation, such as "sending of interrogators or questions, or even the mere presence of intelligence personnel at an interview with a person who is being held in places where his rights are violated, can be reasonably understood as implicitly condoning such practices." *See* Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, ¶ 54, U.N. Doc. A/HRC/10/3 (Feb. 4, 2009), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.3.pdf.

[7] *Habib v. Commonwealth of Australia* [2008] 489 FCA ¶¶ 48, 51, 57 (Madgwick J, Apr. 16).

[8] *Habib v. Commonwealth of Australia* (No. 2) [2009] 228 FCA (Perram J,

Mar. 13).

[9] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85. Section 6(1) of the Crimes (Torture) Act 1988 (Cth), which gives effect to the Convention against Torture, makes it an offence for a public official outside Australia to torture a person. Australia's obligations under that Convention are intended to be more clearly fulfilled through the repeal of that legislation by the Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010 (Cth), introduced on November 19, 2009 and passed on March 11, 2010.

[10] Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

[11] 168 U.S. 250 (1897). *See* Adam Liptak, *U.S. Court Is Now Guiding Fewer Nations*, N.Y. Times, Sept. 17, 2008, *available at* http://www.nytimes.com /2008/09/18/us/18legal.html (noting that Australian courts decreasingly rely on U.S. Supreme Court cases).

[12] *Habib*, *supra* note 1, ¶ 135 (Jagot J).

[13] *Id*. ¶ 118.

[14] *Id*. ¶ 119.

[15] *Id*. ¶ 13 (Black CJ).

[16] *Id*. ¶ 24 (Perram J).

[17] 5 U.S. 137 (1803).

[18] For example, Maher Arar is seeking compensation from the United States alleging that, following a warning by Canadian authorities, he was detained in the United States, mistreated, and extraordinarily rendered to Syria, where he was tortured by Syrian officials before eventual repatriation to Canada. In *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009), the U.S. Court of Appeal held that delivery, providing questions, and obtaining answers that resulted from torture by Syrian officials was insufficient to establish that U.S. officials were clothed with the authority of Syrian law or that their conduct was otherwise attributable to Syria. Arar's claims impermissibly implicated foreign affairs and national security and could disclose confidential information. The U.S. Supreme Court denied a petition for certiorari. *See* Petition for Writ of Certiorari, *Arar* (No. 09-923), *available at* http://ccrjustice.org/ourcases/current-cases/arar-v-ashcroft; *see generally* Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar* (2006), *available at* http://www3.thestar.com/static/PDF/070808_arar_addendum.pdf; *see also* Department of Homeland Security's Office of Inspector General, *The Removal of a Canadian Citizen to Syria*, OIC-08-18 (2008), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIGr_08-18_Jun08.pdf.

[19] For example, Canadian authorities were called upon to investigate whether a former interrogation psychologist for the U.S. military should be investigated for complicity in war crimes and/or torture committed at Guantánamo Bay. *See* Canadian Centre for International Justice/Center for Constitutional Rights, Letter to the Honourable Peter Van Loan (Deputy of Public Safety Canada) (Aug. 5, 2009), *available at* http://ccij.ca/programs /cases/guantanamo/apa-letter-to-minister-8-2009.pdf.

[20] Human Rights Council, *supra* note 6, 19 n.63. *See also* International Commission of Jurists, *Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, Assessing Damage, Urging Action*, at 82 (Feb. 16, 2009), *available at* http://ejp.icj.org /hearing2.php3?id_article=167.

[21] UN Committee Against Torture [CAT], *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Concluding Observations*: *Australia,* ¶¶ 8, 19, 27, U.N. Doc. CAT/C/AUS/CO/3 (May 22, 2008), *available at* http://www2.ohchr.org/english/bodies/cat/docs/co/CAT-C-AUS-CO1.pdf.

[22] *Habib*, *supra* note 1, ¶ 9 (Black CJ) & ¶ 101 (Jagot J).

[23] *Id*. ¶ 38 (Perram J). Contrasting opinions were indicated on whether the doctrine was subject to a public policy exception for grave breaches of human rights as identified in *Kuwait Airways Corp. v. Iraqi Airways Co.* (Nos. 4 and 5) [2002] 2 AC 883, 1079, 1102, 1105 & 1109 (May 16); *compare Habib*, *supra* note 1, ¶¶ 99-100 (Jagot J) and ¶ 43 (Perram J).

[24] *Al Rawi & Others v. Sec'y of State for Foreign & Commonwealth Affairs & Anor* [2006] EWHC 972 (May 4); *A v. Sec'y of State for the Home Dep't* (No. 2) [2005] UKHL 71 (Dec. 8).

[25] *R v. Thomas* [2006] VSCA 165 (Maxwell P, Buchanan & Vincent JJ, Aug. 18). *See also Hicks v. Ruddock* [2007] FCA 299 (Tamberlin J, Mar 8) (a case where another former Guantánamo Bay detainee was repatriated to Australia after the Federal Court determined that it was inappropriate to dismiss *habeas corpus* proceeding without first considering evidence in relation to the nature and extent of co-operation arrangements and other commitments between Australia and the United States).

[26] No declaration is required concerning the conduct of foreign officials who are not subject to the jurisdiction of an Australian court.

[27] In *Al-Quraishi et al*. *v. Nakhla et al*., the U.S. District Court for the District of Maryland denied a motion to dismiss proceedings against a U.S. military contractor commenced by former detainees in military facilities in Iraq, including Abu Ghraib. The Court relevantly concluded that, while questions of immunity were outstanding, there were judicially discoverable and manageable standards for resolving this matter. *See* Al-Quraishi et al. v. Nakhla et al., No. PJM 08-1696 (D.C. Md. July 29, 2010), *available at* http://www.ccrjustice.org/files/7.29.10%20%20Decision%20denying%20motion%20to%20dismiss.pdf.

[28] Criminal Code Act 1995 (Cth), § 11.2(5).

[29] *Bouzari et al. v. Islamic Republic of Iran* [2004] Ct. App. Ont. 95 (Goudge, MacPherson & Cronk JJA, June 30), *available at* http://ccij.ca/uploads/Bouzari-Court%20of%20Appeal.pdf (holding that damages for abduction, imprisonment, and torture by foreign agents in another state's territory would be contrary to the principle of sovereign equality); *compare Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270 (June 14).

[30] Stephen Tully, *Australians Torturing Australians Overseas: The Risk of Complicity* (Feb. 11, 2010), *available at* http://ssrn.com/abstract=1551184.