Habib v Commonwealth of Australia [2010] FCAFC 12 (25 February 2010)

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I Introduction

On 4 October 2001, three days before the commencement of United States (US) combat operations in Afghanistan, dual Australian-Egyptian citizen Mamdouh Habib was arrested in Pakistan by Pakistani authorities assisted by US officials. For the following 40 months, Mr Habib was detained in Pakistan, Egypt, Afghanistan and Guantánamo Bay. Mr Habib alleges that during this time he was subjected to severe mistreatment, amounting to torture, at the instigation or with the knowledge or assistance of US authorities. Throughout, Mr Habib claims, Australian authorities were implicated in his mistreatment.

Following his release from Guantánamo Bay without charge on 28 January 2005, Mr Habib initiated, inter alia, proceedings with respect to tortious acts allegedly committed by Commonwealth officials during the course of his detention.[1] This case note provides an analysis of a motion filed by the Commonwealth of Australia seeking to have Mr Habib's proceedings dismissed on the ground that the determination of Mr Habib's claim would require an assessment of the acts of a foreign State, which acts are not justiciable before Australian courts. *Habib v Commonwealth of Australia*,[2] therefore, is a decision of the Full Court of the Federal Court (Black CJ, Jagot and Perram JJ presiding) considering the content of the common law act of state doctrine, and its application with respect to allegations of torture. Jagot J, with whom Black CJ agreed, authored the majority judgment, while Perram J authored a concurring, but separate, judgment.

Habib is a case of considerable significance. It provides important guidance for former detainees seeking redress for acts of torture committed by agents of a foreign State. The judgment reviews the act of state doctrine in light of contemporary American and British jurisprudence, providing greater certainty as to the contours of the doctrine under Australian law. Furthermore, the decision in *Habib* lends substantial support to the contention that the prohibition against torture enjoys peremptory status under international law and constitutes an established pillar of Australian domestic law.

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1 Mr Habib also pursued defamation proceedings against an Australian newspaper: *Habib v Nationwide News Pty Ltd* [2008] 181 NSWSC 55; this decision was overturned in *Habib v Nationwide News Pty Ltd* [2010] 34 NSWCA. In addition, after Mr Habib's Australian passport was revoked upon his return to Australia, he sought to challenge that decision before the Administrative Appeals Tribunal: *Re Habib and Minister for Foreign Affairs & Trade*; *Re Habib & Director-General of Security* [2007] AATA 1908 14, 60. Mr Habib challenged the Tribunal's decision, which was upheld by the Federal Court; the matter has returned to the Administrative Appeals Tribunal for a further appeal.

2 *Habib v Commonwealth of Australia* [2010] FCAFC 12 (25 February 2010) ('*Habib*').

II The acts alleged

The veracity or otherwise of Mr Habib's allegations with respect to his detention was not at issue before the Court; thus, a comprehensive treatment of their content is not necessary here. In summary, Mr Habib alleged that he was subjected to 'repeated and oppressive interrogation and mistreatment'[3] for the duration of his detention and interrogation: in Pakistan between 4 October and mid-November 2001; in Egypt between 21 November and May 2002; at Bagram and Kandahar airbases in Afghanistan in May 2002; and at Guantánamo Bay from May 2002 until 28 January 2008. According to Mr Habib, this conduct was carried out by or at the behest of agents of Pakistan, Egypt and the US, and constituted acts of torture within the meaning of s 3(1) of the *Crimes (Torture) Act 1988* (Cth),[4] in violation of s 6(1) of that Act.[5] Mr Habib also alleges that the conduct was contrary to provisions applicable to protected persons under the *Geneva Convention Relative to the Treatment of Prisoners of War*,[6] thus contravening s 7(2)(c) of the *Geneva Conventions Act 1957* (Cth) (with respect to conduct occurring prior to 26 September 2002) and ss 268.26(1) and 268.74(1) of the *Criminal Code*, being a Schedule to the *Criminal Code Act 1995* (Cth) (with respect to conduct occurring after 26 September 2002).[7]

Mr Habib's claim for damages against the Commonwealth is predicated upon the allegation that officers of the Australian Federal Police (AFP), Australian Security and Intelligence Organisation (ASIO) and the Department of Foreign Affairs and Trade (DFAT), by their actions, aided, abetted or counselled the unlawful conduct of the agents of the governments of Pakistan, Egypt and the US. Thus, Mr Habib alleges these Commonwealth officers also contravened the abovenamed provisions by virtue of s 11.2 of the *Criminal Code*.[8] Consequently, he has claimed damages against the Commonwealth for the tort of misfeasance in a public office[9] and the innominate tort of intentional infliction of indirect harm.[10]

III History of the proceedings and present application

On 16 December 2005, Mr Habib commenced proceedings in the High Court of Australia against the Commonwealth of Australia, by writ of summons. Pursuant to s 44(2A) of the *Judiciary Act 1903* (Cth),[11] the High Court remitted the proceedings to the Federal Court of Australia on 26 April 2006. A number of Mr Habib's initial claims were dismissed by the Federal Court on 13 March 2009.[12] At this time, Mr Habib was granted leave to re-plead defamation, misfeasance and harassment. By Notice of Motion filed on 17 June 2009, the

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3 Ibid [64] (Jagot J).

4 An Act giving effect to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.

5 Section 6(1) of the Act makes it an offence for a public official outside of Australia to torture a person.

6 *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) ('*Third Geneva Convention*').

7 On 26 September 2002 the offences contained within the *Geneva Conventions Act 1957* (Cth) were relocated to the *Criminal Code*.

8 Section 11.2 of the *Criminal Code* stipulates that aiding, abetting, or counselling the commission of an offence against a Commonwealth law is itself an offence.

9 *Northern Territory v Mengel* (1995) 185 CLR 307, 345–8.

10 *Wilkinson v Downton* [1987] 2 QB 57; *Giller v Procopets* (2008) 40 Fam LR 378.

11 Section 44(2A) of the Act permits the High Court to remit a matter to a court that has jurisdiction with respect to its subject matter.

12 *Habib v Commonwealth of Australia (No 2)* [2009] FCA 228 (13 March 2009).

Commonwealth sought and was granted (with the consent of Mr Habib) a full hearing before the Full Court of the Federal Court in order to determine the Court's jurisdiction to hear such matters in consideration of the act of state doctrine.[13] The following question was placed before the Full Court, pursuant to s 25(6) of the *Federal Court of Australia Act 1976* (Cth) and O 50 r 1 of the *Federal Court Rules 1979* (Cth):

> Should the application be dismissed in respect of the claims made in paragraphs 1-36 of the Fourth Further Amended Statement of Claim on the ground identified in paragraph 1 of the Respondent's Notice of Motion filed 17 June 1009?

The ground identified was:

> that, because the determination of those claims would require a determination of the unlawfulness of acts of foreign states within the territories of foreign states, [so that] those claims:
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> a) are not justiciable and give rise to no 'matter' within the jurisdiction of the Court under s 39B of the *Judiciary Act 1903* (Cth) and s77(i) of the *Constitution;*
> b) further or in the alternative, give rise to no cause of action at common law.

Jagot J, with whom the Chief Justice agreed, accepted the Commonwealth submissions that 'to resolve the claim the Court will have to determine whether Mr Habib's treatment by foreign agents within the territories of foreign states contravened Commonwealth laws creating criminal offences'.[14] After identifying which issues the Court had determine in order to resolve the claim,[15] Her Honour discerned that two primary questions remained before the Court:

1. Does judicial determination of these issues engages the act of state doctrine (which depends on the content and operation of the doctrine)?; and
2. How does the act of state doctrine operate in the Australian constitutional and statutory context?

IV The content and operation of the act of state doctrine

The two primary issues of contest with regards to the operation of the act of state doctrine were: how the court should interpret the development of American, British and Australian case law with respect to the doctrine; and what considerations should inform the content of the doctrine.

A The development of case law

That the act of state doctrine forms part of the common law of Australia is well established,[16] and was not in issue in the proceedings.[17] Rather, the parties disagreed on the

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13 *Habib* [2010] FCAFC 12, [23] (Perram J).
14 Ibid [70].
15 Ibid [57]–[67].
16 *Potter v Broken Hill Proprietary Co Ltd* (1906) 3 CLR 479; *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30; *Petrotimor Companhia de Petroleos SARL v Commonwealth of Australia* (2003) 126 FCR 354.
17 *Habib* [2010] FCAFC 12, [5] (Black CJ).

scope of the doctrine and its application in the present case. The starting point for the Commonwealth's contention that the act of state doctrine precluded Mr Habib's claim, was its reliance on the authoritative statement of the US Supreme Court in *Underhill v Hernandez*[18] that the act of state doctrine is a rule of the common law under which 'the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory'.[19] The Commonwealth maintained that there are no inflexible exceptions to the doctrine, a position reflected in the more recent decision of the US Supreme Court in *Banco Nacional de Cuba v Sabbatino*.[20] In particular, there is no established rule in either American or British jurisprudence that dispenses with the application of the doctrine where the acts in question are alleged to constitute grave violations of international law. While the Court in *Sabbatino* observed that 'the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it', it also concluded that the more important the implications of an issue of international law are with respect to foreign relations, the higher the threshold for judicial involvement in the matter.[21]

With respect to the jurisprudence of the United Kingdom (UK), of which *Oppenheimer v Cattermole (Inspector of Taxes)*[22] and *Kuwait Airways Corporation v Iraqi Airways Company (Nos 4 and 5)*[23] are the seminal cases, the Commonwealth contended that the House of Lords in *Kuwait Airways (No 5)* incorrectly identified *Oppenheimer* as authority for the proposition that there exists an exception to the act of state doctrine for acts of a foreign State contrary to the public policy of the forum State.[24] The Commonwealth instead sought to draw attention to the comments of Lord Hope in *Kuwait Airways (No 5)* that any exceptions to the doctrine must be subject to 'very narrow limits', which limits 'demand that, where there is any room for doubt, judicial restraint must be exercised'.[25]

However, contrary to the Commonwealth's contention that *Underhill* accurately describes the current contours of the act of state doctrine under American law, the doctrine has been the subject of subsequent judicial development before US courts. *Sabbatino* established that consideration of the factors informing the existence of the doctrine is necessary on a case-by-case basis.[26] Jagot J considered that *Sabbatino* elucidated four factors that might inform a conclusion that the doctrine is or is not engaged: the degree of international consensus regarding the pertinent international law; the implications for foreign relations; whether the foreign government continues to exist and remain in power; and whether the violations alleged were in the public interest.[27]

Such a test was applied in *Doe I v Unocal Corp*[28] and its general tenor adopted in *Sarei v Rio Tinto PLC*[29] and mirrored in the development of the doctrine in the UK. Jagot J rejected the Commonwealth's conclusions in relation to *Kuwait Airways*, relying instead on

18 *Underhill v Hernandez* 168 US 250 (1897) ('*Underhill*').
19 Ibid 252 (Fuller CJ).
20 *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964) ('*Sabbatino*').
21 Ibid 427–8.
22 *Oppenheimer v Cattermole (Inspector of Taxes)* [1976] AC 249 ('*Oppenheimer*').
23 *Kuwait Airways Corporation v Iraqi Airways Company (Nos 4 and 5)* [2002] 2 AC 883 ('*Kuwait Airways*').
24 *Kuwait Airways (No 4)* [2002] 2 AC 883, [317]–[320].
25 *Kuwait Airways (No 5)* [2002] 2 AC 883, [138]–[140].
26 *Sabbatino* 376 US 398 (1964), 427–8.
27 *Habib* [2010] FCAFC 12, [95].
28 *Doe I v Unocal Corp* 295 F 3d 921 (9th Cir 2002).
29 *Sarei v Rio Tinto PLC* 456 F 3d 1069 (9th Cir 2006).

Lord Nicholls' conclusion in that case that the public policy exception is 'well established in English law'[30] and exists within the context of the 'wider point of principle' identified in *Oppenheimer* that 'our courts should give effect to clearly established principles of international law'.[31] That *Oppenheimer* can be correctly identified as authority for the proposition that the act of state doctrine will not prevent the adjudication of acts alleged to constitute violations of fundamental human rights was confirmed by the UK Court of Appeal in *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs*.[32] On this basis, Jagot J concluded, it was clear that:

> the jurisprudence of the US and the United Kingdom developed after [the decision of *Underhill* in] 1897 in tandem with international law … and certain violations of international law (including torture) are recognised to involve contraventions of peremptory norms, or *jus cogens*, being norms about which all nations agree or are taken to agree and from which no derogation is permitted.[33]

Jagot J went on to extend the existence of limits on the doctrine, as perceived in the development of US and UK jurisprudence, to Australian authorities. Her Honour noted a number of Australian cases consistent with the development of common law jurisprudence in this context: *Sykes v Cleary*,[34] *Sue v Hill,*[35] *Applicant S v Minister for Immigration and Multicultural Affairs*,[36] and *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*.[37] Jagot J also noted the unequivocal nature of the Australian statutory instruments creating the prohibition against torture,[38] observing that 'the effect of the legislation is to render torture unlawful under Australian law no matter who engages in it or where it is engaged in'.[39] Black CJ, in agreeing with Jagot J, emphasised that:

> [t]orture offends the idea of a common humanity and the Parliament has declared it to be a crime wherever outside of Australia it is committed … The Crimes (Torture) Act reflects the status of the prohibition against torture as a peremptory norm of international law from which no derogation is permitted and the consensus of the international community that torture can never be justified by official acts or policy … [C]ongruence with the policy revealed by the Crimes (Torture) Act and its intended reach to the officials of foreign governments, even when acting within their own territory and under superior orders, points against the application of the act of state doctrine in the circumstances alleged by Mr Habib in the present proceeding.[40]

Finally, Jagot J sought to apply the *Sabbatino* four-stage test to Mr Habib's claims, concluding in relation to the respective stages that:

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30 *Kuwait Airways (No 5)* [2002] 2 AC 883, [18].
31 Ibid [139] (Hope L).
32 *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [52]–[57].
33 *Habib* [2010] FCAFC 12, [108].
34 *Sykes v Cleary* (1992) 176 CLR 77, 135–6 (Gaudron J).
35 *Sue v Hill* (1999) 199 CLR 462, [175] (Gaudron J).
36 *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387.
37 *Re Minister for Immigration and Multicultral and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1.
38 *United Nations Convention Against Torture*, opened for signature 4 February 1985, 1465 UNTS 85 (entered into force on 26 June 1987) arts 2(1)–(2), 4(1); *Crimes (Torture) Act 1988* (Clth).
39 *Habib* [2010] FCAFC 12, [112].
40 Ibid [11].

1. The prohibition on torture is the subject of an international consensus;
2. The potential ramifications for Australian's foreign relations have to be weighed in a context where the prohibition on torture forms part of domestic and customary international law; in addition, it must be recognised that this claim is against Australians in an Australian court, and thus the proposed impact upon agents of a foreign State is minimal;
3. The governments of the foreign States in question remain in existence; and
4. It would be difficult to contend that the alleged violations of international law claimed by Mr Habib were in the public interest.[41]

B The considerations informing the content of the doctrine

The Commonwealth maintained that two considerations should influence the determination of the operation of the act of state doctrine — the separation of powers, and international comity. Drawing from the High Court's statement in *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd*[42] that the principle underlying the doctrine 'is not one of discretion, but is inherent in the very nature of the judicial process',[43] the Commonwealth argued that the principle of separation of powers informed and necessitated the existence of the act of state doctrine. A further consideration, as observed by the US Supreme Court in *Oetjen v Central Leather Co*[44] is the potential that the examination of the acts of foreign States has to 'imperil the amicable relations between governments and vex the peace of nations'.[45] Thus, where the act of state doctrine is prima facie engaged, it applies until a consideration of the separation of powers and international comity militates against the continued operation of the doctrine.

Jagot J accepted that these two considerations influence the operation of the doctrine, but decided that in the present proceedings they did not preclude judicial determination of Mr Habib's claim. With respect to international comity, Her Honour made two observations. Firstly, extensive international consensus exists in support of a clear prohibition of torture, and thus the threat to international comity in the presence of such widespread consensus is minimal. Secondly, the particular circumstances of Mr Habib's claim is such that the involvement of or impact upon foreign officials is minimal.[46] In relation to the separation of powers rationale, Jagot J viewed that issue as inseparable from that of justiciability, for which applicable judicial standards are a requirement.[47] Her Honour considered that 'there are clear and identifiable standards by which the conduct in question may be judged – the requirements of the applicable Australian statutes and the international law which they reflect and embody'.[48] Adopting the language of Lord

41 Ibid [115].
42 *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 ('*Spycatcher*').
43 Ibid 41.
44 *Oetjen v Central Leather Co* 246 US 297 (1918).
45 Ibid 304.
46 *Habib* [2010] FCAFC 12 [118].
47 *Buttes Gas and Oil Co v Hammer* [1982] AC 888, 938 ('*Buttes Gas*').
48 *Habib* [2010] FCAFC 12, [119].

Wilberforce in *Buttes Gas and Oil Co v Hammer,*[49] Her Honour emphasised that the Court was not in a 'judicial no-man's land'.[50]

V The act of state doctrine in the Australian constitutional and statutory context

A final issue raised by the Commonwealth's motion is the question of who may judge Mr Habib's claim. Jagot J disposed of this issue concisely and with little anguish.[51] Her Honour made reference to ss 75(iii), 75(v), 76(i)–(ii) of the *Constitution*, the cumulative effect of which is to bestow: upon the High Court original jurisdiction in matters in which a writ of mandamus or prohibition or an injunction is sought against the Commonwealth or its officers; and upon the Parliament the power to make laws conferring original jurisdiction on the High Court in matters arising under the *Constitution* or involving its interpretation, or arising under any laws made by Parliament. By virtue of s 77(i), the jurisdiction of the High Court might be extended to any federal court with respect to the matters mentioned in ss 75 and 76.[52] Sections 39(B)(1) and 39(1A)(b)–(c) of the *Judiciary Act 1903* (Cth) endow the Federal Court with original jurisdiction equivalent to that defined in ss 75 and 76 of the *Constitution*. Her Honour cited with approval the conclusion of Gleeson CJ in *Plaintiff S157/2002 v Commonwealth of Australia*[53] that the effect of these provisions is to bestow upon the judiciary a 'constitutional jurisdiction to enforce the law so enacted' of which it cannot be deprived.[54]

Jagot J perceived the 'foundation of the principal tort on which Mr Habib relies in the claim (misfeasance in public office) [to be] conduct by Commonwealth officials in excess' of the power conferred on the executive by s 61 of the *Constitution*.[55] In so concluding, Her Honour noted the words of Gummow J in *Re Ditfort; Ex parte Deputy Commissioner of Taxation*[56] that

> a question as to the character and extent of the powers of the Executive Government in relation to the conduct of relations with other countries … will provide a subject matter for the exercise of federal jurisdiction pursuant to CH III of the Constitution. In such a case no question of 'non-justiciability' ordinarily will arise.

Reaching such a conclusion, Her Honour remarked, necessitates a rejection of any suggestion that a judge-made doctrine might succeed in excluding the jurisdiction of courts under ch III of the *Constitution*. A purposive interpretation of the provisions of the *Constitution* compels such a result, with the alternative being the exclusion from judicial scrutiny of the conduct of Australian officials in contravention of Australian laws. Consequently, Her Honour concluded, the Federal Court 'has both the power, and indeed the constitutional obligation, to determine Mr Habib's claim'.[57]

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49 *Buttes Gas* [1982] AC 888, 938.
50 *Habib* [2010] FCAFC 12, [119].
51 See also *Habib* [2010] FCAFC 12, [20]–[37] (Perram J).
52 *Commonwealth of Australia Constitution Act 1900* (Cth) s 77(i).
53 *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476.
54 Ibid.
55 *Habib* [2010] FCAFC 12, [121].
56 *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 369.
57 *Habib* [2010] FCAFC 12, [132].

VI Conclusion and potential significance

The Court's unanimous conclusion that the act of state doctrine did not preclude an assessment of Mr Habib's claims comes at a time when Canadian and British courts are assessing similar claims by their own citizens.[58] Thus, the decision may provide some assistance to other claimants seeking to establish the liability of officials for acts committed in foreign territory. *Habib* certainly provides weight to any argument premised upon the malleability of the act of state doctrine, in particular by outlining in depth the relationship between that doctrine and clear violations of established international human rights laws, especially those related to torture. Finally, the decision is novel in that it contemplates civil remedies for acts of torture committed abroad, and clearly elucidates statutory and jurisprudential arguments that might be harnessed by other former detainees. Even so, the practical obstacles to such proceedings are numerous,[59] and still remain to be overcome by Mr Habib and the others who will undoubtedly follow in his wake.

[58] See also Stephen Tully, 'Australian Court Permits Damages Claim for Torture by former Guantanamo Bay Detainee to Proceed' (2010) 14 *American Society of International Law Insights* 27, 16 September 2010.

[59] Ibid.