Habib v Commonwealth: *clarifying the state of play for acts of state?*

Stephen Tully*

Abstract

This case note assesses the contribution of a recent decision of the Federal Court of Australia to our appreciation of the act of state doctrine. *Habib v Commonwealth* considers allegations made by Mamdouh Habib that Australian intelligence and law enforcement personnel were complicit in his torture while he was detained by Egypt, Pakistan and the United States. The case note reviews: the Third Geneva Convention against Torture; customary international law on the prohibition against torture; recent amendments to legislation implementing the prohibition against torture, and relevant Australian and international jurisprudence. It also considers whether the act of state doctrine, international comity and non-justiciability considerations preclude judicial review of the acts of agents of foreign states committed overseas. The Australian Constitutional and legislative framework specifying the limits of executive action are also explored as well as the potential influence of international law. The decision in *Habib v Commonwealth* is an important development which enhances the prospects for Habib to obtain compensation in tort from the Commonwealth for the harm allegedly perpetrated by the agents of foreign states.

I Introduction

The act of state doctrine was described during the litigation surrounding General Augusto Pinochet as 'a common law principle of uncertain application which prevents the [forum] court from examining the legality of certain acts performed in the exercise of sovereign authority within a foreign country or, occasionally, outside it'.[1] The 'uncertain application' of this doctrine has been partly dispelled by a recent judgment of the Full Court of the Federal Court of Australia in equally controversial circumstances, that is, whether Australian law enforcement and intelligence personnel were complicit in the torture of an Australian national by Pakistani, Egyptian and American officials. These allegations are briefly recounted in Part Two. Part Three reviews the decision in *Habib v Commonwealth*.[2] Part Four examines the contribution of that judgment to our understanding of Australian jurisprudence on the act of state doctrine and

* Legal Officer, Migration and Refugee Review Tribunal, to whom all views are attributable. Many thanks to the two anonymous referees for their valuable contributions.

1 *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [2000] 1 AC 61, 106 ('*Pinochet*').

2 (2010) 183 FCR 62 ('*Habib*').

assesses its treatment of authorities from other jurisdictions. While the outcome in *Habib* may not have been entirely surprising, particularly when considered in its broader context, the reasoning does contain several novel elements.

II Factual background and procedural history

It is now a matter of some notoriety that Mr Mamdouh Habib ('Habib'), a dual Australian-Egyptian citizen, was first captured by United States (US) forces in Afghanistan and then detained in Pakistan by Pakistani authorities during October 2001. During interviews with officers from the Australian Federal Police (AFP) and the Australian Security Intelligence Organisation (ASIO), conducted in the presence of Pakistani officials, Habib complained that he had been kidnapped and abused. He moreover alleged that Australian officials were present when he was interrogated by US personnel and extraordinarily rendered to Egypt in November 2001. Habib claims that he was tortured for a further six months by the Egyptian authorities who enjoyed access to information provided by Australia. He also alleges that Australian officials were present during interrogation sessions on at least one occasion. In 2002 Habib was rendered to Guantanamo Bay under US custody. Once again, Habib complained to AFP and ASIO officers that, having been tortured in Egypt, he was now being mistreated at Guantanamo Bay. Australia referred these allegations to the US for investigation and subsequently accepted its assurances that Habib was being treated humanely. In 2005 Habib was repatriated without charge to Australia.

That same year Habib commenced proceedings against the Commonwealth. He claims that Australia failed to fulfil a justiciable duty of care to its citizens abroad to take all reasonable steps to ensure that, when detained in the custody of foreign governments, Australians are treated lawfully, fairly and humanely. Habib alleged that he met an ASIO officer in the Australian High Commission in Islamabad during October 2001, that indications of ill-treatment were visible, that he informed the officer of his kidnapping and mistreatment and requested assistance. The Commonwealth acknowledged that Habib was interviewed by AFP and ASIO officers at 'safe houses' controlled by Pakistanis.

During an initial procedural skirmish the Federal Court of Australia noted that 'there is little reason to doubt that his arrest and imprisonment were accompanied by measures of more active physical abuse'.[3] However, Madgwick J considered it improbable that Pakistani security authorities would take an Australian into Australian diplomatic territory. Thus, when Habib met one or more Australian officials, his Honour concluded that no such meeting occurred at the Australian High Commission or at any other place under Australian control.

Habib's claims were partly struck out in subsequent proceedings. Justice Perram also granted leave to replead other grounds.[4] This included the claim that Commonwealth officers intentionally harmed him knowing that they acted beyond their lawful jurisdiction or authority or were recklessly indifferent to those limits, thereby committing the torts of misfeasance in a public office and intentionally inflicting

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3 *Habib v Commonwealth* [2008] FCA 489, [48].
4 *Habib v Commonwealth (No 2)* (2009) 175 FCR 350.

indirect harm. The limits of their lawful jurisdiction or authority were as stated under the *Australian Federal Police Act 1979* (Cth), the *Australian Security Intelligence Organisation Act 1979* (Cth) and, in respect of officials from the Department of Foreign Affairs and Trade, the Commonwealth's executive power conferred by s 61 of the *Commonwealth Constitution*. More particularly, Habib alleges that Commonwealth officers involved in his interrogation in Pakistan, Egypt, Afghanistan and Guantanamo Bay aided, abetted, counselled or procured the commission of Commonwealth offences by Pakistani, Egyptian and US officials. He characterised his claim as one in which an Australian citizen sought redress from Australia for the alleged acts of Australian officials unlawful under, and in respect of causes of action recognised by, Australian law. These claims include an entitlement to protection from torture as a prisoner of war or civilian in the circumstances of a war or armed conflict under the *Third Geneva Convention* and the *Fourth Geneva Convention*.[5] Relevantly, the *Crimes (Torture) Act 1988* (Cth) proscribed torture committed by public officials or persons acting in an official capacity outside Australia, irrespective of their citizenship and identity of their home government.

The Commonwealth denied any complicity by its agents in Habib's alleged torture. In its view, Australian courts would inevitably have to adjudge the acts of agents of foreign states. The Commonwealth pointed to the longstanding principle that '[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.'[6] Furthermore, Habib should not be permitted to do indirectly (that is, claim against Commonwealth officers for aiding, abetting and counselling alleged acts of torture by foreign agents) that which he cannot do directly (namely, claim against agents of Pakistan, Egypt and the US for alleged acts of torture who are entitled to invoke sovereign immunity under the *Foreign States Immunities Act 1985* (Cth)). The US, Egypt and Pakistan, not becoming states party to the *Rome Statute of the International Criminal Court*, have moreover limited the circumstances in which the acts of their agents can be judicially scrutinised.

To clarify these questions a special case was stated to the Full Court of the Federal Court of Australia by the Commonwealth with Habib's consent. The question was posed whether proceedings should be dismissed because resolving Habib's claims would require determining the unlawfulness of the acts of agents of foreign states done within their own territories, whether those claims were not justiciable and gave rise to no 'matter' within the jurisdiction of the Federal Court (under s 39B of the *Judiciary Act 1903* (Cth) and s 77(i) of the *Commonwealth Constitution*) or gave

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[5] It was an offence of extraterritorial operation under *Geneva Conventions Act 1957* (Cth) s 7(2)(c) to torture a person protected by the *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 136 UNTS 75 (entered into force 21 October 1950) ('*Third Geneva Convention*') and the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 287 UNTS 75 (entered into force 21 October 1950) ('*Fourth Geneva Convention*'). On 26 September 2002, offences relating to the *Third Geneva Convention* and *Fourth Geneva Convention* were relocated to *Criminal Code Act 1995* (Cth) ss 268.26(1), 268.74(1).

[6] *Underhill v Hernandez,* 168 US 250, 252 (1897) (Fuller J).

rise to no cause of action under Australian common law. The court, composed of Black CJ and Jagot and Perram JJ, unanimously answered 'No'.[7]

III The reasoning in *Habib v Commonwealth of Australia*

The 'uncertain application' of the act of state doctrine under English law considered in *Pinochet* is also true for Australia because '[b]eyond the certainty that the doctrine exists there is little clarity as to what constitutes it'.[8] Justice Perram partly attributed this conceptual confusion to the 'most opaque' judgment of *Potter v Broken Hill Proprietary Co Ltd*.[9] That case considered whether the validity of the grant of a patent in New South Wales was justiciable before Victorian courts. In Perram J's view, *Potter* effected a 'curious commingling' of the doctrine as a vague rule of judicial abstention or deference going to jurisdiction with an alternative perspective that the doctrine was only concerned with the validity of foreign state acts.[10] His Honour instead preferred to characterise the doctrine as a 'super choice of law rule'. Irrespective of which perspective was adopted, 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'.[11]

In contrast to Perram J's detailed reading of Australian jurisprudence, Jagot J applied a multi-factorial analysis derived from the US decision of *Sabbatino* as it has been construed by more recent US authorities.[12] Accordingly, her Honour noted that the prohibition against torture is subject to an international consensus, being a rule of customary international law; the claim is brought by an Australian citizen against the Commonwealth; the foreign officials will not be subject to Australian jurisdiction or any unfairness; the governments of those foreign states continue to exist; and it would be difficult to argue that the international legal violations alleged had been committed in the public interest. Justice Jagot also traced Anglo-American jurisprudence to conclude that the development of the act of state doctrine, evolving in tandem with international law, did not exclude judicial determination of alleged acts of torture constituting grave breaches of human rights and serious violations of international law.[13] Her Honour referred to the dicta of Lord Steyn in *Pinochet* to the effect that the act of state doctrine would generally not defeat a claim arising out of an alleged

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7 *Habib* (2010) 183 FCR 62, 63.

8 Ibid 77 (Perram J).

9 (1906) 3 CLR 479 ('*Potter*').

10 *Habib* (2010) 183 FCR 62, 79. His Honour at [30] doubted the correctness of *Petrotimor Companhia de Petroleos SARL v Commonwealth* (2003) 126 FCR 354 because it was inconsistent with the constitutional arrangements contemplated under ch III insofar as it prevented judicial scrutiny of the limits of Commonwealth legislative or executive authority. The correctness of *Potter*, as well as the judgment in *British South Africa Co v Companhia de Moçambique* [1893] AC 602, was reserved in *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 520.

11 *Habib* (2010) 183 FCR 62, 72.

12 Ibid 96. *Banco Nacional de Cuba v Sabbatino,* 376 US 398, 427–8 (1964); *John Doe I v Unocal Co,* 395 F 3d 932, 959–60 (9th Cir, 2002); *Sarei v Rio Tinto plc,* 456 F 3d 1069, 1084 (9th Cir, 2006).

13 *Habib* (2010) 183 FCR 62, 94–5, 101. Jagot J also cited *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [53], [57].

violation of fundamental human rights including torture.[14] Nor did the doctrine prevent an Australian court from scrutinising the alleged acts of Australian officials committed overseas in breach of peremptory norms of international law (namely, the prohibition against torture) to which effect had been given by Australian laws having an extra-territorial application.

The upshot is an identical conclusion reached by Jagot and Perram JJ that the act of state doctrine did not apply in the circumstances of this case albeit through different reasoning. Significantly, a united position was expressed on three critical points. First, to apply the act of state doctrine so as to oust the jurisdiction of Australian courts was a proposition which could not be reconciled with the particular Australian legislative and constitutional context. The Commonwealth's submissions overlooked ch III of the *Commonwealth Constitution* and a clear Parliamentary intention to proscribe torture and war crimes committed by any person anywhere. The relevant legislation provided standards by which Parliament considered that certain conduct could be subject to judicial determination and stipulated limits on the exercise of Commonwealth power. Just as legislation cannot bar a right to proceed against the Commonwealth or remove from judicial scrutiny issues concerning the limits of its lawful authority, so too must the common law act of state doctrine yield to 'ineluctable imperatives'.[15] Accordingly, '[t]o the extent that the 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'.[16]

Second, their Honours agreed that Habib's claims raised a 'matter' within the Federal Court's jurisdiction under the *Commonwealth Constitution* and relevant enabling legislation. Under s 75 of the *Commonwealth Constitution*, the High Court enjoys jurisdiction in respect of matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party and in which writs of mandamus, prohibition or an injunction are sought against a Commonwealth officer. Their Honours indicated that, were the Commonwealth's submissions to be accepted, the Federal Court would be unable to entertain Habib's suit to enforce the limits of s 61 of the *Commonwealth Constitution* or ensure that Commonwealth officers acted within the bounds of legislation having extraterritorial effect. Thus the judge-made act of state doctrine could not be invoked in answer to a claim under s 75 of the *Commonwealth Constitution*. Justice Jagot noted a principle that federal courts should refrain from entering 'a domain that does not belong to it, namely the consideration of undertakings and obligations depending entirely on political sanctions'.[17] That proposition, however, left unaffected the conclusion that the Commonwealth's submissions 'find no support in and indeed are inconsistent with the Australian constitutional framework'.[18]

Third, their Honours concluded that the limits of Commonwealth power were justiciable. It was 'axiomatic' that allegations of Commonwealth officers acting outside the law was capable of judicial determination and furthermore

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14 *Pinochet* [2000] 1 AC 61, 117.
15 *Habib* (2010) 183 FCR 62, 73 (Perram J).
16 Ibid 74 (Perram J).
17 *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 370 (Gummow J).
18 *Habib* (2010) 183 FCR 62, 100 (Jagot J). See also 74 (Perram J).

international comity, albeit 'a fine and proper thing', provided no basis for a court declining to exercise the federal jurisdiction conferred upon it by Parliament.[19]

Just as swiftly dispatched was the argument that there was no common law cause of action. In Black CJ's view, Australian common law 'should develop congruently with emphatically expressed ideals of public policy, reflective of universal norms.'[20]

IV The contribution of *Habib v Commonwealth* to the act of state doctrine

In several senses the outcome in *Habib v Commonwealth* is unsurprising. Habib's central submission was described by Jagot J as 'compelling'. He alleged breaches of a peremptory norm of customary international law that Australian law, consistent with the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* to which Australia is a party, also proscribes and makes criminal.[21] Put simply, and to quote Black CJ, torture 'offends the ideal of a common humanity'. Judicial scrutiny of the conduct of Commonwealth officials alleged to have involved serious breaches of the inviolable human rights of an Australian citizen in an overseas jurisdiction was desirable because, if proved, Australian law at the time and in the place where the conduct was claimed to have been committed may have been contravened.

The Federal Court's muscular resolve complements decisions which have recently emerged from other jurisdictions. In particular, the question of official complicity in the torture of Canadian and English nationals by the intelligence services of those states has also been raised. For example, one English court expressed the opinion that national security considerations 'should not automatically trump a public interest in open justice which may concern a degree of facilitation by UK officials of interrogation by US officials using unlawful techniques which may amount to torture or cruel, inhuman or degrading treatment'.[22]

The Federal Court's conclusions are also consistent with prior US[23] and Australian authority to the effect that the limits of executive action raise a justiciable question which accords 'an essential place to the obligation of the judicial branch to assess the validity of legislative and executive acts against relevant constitutional requirements'.[24] Indeed, such a judicial duty is 'a basic element of the rule of law'.[25] Thus the act of state doctrine cannot 'mean that the

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19 Ibid 77 (Perram J).

20 Ibid 67.

21 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*Convention Against Torture*').

22 *R (on the application of Mohamed) v Secretary of State for Foreign & Commonwealth Affairs* [2010] 4 All ER 91, [290] (May J).

23 *Marbury v Madison,* 5 US 137, 177 (1803) (Marshall CJ).

24 *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 570 [66] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

25 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 482 [5] (Gleeson CJ).

operation of the Constitution itself was crippled by doctrines devised in other circumstances and for a different system of government'.[26] Nevertheless, judicial consideration of the act of state doctrine in Australia has to date been limited to a handful of several well-known authorities. When the opportunity arises Australian courts typically draw upon contemporary US and English jurisprudence and *Habib* is no exception.

What is particularly interesting in *Habib* is the contrasting treatment of the English decision in *Kuwait Airways Corporation v Iraqi Airways Company (Nos 4 and 5)*.[27] That case recognised an exception to the act of state doctrine for acts of a foreign sovereign contrary to the public policy of the forum state. This precedent was anticipated by both parties in *Habib* as framing the field of battle. The Commonwealth submitted that *Kuwait Airways*, properly analysed, did not establish an exception where grave breaches of human rights were involved, had resulted from an incorrect concession made by counsel in that case and could be confined to its facts.

These explanations were rejected. The public policy exception to the act of state doctrine had been determined on a principled basis, namely, that 'our courts should give effect to clearly established principles of international law'.[28] Nor could *Kuwait Airways* be distinguished on the basis that the violations of international law in that case were clear rather than simply as alleged in *Habib*. The Commonwealth's invocation of the act of state doctrine, if accepted, would preclude the truth or otherwise of Habib's allegations from being resolved. For Perram J, any human rights exception to the act of state doctrine was more consistent with the view that the doctrine is a 'super' conflict of law rule concerned with the validity of acts of foreign states. If the doctrine was a loosely defined principle of judicial abstention or deference 'not connected to any issue of validity then I do not see the conceptual peg upon which a human rights exception might be hung for there is no foreign law to be disengaged'.[29]

It is thorough analysis of this kind, rather than the incantations which typically obfuscate the operation of the act of state doctrine, which will address recent criticism of judicial approaches to the doctrine. It has been suggested, for example, that courts are invoking 'rule-like exceptions' to justify decisions made by reference to the particular facts of each case.[30] The Commonwealth had argued that the 'limits' (rather than the 'exceptions') to the act of state doctrine are to be defined by reference to the principles informing the content of the doctrine, namely international comity and the separation of powers.[31] Its attempt to drag the act of

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[26] *Commonwealth v Mewett* (1997) 191 CLR 471, 548 (Gummow and Kirby JJ); *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30, 44 (Gleeson CJ).

[27] [2002] 2 AC 883, 1102, 1105, 1109, 1079 ('*Kuwait Airways*').

[28] *Habib* (2010) 183 FCR 62, 92–3, 97 (Jagot J) citing *Kuwait Airways* [2002] 2 AC 883, 959 (Lord Hope).

[29] *Habib* (2010) 183 FCR 62, 80.

[30] Andrew Patterson, 'The Act of State Doctrine is Alive and Well: Why Critics of the Doctrine are Wrong' (2008) 15 *University of California Davis Journal of International Law and Policy* 111, 124.

[31] *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 40–1 (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ) ('*Spycatcher*'). Perram J at 77–8 cited *Spycatcher* to support the view that the act of state doctrine is concerned with the validity of foreign State acts whereas Jagot J at 95 observed that the outcome in that case did not turn upon the doctrine.

state doctrine back to first principles, to the effect that the doctrine presumably applies unless factors indicate otherwise, and counselling for judicial restraint, however, went against the weight of recent authority.

Even on the Commonwealth's view, the familiar pairing of international comity with the separation of powers did not preclude judicial determination of Habib's claims. The high degree of inter-state consensus against torture, as reflected under customary international law in conjunction with a treaty, indicated that the international community had 'spoken with one voice'.[32] Australian courts should be permitted to consider whether Commonwealth officials aided, abetted and counselled foreign officials to inflict torture upon an Australian citizen. Habib's claims were based on clear and identifiable standards against which the alleged conduct could be judged: 'the requirements of the applicable Australian statutes and the international law which they reflect and embody'.[33]

All well and good, one might say, but did the Federal Court have anything new to say on the state of play for acts of state? First, the court considered the novel suggestion that, while the act of state doctrine did not operate in the context of constitutional writ proceedings, its application could be maintained in tort proceedings where criminal breaches of international instruments were alleged. The US, Pakistan and Egypt, as states Parties to the *Convention Against Torture*, the *Third Geneva Convention*, and *Fourth Geneva Convention*, have explicitly consented to the exercise of criminal jurisdiction over their nationals. Since constitutional writ proceedings were adjuncts of the criminal law, so the Commonwealth argued, it did not follow that by acceding to these instruments the act of state doctrine had been waived for the purposes of civil proceedings. Such an argument, although not without subtlety, was firmly rejected. Constitutional writ proceedings, properly characterised, seek to control excess of jurisdiction. Any enforcement of the criminal law was only incidental to that process. Furthermore, there is nothing precluding a civil claim for damages based upon a breach of criminal law.[34] Thus the US, Pakistan and Egypt must be taken, by their accession to these treaties, to have assented to the non-application of immunity *ratione materiae* rather than the non-application of the act of state doctrine.

Second—and less groundbreaking but worthwhile noting—is the question whether the act of state doctrine applies to the acts of agents of foreign states when committed in the territory of another foreign state. Bagram airfield and the 'installation' at Khandahar, both in Afghanistan, and Guantánamo Bay in Cuba are not part of US territory. On Perram J's analysis, if the act of state doctrine was applied as a conflict of law rule, it would be conceptually ineffective because the issue was whether the alleged acts occurred and not whether they were valid according to a legal system recognised by Australian courts.[35] Alternatively, if the doctrine was a principle intended to protect diplomatic sensibilities, there was 'no particular reason why the investigation of the acts of another state are likely to be

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32 *Habib* (2010) 183 FCR 62, 97 (Jagot J).
33 Ibid 98 (Jagot J).
34 See, eg, *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270.
35 See also *WS Kirkpatrick & Co v Environmental Tectonics Co Int,* 493 US 400, 405–6 (1989).

less embarrassing just because they are done abroad'.[36] The logical appeal of confining the application of the act of state doctrine was also undermined by the de facto control enjoyed by the US over these areas at all material times.

This analysis recalls the approach taken in relation to another Australian detained by the US in similar circumstances. In *Hicks v Ruddock*[37] it was claimed that the Commonwealth encouraged the denial of a fair trial for David Hicks before a US Military Commission arguably contrary to international law and an offence under Australian law.[38] The Commonwealth argued that the act of state doctrine precluded Australian courts from determining the legality of a detention effected by US military order in what could be regarded as US territory. Hicks submitted that the doctrine was inapplicable because Australian courts were being asked to decide whether the Commonwealth had taken into account considerations extraneous to the proper exercise of the executive authority to protect Australian citizens abroad rather than reviewing the acts of a foreign state. Even if the doctrine did apply, Hicks' detention without lawful trial qualified as an exception analogous to *Kuwait Airways*. The Commonwealth responded that the exception referred to in that case was limited and moreover inapplicable because all parties accepted that Iraq's actions violated international law. Following consideration of relevant Australian, US and English authorities, Tamberlin J concluded that the act of state doctrine did not justify summary judgment.[39]

The precedents of *Hicks* and *Habib* reach identical conclusions on the non-application of the act of state doctrine and signal a judicial resolve to scrutinise executive action. However, the prospects of Habib securing compensation from the Commonwealth are not beyond doubt. Habib must establish to the civil standard that the alleged acts of torture and other inhumane treatment were committed by persons who were, or were acting at the instigation of or with the consent and acquiescence of, public officials or persons acting in an official capacity outside Australia contrary to Australian law implementing the *Convention Against Torture*, the *Third Geneva Convention*, and *Fourth Geneva Convention*. While it is a necessary element of his case that the agents of foreign states committed the principal offence, it is not essential for those persons to have been first prosecuted under the *Criminal Code Act 1995* (Cth).

Notably the proceedings in *Habib* do not capture the entirety of Habib's efforts to ventilate the circumstances outlined above before Australian courts and tribunals. In 2005 the Minister for Foreign Affairs and Trade cancelled Habib's Australian passport upon his return to Australia and refused to issue a replacement. The Minister concluded under s 14 of the *Australian Passports Act 2005* (Cth) that there were reasonable grounds for suspecting that if an Australian passport were issued to Habib that he would be likely to engage in conduct which might prejudice the security of Australia or a foreign country. That decision was affirmed by the

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36 *Habib* (2010) 183 FCR 62 80–1 (Perram J).

37 (2007) 156 FCR 574 ('*Hicks*'). See further Marley Zelinka, 'Hicks v Ruddock versus The United States v Hicks' (2007) 29 *Sydney Law Review* 527, 531–4.

38 *Third Geneva Convention*, opened for signature 12 August 1949, 136 UNTS 75, arts 84-85, 99, 102, 105 (entered into force 21 October 1950); *Criminal Code Act 1995* (Cth) s 268.31.

39 *Hicks* (2007) 156 FCR 574, 587 (Tamberlin J).

Administrative Appeals Tribunal.[40] However, the tribunal also expressed disquiet when there was no evidence presented to contradict Habib's description of physical and psychological abuse in Pakistan, Egypt and Guantanamo Bay which, in its view, could only be described as torture. Nevertheless, the admissions Habib voluntarily made in these conditions could be considered because the information had the 'ring of truth' about it. Although the Federal Court upheld the tribunal's decision, the High Court of Australia has remitted the matter for reconsideration.[41]

In addition, a jury trial determined that an article published by Nationwide News Pty Ltd in *The Daily Telegraph* was defamatory of Habib by conveying an imputation that he knowingly made several false claims. Nationwide News Pty Ltd argued by way of defence that the imputation was substantially true and related to a matter of public interest. This submission was accepted at first instance on the basis of alleged inconsistencies arising from statements made by Habib to Australian authorities in Pakistan and Guantanamo Bay, to the press during a television interview and to Amnesty International Australia.[42] Habib had objected to the admission of the Pakistan and Guantanamo Bay interviews because they were derived from claimed torture. The NSW Court of Appeal found that the primary judge had erred in several respects and remitted the matter for an assessment of the damages due for defamation. The Court of Appeal found that the Pakistan and Guantanamo Bay statements were inadmissible because the primary judge had effectively reversed the relevant onus of proof. The statements made by Habib in the television interview were similarly inadmissible. As Nationwide News Pty Ltd had only established the substantial truth of one of the claims but had not established that Habib had made more than one false claim, the substantial truth of the imputation had not been established.[43]

Finally, the ongoing negligence proceedings commenced by Habib are occurring against a backdrop of recent legislative development. The *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth), introduced on 19 November 2009 and passed on 11 March 2010, repeals the *Crimes (Torture) Act 1988* (Cth) and inserts a new definition of torture into the *Criminal Code Act 1995* (Cth).[44] These amendments are intended to reflect a key purpose of the Convention Against Torture—to end impunity for torture globally—and to 'more clearly' fulfil Australia's treaty obligations.[45] Of particular resonance is the observation that '[a]lthough the new offence of torture applies to public officials

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40 *Re Mamdouh Habib and Minister for Foreign Affairs and Trade; Re Mamdouh Habib and Director-General of Security* [2007] AATA 1908.

41 *Habib v Director-General of Security* (2009) 175 FCR 411 (Black CJ, Ryan and Lander JJ); *Habib v Minister for Foreign Affairs and Trade; Habib v Director-General of Security* [2010] HCATrans 124.

42 *Habib v Nationwide News Pty Ltd* (2008) Aust Torts Reports ¶81-938 (McClellan CJ at CL).

43 *Habib v Nationwide News Pty Ltd* [2010] NSWCA 34 (Hodgson JA, Tobias and McColl JA).

44 The Act also extends the application of the prohibition on using the death penalty to State law with a view to safeguarding Australia's compliance with the *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991).

45 Attorney-General The Hon Robert McClelland, 'Second Reading Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Bill' (Speech delivered at Parliament House, Canberra, 19 November 2009).

both within and outside Australia, it is not anticipated to affect legitimate law enforcement and intelligence gathering activities routinely carried out by federal, State and Territory Government agencies in the course of their duties.'[46] The Commonwealth might have therefore pre-empted a crucial outcome, whether or not Habib succeeded. In any event, proceedings were ultimately settled when the Commonwealth paid compensation to Habib without admitting liability.[47]

V Conclusions

The proceedings in *Habib* are noteworthy for affirming the prohibition against torture under national law consistent with its status as a peremptory norm of international law and clearly rejecting non-justiciability considerations as any impediment to judicial scrutiny of the limits on executive action in the particular circumstances of that case. The judgment also yields several significant points concerning the influence of international law in Australia and the scope and application of the act of state doctrine. Practitioners are referred to Jagot J's resort to North American jurisprudence, Perram J's distillation of alternative perspectives on the act of state doctrine, the Commonwealth's novel but ultimately misplaced link between the accession by states to international criminal law conventions and constitutional writ proceedings, the rather unexpected treatment given to *Kuwait Airways* and the further nail in *Potter's* coffin. It can only be hoped that, by clarifying these relatively esoteric doctrinal points, the allegations of official Australian complicity in torture can finally be laid to rest, one way or another.[48]

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46 Explanatory Memorandum, Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Bill 2009 (Cth) 2, 5.

47 D Welch, 'Secret Sum Settles Habib Torture Compensation Case', *Sydney Morning Herald*, 8 January 2010, 3.

48 The Inspector-General of Intelligence and Security has been requested to conduct an inquiry into the actions of relevant Australian agencies in relation to Habib's arrest and detention overseas from 2001 to 2005. Accessed online at <http://www.igis.gov.au/public_statments/media_release/habib_jan_2011.cfm>.