

# Australian court allows Guantánamo torture compensation case to proceed

By Robert Morgan  
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Late last month, the Full Federal Court of Australia unanimously dismissed an application by the Rudd government to stop it hearing former Guantánamo Bay detainee Mamdouh Habib's claim for compensation. Habib is suing the Australian Commonwealth for complicity in acts of torture allegedly committed against him by officials from the United States, Pakistan and Egypt between 2001 and 2005.

Pakistani police seized Habib, an Australian citizen and father of four, in October 2001, shortly after the September 11 terrorist attacks in the United States. After interrogation in Pakistan, he was subjected to "extraordinary rendition" to Egypt. In April 2002, he was transferred to the US-controlled Bagram airbase in Afghanistan, and in May 2002, to Guantánamo Bay, Cuba. In January 2005, Habib was finally released to Australia, with no charges ever being laid.

Throughout this period the Howard government, backed by the Labor Party, supported the "war on terror" and the detention of both Habib and fellow Australian David Hicks in Guantánamo. In early 2005, Labor joined the Howard government in rejecting Habib's offer to provide first-hand information to the Australian Senate about his detention and rendition.

During the lead-up to the 2007 election, amid growing public opposition to the continued incarceration of Hicks and other abuses committed under the auspices of the "war on terror," Labor leaders professed concerns about the infringements of human rights and legal principles, without actually calling for Hicks's release. Since Labor took office in 2007, the fraudulent character of these concerns has become crystal clear. The Rudd government has maintained the Howard government's harassment of Habib, including ongoing police and intelligence surveillance and the suspension of his passport. And it has repeatedly opposed his attempts to seek legal redress.

In early 2009, Labor asked the Federal Court to

summarily dismiss Habib's claim, remarkably arguing that the Australian government owed no "fiduciary duty" toward him. Justice Nye Perram said governments owed "some kind of duty" but that this was a "political" one of "imperfect obligation and thus unenforceable". In effect, the judge ruled that a government decision to abandon its citizens overseas was immune from legal scrutiny, even where there was evidence of illegal detention and torture. (See: "Australia: Rudd government tries to block Guantánamo torture case").

However, Habib was permitted to amend his pleading to claim that Australian federal officers committed acts of "misfeasance in public office" and inflicted "intentional but indirect" harm on Habib by "aiding, abetting and counselling his torture and other inhumane treatment by foreign officials".

Habib alleges that in Pakistan, Egypt and Guantánamo, he was subjected to, among other things, "electrical shocks, beating, suspension from chains... the removal of fingernails, the use of electric prods, threatened sexual assault with a dog, forcible injection of drugs, extinguishment of cigarettes on flesh, the insertion of unspecified objects and gases into his anus and the electrocution of his genitals... sleep deprivation, pepper spray, threats of sexual assault, beatings, the use of electrical prods, water boarding, exposure to loud music in a dark cell with flashing lights and smearing with menstrual blood."

Habib states that officers from the Australian Security and Intelligence Organisation (ASIO), the Australian Federal Police (AFP) and the Department of Foreign Affairs and Trade (DFAT) participated in his detention, interrogation and abuse on multiple occasions. By doing so, Habib alleges that Australian federal officers played a part in the commission of grave crimes under Australian and international law, and that their actions caused him to sustain serious physical and psychological injuries.

After last year's court ruling, the Rudd government went to the Full Federal Court in another bid to terminate Habib's case. Like the US administration of Barack Obama, the Rudd government fears that former Guantánamo prisoners testifying about their torture would not only expose past crimes, but obstruct the use of such methods in the future. (See: "US to hold 50 Guantánamo prisoners indefinitely").

The anti-democratic and lawless character of the "war on terror" found expression in the Rudd government's various legal arguments. Commonwealth Solicitor-General Stephen Gageler SC argued that the "act of state" doctrine prevented the court from hearing Habib's case.

This doctrine, as Chief Justice Michael Black explained, forms part of the common law and is usually defined as: "Every 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."

The government argued that the court could not rule that ASIO, AFP and DFAT officers acted unlawfully without first determining the unlawful character of the actions of US, Pakistani and Egyptian officials. This would "vex the peace" between nations (which, in this context, meant disrupt relations with Washington). Furthermore, the government insisted that there should be no exception to the "act of state" doctrine in Habib's case, even though he alleged grave violations of international law.

Essentially, the Rudd government's argument was that (operating through its executive agencies) it could aid, abet and supervise the torture of Australian citizens in overseas countries without any fear of legal redress within Australian courts—so long as the Australian government outsourced the immediate dirty-work of torture to the agents of a foreign government.

The court rejected the government's arguments on several grounds. Justice Perram rested on the Australian constitution. To adopt the government's argument, he held, would neuter the power of courts to determine the legality of executive action. The "act of state" doctrine could not apply where Commonwealth officials were alleged to have "acted beyond the bounds of their authority under Commonwealth law". Such "immunity from suit" was to be "rejected in a fashion as complete as it is emphatic".

Justice Jayne Jagot agreed with Justice Perram, but

went further into issues of international law. Both she and Chief Justice Black found that the absolute prohibition on torture in international and Australian law meant that it could never be condoned as a legitimate aspect of government policy.

After reviewing US and UK case law, Justice Jagot ruled that the "act of state" doctrine could not prevent judicial scrutiny of allegations of grave violations of international human rights law by the Australian government. Only a valid claim of "sovereign immunity" could achieve that. This is a principle of international law that renders foreign states and their agencies immune from the jurisdiction of domestic courts.

However, the judge rejected the Commonwealth's spurious argument that, since "sovereign immunity" would make Pakistani, US and Egyptian officials immune in Australian courts, Habib should not be able to sue Australian officials for their alleged complicity in his treatment.

Justice Jagot noted the government's suggestion that Australia's "national nerves" might be "attuned to the sensibilities" of the government's "coalition partners", but said this consideration had to be weighed against the prohibition on torture in international law. Her judgment left open whether a court might dismiss a future claim involving allegations that, while serious and harmful, did not amount to torture.

While the Rudd government has suffered a political setback in the Full Federal Court, it may appeal to the High Court, Australia's supreme court. Moreover, the ruling does not imply that judges will find in Habib's favour when his allegations are finally presented as evidence in court. The government's record indicates that it will continue to utilise every means at its disposal to prevent Habib's case from shedding light on the actions of the Australian government, and those of its allies, in the criminal, US-led "war on terror".

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