Federal Court of Australia - Full Court

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

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FEDERAL COURT OF AUSTRALIA

Habib v Commonwealth of Australia [2010] FCAFC 12

Citation:	Habib v Commonwealth of Australia [2010] FCAFC 12
Parties:	**MAMDOUH HABIB V COMMONWEALTH OF AUSTRALIA**
File number:	NSD 956 of 2006
Judges:	BLACK CJ, PERRAM AND JAGOT JJ
Date of judgment:	25 February 2010
Catchwords:	**CONSTITUTIONAL LAW** – act of state doctrine – non-justiciability – scope of act of state doctrine – where Australian citizen has brought proceedings against the Commonwealth – where a determination of the proceedings would depend on findings of the legality of the acts of foreign agents outside Australia – whether act of state doctrine applicable where allegations of grave breaches of international law – whether manageable judicial standards **HIGH COURT AND FEDERAL COURT** – original jurisdiction of the High Court and Federal Court – judicial scrutiny of actions of the Executive by Ch III Courts – whether Constitutional framework and legislation in question enables such scrutiny **Held:** act of state doctrine inapplicable

Legislation:

The Constitution, ss 51(xxxi), 61, 75, 76, 77(i)

Administrative Decisions (Judicial Review) Act 1977 (Cth)
Australian Federal Police Act 1979 (Cth)
Australian Security Intelligence Organisation Act 1979 (Cth)
Crimes (Torture) Act 1988 (Cth), ss 3, 5A, 6, 7, 8
Criminal Code Act 1995 (Cth)
The Criminal Code, ss 11.2, 16.1, 268.26, 268.74
Director of Public Prosecutions Act 1983 (Cth)
Federal Court of Australia Act 1976 (Cth), s 25
Foreign States Immunities Act 1985 (Cth), s 9
Geneva Conventions Act 1957 (Cth), s 7
Judiciary Act 1903 (Cth), ss 30, 39B, 44, 79
Jurisdiction of Courts (Foreign Lands) Act 1989 (NSW) s 3
Law Reform (Miscellaneous Provisions) Act 1955 (ACT) s 34
Public Service Act 1999 (Cth)
Seas and Submerged Lands Act 1973 (Cth)
Federal Court Rules, Order 50 r 1

Treaties:

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984
Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949
Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949
Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, 1977
Rome Statute of the International Criminal Court, 1998
Statute of the International Court of Justice, 1945
Vienna Convention of the Law of Treaties, 1969

Cases cited:

A v Hayden [1984] HCA 67; (1984) 156 CLR 532 cited
Abebe v Commonwealth (1999) 197 CLR 510 cited
Al Maqaleh v Gates 604 FSupp.2d 205 (D.D.C. 2009) cited
Amnesty International Canada v Canadian Forces (Defence Staff, Chief) (2008) 305 DLR (4^{th}) 741 cited
APLA Limited v Legal Services Commissioner (NSW) [2005] HCA 44; (2005) 224 CLR 322 cited
Applicant S v Minister for Immigration and Multicultural Affairs (2004) 217 CLR 387; [2004] HCA 25 cited
Attorney-General (NSW) v Quinn (1990) 170 CLR 1 cited
Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd [1988] HCA 25; (1988) 165 CLR 30 considered
Attorney-General for Western Australia v Marquet [2003] HCA 67; (2003) 217 CLR 545 cited

Australian Communist Party v Commonwealth [1951] HCA 5; (1951) 83 CLR 1 applied
Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd [2007] HCA 38; (2007) 232 CLR 1 cited
Baker v Carr [1962] USSC 42; 369 US 186 (1962) cited
Banco de Vizcaya v Don Alfonso de Borbon Y Austria [1935] 1 KB 140 cited
Banco Nacional de Cuba v Sabbatino [1964] USSC 48; 376 US 398 (1964) considered
Bernstein v N V Nederlandsche-Amerikaansche, Stoomvaart-Maatschappij [1954] USCA2 73; 210 F.2d 375 (2d Cir. 1954) cited
British American Tobacco Australia Ltd v Western Australia [2003] HCA 47; (2003) 217 CLR 30 cited
British South Africa Co v Companhia de Moçambique [1893] AC 602 questioned
Boumediene v Bush 553 128 SCt 2229 (2008) cited
Buttes Gas and Oil Co v Hammer [1982] AC 888 considered
Commonwealth v Mewett [1997] HCA 29; (1997) 191 CLR 471 cited
Commonwealth v Woodhill [1917] HCA 43; (1917) 23 CLR 482 cited
Commonwealth v Yamirr [2001] HCA 56; (2001) 208 CLR 1 cited
Corporation of the City of Enfield v Development Assessment Commission [2000] HCA 5; (2000) 199 CLR 135 cited
Deputy Commissioner of Taxation v Richard Walter Pty Ltd [1995] HCA 23; (1995) 183 CLR 168 cited
Doe I v Unocal Corp [2002] USCA9 708; 395 F. 3d 932 (9th Cir. 2002) considered
Empresa Exportadora De Azucar v Industria Azucarera Nacional SA (The "Playa Larga" and "Marble Islands") [1983] 2 Lloyd's Rep 171 (CA) cited
Habib v Commonwealth (No 2) (2009) 175 FCR 350; [2009] FCA 228 referred to
Hicks v Ruddock (2007) 156 FCR 574; [2007] FCA 299 referred to
Hornsby Shire Council v Danglade (1928) 29 SR (NSW) 118 cited
First National City Bank v Banco Nacional de Cuba 406 US 759 (1972) referred to
In re Fried Krupp Actien – Gesellschaft [1917] 2 Ch 188 cited
Giller v Procopets [2008] VSCA 236; (2008) 40 Fam LR 378 cited
Harris v Caladine [1991] HCA 9; (1991) 172 CLR 84 cited
Hesperides Hotels Ltd v Muftizade [1979] AC 508 cited
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Arabia [2006] UKHL 26; [2007] 1 AC 270 distinguished
Kartinyeri v Commonwealth [1998] HCA 22; (1998) 195 CLR 337 cited
Kuwait Airways Corporation v Iraqi Airways Company (Nos 4 and 5) [2002] UKHL 19; [2002] 2 AC 883 considered
Lipohar v The Queen [1999] HCA 65; (1999) 200 CLR 485 cited
Lowenthal v Attorney-General [1948] 1 All ER 295 cited
Marbury v Madison [1803] USSC 16; 5 US 137 (1803) applied
Minister for Immigration and Multicultural Affairs v Yusuf [2001] HCA 30; (2001) 206 CLR 323 cited
Mutual Pools & Staff Pty Ltd v The Commonwealth [1994] HCA 9; (1994) 179 CLR 155 cited
Northern Territory v Mengel [1995] HCA 65; (1995) 185 CLR 307 cited
Phillips v Eyre (1869) LR 4 QB 225; (1870) LR 6 QB 1 cited
Oetjen v Central Leather Co [1918] USSC 66; 246 US 297 (1918) considered
Oppenheimer v Cattermole (Inspector of Taxes) [1976] AC 249 considered
Petrotimor Companhia de Petroleos SARL v Commonwealth of Australia (2003) 126 FCR 354; [2003] FCAFC 3 referred to
Plaintiff S157/2002 v Commonwealth of Australia (2003) 211 CLR 476; [2003] HCA 2 referred to
Potter v The Broken Hill Proprietary Co Ltd (1905) VLR 612 cited
Potter v Broken Hill Proprietary Co Ltd [1906] HCA 88; (1906) 3 CLR 479 referred to
R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 1) [2000] 1 AC 61 referred to
R v Bow Street Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3) [1999] UKHL 17; [2000] 1 AC 147 considered
R v Home Secretary; Ex parte L [1945] KB 7 cited
R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1598 considered
Rasul v Bush [2004] USSC 2809; 542 US 466 (2004) cited
Re Ditfort; Ex parte Deputy Commissioner of Taxation (1988) 19 FCR 347 considered
Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam (2003) 214 CLR 1; [2003] HCA 6 cited
Regie Nationale des Usines Renault SA v Zhang [2002] HCA 10; (2002) 210 CLR 491 cited
Sarei v Rio Tinto PLC 456 F.3d 1069 (9th Cir. 2006) referred to

Sharon v Time, Inc., 599 FSupp 538 (SDNY 1984) cited
Singh v Commonwealth [2004] HCA 43; (2004) 222 CLR 322 cited
Telstra Corporation Ltd v Commonwealth [2008] HCA 7; (2008) 234 CLR 210 cited
Underhill v Hernandez [1897] USSC 197; 168 US 250 (1897) considered
Sue v Hill [1999] HCA 30; (1999) 199 CLR 462 cited
W S Kirkpatrick Co, Inc v Environmental Tectonics Corp, International [1990] USSC 11; 493 US 400 (1989) cited
Wilkinson v Downton [1897] 2 QB 57 cited
Wolf v Oxholm [1817] EngR 274; (1817) 6 M & S 92; 105 ER 1177 cited

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Larocque F, "The Tort of Torture" (2009) 17 Tort L Rev 158
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Date of hearing: 14-15 September 2009

Place: Sydney

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 136

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Solicitor for the Respondent: Australian Government Solicitor

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY

GENERAL DIVISION **NSD 956 of 2006**

BETWEEN:	**MAMDOUH HABIB** **Applicant**
AND:	**COMMONWEALTH OF AUSTRALIA** **Respondent**
JUDGES:	**BLACK CJ, PERRAM AND JAGOT JJ**
DATE OF ORDER:	**25 FEBRUARY 2010**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The order sought in paragraph 1 of the notice of motion filed by the respondent on 17 June 2009 be refused.
2. The question reserved under s 25(6) of the *Federal Court of Australia Act 1976* (Cth) and Order 50 rule 1 of the Federal Court Rules:

> *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 2009* (namely, 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 those claims 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 s 77(i) of the *Constitution*, or give rise to no cause of action at common law).

be answered as follows:

"No".

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
The text of entered orders can be located using Federal Law Search on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 956 of 2006**

BETWEEN:

MAMDOUH HABIB Applicant

AND:

COMMONWEALTH OF AUSTRALIA Respondent

JUDGES:	**BLACK CJ, PERRAM AND JAGOT JJ**
DATE:	**25 FEBRUARY 2010**

PLACE: SYDNEY

REASONS FOR JUDGMENT

BLACK CJ:

1 I agree with Jagot J, for the reasons her Honour gives, that the reserved question should be answered 'No'. I would add the following observations. In doing so, I must emphasise that the allegations made by Mr Habib are, at this stage of the proceeding, no more than allegations in an amended statement of claim and not the subject of evidence, much less any judicial determination of their accuracy or otherwise.

2 The applicant Mr Habib, the plaintiff in a proceeding remitted to this Court by the High Court of Australia, is an Australian citizen. He alleges that officers of the Commonwealth committed the torts of misfeasance in public office and intentional but indirect infliction of harm by aiding, abetting and counselling his torture and other inhumane treatment by foreign officials while he was detained in Pakistan, Egypt and Afghanistan and at Guantánamo Bay. If officers of the Commonwealth were found to have aided, abetted or counselled the commission of those offences, the officers would be taken to have committed those offences (s 11.2 of the *Criminal Code Act 1995* (Cth)) and thus, Mr Habib alleges, to have acted beyond the scope of their lawful authority.

3 For this part of his case to succeed, Mr Habib must prove, on 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 in breach of s 6 of the *Crimes (Torture) Act 1988* (Cth)) ('Crimes (Torture) Act') or by or at the behest of agents of foreign states in breach of s 7 of the *Geneva Conventions Act 1957* (Cth) and ss 268.26 and 268.74 of the Criminal Code. (The Crimes (Torture) Act gives effect for Australia to the provisions of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations on 10 December 1984* ('the Torture Convention') and the *Geneva Conventions Act 1957* (Cth) gives effect to the *Convention relative to the Treatment of Prisoners of War adopted at Geneva on 12 August 1949* (the Third Geneva Convention) and the *Convention relative to the Protection of Civilian Persons in Time of War adopted at Geneva on 12 August 1949* (the Fourth Geneva Convention). Australia is a party to each of these conventions.) Whilst it is a necessary element of the case against the Commonwealth that the agents of foreign states committed the principal offence, it is not a necessary element that those persons were prosecuted (s 11.2(5) Criminal Code).

4 The question reserved for the Court under s 25(6) of the *Federal Court of Australia Act 1976* (Cth) and O 50 r 1 of the Federal Court Rules is whether, as the Commonwealth asserts, the Court should dismiss the claims of misfeasance in a public office and intentional but indirect infliction of harm for the reason that, since their resolution would require a determination of the unlawfulness of acts of agents of foreign states within the territories of foreign states, those claims 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 s 77(i) of the Constitution, or give rise to no cause of action at common law.

5 The Commonwealth argues that the act of state doctrine of the common law compels this result. Whilst there was dispute about the scope of the doctrine, it was not in contention that it forms part of the common law of Australia: see *Potter v Broken Hill Proprietary Co Ltd* [1906] HCA 88; (1906) 3 CLR 479; *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* [1988] HCA 25; (1988) 165 CLR 30; *Petrotimor Companhia de Petroleos SARL v Commonwealth of Australia* [2003] FCAFC 3; (2003) 126 FCR 354.

6 Judicial consideration of the doctrine in Australia has been limited and conceptions of it in this country draw upon cases decided by the House of Lords and courts of the United States. The doctrine is commonly defined by reference to the observations of Fuller J in *Underhill v Hernandez* [1897] USSC 197; 168 US 250 (1897) at 252 that:

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.

7 I agree with Jagot J that the common law has evolved such that the authorities do not support the application of the act of state doctrine in the present case. If, however, the choice were finely balanced, the same conclusion should be reached. When the common law, in its development, confronts a choice properly open to it, the path chosen should not be in disconformity with moral choices made on behalf of the people by the Parliament reflecting and seeking to enforce universally accepted aspirations about the behaviour of people one to another.

8 Torture offends the ideal of a common humanity and the Parliament has declared it to be a crime wherever outside Australia it is committed. Moreover, and critically in this matter, the Crimes (Torture) Act is directed to the conduct of public officials and persons acting in an official capacity irrespective of their citizenship and irrespective of the identity of their government. The circumstance that a prosecution may only be brought against an Australian citizen or a person present in Australia and requires the consent of the Attorney-General of the Commonwealth has evident practical consequences, but prohibited conduct is not thereby deprived of its character as a crime nor is the strength of the Parliament's emphatic disapproval of such conduct in any way thereby diminished.

9 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.

10 As well, and again consistently with Australia's obligations under the Torture Convention, the Parliament has spoken with clarity about the moral issues that may confront officials of governments, whether foreign or our own, and persons acting in an official capacity. It has proscribed torture in all circumstances, answering in the negative the moral and legal questions whether superior orders can absolve the torturer of individual criminal responsibility and whether, in extreme circumstances, torture may be permissible to prevent what may be apprehended as a larger wrong: see the Crimes (Torture) Act, s 11; the Torture Convention, Art 2.

11 In these circumstances, if – contrary to the view that I share with Jagot J – the question were finely balanced and the common law were faced with a choice, congruence 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.

12 Consideration of the relevant sections of the Criminal Code, the Geneva Conventions Act and the Third and Fourth Geneva Conventions also, in my view, support these observations.

13 It is not to the point that Mr Habib's proceeding is a civil claim for damages and not a criminal proceeding under the Crimes (Torture) Act, the Geneva Conventions Act or the Criminal Code. The point is that, if a choice were indeed open, in determining whether or not the act of state doctrine operates to deny a civil remedy contingent upon breach of those Acts, the common law should develop

congruently with emphatically expressed ideals of public policy, reflective of universal norms.

I certify that the preceding thirteen (13) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Black

Associate:

Dated: 25 February 2010

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 956 of 2006**

BETWEEN:

MAMDOUH HABIB Applicant

AND:

COMMONWEALTH OF AUSTRALIA Respondent

JUDGES: **BLACK CJ, PERRAM AND JAGOT JJ**
DATE: **25 FEBRUARY 2010**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

PERRAM J:

I

14 The applicant, Mr Habib, seeks redress for what he alleges was Commonwealth complicity in alleged acts of torture committed upon him by officials of the governments of the United States, Egypt and Pakistan. In response the Commonwealth invokes the act of state doctrine and contends that because notions of international comity would prevent this Court from reviewing the lawfulness of foreign State acts of torture there can be no inquiry into whether the Commonwealth's officials were themselves complicit in that torture. The issues which arise are:

1. whether the act of state doctrine, to the extent that it would prevent this Court from reviewing the validity of acts of the Commonwealth executive, is inconsistent with Chapter III of the *Constitution*;
2. whether that doctrine applies to cases involving serious breaches of human rights; and
3. whether the doctrine is applicable to conduct of the United States government taking place outside that country.

II

15 On 7 October 2001 the United States ("the US") commenced military operations in Afghanistan entitled "Operation Enduring Freedom - Afghanistan" which appears to have had as its initial aim the ousting of the former Taliban regime and the denial to the Al Qaeda terrorist network of a safe-haven. As is well-known, that invasion formed a significant initial aspect of the Global War on Terror announced following the events in the US on the morning of 11 September 2001. On 4 October 2001 the present applicant, Mr Habib, alleges that he was arrested in Pakistan by agents of the government of that country acting with the assistance of agents of the US government. During his detention he alleges he was mistreated by Pakistani officials with the knowledge or assistance of US officials. The catalogue of mistreatments is extensive but includes, by way only of example, the administration of electrical shocks, beating, suspension from chains and being made to stand upon an electrified drum whilst, apparently, shackled to a wall. In mid-November 2001 he alleges that he was removed from Pakistan to Egypt by plane and that the circumstances of his embarkation included his being punched and kicked in the head, assaulted with a gun, shackled and chained with goggles on his eyes and a bag over his head. He claims that he was kept in Egypt for about six months between 21 November 2001 and May 2002 during which time Egyptian officials, with the knowledge or assistance of US officials, interrogated him using torture. Again the list of tortures is long but it includes, to give only the general flavour, the removal of fingernails, the use of electric prods, threatened sexual assault with a dog, forcible injection with drugs, extinguishment of cigarettes on flesh, the insertion of unspecified objects and gases into his anus and the electrocution of his genitals. Many other things besides are alleged to have occurred but they need not be set out. The general tenor is clear. During this six month period of interrogation Mr Habib alleges that he was encouraged to sign a confession that he had taken part in acts of terrorism.

16 In April or May 2002 – Mr Habib is not quite sure which – he claims to have been put back on a plane by Egyptian and US officials and then flown to Bagram airfield which is in Afghanistan and which, there is no dispute, was then under the *de facto* control of the US. There, he says, he remained for about two weeks, all the time in the custody of US officials. Thereafter, so he claims, he was flown to Khandahar which is also in Afghanistan and which, at this time, was also under the *de facto* control of the US. His stay there was not long for on 6 May 2002 he was placed, Mr Habib alleges, onto another plane and flown to a detention camp in the US naval base situated at Guantánamo Bay which, depending on one's view of the *Cuban-American Treaty* of 1903 may, or may not be, under the ultimate sovereignty of Cuba. In this place he alleges he was kept until 28 January 2005 when he was repatriated to Australia. For the 33 month period between his arrival at Bagram airfield and his ultimate departure from Guantánamo Bay, Mr Habib alleges that he remained at all times in the custody of officials of the US government. Whilst in that custody he alleges he was again the victim of a series of abuses – the list once more is not exhaustive – 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. Mr Habib alleges that in consequence of his torture he has suffered a number of serious ailments including post traumatic stress disorder, major depression, mental

distress, bruising and lacerations, burns, loss of memory, nightmares and flashbacks, scarring and sore ribs. Other injuries, mostly of a physical nature, are also alleged.

17 Pertinently to the present proceedings, Mr Habib claims that Australian officials were implicated in his mistreatment. So far as the period of his detention in Pakistan is concerned he says that on at least 24, 26 and 29 October 2001 one or more officers of the Australian Security and Intelligence Organisation ("ASIO"), the Australian Federal Police ("the AFP") and/or an officer from the Department of Foreign Affairs and Trade ("DFAT") participated in interrogations of him in the presence of Pakistani and/or US officials. He alleges that he was brought to the interrogation sessions in shackles and under armed Pakistani guard; that the questions he was asked concerned his alleged connexions with Al Qaeda; that it would have been obvious to anyone that he had been physically mistreated; that his questioning continued for many hours; and, that he was told he had lost his Australian citizenship and would be handed over to the Egyptians. He names a particular official within DFAT as being present and alleges that all the Australians officials who were there would have known, by looking at him, of the mistreatment he had suffered. He also alleges that the Australian officials sought, presumably through US or Pakistani officials, to have his detention continue. His allegations concerning his rendition to Egypt are of a similar kind. He claims that the Australian officials involved urged his rendition to that place and that some of the officials were actually present when he was subjected to the mistreatments previously recounted. Further, so he claims, ASIO itself supplied Egyptian officials with information to be used in his interrogation which had been obtained by ASIO under warrant from his home and car in Australia.

18 So far as Australian participation in the events at Guantánamo Bay is concerned Mr Habib's allegations are thus: that there were at least 12 occasions upon which Australian officials participated in interrogations of him; that he was interviewed by them whilst shackled in chains to the floor; that the signs of his mistreatment would have been obvious from his countenance; that he was interrogated by the Australian officials about his links with Al Qaeda; and, that the interrogations were of lengthy durations (on one occasion exceeding 14 hours). Further, he attributes to Australian officials requests by them of the US government that he be transferred to, and kept at, the detention camp at Guantánamo Bay.

19 All of these allegations, and many others besides, are contained in Mr Habib's fourth further amended statement of claim filed in these proceedings. Apart from some general matters upon which there is broad agreement between Mr Habib and the Commonwealth – for example, that Mr Habib was incarcerated by the US government at Guantánamo Bay – Mr Habib's allegations remain, it is to be emphasised, just that – allegations. There has been no trial and hence, thus far, no determination of their correctness.

III

20 Section 6 of the *Crimes (Torture) Act 1988* (Cth) makes it an offence for a public official outside of Australia to torture a person. Until 26 September 2002 s 7(1) of the *Geneva Conventions Act 1957* (Cth) made it an offence of extraterritorial operation to torture a person protected by the *Convention relative to the Treatment of Prisoners of War adopted at Geneva on 12 August 1949* ("the Third Geneva Convention") or the *Geneva Convention relative to the Protection of Civilian*

Persons in Time of War adopted at Geneva on 12 August 1949 ("the Fourth Geneva Convention"). On 26 September 2002, a date of no particular significance, the Commonwealth Parliament determined to relocate the offences relating to the Geneva Conventions from the *Geneva Conventions Act 1957* to ss 268.26 and 268.74 of the *Criminal Code Act 1995* (Cth) ("*Criminal Code*"). In circumstances of war or armed conflict, the Third Geneva Convention requires States party to the Convention to afford certain protections to prisoners of war whilst the Fourth Geneva Convention performs the same role for civilians. Mr Habib alleges that he was entitled to protection either under the Third or the Fourth Geneva Convention because there were wars or armed conflicts taking place and because he was necessarily either a prisoner of war or a civilian. The Commonwealth has previously denied the applicability of the Conventions to Mr Habib. The thicket of difficult issues arising from that denial – whether there was an armed conflict, whether Mr Habib as a national of a US ally is entitled to their protection and whether he was an enemy combatant rather than a civilian or prisoner of war – do not presently fall for consideration.

21 Mr Habib then alleges that each of the US, Egyptian and Pakistani officials who tortured him committed the various offences against Commonwealth laws set out above. Section 11.2 of the *Criminal Code* deems persons who aid, abet, counsel or procure offences against Commonwealth laws to have themselves committed those offences. Mr Habib alleges that each of the Australian officials who was involved in his interrogation in Pakistan, Egypt, Afghanistan and Guantánamo Bay aided, abetted, counselled or procured the commission of Commonwealth offences by US, Egyptian and Pakistani officials. Consequently, so he alleges, each of the Australian officials has committed the same offences. It follows, says Mr Habib, that the Commonwealth officials acted beyond their jurisdiction for neither the *Australian Federal Police Act 1979* (Cth) ("the AFP Act") nor the *Australian Security Intelligence Organisation Act 1979* (Cth) ("the ASIO Act") authorised members of those organizations to commit offences against Commonwealth law. As for the DFAT officials, the power being exercised by them could only have been a species of the executive power of the Commonwealth conferred by s 61 of the *Constitution*. That power was conferred for the express purpose of maintaining the laws of the Commonwealth and could not, therefore, be the source of any authority to commit Commonwealth offences: *A v Hayden* [1984] HCA 67; (1984) 156 CLR 532 at 540, 550, 562 and 580-581. The result, so Mr Habib contends, was that the Commonwealth officers concerned intentionally harmed him knowing that what they were doing was beyond anything the law authorised them to do or recklessly indifferent to what the limits of their lawful authority might have been. Consequently, so he claims, they committed the tort of misfeasance in a public office: *Northern Territory v Mengel* [1995] HCA 65; (1995) 185 CLR 307 at 345-348. He also alleges that by acting as they did the officials committed the innominate tort of intentional infliction of indirect harm: *Wilkinson v Downton* [1897] 2 QB 57; *Giller v Procopets* [2008] VSCA 236; (2008) 40 Fam LR 378; cf Larocque F, "The Tort of Torture" (2009) 17 Tort L Rev 158 at 169-172.

IV

22 In order to make good his claim that Australian officials committed the crime of aiding and abetting the commission of crimes by foreign officials Mr Habib must prove that the foreign officials committed those crimes. Section 11.2(b) of the *Criminal Code* makes

clear what might well otherwise have been obvious that there can be no criminal liability for complicity unless the primary offence is first shown to have been committed. This does not mean, of course, that the principal offender need be convicted or even prosecuted (s 11.2(5)); rather, it is simply a necessary element of the prosecution case. Consequently, Mr Habib will need to prove at the civil standard that each of the foreign officials committed the offences against Commonwealth law which he alleges. It is against that eventual necessity that the Commonwealth now seeks pre-emptively to wield what has come to be known as the act of state doctrine. It relies upon the oft-cited decision of the United States Supreme Court in *Underhill v Hernandez* [1897] USSC 197; 168 US 250 (1897) where Fuller CJ (delivering the opinion of the Court) said (at 252) that:

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. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

23 The Commonwealth contends that to determine whether agents of the US, Egypt and Pakistan committed offences against the *Crimes (Torture) Act 1988* (Cth), s 7(1) of the *Geneva Conventions Act 1957* (Cth) or ss 268.26 and s 268.74 of the *Criminal Code* it will inevitably be necessary for this Court to sit in judgment on the acts of the governments of those States done within their own territories, contrary to the proscription in *Underhill*. Consequently, there should be no trial on the merits and the proceedings should be dismissed. On 13 March 2009 I determined *inter alia* that the Commonwealth's contention that Mr Habib's proceedings were certain to fail in light of the act of state doctrine was not correct, that there was a triable issue as to whether the doctrine applied and that the matter should proceed: *Habib v Commonwealth (No 2)* [2009] FCA 228; (2009) 175 FCR 350 at 370-371 [80]- [82]. Somewhat exceptionally – but, it is to be emphasised, with the consent of Mr Habib – the Commonwealth then successfully sought the stating of a special case to the Full Court posing, on a final basis, the question of whether the act of state doctrine was a complete answer to Mr Habib's contentions. In my opinion, it is not and that the question should be answered "No".

V

24 Much of the debate in this Court revolved around whether the act of state doctrine was subject to an exception where grave breaches of human rights were concerned (see, eg *Kuwait Airways Corporation v Iraqi Airways Company (Nos 4 and 5)* [2002] UKHL 19; [2002] 2 AC 883 ("*Kuwait Airways*") at 1079, 1102, 1105 and 1109) and whether the doctrine could apply to US activities at Bagram airfield and Khandahar Afghanistan and Guantánamo Bay (cf. *The Playa Larga and Marble Islands* [1983] 2 Lloyd's Rep 171 (CA)). Subject to the matters set out in Section VI, those turbid waters need not presently be chanced for the Commonwealth's contention should clearly be rejected for another, more significant, reason. 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.

25 The relevant principle was expounded by Marshall CJ in *Marbury v Madison* [1803]

USSC 16; 5 US 137 (1803) at 177 when he said that "[i]t is, emphatically, the province and duty of the judicial department to say what the law is". The doctrine in *Marbury v Madison* is one of the constitutional norms of this country for "in our system the principle in *Marbury v Madison* is accepted as axiomatic": *Australian Communist Party v Commonwealth* [1951] HCA 5; (1951) 83 CLR 1 at 262 per Fullagher J; cited with approval *Attorney-General for Western Australia v Marquet* [2003] HCA 67; (2003) 217 CLR 545 at 570 [66] per Gleeson CJ, Gummow, Hayne and Heydon JJ; *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* [2007] HCA 38; (2007) 232 CLR 1 at 48 [101] per Kirby J; *Singh v Commonwealth* [2004] HCA 43; (2004) 222 CLR 322 at 330 [7] per Gleeson CJ; *Commonwealth v Mewett* [1997] HCA 29; (1997) 191 CLR 471 at 547 per Gummow and Kirby JJ; *Harris v Caladine* [1991] HCA 9; (1991) 172 CLR 84 at 134-135 per Toohey J. The decision in *Marbury v Madison* was concerned with judicial review of legislative action but in this country it is established that the doctrine also explains the capacity of the judiciary to review the legality of administrative action: *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36 per Brennan J; *Attorney-General for Western Australia v Marquet* [2003] HCA 67; (2003) 217 CLR 545 at 570 [66] per Gleeson CJ, Gummow, Hayne and Heydon JJ; *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 at 347-348 [73] per McHugh, Gummow and Hayne JJ; *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135 at 152-153 [43]- [44] per Gleeson CJ, Gummow, Kirby and Hayne JJ; *Abebe v Commonwealth* (1999) 197 CLR 510 at 560 [137] per Gummow and Hayne JJ; *Kartinyeri v Commonwealth* [1998] HCA 22; (1998) 195 CLR 337 ("*Kartinyeri")* at 381 [89] per Gummow and Hayne JJ; *Commonwealth v Mewett* [1997] HCA 29; (1997) 191 CLR 471 at 497 per Dawson J. The doctrine "ensures that courts exercising the judicial power of the Commonwealth determine whether the legislature and the executive act within their constitutional powers" (*Kartinyeri* at 381 [89] per Gummow and Hayne JJ). That principle accords "an essential place to the obligation of the judicial branch to assess the validity of legislative and executive acts against relevant constitutional requirements" (*Attorney-General for Western Australia v Marquet* [2003] HCA 67; (2003) 217 CLR 545 at 570 [66] per Gleeson CJ, Gummow, Hayne and Heydon JJ). The existence of that obligation on the judicial branch is "a basic element of the rule of law" (*Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 482 [5] per Gleeson CJ) and the rule of law itself is "one of the assumptions upon which the *Constitution* is based" (*APLA Limited v Legal Services Commissioner (NSW)* [2005] HCA 44; (2005) 224 CLR 322 at 351 [30] per Gleeson CJ and Heydon J citing *Australian Communist Party v The Commonwealth* [1951] HCA 5; (1951) 83 CLR 1 at 193 per Dixon J).

26 These observations are consistent with the text of Chapter III. Section 75(iii) confers jurisdiction on the High Court in matters "in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party"; s 75(v) in all matters "in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth". Together these two provisions, as Deane and Gaudron JJ explained in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* [1995] HCA 23; (1995) 183 CLR 168 at 204-205:

constitute an important component of the Constitution's guarantee of judicial process in that their effect is

to ensure that there is available, to a relevantly affected citizen, a Ch III court with jurisdiction to grant relief against an invalid purported exercise of Commonwealth legislative power or an unlawful exercise of, or refusal to exercise, Commonwealth executive authority.

27 Consequently no law of the Parliament may bar the right to proceed against the Commonwealth in respect of the scope of its constitutional power: *Mutual Pools & Staff Pty Ltd v The Commonwealth* [1994] HCA 9; (1994) 179 CLR 155 at 217 per McHugh J; *Commonwealth v Mewett* [1997] HCA 29; (1997) 191 CLR 471 at 497 per Dawson J. And, just as a law of the Parliament may not remove from judicial scrutiny issues about the limits of the Commonwealth's lawful authority, so too it must follow that common law doctrines imported from unitary systems such as England's must yield to the ineluctable imperatives of ss 75(iii) and (v). Thus, for example, the doctrine of the Crown's immunity from suit can have no operation in federal jurisdiction for if it did it would surely "cut across the principle in *Marbury v Madison*. It would mean that the operation of the *Constitution* itself was crippled by doctrines devised in other circumstances and for a different system of government": *Commonwealth v Mewett* [1997] HCA 29; (1997) 191 CLR 471 at 548 per Gummow and Kirby JJ; *British American Tobacco Australia Ltd v Western Australia* [2003] HCA 47; (2003) 217 CLR 30 at 44 [11] per Gleeson CJ.

28 The effect of this principle is to ensure that whenever a question as to the limits of Commonwealth power arises it is justiciable. Such questions may arise in a multitude of forms. They may arise directly, and in their purest form, where writs of mandamus or prohibition are sought under s 75(v) of the *Constitution* or s 39B of the *Judiciary Act 1903* (Cth) ("*Judiciary Act*"). But they may arise elsewhere. Thus, any Court exercising federal jurisdiction may declare a law of the Parliament to be invalid where such an issue arises in a matter before it even if the court in question has not been granted jurisdiction in matters arising under the *Constitution* under s 76(i), just as the High Court's power to declare laws invalid in no way awaits the Parliament's decision to grant it the optional jurisdiction in s 76(i). So too, questions as to the limits of executive power may arise outside of a suit to obtain a writ of prohibition or mandamus, for example, in proceedings for statutory orders or declaratory relief or under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). In private law similar questions can occur. There may, for example, be an issue as to whether the Commonwealth or its agencies had the power to enter into a particular commercial arrangement just as the question of *ultra vires* inevitably arises in the tort of misfeasance in a public office. Of course, the Parliament is free in a number of these contexts to vary the substantive law – it can enact an ouster clause or it may be able to abolish the tort – but what it cannot do is to command courts exercising federal jurisdiction to shy away from determining the question of legality when it arises.

29 This then is the principle applicable to Mr Habib's case. His suit is in federal jurisdiction for it both arises under the *Constitution* (s 39B(1A)(b) of the *Judiciary Act*) and under the *Australian Federal Police Act* and the *Australian Security and Intelligence Organisation Act* (s 39B(1A)(c) of the *Judiciary Act*). Thus the judicial power of the Commonwealth is engaged. Whatever else the act of state doctrine is it can neither "cut across *Marbury v Madison*" nor operate so that the *Constitution* itself is "crippled". Yet that is precisely what the Commonwealth's submissions entail. If accepted, they would mean that the High Court (and this Court too) would be unable to entertain Mr Habib's suit to enforce the limits of s 61 of the *Constitution* and to ensure

that officers of ASIO and the AFP acted within the law. To 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.

30 There are four footnotes to these observations. The first concerns the Full Court of this Court's decision in *Petrotimor Companhia de Petroleos SARL v Commonwealth of Australia* [2003] FCAFC 3; (2003) 126 FCR 354 ("*Petrotimor*"). My reading of that decision is that the Court declined, on the basis that it lacked jurisdiction, to entertain a suit which sought *inter alia* to establish that a Commonwealth statute was a law with respect to the acquisition of property and that it had not provided for just terms. The acquisition was said to flow because the property in question was a foreign immovable and was, therefore, subject to the rule laid down by the High Court in *Potter v Broken Hill Proprietary Co* [1906] HCA 88; (1906) 3 CLR 479 ("*Potter*") which extended to foreign patents the rule laid down by the House of Lords in *British South Africa Co v Companhia de Moçambique* [1893] AC 602 ("*Moçambique*"). The *Moçambique* rule denied the jurisdiction of the English courts to entertain suits touching upon the title to foreign land because of a distinction between local and transitory actions. Whatever else one might say about those two rules (as to which see Section VI below) they cannot operate to overcome the effects of Chapter III. It may well be that a claim that a law of the Parliament has appropriated foreign immovable property may turn out to be rather difficult to prove but it is not to be accepted that the Commonwealth's constitutional limits cease to be justiciable merely because those limits are played out in a way which touches on foreign property. If the Parliament has erected limitations on power which affect foreign property then those limits are irretrievably justiciable. To that extent the *Moçambique* rule and its progeny operate to prevent judicial scrutiny of the limits of Commonwealth legislative or executive authority they are to be seen, as Crown immunity itself was seen in *Mewett*, as inconsistent with the scheme contemplated by Chapter III and inapplicable. To the extent that *Petrotimor* holds to the contrary it is, in my opinion, and with great respect to the distinguished judges who decided it, plainly wrong. This is not to decline to follow *Potter* or *Moçambique* (a path foreclosed in this Court) for their direct operation does not arise in Mr Habib's case. It is instead simply to observe that they cannot be applicable where they are directly inconsistent with established constitutional arrangements.

31 The second footnote concerns a line of cases which suggest that there is no "matter" which may be dealt with in federal jurisdiction where a federal court is called upon to extend "its true function into a domain that does not belong to it, namely the consideration of undertakings and obligations depending entirely on political sanctions": *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 370 per Gummow J ("*Ditfort*"). For reasons set out below I doubt whether that principle, which is a part of constitutional law, comprises any part of the act of state doctrine. But whether or not that be so, it is difficult to see that there will ever be such an issue where there is an allegation of excess by the Commonwealth of its constitutional authority. The same remark may be made of the political question doctrine considered in *Baker v Carr* [1962] USSC 42; 369 US 186 (1962) at 211.

32 The third footnote concerns the Commonwealth's acceptance during argument that the act of state doctrine could not have been invoked as an answer to a claim under s 75(v)

for a constitutional writ. Despite that concession it sought to confine the non-application of the doctrine to suits under that provision and denied that s 75(v) meant that it had become inapplicable in the present suit. For reasons set out above, the inconsistency which exists is not with s 75(v) alone (although it is certainly that). It is rather with the principle in *Marbury v Madison* and the provisions of s 75(iii) and (v) taken together and the schema they express. Mr Habib's suit started life in the High Court as (at least) a suit under s 75(iii) but was remitted to this Court by Gummow J. It is untenable to think that the act of state doctrine could have been pleaded against s 75(iii); no different position obtains in this Court.

33 The last footnote concerns the soundness of the Commonwealth's argument that there were reasons to distinguish, from the perspective of the act of state doctrine, an action in tort against the Commonwealth from an application for a writ of prohibition. As a matter of impression the distinction is unattractive. Mr Habib's claim could now be amended to include a claim for a writ of prohibition directed to ASIO, the AFP and DFAT officers concerned in addition to the claim for damages for misfeasance and indirect infliction of harm. At that point the inevitable working through of the Commonwealth's position would appear to be that the act of state doctrine would both apply and not apply to Mr Habib's suit. Notwithstanding the sentiment of Oliver Wendell Holmes Jr that "[t]he life of the law has not been logic; it has been experience" (Holmes O W Jr, *The Common Law* (Little, Brown and Company, 1881) p 1) such a result bespeaks the presence of an erroneous premise which should be located and rejected.

34 The presentment that the argument may be unsound does not diminish upon its approach. The Commonwealth sought to maintain the existence of the act of state doctrine in civil tort proceedings whilst conceding its non-existence in civil constitutional writ proceedings by characterising the latter as adjuncts to the criminal process contemplated by the *Crimes (Torture) Act 1988*, s 7(1) of the *Geneva Conventions Act 1957* and ss 268.26 and 268.74 of the *Criminal Code*. That mattered, so it was put, because each of the foreign states in question had explicitly consented to criminal jurisdiction over their officials by the very act of acceding to the Third and Fourth Geneva Conventions and the convention underpinning the *Crimes (Torture) Act 1988* (that is, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations on 10 December 1984*) (collectively, the Conventions). If they had assented to criminal jurisdiction over their own officials it followed that there could be no room for the operation of the act of state doctrine when criminal breaches of those international instruments was alleged. It did not follow, so the learned Solicitor-General for the Commonwealth submitted, that they had by accession to the Conventions thereby waived the act of state doctrine in civil proceedings. Since constitutional writ proceedings were to be seen as adjuncts of the criminal law there was no anomaly in accepting that the act of state doctrine did not apply in such cases for waiver by accession had occurred. That, however, could not be said in relation to ordinary civil proceedings where, accordingly, the doctrine continued to apply.

35 This argument is not, it should be said, without subtlety. However, it contains two steps which must be rejected. The first concerns the proper characterisation of constitutional writ proceedings as civil or criminal. Civil proceedings to enforce the criminal law are not entirely unknown in Australian law even if they are not especially common. The usual view is that if a statute is merely criminal and nothing else then equity will grant no

injunction: *Hornsby Shire Council v Danglade* (1928) 29 SR (NSW) 118. The fact that many modern statutes dealing with administration create criminal offences has led to considerable developments in the availability in public law of equitable remedies: *Enfield City v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135 at 145 [22]. Given the nature of the offences in question it is perhaps open to doubt whether it would be possible to obtain an injunction to restrain their commission. But assuming those problems could be surmounted, there would be no particular difficulties in describing such proceedings as being collateral to the criminal law. It may be that the States Party to the Conventions should be taken to have consented not only to criminal proceedings against their officials under the Conventions (or the legislation implementing the Conventions) but also to civil proceedings seeking to enforce those criminal provisions against them. But even allowing that might be so, an application for a writ of prohibition under s 75(v) does not bear the character of being a suit to enforce, by civil process, the criminal law against the officials of a State Party. So far as States Party other than the Commonwealth are concerned the conclusion is obvious for a writ of prohibition directed to Commonwealth officials does not touch them. So far as the Commonwealth itself is concerned, there is a difference between a proceeding to enforce the criminal law *qua* criminal law and a proceeding which, by contrast, seeks to control excess of jurisdiction and whose effect of enforcing the criminal law is an incident of that process. That distinction is a fatal one for the Commonwealth's argument. It shows that constitutional writ proceedings are not proceedings whose purpose is to enforce the criminal law and it means that it cannot be correct then to assert that States party must have implicitly consented to such proceedings.

36 The second difficulty concerns that very proposition *viz* that the States Party must be taken, by their accession to the Conventions, to have assented to the non-application of the act of state doctrine. In fact, what they assented to was the non-application of immunity *ratione materiae*: *R v Bow Street Metropolitan Stipendiary Magistrate; ex parte Pinochet (No 3)* [1999] UKHL 17; [2000] 1 AC 147 at 205 per Lord Browne-Wilkinson, 266-267 per Lord Saville of Newdigate, 277-278 per Lord Millett and 290 per Lord Phillips; *Jones v Ministry of the Interior of the Kingdom of the Saudi Arabia* [2006] UKHL 26; [2007] 1 AC 270 at 286 [19] per Lord Bingham of Cornhill, 303-304 [89]-[94] per Lord Hoffman and 306 [103] per Lord Rodger of Earlsferry, [104] Lord Walker of Gestingthorpe and [105] per Lord Carswell. It is true that in *Pinochet (No 3)* Lord Millett (at 269) spoke of immunity *rationae materiae* as being "closely similar to" and perhaps "indistinguishable from aspects of the Anglo-American act of state doctrine" but it seems to me that that cannot, with respect, be literally correct since the latter doctrine can be invoked in suits where questions of immunity simply do not arise and in which neither the State concerned nor any of its officials are parties.

37 The heart of the matter then is that Mr Habib alleges before a Court exercising federal jurisdiction that Commonwealth officers acted outside the law. The justiciability of such allegations is axiomatic and could not be removed by Parliament still less the common law. No doubt comity between the nations is a fine and proper thing but it provides no basis whatsoever for this Court declining to exercise the jurisdiction conferred on it by Parliament.

VI

38 What has been said is sufficient to dispose of the matter. Much of the hearing was devoted to whether the act of state doctrine was subject to an exception in the case of gross breaches of human rights. In order to answer that question it would be necessary to have a clear understanding of precisely what the doctrine comprised and which part of it was in play. This Court should proceed on the basis that the doctrine exists. There are considered dicta in the High Court to that effect: *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* [1988] HCA 25; (1988) 165 CLR 30 at 40-41 ("*Spycatcher*"). A decision of the Full Court of this Court holds to the same effect: *Petrotimor* [2003] FCAFC 3; (2003) 126 FCR 354. Beyond the certainty that the doctrine exists there is little clarity as to what constitutes it. It is likely that the doctrine includes the principle of private international law that requires the lex situs to be applied to movables: *Buttes Gas and Oil Co v Hammer* [1982] AC 888 at 931 per Lord Wilberforce (with whom the other members of the House agreed at 938-939) ("*Buttes*"); *Ditfort* at 371 per Gummow J. In the United States the doctrine merely requires foreign state action to be treated as valid: *W S Kirkpatrick Co, Inc v Environmental Tectonics Corp, International* [1990] USSC 11; 493 US 400 (1989) ("*Kirkpatrick*") at 406, 409-410 per Scalia J (delivering the opinion of the Court). I would read that interpretation as supporting the view that the doctrine is a super choice of law rule requiring the lex fori to apply foreign law as the lex causae where it otherwise would not do so under its own private international law rules: cf. *Ditfort* at 372 per Gummow J. There are statements in this country which support the view that the doctrine is merely concerned with the validity of foreign State acts: *Spycatcher* at 40-41; *Potter* at 498, 500 per Griffiths CJ, 503, 504-505 , 507 per Barton J and 510-511, 513 per O'Connor J. But, on the other hand, there are statements too which suggest a connexion between *Underhill* and the rule in *Moçambique*: *Potter* at 495-497 per Griffiths CJ, 510-511, 513 per O'Connor J. As already noted, the *Moçambique* rule holds that local courts do not have jurisdiction to entertain suits involving title to foreign land because actions involving land are local and not transitory: *Moçambique* at 619, 622-623, 627-628 per Lord Herschell LC (with whom Lord Morris agreed), 631 per Lord Halsbury, 634 per Lord Macnaghten. That reading of *Moçambique* is consistent with recent pronouncements in the High Court as to what *Moçambique* means: *Commonwealth v Yamirr* [2001] HCA 56; (2001) 208 CLR 1 at 44 [32] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; *Lipohar v The Queen* [1999] HCA 65; (1999) 200 CLR 485 at 517 [81] per Gaudron, Gummow and Hayne JJ. The Court's earlier decision in *Potter* seems to regard *Moçambique* as being a manifestation of a rule – derived from *Underhill* – which requires state action in granting title to land (or as in *Potter* state action in issuing a patent) to be deemed valid: cf. *Potter* at 497-498 per Griffiths CJ, 501-503 per Barton J and 511 per O'Connor J. That view of *Moçambique* is not consistent with its application to suits involving land where the title is not in dispute: cf *Hesperides Hotels Ltd v Muftizade* [1979] AC 508 where the rule was applied even though no issue as to title arose.

39 If the act of state doctrine is concerned with validity (*Spycatcher* at 40-41, *Kirkpatrick* at 406, 409-410) and is not a rule of abstention ("[t]he act of state doctrine is not some vague doctrine of abstention": *Kirkpatrick* at 406 per Scalia J), then it is very difficult to be clear about what *Potter* actually holds. In that regard, there are two particular aspects of *Potter* which deserve emphasis. *First,* the *Underhill* question was first raised by the Court itself (see *Potter* at 493) and was not argued before the Full Court of Victoria where the only two issues were the application of the

Moçambique rule and the rule in *Phillips v Eyre* (1869) LR 4 QB 225 and (1870) LR 6 QB 1 (see *Potter* at 492) – there was no issue before the Full Court as to its jurisdiction to entertain the defendant's plea that the patent was invalid. *Secondly,* the High Court held that the Supreme Court had no jurisdiction to entertain the plaintiff's suit to enforce his patent because it had no jurisdiction to entertain that defence (*Potter* at 500 per Griffiths CJ and 516 per O'Connor J; Barton J's position is not entirely clear). This was not an application of the *Moçambique* rule at all. The actual application of the *Moçambique* rule would have led to the conclusion that the Supreme Court had no jurisdiction to entertain any kind of suit to enforce a foreign immovable (which was in fact the Supreme Court's conclusion: *Potter v The Broken Hill Proprietary Co Ltd* (1905) VLR 612 at 631 per Hood J and 639-640 per Hodges J). On that analysis the defence that the patent was invalid was irrelevant. On one view what has occurred is that a rule of abstention, *Moçambique*, has become fused with a rule of validity, *Underhill,* in a way which is productive only of confusion.

40 So much may be apparent from the Full Court of this Court's decision in *Petrotimor,* my respectful disagreement with certain aspects of which I have already flagged. That case concerned, in part, an amendment to the *Seas and Submerged Lands Act 1973* (Cth) which changed the definition of the continental shelf so that Australian sovereignty became asserted over a part of the seabed between Australia and East Timor. That part of the seabed had formerly been subject to a claim of sovereignty by Portugal when it was present in East Timor. The applicant held a concession to mine oil in that area from Portugal which was granted in 1974. One of the applicant's contentions was that by changing the definition of the continental shelf the Parliament had appropriated its property in the concession without paying just terms contrary to s 51(xxxi). The Court reasoned that the oil concession was a foreign immovable to which the *Moçambique* rule (or the *Potter* rule) applied (*Petrotimor* at 368 [42]-[43] per Black CJ and Hill J) and that the Court therefore had no jurisdiction to entertain the suit (at 368-369 [44]). This result is disconcerting at two levels. *First*, there was no suggestion that the concession had not been validly granted (as there was in the defendant's defence in *Potter*) so there was no risk that the Court was going to have pass on that question. If the act of state doctrine is a rule requiring local Courts to proceed on the basis that foreign state action is valid then the outcome would have been that the Federal Court was bound to assume that the concession was valid, a proposition which would not have provided any basis for a finding that the Court lacked jurisdiction to determine a debate as to whether s 51(xxxi) had been complied with. The conceptual confusion flowing from *Potter's* curious commingling of a rule of jurisdiction - *Moçambique* - with a rule of validity - *Underhill* - is the likely source of this surprising outcome. *Secondly,* it would appear to mean that the guarantee of just terms in s 51(xxxi) does not extend to property subject to the *Moçambique* rule. The first of these propositions is, for reasons I have already given, inconsistent with Chapter III which casts upon this Court both a jurisdiction and a duty to determine suits in which questions of constitutional power arise whatever else the rule in *Moçambique,* imported as it is from a unitary system, might say. The second proposition is very difficult to reconcile with the repeated statements in the High Court that "property" in s 51(xxxi) is to be construed liberally (*Telstra Corporation Ltd v Commonwealth* [2008] HCA 7; (2008) 234 CLR 210 at 230 [43] and the authorities there collected). It would be difficult to think that the word "property" would not include a foreign immovable and more difficult still to think of any plausible reason why s 51(xxxi) (or any other part of the *Constitution*

for that matter) should be construed as stopping at the 10 mile limit.

41 A common thread in all of these uncertainties is the *Moçambique* rule itself. The High Court has reserved the correctness of both *Moçambique* and *Potter: Regie Nationale des Usines Renault SA v Zhang* [2002] HCA 10; (2002) 210 CLR 491 at 520 [75]-[76]. In might be noted for completeness that the *Moçambique* rule has been abolished in NSW by s 3 of the *Jurisdiction of Courts (Foreign Land) Act 1989* and also in the ACT by s 34(1) of the *Law Reform (Miscellaneous Provisions) Act 1955*. The role of those provisions in federal jurisdiction in light of s 79 of the *Judiciary Act 1903* is, as yet, unclear. However, on any view, the rule continues to have an ongoing effect on the content and operation of the act of state doctrine because of its reference to *Underhill*. *Moçambique* undoubtedly binds this Court since it was applied not only in *Potter* but also in *Commonwealth v Woodhill* [1917] HCA 43; (1917) 23 CLR 482. *Potter*, of course, binds this Court although there are serious difficulties in disentangling precisely what it holds. The fact that the issue the High Court appears to have decided the case on – *Underhill* – was not argued in the Court below and the fact that although the validity of the patent was put in issue by the defendant's defence the actual issue before the High Court was whether the *Moçambique* rule applied has resulted in a decision whose precise meaning is, in my respectful opinion, most opaque.

42 It is possible the act of state doctrine also includes the abstention principle discussed by Lord Wilberforce in *Buttes* (at 931-934) which may now be some species of vaguely defined deference rule (*Kuwait Airways* at 1109 [140] per Lord Hope of Craigend, 1101 [113] per Lord Steyn; although cf. 1080 [24] per Lord Nicholls of Birkenhead, 1105 [125] per Lord Hoffman). The Full Court of this Court, whilst not deciding the issue, left open the possibility that the act of state doctrine did include such a principle in *Petrotimor* (at 369 [45]-[46]). Gummow J noted in *Ditfort* (at 370-371) that this kind of issue was closer to the United States political question doctrine. Like Gummow J, I would see the concerns arising from the kind of subject matter in *Buttes* as being resolved, at least in the federal jurisprudence of this country, on the basis of an absence of a "matter" or of parties with standing: *Ditfort* at 370-371. I would not regard it as part of the act of state doctrine which is much more likely to be a choice of law rule.

43 I mention these obscurities because it would be essential to know what the doctrine was before one could determine whether there was an exception from it for human rights breaches. If, contrary to the view I have just expressed, the *Buttes* abstention or deference doctrine in cases lacking manageable judicial standards is part of the act of state doctrine then there can, at least to that part of the doctrine, be no human rights exception. The absence of a matter in the requisite sense is a constitutional prohibition on the exercise of federal jurisdiction. That a human rights breach might somewhere be located within such a suit simply provides no answer to that problem. If, on the other hand, the doctrine is a super choice of law rule then there are no especial difficulties in declining to give effect to particular foreign laws which are repellent to the public policy of this country. It has long been clear that the rule that the lex situs is applicable to chattels may be disregarded if it offends the policy of the forum. Thus, foreign laws which confiscate, on the commencement of a war, the property of citizens of the forum will not be enforced in the forum: *Wolf v Oxholm* [1817] EngR 274; (1817) 6 M & S 92; 105 ER 1177; *In re Fried Krupp Actien – Gesellschaft* [1917] 2 Ch 188. Another line of cases refuses recognition to foreign expropriation laws which are aimed at particular individuals or classes of individuals. Thus no effect was afforded a Spanish

law which appropriated the property of the deposed king: *Banco de Vizcaya v Don Alfonso de Borbon Y Austria* [1935] 1 KB 140. Cut from the same cloth are the better known, but conceptually similar, decisions refusing to give effect to the Nazi law which expropriated Jewish property: *Oppenheimer v Cattermole (Inspector of Taxes)* [1976] AC 249 at 277-278 per Lord Cross of Chelsea, 282-283 per Lord Salmon; *R v Home Secretary; Ex parte L* [1945] KB 7 at 10; *Lowenthal v Attorney-General* [1948] 1 All ER 295 at 299. More recently it has been held that the lex situs does not apply where it arises from an invasion in undoubted breach of public international law and a UN Security Council resolution: *Kuwait Airways* at 1081 [27]-[29] per Lord Nicholls of Birkenhead (with whom Lord Hoffman agreed on this issue), 1102 [114] per Lord Steyn and 1111 [148] per Lord Hope. If, contrary to my present view, the act of state doctrine is a loosely defined principle of 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. The kinds of difficulty involved can be seen most clearly by asking how the reasoning in *Oppenheimer v Cattermole* could have been used to outflank the *Moçambique* rule if a suit had been brought in England for trespass to Jewish land situated in Germany confiscated under the Nazi laws. Revulsion is not, by itself, a source of jurisdiction.

44 Finally, mention should be made of the argument that the act of state doctrine could not apply at Bagram airfield, Khandahar or Guantánamo Bay because those places were not part of the United States. If the act of state doctrine is a conflict of laws rule concerned with validity then this issue will not arise for the doctrine will be conceptually ineffective as a defence to Mr Habib's claim: "The issue in this litigation is not whether [the alleged] acts are valid, but whether they occurred": *Sharon v Time, Inc.,* 599 FSupp 538, 546 (SDNY 1984) cited with approval by Scalia J in *Kirkpatrick* at 406. Mr Habib's contention is that his torture caused him personal injury, not that it was invalid, a proposition which, should the allegation be made good, is unlikely to have crossed his mind at the time. In a case where a rule of validity was engaged it would be essential to know which legal system the Courts of this country were bound to recognise. In that context, it would be of no assistance to know that the US is in *de facto* control of Guantánamo Bay (*Rasul v Bush* [2004] USSC 2809; 542 US 466 (2004) at 471, 480 (Stevens J, delivering the opinion of the Court) and 485 (Kennedy J concurring); *Boumediene v Bush* 553 128 SCt 2229 (2008) at 2251-2253) or Bagram airfield (*Al Maqaleh v Gates* 604 FSupp.2d 205 (D.D.C. 2009) at 209, 222 and 223) or the "installation" at Khandahar (*Amnesty International Canada v Canadian Forces (Defence Staff, Chief)* (2008) 305 DLR (4th) 741 at 747 [25]). The relevant inquiry would be one whose endpoint was the identification of the State whose sovereignty Australia recognised in those places. No submission was made by the Commonwealth as to whether Australia recognised US sovereignty in Bagram airfield or Khandahar or Guantánamo Bay.

45 If, on the other hand, the doctrine is a deference principle disconnected from validity (as the Commonwealth contends and which I would reject) then there would be appear to be no particular need to direct attention to the issue of sovereignty at all for the application of legal rules is not in any way involved. On this view of things what applies is a principle of abstention or deference whose end is the avoidance of diplomatic embarrassment. I can see no particular reason why the investigation of the acts of another State are likely to be the less embarrassing just because they are done abroad.

Indeed, there may be much to be said for the view that extra-territorial State conduct carries with it a greater potential for embarrassment. If I am wrong in my view that the act of state doctrine is a rule of validity and not a rule of abstention or deference then I would conclude that it is applicable outside the relevant State's territory. However, this is not my view of the doctrine.

VII

46 The Commonwealth's contention that this Court is not permitted to consider whether its officials' conduct was valid because to do so would require it to sit in judgment on the acts of other States is to be rejected. The question reserved should be answered "No". I agree with the orders proposed by Jagot J.

I certify that the preceding thirty-three (33) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram.

Associate:

Dated: 25 February 2010

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 956 of 2006**

BETWEEN:

MAMDOUH HABIB Applicant

AND:

COMMONWEALTH OF AUSTRALIA Respondent

JUDGES: **BLACK CJ, PERRAM AND JAGOT JJ**
DATE: **25 FEBRUARY 2010**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

JAGOT J:

47 The issue is whether the Court is bound to dismiss the major part of the applicant's claim because its resolution in his favour will require finding the acts of agents of foreign states outside Australia to be illegal. According to the respondent, the Commonwealth of Australia, the act of state doctrine precludes this Court (and any Australian court) from so finding, thereby preventing any judicial determination of the claim.

48 The claim is for damages. Liability on the part of the Commonwealth is said to arise from the acts of Commonwealth officers constituting the torts of misfeasance in public office and the intentional but indirect infliction of harm. The essence of the alleged wrongs is that officers of the Commonwealth are said to have aided, abetted and counselled the agents of foreign states to inflict torture on the applicant, Mamdouh Habib, whilst he was detained in Pakistan, Egypt, Afghanistan and Guantánamo Bay following the events of 11 September 2001.

49 Mr Habib commenced the proceeding in the High Court by writ of summons dated 16 December 2005. Section 44(2A) of the *Judiciary Act 1903* (Cth) permits the High Court to remit a matter to a court that has jurisdiction with respect to its subject-matter. The High Court remitted Mr Habib's proceeding to this Court on 26 April 2006. It appears to be common ground that but for the Commonwealth's argument in reliance on the act of state doctrine this Court would have jurisdiction to determine Mr Habib's proceeding. This Court has original jurisdiction in any matter either arising under the Constitution or involving its interpretation or arising under any laws made by the Parliament other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter (ss 39B(1A)(b) and (c) and 44(3) of the Judiciary Act).

50 At the outset it should be said that the Commonwealth categorically denies any complicity on the part of its agents in Mr Habib's alleged torture. Mr Habib's allegations are untested. The truth or otherwise of his allegations is not for present comment or consideration. This is because the Commonwealth's position is that the truth of these allegations cannot be tested in an Australian court by reason of the act of state doctrine.

51 The act of state doctrine has been described 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" (*R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [2000] 1 AC 61 at 106 (***Pinochet (No 1)***)).

52 Mr Habib acknowledges that the act of state doctrine exists and forms part of the common law of Australia, albeit in a form the precise nature and scope of which remains uncertain. Mr Habib contends that as he alleges acts of torture in grave breach of his human rights, constituting serious violations of international law and conduct made illegal by Australian laws having extra-territorial effect, the act of state doctrine is not engaged.

53 The issue arises as a question reserved for the Full Court under s 25(6) of the *Federal Court of Australia Act 1976* (Cth) and Order 50 r 1 of the Federal Court Rules. The question is:

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 2009?

54 Paragraph 1 of the Commonwealth's notice of motion filed on 17 June 2009 identifies the following ground for dismissal of paragraphs 1-36 of Mr Habib's fourth further amended statement of claim:

...the determination of those claims would require a determination of the unlawfulness of acts of agents of

foreign states within the territories of foreign states, [so that] those claims:

> a. are not justiciable and give rise to no "matter" within the jurisdiction of the Court under ss 39B and 44(3) of the Judiciary Act 1903 (Cth) and s 77(i) of the Constitution;
>
> b. further or in the alternative, give rise to no cause of action at common law.

55 The Commonwealth's contention of non-justiciability by reason of the lack of either a "matter" or common law cause of action depends upon its submission that the act of state doctrine places Mr Habib's claim outside the scope of "the court's true function [and] into a domain that does not belong to it" (*Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 370).

56 The questions which arise are as follows:

(1) What issues must the Court determine in order to resolve the impugned paragraphs of the fourth further amended statement of claim? A claim's "susceptibility to judicial handling" can be determined only "in the light of its nature and posture in the specific case, and of the possible consequences of judicial action" (*Baker v Carr* [1962] USSC 42; 369 US 186 at 211-212 (1962) cited *in Re Ditfort* at 367-368).

(2) Does judicial determination of these issues engage the act of state doctrine (which depends on the content and operation of the doctrine)?

(3) How does the act of state doctrine operate in the Australian constitutional and statutory context?

(1) WHAT ISSUES MUST THE COURT DETERMINE?

Some undisputed facts

57 The undisputed background facts giving rise to Mr Habib's proceeding are recorded in *Habib v Commonwealth (No 2)* (2009) 175 FCR 350; [2009] FCA 228 at [1]- [3] as follows:

[1] ... On 11 September 2001 a series of terrorists [sic] attacks took place on the mainland of the United States of America ("the US") as a result of which there was significant loss of civilian life. On 9 October 2001, the President of the US wrote to the Speaker of the House of Representatives and the President Pro Tempore of the Senate and informed the Congress that at 12.30 pm on 7 October 2001 US armed forces had commenced combat operations against Al Qaida terrorists and their Taliban supporters in Afghanistan. Pakistan shares a border with Afghanistan. Shortly before the commencement of the US combat operations on 7 October 2001 Mr Habib was present in Pakistan. ...[B]y 5 October 2001 Mr Habib had been detained by Pakistani authorities. ...[I]n early October 2001 the Commonwealth of Australia ("the Commonwealth") became aware of that state of affairs. [2] On 26 and 29 October 2001 Mr Habib was interviewed in Islamabad by an officer of the Australian Security Intelligence Organisation ("ASIO")... [I]n or around mid-November 2001 Mr Habib was taken to Egypt. The Commonwealth ...was aware in November 2001 that it was likely Mr Habib had been taken to Egypt and ...became aware in early 2002 that he was almost certainly there. ... [3] At some point Mr Habib was transferred from Egypt to Afghanistan. ...Mr Habib was, by this stage, in the custody of the US. ...Mr Habib had arrived in Guantánamo Bay by approximately 3 May 2002. ...[H]e remained there for two and a half years until 27 January 2005 incarcerated and uncharged. ...Mr Habib was visited by Australian officials during his incarceration. This included consular officials and officers of ASIO and the AFP [the Australian

Federal Police]. He was questioned by some of these people on several occasions. On 27 January 2005, Mr Habib was repatriated to Australia without charge.

58 But for these undisputed facts the questions must be answered by reference to Mr Habib's allegations.

Relevant people

59 Mr Habib is an Australian citizen (para 1 of the statement of claim). The statement of claim also records the status of officers of the Australian Federal Police (**the AFP**), Australian Security Intelligence Organisation (**ASIO**) and the Department of Foreign Affairs and Trade (**DFAT**) as persons purporting to exercise the duties, functions and powers vested in them by both enabling legislation (the *Australian Federal Police Act 1979* (Cth), the *Australian Security Intelligence Organisation Act 1979* (Cth) and the *Public Service Act 1999* (Cth)) and s 61 of the Constitution (the executive power of the Commonwealth). Further, the statement of claim contends that those officers, in respect of the conduct founding Mr Habib's complaints, were purporting to exercise a public duty in circumstances where the Commonwealth was liable (vicariously or otherwise) for their actions (paras 2, 3 and 4).

Relevant states

60 The statement of claim (paras 5 and 6) records that the Commonwealth of Australia, the United States of America (**the US**), Afghanistan, Pakistan and Egypt are parties to the *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949* (**the Third Geneva Convention**) and the *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949* **(the Fourth Geneva Convention**). It also records that Australia and Egypt are parties to the *Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts* (**Additional Protocol 1**). Although not pleaded, it is also not in dispute that Australia, the US, Egypt and Afghanistan are parties and Pakistan a signatory to the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984* (**the Torture Convention**).

61 Paragraphs 7 and 8 of the statement of claim assert that from no later than 1 October 2001 each of Australia, the US, Pakistan and Egypt were engaged in an armed conflict on their own territory and elsewhere with the organisation known as Al Qaeda (**the Al Qaeda armed conflict**) and from on or about 7 October 2001 in a declared war or armed conflict with the State of Afghanistan then under the control of a government known as the Taliban (**the Afghan armed conflict**).

Relevant conduct

62 Mr Habib was detained between 5 October 2001 and 28 January 2005 (when he was released from Guantánamo Bay without charge). Paragraphs 9 to 16 of the statement of claim relate to Mr Habib's detention and interrogation in Pakistan between about 4 October 2001 and mid November 2001. Paragraphs 17 to 23 relate to his detention and interrogation in Egypt between about 21 November 2001 and May 2002. Paragraphs 24 to 36 relate to his detention and interrogation at Bagram and Kandahar

airbases in Afghanistan for two weeks in about May 2002 and thereafter at Guantánamo Bay until 28 January 2005.

63 Mr Habib alleges that he was detained in Pakistan and Egypt by persons engaged or employed by the governments of Pakistan and Egypt respectively, and by or with the assistance of persons engaged or employed by the government of the US in connection with the Al Qaeda armed conflict and the Afghan armed conflict. He alleges that he was detained at Bagram and Kandahar airbases in Afghanistan and in Guantánamo Bay by persons engaged or employed by the government of the US in connection with the Al Qaeda armed conflict and the Afghan armed conflict.

64 Mr Habib alleges that during his period of detention in Pakistan and Egypt he was subjected to repeated and oppressive interrogation and mistreatment undertaken by or at the behest of persons engaged or employed by the governments of Pakistan and Egypt, and by or with the assistance or knowledge of persons engaged or employed by the government of the US. He further alleges that during his period of detention at Bagram and Kandahar Airbases in Afghanistan and in Guantánamo Bay he was subjected to repeated and oppressive interrogation and mistreatment undertaken by or at the behest of persons engaged or employed by the government of the US.

65 Mr Habib alleges that the conduct carried out by or at the behest of agents of the governments of Pakistan, Egypt and the US in the places identified:

• constituted acts of torture within the meaning of s 3(1) of the *Crimes (Torture) Act 1988* (Cth) (a statute giving effect to the Torture Convention) in circumstances where that conduct was unlawful under Australian law, being contrary to s 6(1) of that Act (a section which makes it an offence for a public official outside of Australia to torture a person);

• in the case of the conduct carried out before 26 September 2002, involved the infliction of torture, inhuman treatment or the wilful causing of great suffering by Mr Habib being a person protected by the Third Geneva Convention and thus was a grave breach thereof within the meaning of article 130 and, as such, was unlawful under Australian law, being contrary to s 7(2)(c) of the *Geneva Conventions Act 1957* (Cth); and

• in the case of the conduct carried out after 26 September 2002, involved actions unlawful under Australian law by reason of ss 268.26(1) and 268.74(1) of the Criminal Code (being the Schedule to the *Criminal Code Act 1995* (Cth) (**The Criminal Code**)) which concern the war crimes of inhumane treatment and outrages upon personal dignity (and which, from 26 September 2002, replaced the equivalent provisions in the Geneva Conventions Act).

66 Mr Habib alleges that officers of the AFP, ASIO and DFAT, by their actions, aided, abetted or counselled this unlawful conduct of the agents of the governments of Pakistan, Egypt and the US. Those officers, thereby, also contravened each of s 6(1) of the Crimes (Torture) Act, s 7(2)(c) of the Geneva Conventions Act and ss 268.26(1) and 268.74(1) of the Criminal Code (as aiding, abetting or counselling the commission of an offence against a Commonwealth law is itself an offence by operation of s 11.2 of The Criminal Code).

67 Mr Habib alleges that he suffered loss and damage as a result of this unlawful conduct of the officers of the AFP, ASIO and DFAT. He also claims that, based on the same facts, the officers of the AFP, ASIO and DFAT acted in a way calculated to cause harm to him, without any lawful justification, and as a result of which he suffered harm.

Conclusions

68 The Commonwealth described the claim as one depending on Mr Habib proving that his alleged treatment by foreign agents within the territories of foreign states constituted criminal offences against Commonwealth laws.

69 Mr Habib described his claim as one in which an Australian citizen seeks redress from the Australian government for the alleged acts of Australian officials unlawful under and in respect of causes of action recognised by Australian law.

70 The Commonwealth's description of Mr Habib's claims is accurate; 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.

71 Mr Habib's description, however, is also accurate; his claim is one in which an Australian citizen seeks redress from the Australian government for the alleged acts of Australian officials unlawful under Australian law and in respect of causes of action recognised by Australian law.

(2) IS THE ACT OF STATE DOCTRINE ENGAGED?

The Commonwealth's submissions

72 The Commonwealth submitted that the act of state doctrine was described accurately by Fuller CJ of the Supreme Court of the United States in *Underhill v Hernandez* [1897] USSC 197; 168 US 250 at 252 (1897) as 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". The House of Lords approved the doctrine in *Buttes Gas and Oil Co v Hammer* [1982] AC 888. The doctrine forms part of the common law of Australia. It was referred to with approval by the High Court in *Potter v Broken Hill Proprietary Co Ltd* [1906] HCA 88; (1906) 3 CLR 479 at 495, 506-507 and 511 (***Potter v BHP***) and *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* [1988] HCA 25; (1988) 165 CLR 30 at 40-41 (***Spycatcher***). It was applied by the Full Court of the Federal Court in *Petrotimor Companhia de Petroleos SARL v Commonwealth of Australia* (2003) 126 FCR 354; [2003] FCAFC 3 to deny the existence of a matter within the meaning of s 77(i) of the Constitution and s 39B of the Judiciary Act. It was rejected as a reason for precluding summary dismissal of a proceeding for judicial review of the Executive's dealings with the US in respect of the detention of an Australian citizen in Guantánamo Bay in *Hicks v Ruddock* (2007) 156 FCR 574; [2007] FCA 299. It was referred to by Gummow J in *Re Ditfort* at 371.

73 The Commonwealth submitted that the doctrine is informed by the principles of the separation of powers and international comity (see *Spycatcher* at 41 endorsing *Buttes* at 932 to the effect that the underlying principle "is not one of discretion, but is inherent

in the very nature of the judicial process" and the statement of the US Supreme Court in *Oetjen v Central Leather Co* [1918] USSC 66; 246 US 297 at 304 (1918) that to permit the validity of the acts of a sovereign state to be examined and perhaps condemned by the courts of another would "imperil the amicable relations between governments and vex the peace of nations"). From this, the Commonwealth said, it follows that the limits of the doctrine are not to be found in *a priori* exceptions whether based on public policy or otherwise but from a consideration of the principles that inform the content of the doctrine. The better view is that where the doctrine is *prima facie* engaged, it operates unless the considerations of international comity and separation of powers that inform the content of the doctrine are clearly inapplicable. According to the Commonwealth, if there is any doubt about these considerations, judicial restraint is required. This is because the doctrine exists to avoid the need for inquiry by a court as to the effect on foreign relations of any particular determination about the validity of sovereign acts of foreign states.

74 The Commonwealth rejected the proposition that the doctrine does not apply where the acts in question are alleged to constitute grave violations of international law. The Commonwealth said this proposition gains no support from the jurisprudence of the US courts or, properly analysed, from the courts of the United Kingdom.

75 The present position of the US Supreme Court is derived from its statement in *Banco Nacional de Cuba v Sabbatino* [1964] USSC 48; 376 US 398 (1964). The Court rejected inflexible exceptions to the doctrine. The Court, instead, adopted a multi-factorial analysis as follows at 427-428:

If the act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs. It should be apparent 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, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence, as in the Bernstein case [referring to Bernstein v N V Nederlandsche-Amerikaansche, Stoomvaart-Maatschappij [1954] USCA2 73; 210 F.2d 375 (2d Cir. 1954)], for the political interest of this country may, as a result, be measurably altered. Therefore, rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

76 The two relevant decisions of the House of Lords are *Oppenheimer v Cattermole (Inspector of Taxes)* [1976] AC 249 and *Kuwait Airways Corporation v Iraqi Airways Company (Nos 4 and 5)* [2002] UKHL 19; [2002] 2 AC 883 (***Kuwait Airways No 4*** refers to the judgment of the Court of Appeal, ***Kuwait Airways No 5*** refers to the judgment of the House of Lords, collectively ***Kuwait Airways***).

77 Although a tax case, *Oppenheimer* involved the infamous German Nationalist Socialist (Nazi) citizenship laws of 1941 the purported effect of which was to deprive all German Jews living abroad of their German citizenship and property. Lord Cross (at 278) acknowledged that the question of the legitimacy of confiscatory property laws may create wide differences of opinion. His Lordship continued:

But what we are concerned with here is legislation which takes away without compensation from a section of the citizen body singled out on racial grounds all their property on which the state passing the legislation can lay its hands and, in addition, deprives them of their citizenship. To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all.

78 The Commonwealth emphasised the context exposed by the analysis of Lord Salmon in *Oppenheimer*. After expressing his agreement with Lord Cross (at 281), Lord Salmon observed (at 282) that, ordinarily, a refusal by the courts of the United Kingdom to recognise legislation of sovereign states about property within its territory and the citizenship of its nationals on the ground that it was "utterly immoral and unjust" could "obviously embarrass the Crown in its relations with a sovereign state whose independence it recognised and with whom it had and hoped to maintain friendly relations". In the case at hand, however, Lord Salmon (at 283) characterised the immorality of the Nazi decree of 1941 as "without parallel". His Lordship continued:

But, even more importantly...England was at war with Germany in 1941 – a war which...was presented in its later stages as a crusade against the barbarities of the Nazi régime of which the 1941 decree is a typical example. I do not understand how, in these circumstances, it could be regarded as embarrassing to our government in its relationship with any other sovereign state or contrary to international comity or to any legal principles hitherto enunciated for our courts to decide that the 1941 decree was so great an offence against human rights that they would have nothing to do with it.

79 The Commonwealth acknowledged that the decision of the Court of Appeal in *Kuwait Airways No 4* recognised an exception to the act of state doctrine for acts of a foreign sovereign contrary to public policy of the forum state (at [317]-[320]). The Commonwealth said, however, that the decision was not authority for the proposition that an exception to the doctrine exists in circumstances where the proceedings concern grave breaches of international human rights law. According to the Commonwealth, the approach of the House of Lords was affected by an incorrect concession to that effect. The concession wrongly treated *Oppenheimer* as identifying an exception to the act of state doctrine based on the public policy of the forum state. To the contrary, properly analysed, the non-application of the act of state doctrine in *Oppenheimer* enabled the forum court to apply its own public policy.

80 The Commonwealth noted that, despite the concession, Lord Hope in *Kuwait Airways No 5* accepted that any exceptions to the doctrine must be subject to "very narrow limits" so that a judge should be "slow to depart from" the principle that a foreign state ordinarily has jurisdiction over all assets in its territory (at [138]). At [140] his Lordship concluded that:

The golden rule is that care must be taken not to expand its ["the public policy exception"] application beyond the true limits of the principle. These limits demand that, where there is any room for doubt,

judicial restraint must be exercised. But restraint is what is needed, not abstention. And there is no need for restraint on grounds of public policy where it is plain beyond dispute that a clearly established norm of international law has been violated.

81 The Commonwealth also described the facts underlying the decision in *Kuwait Airways* as pivotal. *Kuwait Airways* involved an Iraqi law associated with Iraq's unlawful invasion of Kuwait. The law purported to transfer all Kuwait Airlines' assets to Iraq and thence to Iraqi Airways. The case raised no issues of breaches of international law "on spurious or inadequate or highly debatable grounds and/or where the country has friendly and peaceful relations with the foreign state in question, or where judicial intervention would undermine the diplomatic process or vex the peace of nations" (*Kuwait Airways No 4* at [377]). The breach of international law was beyond debate and arose in the context of hostile action by the foreign state.

82 The Commonwealth submitted that the operation of the analogous doctrine of sovereign immunity is instructive (specifically, immunity *rationae materiae* or subject-matter immunity). In *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)* [1999] UKHL 17; [2000] 1 AC 147 at 269 (***Pinochet (No 3)***) Lord Millet said that sovereign immunity is "closely similar to and may be indistinguishable from aspects of the Anglo-American act of state doctrine"; the former is a creature of international law operating as a "plea in bar to the jurisdiction of the national court, whereas the latter is a rule of domestic law which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state".

83 The Commonwealth also relied on *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26; [2007] 1 AC 270 to support the analogy to the doctrine of sovereign immunity. The case concerned allegations of torture in Saudi Arabia. The respondents – in effect – were the Kingdom of Saudi Arabia and its agents. The Commonwealth emphasised that part of the decision (at [17]-[32]) in which Lord Bingham distinguished between universal criminal jurisdiction for torture offences mandated in the Torture Convention and the lack of any equivalent universal civil jurisdiction. His Lordship also rejected the notion that a civil action for torture against agents of a foreign state did not directly implead the state (at [31]). It followed that despite the prohibition on torture being acknowledged as a peremptory norm or *jus cogens* as defined in article 53 of the *Vienna Convention of the Law of Treaties 1969*, that is "a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted", the application of the doctrine of sovereign immunity, a "procedural rule", did not involve any impermissible derogation from that norm. As Lord Bingham reasoned at [45]:

To produce a conflict with state immunity, it is therefore necessary to show that the prohibition on torture has generated an ancillary procedural rule which, by way of exception to state immunity, entitles or perhaps requires states to assume civil jurisdiction over other states in cases in which torture is alleged. Such a rule may be desirable and, since international law has changes, may have developed. But... it is not entailed by the prohibition of torture.

84 It followed that the civil claim in *Jones* could not be maintained in a court of the United Kingdom.

85 The Commonwealth submitted that *Jones* establishes sovereign immunity as an answer to any civil case involving an allegation of torture against a foreign state or its agents in

the territory of that foreign state. Thus, in the present case, if the agents of Pakistan, Egypt and the USA were sued directly in an Australian court for the alleged acts inflicted on Mr Habib those agents would be entitled to invoke sovereign immunity under s 9 of the *Foreign States Immunities Act 1985* (Cth) (a proposition Mr Habib accepted). According to the Commonwealth, the common jurisprudential underpinnings of the doctrines of sovereign immunity and act of state (that is, international comity and separation of powers) mean that the same result should follow for acts done in the territory of the foreign state. Putting it another way, Mr Habib should not be permitted to do indirectly (claiming against officers of the Commonwealth for aiding, abetting and counselling alleged acts of torture by foreign agents) that which he could not do directly (claiming against foreign agents for alleged acts of torture).

86 The Commonwealth accepted that the act of state doctrine, as a rule of the common law, is capable of statutory modification but submitted that it has not been modified for the purpose of civil proceedings. Under the Crimes (Torture) Act the conduct about which Mr Habib complains, in theory, could be the subject of criminal prosecution. In a prosecution the statute would displace the doctrine. In that event, the Commonwealth said that Parliament has provided for the considerations underpinning the doctrine by two statutory mechanisms – first, the need for the Attorney-General's consent to commence the prosecution (s 8(1) of the Crimes (Torture) Act and s 16.1 of The Criminal Code for offences in a foreign country) and, second, the ongoing prosecutorial discretion of the Director of Public Prosecutions being subject to the Attorney-General's direction (ss 6 and 8 of the *Director of Public Prosecutions Act 1983* (Cth)).

87 The Commonwealth, referring to the distinction between universal criminal and civil jurisdiction highlighted by the reasoning in *Jones*, stressed that the provisions of the Crimes (Torture) Act create a criminal offence. To that extent only the statute modifies the operation of the act of state doctrine. But this, said the Commonwealth, is a common law claim for damages invoking the Court's civil jurisdiction. The Crimes (Torture) Act says nothing about such a civil claim, just as the availability of a criminal prosecution says nothing about the operation of the doctrine in civil proceedings. Further, the Commonwealth noted that the US has not accepted the jurisdiction of the International Court of Justice under article 36(2) of the *Statute of the International Court of Justice 1945*, nor ratified or acceded to the *Rome Statute of the International Criminal Court 1998* (**the Rome Statute**). Egypt and Pakistan are also not parties to the Rome Statute. None of the foreign states are parties to this proceeding. The Court is thus asked to scrutinise the acts of agents of foreign states where, by sovereign choice, their nation state has limited the circumstances in which their agents' acts may be subject to international judicial scrutiny.

88 Having regard to these considerations the Commonwealth submitted that the act of state doctrine applies as Mr Habib's claim depends on a determination of the illegality of the acts of agents of foreign states in a foreign territory. As the doctrine's limits are to be found in consideration of the principles of international comity and separation of powers, the doctrine may be excluded only where those considerations can be shown to have no application. This is not such a clear case. It is not like *Oppenheimer* where England and Germany were at war. It is not like *Kuwait Airways* where Iraq's invasion of Kuwait was condemned by the international community as a manifest breach of international law. Further, the allegations that underpin the claim are not clear and

acknowledged but rather disputed as a matter of fact. Australia was in a coalition with the foreign states in question. The foreign states are not parties to this proceeding. By reason of the operation of the act of state doctrine the claim is unenforceable in an Australian court.

89 The Commonwealth disputed Mr Habib's alternative argument that the doctrine could not apply to acts of agents of a foreign state in the territory of another foreign state. This is relevant to paras 24 to 36 of the statement of claim which concern the alleged acts of US agents occurring at Bagram and Kandahar in Afghanistan and Guantánamo Bay in Cuba. The Commonwealth said that the act of state doctrine either extends to all acts outside the forum state (in this case, Australia) or at least to all acts in territories under the de facto control of the foreign state (in this case, the US). Mr Habib accepted that the airbases in Afghanistan and Guantánamo Bay were under the control of the US which, the Commonwealth said, sufficed to engage the doctrine.

General conclusion

90 Taken on their own terms, there are three difficulties confronting the Commonwealth's contentions. The first is that the development of the case law does not support the contentions. The second is that the considerations informing the content of the doctrine indicate that the dispute is justiciable in an Australian court. Third, none of the case law directly on point was decided in the Australian constitutional and statutory context.

The development of the case law

91 The facts of the present case bear some similarity to those that underpinned the seminal decision in *Underhill v Hernandez*. Hernandez was in charge of a revolutionary army in Venezuela. Underhill, a citizen of the US, was in Venezuela under a contract with the government. Underhill sued Hernandez in the US courts for damages for refusal to grant a passport allowing him to leave, confining him to his house and subjecting him to assaults and affronts by Hernandez's soldiers. The US courts gave judgment for Hernandez on the basis that the acts of Hernandez were the acts of Venezuela and not properly the subject of adjudication in the US courts.

92 However, the law in the US developed after *Underhill v Hernandez*. In *Sabbatino* the US Supreme Court refused to recognise any exception from the doctrine for violations of international law *per se* (at 431). Nevertheless, the decision represents a development of the doctrine by requiring consideration of the factors informing the existence of the doctrine on a case-by-case basis (at 427-428).

93 The development of the US jurisprudence did not cease with *Sabbatino*. The US Supreme Court described the doctrine as "not an inflexible one" in *First National City Bank v Banco Nacional de Cuba* 406 US 759 at 763 (1972). The Court adopted an approach, disavowed by both the Commonwealth and Mr Habib in the present case, of deference to an assurance from the Federal Government that its foreign relations would not be affected by a judicial determination of the claim (at 769-770).

94 In *W S Kirkpatrick Co, Inc v Environmental Tectonics Corp, International* [1990] USSC 11; 493 US 400 (1989) the US Supreme Court found that the factual predicate for the act of state doctrine did not exist as the Court was not being asked to declare

invalid any official act of a foreign state. The fact that the case involved an allegation that a contract had been procured by a bribe – which was illegal under Nigerian law – was held to be insufficient to engage the doctrine. The Court did not have to decide (in the sense that the case did not turn upon) the question of the Court's recognition of the official act of a foreign sovereign; the issue in the case was not the validity of those acts but whether they occurred (at 405-406). At 409-410 the Court clarified this distinction in the following terms:

The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid. That doctrine has no application to the present case because the validity of no foreign sovereign act is at issue.

95 In *Doe I v Unocal Corp* [2002] USCA9 708; 395 F. 3d 932 (9th Cir. 2002) the US Court of Appeals for the Ninth Circuit dealt with a case involving claims for damages against a private corporation, Unocal, and the Myanmar military for human rights violations allegedly perpetrated during the construction of an oil pipeline. The claims were brought by Myanmar residents under the *Alien Tort Claims Act* 28 USC SS 1350. This Act permitted a foreigner to bring a claim in a US Court for a tort committed in violation of the law of nations. The Court held that the Myanmar military (alleged to have committed the violations when providing security services for the oil pipeline) was immune by reason of sovereign immunity. Contrary to Unocal's argument, however, Unocal was not protected by the analogous act of state doctrine. While the Court accepted that the case required the Court to decide whether the Myanmar military had violated intentional law (thus distinguishing *Kirkpatrick*), it applied the *Sabbatino* factors to reach a conclusion that the doctrine was not engaged and thus did not preclude the claim against Unocal. First, as to international consensus, the acts alleged (murder, torture, rape and slavery) were all described by at 959 as *jus cogens* violations and thus involved norms binding on all nations whether or not they agree. By definition, all *jus cogens* violations are internationally denounced. Hence, the Court found that there was a high degree of international consensus about the illegality of the acts alleged – a consensus which severely undermined any application of the act of state doctrine. Second, as to implications for foreign relations, the US government had already denounced Myanmar's human rights violations. Third, the accused government continued to exist and remained in power. Fourth, the Court said it would be difficult to contend that the violations alleged were in the public interest. Accordingly, applying the four *Sabbatino* factors, the Court found that the act of state doctrine did not bar the claim against Unocal despite the fact that the Myanmar military was protected by sovereign immunity (at 959-960).

96 In *Sarei v Rio Tinto PLC* 456 F.3d 1069 (9th Cir. 2006), the claim was by residents of Papua New Guinea against a private company alleging human rights violations in respect of the operation of a copper mine. The Court summarised the relevant principles as follows (at 1084):

The act of state doctrine prevents U.S. courts from inquiring into the validity of the public acts of a

recognized sovereign power committed within its own territory. See Banco Nacional de Cuba v. Sabbatino, [1964] USSC 48; 376 U.S. 398, 401[1964] USSC 48; , 84 S.Ct. 923, 11 L.Ed.2d 804 (1964); Timberlane Lumber Co. v. Bank of America, [1977] USCA9 255; 549 F.2d 597, 605-607 (9th Cir.1977) (recounting history of doctrine). The doctrine reflects the concern that the judiciary, by questioning the validity of sovereign acts taken by foreign states, may interfere with the executive's conduct of American foreign policy. W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., [1990] USSC 11; 493 U.S. 400, 404[1990] USSC 11; , 110 S.Ct. 701, 107 L.Ed.2d 816 (1990). As a result, an action may be barred if (1) there is an "official act of a foreign sovereign performed within its own territory"; and (2) "the relief sought or the defense interposed [in the action would require] a court in the United States to declare invalid the [foreign sovereign's] official act." ...If these two elements are present, we may still choose not to apply the act of state doctrine where the policies underlying the doctrine militate against its application.

97 The jurisprudence of the United Kingdom shows a similar development of principle.

98 Contrary to the Commonwealth's submissions, the reasoning of Lord Salmon in *Oppenheimer* is not at odds with that of Lord Cross. Lord Salmon expressed his "entire agreement" with all the views of Lord Cross (at 281). Lord Salmon's observation that England was at war with Germany in 1941 is in the context of a paragraph that recognised the unparalleled immorality of the Nazi decree (said to be "different in kind" from a mere confiscatory law by the Soviet Republic in June 1918) and declared the decree to be "so great an offence against human rights that they [UK courts] would have nothing to do with it" (at 283).

99 Counsel's concession in *Kuwait Airways* also does not play as significant a role in the process of judicial reasoning in that decision as the Commonwealth's submissions suggested. In *Kuwait Airways No 4* the Court of Appeal referred to the opinion of Lord Cross in *Oppenheimer* as "permeated with a consideration of the role of international law" in deciding the legitimacy of foreign legislation (at [275]). The Court of Appeal's reasons disclose acceptance of what is described as a "public policy" exception to the act of state doctrine on a principled basis and not as a mere reflection of a concession by counsel (see, for example, at [307], [317]-[323], [372]-[383]).

100 The reasoning of the House of Lords in *Kuwait Airways No 5* is consistent with that of the Court of Appeal. Lord Nicholls described the public policy exception as "well established in English law" (at [18]). His Lordship thereafter described the principle of non-justiciability underpinning the decision in *Buttes* (a case at the heart of which was a boundary dispute between states, as Lord Wilberforce noted at 927) as one based on the lack of "judicial or manageable standards by which to judge [the] issues" (at [25] citing *Buttes* at 938). No problem of that kind existed where there was a plain, indeed acknowledged, breach of an established principle of international law (at [26]). Lord Steyn saw the public policy exception recognised by the Court of Appeal as a natural development of the reasoning in *Oppenheimer* (at [114]). Lord Hope identified the limits on the exception but recognised its existence (at [137]-[140]). In so doing his Lordship identified the "wider point of principle" in *Oppenheimer*, namely, that "our courts should give effect to clearly established principles of international law" (at [139]).

101 The "clearly established principles of international law" include the crime of torture which has the status of a *jus cogens* violation.

102 In *Pinochet (No 1)* at 117 Lord Steyn (subject to replacing the word "probably" with

"generally" in the text) endorsed the observation in American Law Institute, Restatement (Third) of Foreign Relations Law of the United States (1987) SS 443, to the effect that:

A claim arising out of an alleged violation of fundamental human rights – for instance, a claim on behalf of a victim of torture or genocide – would (if otherwise sustainable) probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established and contemplates external scrutiny of such acts.

103 While their Lordships reached a different view on sovereign immunity in *Pinochet (No 3)* (a case involving extradition for the purpose of a criminal prosecution), they nevertheless identified that the prohibition on torture was absolute from which no deviation is permitted. This is the rationale for universal criminal jurisdiction for torture offences so that the "international criminal – the torturer – could find no safe haven" (at 199).

104 In *Jones* (a civil action precluded by sovereign immunity) Lord Bingham referred to "the extreme revulsion which the common law has long felt for the practice and fruits of torture" as the "subject of express agreement by the nations of the world" through the Torture Convention (at [15]).

105 In *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 the claimant, a British citizen held in Guantánamo Bay without access to a lawyer, sought an order that the British Foreign Office make representations to the US government on his behalf. The Court of Appeal (at [52]-[57]) referred to the opinion of Lord Cross in *Oppenheimer* (at 277) and continued:

[53]. This passage lends support to ... [the] thesis that, where fundamental human rights are in play, the courts of this country will not abstain from reviewing the legitimacy of the actions of a foreign sovereign state. A more topical support for this proposition can be derived from the exercise that the court has to undertake in asylum cases, where the issue is often whether the applicant for asylum has a well-founded fear of persecution if removed to a third country. In such circumstances consideration of the claim for asylum frequently involves ruling on allegations that a foreign state is acting in breach of international law or human rights. ... [57] ...the passage from Lord Cross' speech in [Oppenheimer] supports the view that, albeit that caution must be exercised by this court when faced with an allegation that a foreign state is in breach of its international obligations, this court does not need the statutory context [that is, relating to refugees] in order to be free to express a view in relation to what it conceives to be a clear breach of international law, particularly in the context of human rights.

106 On the facts in *Abbasi* the Court declined relief observing (at [107] that "(o)n no view would it be appropriate to order the Secretary of State to make any specific representations to the United States, even in the face of what appears to be a clear breach of a fundamental human right, as it is obvious that this would have an impact on the conduct of foreign policy, and an impact on such policy at a particularly delicate time". This "delicacy" included that discussions were continuing at high levels with respect to British detainees, the appellate courts in the US also were to consider the position of detainees and those courts "have the same respect for human rights as our own", the detainees' cases having been taken up by the Inter-American Commission on Human Rights (at [107]).

107 The foregoing discussion shows that a number of the decisions do refer to the existence of a "public policy exception" to the doctrine. A recent article described this process as courts invoking "rule-like exceptions" to justify decisions made by reference to the facts of the particular case (Patterson, Andrew D, "The Act of State Doctrine is Alive and Well: Why Critics of the Doctrine are Wrong", 15 U.C. Davis J. Int'l L. & Pol'y 111 at 124 (2008)). The Commonwealth, as noted, rejected the notion of *a priori* exceptions to the doctrine, based on public policy or otherwise. According to the Commonwealth, the doctrine does not apply where, and only where, it is clear without any further inquiry that the considerations informing the rule's existence are not and cannot be engaged.

108 The Commonwealth's approach is superficially attractive. Whether the language of limitation should be preferred to that of exception, nevertheless, it is apparent that the test which the Commonwealth posits reflects the reasoning in *Underhill v Hernandez*, a decision made in 1897. But the foregoing discussion shows that the jurisprudence of the US and the United Kingdom developed after 1897 in tandem with international law, particularly international law following the exposure of the horrors of the Nazi regime in Europe at the end of the Second World War. Specifically, international humanitarian law has been codified through the Geneva Conventions of 1949 and Additional Protocols of 1977, the Torture Convention has been rapidly and almost universally acceded to, 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.

109 For similar reasons it cannot be said that the recognition of limits on the doctrine is inconsistent with Australian authority. *Potter v BHP* is a decision of the High Court from the same era as *Underhill v Hernandez* and did not raise issues similar to the present case. The outcome in *Spycatcher* did not turn upon the act of state doctrine. Further, there are some references in decisions of the High Court consistent with recognition of the development of common law jurisprudence in this context. In *Sykes v Cleary* [1992] HCA 60; (1992) 176 CLR 77 at 135-136, Gaudron J cited *Oppenheimer* as authority for the proposition that a court is not bound to recognise a foreign citizenship law which "does not conform with established international norms or which involves gross violation of human rights". Her Honour made the same reference in *Sue v Hill* [1999] HCA 30; (1999) 199 CLR 462 at [175]. See also the references to both *Oppenheimer* and *Kuwait Airways* in *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387; [2004] HCA 25 at [46] and *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1; [2003] HCA 6 at [100], as well as the observations of Beaumont J in *Petrotimor* at [251].

110 The Commonwealth sought to distinguish the present case (in which Mr Habib's allegations remained untested) from cases such as *Oppenheimer* and *Kuwait Airways* in which the violations of international law were clear (indeed, notorious). However, the cases do not support a distinction between known and alleged violations. Moreover, there is no principled basis for such a distinction. As Mr Habib submitted, there is no requirement apparent in the jurisprudence that the violations of international law and human rights alleged be "established at some indeterminate level of confidence at an interlocutory stage". This must be so. The effect of the

Commonwealth's invocation of the act of state doctrine, if accepted, is to preclude the truth or otherwise of the allegations founding the claim from being tested and determined. The essence of the allegations founding the claim as ones involving grave breaches of international law and contraventions of Australian law, remain. As in *Kuwait Airways,* these legal parameters provide the standards necessary for judicial determination and place the present case in a category different from the "judicial no-man's land" apparent in *Buttes* (see, in particular, the reference by Lord Nicholls in *Kuwait Airways No 5* at [26] to the decision in *Buttes* turning upon "adjudication problems").

111 The long title of the Crimes (Torture) Act is "[a]n Act to give effect to certain provisions of [the Torture Convention], and for related purposes". The Act annexes the Torture Convention in its Schedule. Article 2(1) of the Torture Convention is unequivocal: "(e)ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction". Further, under article 2(2) "(n)o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture". Article 4(1) requires that " (e)ach State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture". Article 14 concerns the rights of victims of torture to compensation analysed in *Jones* (that is, rejection of the proposition of the article conferring universal civil jurisdiction but, rather, construing it as relating to claims of torture in the forum state only).

112 The Crimes (Torture) Act creates an offence of torture. 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, and regardless of whether a prosecution may be commenced and sustained against the alleged torturer. The statute thus reflects and embodies our Parliament's endorsement of the common law's "extreme revulsion...for the practice and fruits of torture" (*Jones* at [15]). As submitted for Mr Habib, if proved, his allegations would constitute grave violations of international human rights law. The weight of authority discussed above does not support the protection of such conduct from judicial scrutiny other than in the face of a valid claim for sovereign immunity.

113 Mr Habib's claim is against the Commonwealth. He alleges that the Commonwealth is liable for acts committed by its own officers, albeit in aiding and abetting agents of foreign states. The Commonwealth has no claim for sovereign immunity in respect of a claim brought against it in an Australian court. The fact that the foreign officials could claim sovereign immunity if sued in an Australian court, and the Australian officials if sued in a foreign court, may disclose some incoherence of underlying principle. The same situation, however, arose in *Unocal* when the perpetrators were protected by sovereign immunity but the company on whose behalf the violations were said to have been perpetrated was not protected by the act of state doctrine.

114 As Mr Habib said, the consequence of the Commonwealth's submission is that Commonwealth officials could not be held accountable in any court for their alleged breaches of Australian laws having extra-territorial effect. The consequence of Mr Habib's submissions, in contrast, is that each set of government officials would be able to be held accountable for their actions in their national courts. The cases on which the Commonwealth relied do not support a conclusion that the act of state doctrine prevents an Australian court from scrutinising the alleged acts of Australian officials

overseas in breach of peremptory norms of international law to which effect has been given by Australian laws having extra-territorial application. The case law indicates to the contrary.

115 In terms of the US jurisprudence, the *Sabbatino* factors show that, first, the prohibition on torture is the subject of an international consensus. Second, Australia's "national nerves", as the Commonwealth intimated, might be attuned to the sensibilities of its coalition partners but this has to be weighed in a context where the prohibition on torture forms part of customary international law and those partners themselves are signatories to an international treaty denouncing torture. Moreover, the claim is by an Australian citizen against the Commonwealth of Australia. Findings will be necessary as facts along the way but no declaration with respect to the conduct of foreign officials is required. Those officials will not be subject to the jurisdiction of an Australian court (or, for that matter, any international court by reason of this proceeding). It is the Commonwealth alone which is the respondent to this proceeding. Insofar as the Commonwealth suggested some unfairness to the (unidentified) foreign officials in question by reason of the foreign states not being parties to the proceeding, it is common ground that those states would have a valid claim for sovereign immunity if sued in an Australian court. Such unfairness as might arise, in any event, is a matter for the trial, not the reserved question. Third, the governments of the foreign states in question all remain in existence. Fourth, and as in *Unocal*, it would be difficult to contend that the alleged violations of international law identified in Mr Habib's claim were in the public interest.

116 In terms of the jurisprudence of the United Kingdom, there is no reason why an Australian court also "should not give effect to clearly established principles of international law" (*Kuwait Airways No 5* at [139]), particularly where those principles involve protection against the infliction of torture which the Commonwealth Parliament has prohibited.

Considerations informing the content of the doctrine

117 The claim is founded on allegations of torture. The prohibition on torture is an absolute requirement of customary international law. The prohibition is codified in the Torture Convention to which each of the states in question is party (other than Pakistan which is a signatory). It is conduct which the Commonwealth Parliament has proscribed by legislation expressed to apply throughout the world and to all persons, consistent with the international consensus that the torturer must have no safe haven. In terms of the "degree of codification or consensus concerning a particular area of international law" (the first *Sabbatino* factor) the prohibition on torture is an agreed absolute value from which no derogation is permitted for any reason. The prohibition is a clearly established principle of international law in the sense described in *Kuwait Airways No 5* at [139]. The international community has spoken with one voice against torture.

118 As the Commonwealth submitted, international comity is concerned not only with the content of the international consensus against torture but also the question of who may judge any contravention of that norm. While this case will involve factual findings about the conduct of foreign officials, the context in which their conduct arises for consideration is inconsistent with the acceptance of the Commonwealth's proposition that international comity might be undermined. The case involves an Australian court considering and determining whether, as alleged, officials of its own government aided,

abetted and counselled foreign officials to inflict torture upon an Australian citizen in circumstances where the acts of those foreign officials, if proved as alleged, would themselves be unlawful under Australian laws having extra-territorial effect. Insofar as judicial scrutiny might be thought to give rise to a risk of generalised embarrassment to Australia's foreign relations, the Commonwealth disavowed any suggestion that Australian jurisprudence should adopt an approach of deference to the advice of the executive about the state of foreign relations from time to time (referred to as the *Bernstein* exception, by reference to a US case bearing that name, *Bernstein v N V Nederlandsche-Amerikaansche, Stoomvaart-Maatschappij* [1954] USCA2 73; 210 F.2d 375 (2d Cir. 1954), discussed in *Sabbatino* at 427-428 and Patterson at 128-129).

119 The separation of powers rationale cannot be considered in isolation from that of justiciability. Issues for which there are no "judicial or manageable standards" of judgment are outside the reach of the judicial branch (*Buttes* at 938 and see also *Re Ditfort* at 370). But, as Mr Habib's submissions proposed, in this case 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. The Court will not be in a "judicial no-man's land" (*Buttes* at 938).

120 For these reasons, the two considerations of relevance to the content of the doctrine the Commonwealth identified do not support the operation of the act of state doctrine to preclude judicial determination of Mr Habib's claim.

(3) AUSTRALIAN CONSTITUTIONAL AND STATUTORY CONTEXT

121 As a rule of the common law (that is, a judge-made rule), the act of state doctrine yields to any contrary Parliamentary intention. Accordingly, the doctrine can be modified or excluded by statute. This reflects one of the foundations on which the doctrine rests – the separation of powers between the judicial and other branches of government. It is also a product of another fundamental principle – parliamentary sovereignty.

122 It is true that a criminal charge for the offence of torture created by the Crimes (Torture) Act may only be brought against an Australian citizen or a person in Australia and requires the consent in writing of the Attorney-General. The proceeding does not involve a charge under the Act. It alleges breaches of a peremptory norm that the Act, consistent with the Torture Convention, proscribes and makes criminal for the purposes of Australian law.

123 Part of the significance of the provisions of the Crimes (Torture) Act, the Geneva Conventions Act and The Criminal Code called up in the impugned paragraphs of the statement of claim is that they provide standards by which Parliament considered that conduct (including conduct of foreign officials outside Australia) may be subject to judicial determination by Australian courts. In so doing the provisions also disclose Parliament's intention that the issues in this area of discourse are capable of judicial determination.

124 Another part of the significance of these provisions is that they stipulate a limit on the power of the Commonwealth and its officers. Whatever else the Commonwealth and its officers might do in exercising their powers, they may not act in breach of

Commonwealth statutory proscriptions. The question as to who may judge whether they have done so or not calls up for consideration the specific Australian constitutional context.

125 By ss 75(iii) and (v) of the Constitution, the High Court has original jurisdiction in all matters "in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party" and "in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth" respectively. By ss 76(i) and (ii) of the Constitution, the Parliament may make laws conferring original jurisdiction on the High Court in any matter arising under the Constitution or involving its interpretation, or arising under any laws made by the Parliament respectively. Section 30 of the Judiciary Act gives original jurisdiction to the High Court in all matters arising under the Constitution or involving its interpretation. Under s 77(i) of the Constitution, the Parliament of the Commonwealth may make laws defining the jurisdiction of any federal court other than the High Court with respect to any of the matters mentioned in ss 75 and 76. By s 39B(1) of the Judiciary Act this Court has original jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth (s 75(v) of the Constitution). By s 39B(1A)(b) and (c) of the Judiciary Act this Court also has original jurisdiction in any matter arising under the Constitution, or involving its interpretation or arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

126 These provisions have been described as securing "a basic element of the rule of law" which cannot be removed by the Parliament because it too is bound by the Constitution. Thus as Gleeson CJ said in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476; [2003] HCA 2 at [5]- [6]:

[5]...Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed. But it cannot deprive this Court of its constitutional jurisdiction to enforce the law so enacted. ... [6] The Parliament cannot abrogate or curtail the Court's constitutional function of protecting the subject against any violation of the Constitution, or of any law made under the Constitution. However, in relation to the second aspect of that function, the powers given to Parliament by the Constitution to make laws with respect to certain topics, and subject to certain limitations, enable Parliament to determine the content of the law to be enforced by the Court.

127 The Commonwealth's submission that this is a common law claim for damages, not a constitutional claim, needs to be analysed. This is a proceeding in which the Commonwealth is a party. The foundation of the principal tort on which Mr Habib relies in the claim (misfeasance in public office) is conduct by Commonwealth officials in excess of power. Specifically, it is alleged that the acts of the Commonwealth officials exceeded the power of the executive in s 61 of the Constitution in that those acts were not for the execution and maintenance of the Constitution and contravened the laws of the Commonwealth (paras 2.5(ii), 3.3(ii) and 4.5(ii) of the statement of claim). For the same reason the acts could not have been authorised by the enabling legislation constituting the agencies for which the Commonwealth officials performed their functions.

128 As noted in *Habib (No 2)* at [49], "it is plain that the extent of the executive power is consigned to the Ch III courts". And, at [50], that it is equally plain that the "executive

> power of the Commonwealth does not run to authorising...crimes [against humanity] under the guise of conducting foreign relations". Or, using the words of Gummow J in *Re Ditfort* at 369:

In Australia, with questions arising in federal jurisdiction, one looks not to the content of the prerogative in Britain, but rather to s 61 of the Constitution, by which the executive power of the Commonwealth was vested in the Crown. That power extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth and enables the Crown to undertake all executive action appropriate to the spheres of responsibility vested in the Commonwealth. One such sphere is the conduct of relations with other countries, including the acquisition of international rights and obligations, and in this sphere the executive power of the Commonwealth is exclusive of that of the States... The result is 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 may give rise to a matter which arises under or involves the interpretation of s 61 of the Constitution and will so affect the interests of a plaintiff as to give the necessary standing. These circumstances 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.

> 129 This analysis indicates that the Commonwealth's submissions find no support in and indeed are inconsistent with the Australian constitutional framework. Section 61 of the Constitution and the legislation having extra-territorial effect on which Mr Habib's allegations of unlawful conduct rely found the jurisdiction of courts under Ch III of the Constitution. A judge-made doctrine cannot exclude that jurisdiction. This difficulty for the Commonwealth was exposed in argument. Assume a person reasonably believed that officials of the Commonwealth proposed to aid, abet and counsel foreign agents to inflict torture upon that person. The act of state doctrine, being a rule of the common law but no more, could not exclude the High Court's original jurisdiction guaranteed by s 75(v) of the Constitution to restrain the Commonwealth officer by injunction from acting in excess of s 61 of the Constitution and in breach of s 6 of the Crimes (Torture) Act. Such a claim is manifestly justiciable raising, as it does, the limits of the powers of the Commonwealth. From there it is but a small step to reject the proposition that the act of state doctrine excludes the jurisdiction of a Ch III court to determine a claim for damages against the Commonwealth (and thus in which the Commonwealth is a party as referred to in s 75(iii) of the Constitution) where the Commonwealth's liability is said to flow from the very same excess of power (albeit that the alleged excess has already taken place, rather than merely being threatened).
>
> 130 The Commonwealth's attempts to answer this example were not persuasive. It may be accepted that the example is hypothetical and is not this case. But it exposes a real difficulty in reconciling the position of the Commonwealth with the provisions of Ch III of the Constitution and the content of the laws which the Parliament has seen fit to pass (specifically, the prohibitions on torture and war crimes founding Mr Habib's allegations of conduct in contravention of Australian laws having extra-territorial operation).
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> 131 Ultimately, the central submission for Mr Habib is compelling. If accepted, the Commonwealth's submissions would exclude judicial scrutiny of the conduct of Australian officials alleged to have involved serious breaches of the inviolable human rights of an Australian citizen in an overseas jurisdiction, even though the alleged conduct, if proved, would contravene Australian law at the time and in the place where the conduct is said to have been committed. That is a heavy burden to place on a

"self-denying" doctrine (*Pinochet (No 1)* at 107) created by the judicial branch of government in order to avoid it trespassing into the executive's sphere of action.

132 From this analysis it follows that this Court has both the power, and indeed the constitutional obligation, to determine Mr Habib's claim

133 Given this conclusion it is not necessary that the territorial issue with respect to the act of state doctrine be addressed. This is the issue raised by Mr Habib that the doctrine cannot be engaged with respect to the acts of agents of the US outside of the territory of the US (that is, in Afghanistan and Guantánamo Bay). For present purposes it is sufficient to say that Mr Habib's acceptance that the US had complete control over those areas at all material times undermines the logical attraction of confining the doctrine to acts within the territory of the state. *The Playa Larga and Marble Islands* [1983] 2 Lloyd's Rep 171 (CA), on which Mr Habib relied, did not require resolution of this question. Nor did *Buttes* (at 934) in which Lord Wilberforce described the doctrine as normally relating to acts within the territory of the foreign state.

ANSWER TO RESERVED QUESTION

134 Neither of the considerations upon which the Commonwealth relied – the development of the common law jurisprudence and the factors informing the content of the act of state doctrine (international comity and the separation of powers) – support the conclusion that an Australian court may not determine Mr Habib's claim insofar as that claim alleges that the Commonwealth is liable for the acts of its officials constituting the torts of misfeasance in public office or the action of intentional but indirect infliction of harm by the aiding, abetting and counselling of agents of foreign states to subject Mr Habib to torture whilst he was detained in Pakistan, Egypt, Afghanistan and Guantánamo Bay.

135 To the contrary the development of Anglo-American jurisprudence indicates that the act of state doctrine does not exclude judicial determination of Mr Habib's claim as it involves alleged acts of torture constituting grave breaches of human rights, serious violations of international law and conduct made illegal by Australian laws having extra-territorial effect. Further, exclusion of the jurisdiction of Australian courts by reference to a doctrine which is a rule of the common law cannot be reconciled with Ch III of the Constitution or the content of the laws of the Parliament that proscribe torture and war crimes committed by any person any where.

136 It follows that the reserved question:

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 2009,

must be answered "No".

I certify that the preceding ninety (90) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jagot.

Associate:

Dated: 25 February 2010
