Australia: Rudd government tries to block Guantánamo torture case

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25 March 2009

In a bid to suppress evidence of torture of an Australian citizen by the US military, the Rudd government has unsuccessfully asked the Federal Court to summarily dismiss a compensation case by former Guantánamo Bay prisoner Mamdouh Habib.

Habib is suing for damages, alleging that between 2001 and 2005 he was tortured in Pakistan, Egypt and Guantánamo Bay, and that the Australian government knew of this and did little or nothing to stop it. Further, he accuses Australian officials of interrogating him while he was shackled to the floor in Guantánamo and of handing over information about him to Egyptian officials to be used in his torture.

Habib issued his writ in December 2005, but the case has been delayed and obstructed for more than three years, first by the Howard government, and now the Rudd government. The court's latest ruling partially—but not completely—struck out Habib's claim on the basis of various legal technicalities.

Justice Nye Perram's judgment was released last week just as a leaked International Red Cross report provided conclusive evidence that the US government carried out torture and "cruel, inhuman, or degrading punishment" at Guantánamo Bay and secret CIA-run prisons. (See "Torture and the American ruling class")

Like the Obama administration—which is trying to protect those who are criminally responsible by claiming "state secrets" to quash lawsuits by detainees and former detainees—the Rudd government is using every possible legal device to block Habib's case and shield those culpable for his torture, who include senior members of the former Howard government as well as top figures in the Bush administration.

According to the undisputed facts, acknowledged by the government's lawyers, Pakistani authorities detained Habib in Pakistan in October 2001, a few weeks after the September 11 terrorist attacks in the United States. There he was interrogated several times, including by Australian Security Intelligence Organisation (ASIO) officers in the presence of US, Pakistani and other foreign officials, before being "transferred" by the US to Egypt in mid-November. The Australian government now admits that it knew by early 2002 that Habib was in Egypt.

After nearly six months, Habib was shifted to Afghanistan, before arriving at Guantánamo in early May 2002. There he remained, incarcerated without charge, until January 2005, when he was repatriated to Australia and released. In all, Habib was detained for more than three years without charge or trial.

Together with another Australian citizen, David Hicks, Habib was among hundreds of men indiscriminately rounded up by American, Pakistani and Northern Alliance forces in Afghanistan and Pakistan in 2001-02 and designated "enemy combatants" in violation of the Geneva Conventions on the treatment of war prisoners. Some, like Habib, were secretly and illegally "rendered" to third countries, such as Egypt, specifically for the purposes of torture.

The Howard government, with the bipartisan support of the then Labor opposition, endorsed Washington's criminal practices, echoing its claims that Habib and Hicks were among the "worst of the worst" terrorists. Howard and his ministers specifically denied any knowledge that Habib had been tortured. As late as 2005, Minister for Foreign Affairs Alexander Downer said he was not sure Habib had been sent to Egypt.

In their Federal Court pleadings, Habib's lawyers said Australian officials were not only complicit in Habib's torture, but actively participated in it by giving, "Egyptian security officials information and documents including tapes of private telephone conversations, sim cards, a laptop computer, his address book, his Egyptian identity card, files taken from his home".

Acting for the Rudd government, lawyers representing the Australian Government Solicitor's office asked the court to dismiss all Habib's legal claims for damages, except for one, for defamation, as having "no reasonable prospect of success".

Most ordinary people are under the belief that governments are obliged to assist citizens who are detained by foreign governments. But the Labor government denied that it owed any "fiduciary duty" toward Habib or any other duty of care to assist a citizen overseas, even if unlawfully detained and tortured.

The judge described this assertion as "too simplistic", noting that

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previous courts had recognised that governments had "some kind of duty". Nevertheless, he agreed to strike out this part of Habib's case, because previous cases established that a government's obligation was simply a "political" one of "imperfect obligation and thus unenforceable".

Justice Perram concluded that it was simply beyond the realm of the courts to decide whether a government had failed to protect a citizen, because the duty of care belonged to the "exclusive domain of the political branches". In other words, any government decision to abandon a citizen, even where there is evidence of torture, is completely immune from legal scrutiny.

To protect Washington, the Rudd government also invoked a related legal doctrine—the "act of State" principle, arguing that the rule prevented any court from "examining the rights and wrongs of the acts of a foreign State," in this case, the actions of Pakistan, the US and Egypt. Justice Perram, however, refused to dismiss Habib's claims on this basis, ruling that there might be an exception to that principle where a foreign state committed grave breaches of international law.

The judge noted that the Geneva Conventions set a "clear standard" to judge the conduct of a foreign government and that the Commonwealth Criminal Code made it a crime to "aid, abet, counsel or procure" a "grave breach" of the Geneva Conventions.

By all the evidence, what happened to Mamdouh Habib constituted several "grave breaches" specified by the Criminal Code, including "afflicting severe physical or mental pain" on a prisoner (up to 25 years jail) and "unlawful deportation or transfer" (up to 17 years). Those who aid and abet are liable to the same prison sentences.

Ultimately, the judge did not grant the government's motion to strike out Habib's case altogether. He left three legal claims open to possible future argument: defamation, "harassment" and "misfeasance in public office". The judge gave Habib's lawyers 21 days to amend their pleadings on these claims, and then he will decide whether the case can proceed.

Significant legal difficulties remain with each of these claims. Harassment and misfeasance in public office are rare torts, and difficult to prove. Misfeasance requires an intentionally harmful act by a public officer. But Justice Perram said Habib's allegation that Australian officials gave Egyptian security organisations material about Habib to use in interrogation sessions could constitute such an act.

It is now four and half years since the Howard government's lies that it had no evidence of the US military's torture and abuse of Habib and Hicks fell apart when Foreign Affairs officials admitted that both detainees had lodged official complaints about their treatment in 2003. (See "Australian government aids and abets US torture")

But the Labor government is just as committed as the Howard government to smothering the evidence of the crimes committed by the US and Australian governments. Like Obama's administration, Labor is anxious to cover up its own record of backing the police-state measures adopted in the "war on terror" and also wants to reserve the right to continue such practices.

In fact, the government lawyers continued to insist, in line with the illegal policy of the Bush and Howard administrations, that Habib was an "enemy combatant" who was not protected by the Geneva Conventions.

The Obama administration recently dropped the terminology of "enemy combatant," while still asserting the right to hold detainees indefinitely without charge or judicial process. (See "Obama administration ends use of ‘enemy combatant' designation")

But the Rudd government is standing by the infamous designation, and also arguing that even if Habib was not an "enemy combatant," he was simply not covered by the Geneva Conventions because there was no armed conflict in Pakistan when he was detained. This argument flies in the face of Article 5 of the Third Geneva Convention, which states the Convention's protections must apply to a person whose status is unclear until a competent tribunal determines that status.

Despite the far-reaching implications of the Rudd government's stance for basic democratic and legal rights, both domestically and internationally, no mention of the case or the government's arguments has been made in the Australian mass media.

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