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The Torture Victim's Protection Act, the Alien Tort Claims Act, and Foucault's Archaeology Of Knowledge

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THE TORTURE VICTIM’S PROTECTION ACT, THE ALIEN TORT CLAIMS ACT, AND FOUCAULT’S ARCHAEOLOGY OF KNOWLEDGE

Eric Engle*

I. INTRODUCTION

To understand the basis for any governmental action sanctioning torture, whether in tort or in criminal law, one must not only understand the legal issues involved, but also the societal and historical events which gave rise to those legal remedies. Modern international law universally condemns torture—as it rightly should—for both practical and theoretical reasons. This is one happy instance where law and morality are essentially congruent. Because of this need to understand both the legal realities, which result from the rejection of torture as a viable method of governmental action, and the historical backdrop thereto, my comments will first discuss the law pertaining to torture, followed by a brief look at the philosophy, history, and theory of medieval torture, and then conclude with a discussion of contemporary events that implicate or directly involve the modern practice of torture.

II. THE ATCA AND THE TVPA

There are two statutes in American law with which I hope you are familiar: the Alien Tort Claims Act (“ATCA”)1 and the Torture

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Victim Protection Act of 1991 ("TVPA"). The TVPA and ATCA are two wonderful American laws. These laws grant persons, not even necessarily United States citizens, a cause of action in tort in the United States for torts that violate international law—such as torture. When I think of the ATCA and the TVPA, I can only imagine that Attorney General Ashcroft is throwing his hands in the air in frustration because until September 11th, the United States could afford to say, we don’t torture, we don’t torture, we don’t torture. Since facing the reality of domestic terrorism, the United States is asking itself, should it torture, should it torture, and it should not. These laws illustrate the political difficulties of whether or not the international community—especially the United States—will in fact respect what is the jus cogens norm—namely, the norm against torture as a non-derogable international law.

The ATCA and the TVPA create a private right of action in the United States both for United States nationals under the TVPA and for foreign nationals under the ATCA. The ATCA is a jurisdictional statute. It was enacted as a part of the first judiciary act of the United States in 1789. The ATCA provides that: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

The legislative history of the ATCA is unknown. The statute itself remained relatively dormant until Filartiga v. Pena-Irala. In Filartiga, an alien, Filartiga, successfully sued Pena-Irala, a non-citizen living in the United States, in a United States court, for torturing Filartiga’s son to death in Paraguay. The plaintiff succeeded on his claim, despite defendant’s deportation to Paraguay prior to trial, because the court determined that torture is a violation of the law of nations, and thus was a valid basis for an

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3 Jus cogens, from the Latin meaning “compelling law”. See BLACK’S LAW DICTIONARY 864 (7th ed. 1999) (defining jus cogens as “[a] mandatory norm of general international law from which no two or more nations may exempt themselves or release one another”).

4 Jus cogens norms are owed by states towards each other and, possibly, towards individuals. For a thoughtful discussion on the idea of jus cogens, see Anita Ramasastry, Corporate Complicity: From Nuremberg to Rangoon An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations, 20 BERKELEY J. INT’L L. 91, 153–54 (2002).

5 Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980).


7 Filartiga, 630 F.2d at 878.
ATCA claim.\textsuperscript{8} The court noted that although the ATCA traces its origins to the Judiciary Act of 1789, the evolution of international law since that time requires courts to interpret and apply current international law to ATCA claims.\textsuperscript{9} \textit{Filartiga} was the first modern case to litigate the ATCA.

The ATCA does not facially create an independent substantive cause of action. Rather, it grants jurisdiction in the United States to adjudicate torts in violation of the law of nations.\textsuperscript{10} Since the ATCA does not permit United States citizens to sue, it deflects any criticism that the statute demonstrates partiality. Defendants may, however, be of any other citizenship. 

\textit{Filartiga} has since inspired many cases—including class actions—either directly litigating ATCA claims, or at least mentioning them.\textsuperscript{11} This issue is important enough that the Supreme Court has directly addressed the ATCA in at least two contemporary cases.\textsuperscript{12} While in both of those cases, the Supreme Court did not question the legality of the ATCA under international law, it did deny plaintiffs access to the federal courts based on the defendants’ sovereign immunity.\textsuperscript{13}

Not only has the Supreme Court not outright rejected the use of the ATCA to litigate claims before the American courts, Congress has expressed its approval of the use of the ATCA by enacting the TVPA. The TVPA extends to United States citizens a remedy for torture and extrajudicial killing that had previously been available only to aliens.\textsuperscript{14} While the TVPA is not jurisdictional like the ATCA,
it creates a substantive cause of action in tort. Like "Private" torture may be recognized as a violation of the TVPA where the torture occurred under "color of law." Like the ATCA, the TVPA requires exhaustion of local remedies. Additionally, the TVPA subjects claims to a ten-year statute of limitations. This ten-year statute of limitations was also applied to the ATCA, although the ATCA itself is silent as to any limitation.

A. Obstacles to Succeeding Under the ATCA/TVPA

There are eight distinct domestic obstacles to using these private remedies against those who violate the law of nations; all of these obstacles result from current interpretation of United States law. The more pertinent and relevant discussion focuses on how to meet and overcome these various obstacles.

1. Jurisdictional Requirements

Personal jurisdiction and subject matter jurisdiction present the first obstacle to finding liability under the ATCA. For example, in the case of An v. Chun, Young-Kae An sued General Doo-Whan Chun, General Tae Woo Roh, and several other military leaders of Korea, alleging that they tortured his father to death. The case, though factually similar to Filartiga, was dismissed due to a lack of personal jurisdiction over the defendants. Though the defendants did occasionally visit the United States, their visits as government employees were not sufficient to trigger general jurisdiction. One
defendant did visit the United States at least once on vacation but that was not considered a sufficient "minimum contact" for specific jurisdiction.\textsuperscript{25}

What might appear to be a debilitating jurisdictional obstacle, however, need not always block a foreign plaintiff from successfully obtaining jurisdiction over a defendant in the United States. An should be contrasted with Wiwa v. Royal Dutch Petroleum Co.,\textsuperscript{26} where New York found it had jurisdiction over a foreign petroleum company, despite the availability of an arguably more convenient forum in England.\textsuperscript{27}

2. Exhaustion

Exhaustion presents the second obstacle to a plaintiff's ATCA/TVPA claim. Plaintiffs making claims under the TVPA—and possibly also under the ATCA—must have first exhausted their local remedies.\textsuperscript{28} In practice, however, the realities of lawless regimes indicate that the requirement of exhaustion of local remedies will not be problematic for litigants.\textsuperscript{29} This obstacle is more theoretical than practical.

3. Comity

Comity is a third obstacle that a plaintiff is likely to face.\textsuperscript{30} International comity has been defined as "the recognition which one nation allows within its territory to the legislative, executive or

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Where service is made under § 1608 of the FSIA, the relevant area in delineating contacts is the entire United States, not merely the forum state. Appellees have not engaged in the necessary activity in the United States to confer either general or specific personal jurisdiction. They do not own property or conduct business anywhere in the United States. Their visits to this country have been almost entirely official visits on behalf of the Korean government, which do not confer general jurisdiction, and were unrelated to the cause of action in this case.
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\textsuperscript{25} Id. at n.12.
\textsuperscript{26} 226 F.3d 88 (2d Cir. 2000).
\textsuperscript{27} Id. at 92.
\textsuperscript{28} TVPA § 2(b).
\textsuperscript{30} Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 409–10 (1964) (finding that the privilege of suit has been denied to governments that are at war with the United States, but that merely unfriendly relations would not be a sufficient reason to deny the privilege of bringing suit in the United States).
judicial acts of another nation." Comity is a discretionary doctrine, often invoked by the forum jurisdiction upon its concluding that principles of fairness or judicial economy indicate that a foreign court would be a more appropriate forum for the cause of action.

4. Forum non conveniens

*Forum non conveniens* is a discretionary jurisdictional defense. A precondition for a finding of *forum non conveniens* is the existence of a foreign forum with jurisdiction to adjudicate. If such a forum exists and would not refuse the suit for discretionary reasons, the court must then balance “any public interests at stake” with the interests of the plaintiff and defendant. Ordinarily the plaintiff’s choice of forum will be respected, but compelling circumstances can cause a court to reject a plaintiff’s claim because of inconvenience either to the court, to the defendant, or to both. Essentially, the inquiry of the court is whether the choice of forum by the plaintiff is oppressive to the defendant. If not, and if there are no compelling issues of judicial economy, the plaintiff’s choice of forum will be respected. Thus I would argue *forum non conveniens* is a more objectively predictable obstacle than comity.

In *Wiwa*, an Anglo-Dutch company was sued in the United States for a tort in Nigeria; the *forum non conveniens* objection was accepted at trial, but rejected on appeal. The appellate court considered the substantive English law and balanced the interests of the United Kingdom, the United States, Nigeria, the plaintiffs, and the defendants in determining whether to sustain the defendants’ *forum non conveniens* objection. Before sustaining the objection, the trial court first had to find it had jurisdiction over the matter; to support its finding of jurisdiction, the trial court pointed to the fact that the defendants were listed on the New York Stock Exchange.

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33 *Wiwa* v. Royal Dutch Petroleum Co., 226 F.3d 88, 99–100 (2d Cir. 2000) (articulating that the court may permissibly dismiss a claim under this doctrine, regardless of the fact that the court’s jurisdiction was proper).
34 Id. at 100.
35 Id.
36 Id.
37 Id. at 101.
38 Id. at 102.
39 *Wiwa*, 226 F.3d at 106–08.
40 Id.
Exchange, and that they organized ancillary activities in the United States.41

In terms of forum non conveniens, the Court of Appeals pointed out that although such a determination is generally at the discretion of the trial court, the trial court had failed to adequately consider two interests: (1) the fact that two of the plaintiffs were United States residents; and (2) the policy interest, implicit in federal statutory law, to provide foreigners with a forum for adjudicating claims of violations of the law of nations.42 In other words, the United States’ commitment to the rule of law is so important that when balancing competing interests, it may tip the balance in favor of adjudication in the United States.

5. Act of State Doctrine

Plaintiffs seeking recovery in United States courts should consider whether the act of state doctrine will be applied by the court to “preclude[ ] the courts of [the United States] from inquiring into the validity of the public acts [of] a recognized foreign sovereign power committed within its own territory.”43 Historically, the act of state doctrine was based on notions of comity.44 As such, it was and possibly still is a discretionary remedy. However, recently the act of state doctrine has been viewed as grounded in notions of separation of powers,45 which might indicate it is not discretionary. The act of state doctrine evinces a desire to avoid embarrassing foreign powers or risk causing hostile confrontations with foreign powers. In substantive terms, the act of state doctrine arises where the relief sought or the defense interposed requires a court in the United States to declare invalid the official act of a foreign sovereign performed in its own territory.46 In determining the applicability of this doctrine, the court should also consider whether the foreign sovereign acted in the public interest.47 A mere commercial act is less likely than a sovereign act to be designated an “act of state”.48

41 Id. at 93.
42 Id. at 100, 106.
45 See id. (suggesting that the courts’ use of the doctrine may improperly encroach upon the powers of the other branches of United States government).
46 Banco Nacional de Cuba, 376 U.S at 401.
47 Doe, 963 F. Supp. at 893.
48 Maria Gavouneli & Ilias Bantekas, International Decision: Prefecture of Voiotia v.
The act of state doctrine is no shield for illegal activity. An act by a state official in violation of the state's laws, or the law of nations, is not an “act of state”, either a priori, because the acts are illegal, or a fortiori, if the act of state doctrine is interpreted as a discretionary outgrowth of comity. Furthermore, because the use of the doctrine represents a refusal of the court’s usual duty to adjudicate cases before it, judicial review of the application of the act of state doctrine is not deferential.

6. Political Question Doctrine

As a part of domestic United States law, the political question doctrine may also present a significant challenge to the plaintiff. For example, in Kadic v. Karadzic, Radovan Karadzic, purported head of state of the Republic of Srpska, resisted trial in the United States based on head of state immunity; he also argued that his presence in the United States was incidental to his political functions, and that the trial was thus political rather than legal. In other words, Karadzic invoked the “political question” doctrine as his last defense against standing trial in the United States.

There were two central issues in Karadzic: (1) presuming Karadzic was the head of a de facto state, under what circumstances may such a foreign head of state be sued in the United States; and (2) whether the executive or legislative branch—rather than the judiciary—should determine if the claims presented in the action

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Federal Republic of Germany, 95 A M. J. INT’L L. 198 (2001). “The distinction between acts jure imperii and jure gestionis is effected on the basis of the law of the forum and using as a basic criterion the nature of the act carried out by the foreign state, i.e., whether it involves the exercise of a sovereign power.” Id. (quoting Prefecture of Voiotia v. Federal Republic of Germany, Case No.11/2000 (Areios Pagos (Sup. Ct. of Greece)), May 4, 2000).

Filartiga v. Pena-Irala, 630 F.2d 876, 889 (2d Cir. 1980).

In discussing the standard of the review, the court stated: Although the standard of review of a district court’s decision to abstain is often described as an abuse-of-discretion standard, we have noted that in the abstention area that standard of review is somewhat more rigorous. Because we are considering an exception to a court’s normal duty to adjudicate a controversy properly before it, the district court’s discretion must be exercised within the narrow and specific limits prescribed by the particular abstention doctrine involved. Thus, there is little or no discretion to abstain in a case which does not meet traditional abstention requirements.


Id. at 245–47.

Id. at 249.

Id. at 247–48.
were “political”, as Karadzic argued. The court found that Karadzic’s presence within the United States was a valid basis for jurisdiction. Even if Srpska was a de facto state, the court carefully pointed out that it was not yet so recognized. Therefore, Karadzic had no head-of-state immunity by virtue of his position within a recognized government, friendly to the United States.

Though Srpska was not recognized as a state, it had several attributes of statehood (territory, population, and functioning government) and may even have had some de facto recognition. Despite these factual and legal questions, neither political question nor sovereign immunity was found in Kadic.

7. Immunity

While the political question doctrine itself does not present an insurmountable obstacle to the plaintiff, the related issue of immunity may present the plaintiff’s most serious obstacle. The historical basis of sovereign immunity was in principles of “grace and comity,” not the Constitution.

The issue of sovereign immunity encompasses two distinct types of immunity: (1) immunity of the state itself—sovereign immunity; and (2) immunity of the state’s agents—official immunity. Ministers and heads of state enjoy absolute immunity during their terms of office. Though official immunity is not a valid defense against an ATCA/TVPA claim where the act committed by the official was illegal under the law of the state, trying former heads

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55 Id. at 248–50.
56 Id. at 247–48 (holding that the narrow circumstances expressly providing immunity from suit by the Headquarters Agreement were not applicable here as Karadzic was neither served within the Headquarters District nor was he a designated representative of any member of the United Nations).
57 Kadic, 70 F.3d at 248.
58 Id. at 245.
59 Id. at 250 (“In a ‘Statement of Interest,’ signed by the Solicitor General and the State Department's Legal Adviser, the United States has expressly disclaimed any concern that the political question doctrine should be invoked to prevent the [current] litigation . . . .”).
60 Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1149 n.3 (7th Cir. 2001) (implying that comity was one justification for the grant of immunity to Germany).
62 See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (concluding that “Paraguay's renunciation of torture . . . does not strip the tort of its character as an international law violation, if it in fact occurred under color of government authority”).
of state can still present a challenge. However, official immunity did not prevent the United States from successfully trying Manuel Noriega, the former dictator of Panama, for drug trafficking, perhaps in part because the United States never recognized the legitimacy of the Noriega government.

Suits against foreign states themselves are generally barred by sovereign immunity, unless that state has waived such immunity. In Sampson v. Federal Republic of Germany, the court held Germany to be immune under the Foreign Sovereign Immunity Act (FSIA) when sued for compensation by an individual, Sampson, who had been interned in a concentration camp and forced to work during World War II. Sampson, a pro se litigant, argued for an implied waiver of immunity for acts in violation of jus cogens. However, the court held that there is no implied waiver of immunity under the FSIA for acts in violation of jus cogens.

The general rule both within the United States and internationally is that a state is immune for its sovereign acts, but not for its commercial acts. For example, when a Liberian (neutral) vessel was attacked by the Argentine Air Force outside the zone of exclusion during the Falklands War, Argentina was immune from liability under the ATCA for the resulting property damage because the action did not amount to a commercial act.

The exceptions to the FSIA provide the only means of obtaining jurisdiction in the United States over a foreign sovereign. The general rule of the FSIA is that foreign states are immune from suit

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63 In 1998, Spain unsuccessfully attempted to extradite former Chilean dictator, Senator Pinochet, from the United Kingdom to try him for acts committed by him or under his direction in violation of international law during his tenure in office. Regina v. Bartle & the Comm'r of Police for the Metropolis-Ex Parte Pinochet, 38 I.L.M. 581, 583–85 (1999).

64 United States v. Noriega, 117 F.3d 1206, 1209 (11th Cir. 1997). The Noriega court articulated the idea that in assessing an immunity claim, the court must look to the Executive Branch for guidance as to whether or not immunity is appropriate. Id. at 1212.

65 Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1149 (7th Cir. 2001).

66 Id. at 1156.

67 Id. For a discussion of the legal issues in related cases, see Scott A. Richman, Comment, Siderman De Blake v. Republic of Argentina: Can the FSIA Grant Immunity for Violations of Jus Cogens Norms?, 19 BROOK. J. INT’L L. 967, 994–96 (1993) (arguing that the FSIA should be interpreted to exempt from protection those acts committed in violation of jus cogens norms because no act of Congress can be construed to violate international law, and granting immunity for violations of jus cogens norms would be tantamount to a violation of international law).


70 Id. at 443.
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in the United States.\textsuperscript{71} There are several exceptions to the general grant of immunity, which can be categorized as either based on waivers of immunity or on the commission of commercial acts.\textsuperscript{72}

The FSIA permits suit against a state where the state has waived its immunity.\textsuperscript{73} Waiver may be implied, but implied waivers are strictly construed.\textsuperscript{74} For example, in determining the \textit{Sampson} case, where there was no implied waiver of immunity under the FSIA just because the actions taken were in violation of jus cogens,\textsuperscript{75} the court held that declarations by Germany of her desire to compensate compulsory laborers were not sufficient to waive Germany’s sovereign immunity.\textsuperscript{76} Clearly, direct evidence of intent to waive must be presented to successfully argue that a state has impliedly waived her immunity.

The FSIA also provides for liability for purely commercial acts.\textsuperscript{77} Though claims are permitted where a tortious act either occurred in the United States or has a direct effect in the United States,\textsuperscript{78} mere financial effects may not be sufficient to support a finding of “direct effects” under the FSIA.\textsuperscript{79}

As to the procedure of arguing the applicability of FSIA immunity, the initial burden of proof is on the defendant state to demonstrate that it is immune,\textsuperscript{80} but it is the plaintiff’s burden of production to demonstrate that one of the exceptions to the general rule of immunity applies.\textsuperscript{81}

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) amended the FSIA to permit claims against states which are considered by the United States to be sponsors of state terrorism.\textsuperscript{82} It creates a privately enforceable cause of action in tort
in cases of extra-judicial killing and aircraft hijacking. Thus, “foreign states that have been designated as state sponsors of terrorism are denied immunity from damage actions for personal injury or death resulting from aircraft sabotage.” The victim (or the claimant) must be a United States national and the tort must have occurred in the territory of a so-designated foreign state.

An obvious use of the AEDPA is against hijackers. For example, the relatives of the victims of the Lockerbie disaster used the AEDPA to sue the government of Libya. However, the AEDPA may be a violation of international law because of the international law doctrine of sovereign equality. Sovereign equality holds that one state may not impose its will upon another sovereign.

8. Burdens of Proof

The last issue a plaintiff must consider relates to the different burdens of proof applicable in this area of law. These burdens are used to resolve doubtful cases and thus have great practical importance. A brief list of relevant burdens of proof under the various claims and defenses follows:

(A) The plaintiff is held to have presumptively exhausted all local remedies; therefore, the burden of proof is on the defendant to show that the plaintiff has not in fact exhausted all local remedies.

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84. Rein v. Socialist People's Libyan Arab Jamahiriya, 162 F.3d 748, 754 (2d Cir. 1998).
86. Id. at § 1605(a)(7)(B)(i).
87. See The Pan Am 103 Crash Website, at http://www.geocities.com/CapitolHill/5260/headpage.html (last updated Mar. 19, 2003) (describing the details of the horrific explosion of Pan Am flight 103, which exploded over Scotland, killing all 259 people aboard and eleven people on the ground).
88. Rein v. Socialist People’s Libyan Arab Jamahiriya, 162 F.3d 748, 753 (2d Cir. 1998).
89. See William P. Hoye, Fighting Fire With . . . Mire? Civil Remedies and the New War on State-Sponsored Terrorism, 12 DUKE J. COMP. & INT’L L. 105, 139 (2002) (suggesting “[t]he doctrine of sovereign equality could be used to characterize the [AEDPA] as an unlawful attempt by one state to abrogate unilaterally the immunity of another sovereign state without that state’s express or implied consent”).
90. See S.S. Lotus (Fr. v. Turk), 1927 P.C.I.J. (ser. A) No. 8, 4, 32 (Sept. 7) (rejecting France’s contention that the Turkish criminal proceedings against Lt. Demons, the officer on watch on the Lotus during the collision with the Boz-Kourt, violated international law principles of sovereign equality).
(B) The defendant must prove any immunity asserted. Though state defendants are presumed immune under the FSIA, they bear the burden of proving that none of the FSIA exceptions to sovereign immunity apply.

(C) The plaintiff bears the burden of proving that both subject matter and personal jurisdiction exist.

(D) The party asserting the applicability of the act of state doctrine must also bear the burden of proof as to its applicability. Thus, some burdens of proof reduce, to some extent, the impact of the procedural obstacles a plaintiff faces in prosecuting a private law action.

III. FOUCAULT—A METHODOLOGICAL FRAMEWORK TO UNDERSTAND TORTURE

Law can only be understood within the presumptions upon which it is founded. These first presumptions are the province of philosophy. Understanding and changing those presumptions is the most effective way to effect systematic change. Thus I would like to direct your attention to a methodology that might permit you to pose and perhaps even answer fundamental questions. I will attempt to analyze torture from the perspective of Michel Foucault. Foucault was a brilliant and prolific French scholar who died in 1984, at the age of fifty-seven. Foucault is one of the best contemporary theorists. His work, although cut off in the middle, is nonetheless voluminous. I would like to try to undertake a brief inquest into torture using Foucault’s methodology, as I think his method reveals where the efforts at resistance against power would be most effective.

Foucault’s life work was an attempt, I think successful, to construct an archaeology of power and knowledge. Foucault saw power and knowledge as intimately related: he would refer to them

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93 Id.

94 See An v. Chun, No. 96-35971, 1998 WL 31494, at *1 (9th Cir. Jan. 28, 1998); Sinaltrainal, 256 F. Supp. 2d at 1352 (explaining the requirement that the complaint allege a basis for subject matter jurisdiction).

95 Liu v. Republic of China, 892 F.2d 1419, 1432 (9th Cir. 1989).

occasionally as power-knowledge,\textsuperscript{97} perhaps in emulation of the continuous theory of space-time. The center of Foucault’s study of power-knowledge, however, was the body.\textsuperscript{98} He was focusing his attention on power-knowledge: the body as both vector and victim of power was the center of this focus.

Foucault’s perspective on power is interesting because it is an attempt to radically re-situate discourse about power in order to influence the exercise of power: it does this in two ways. First, he places the center of the study of power upon the body. Second, Foucault insists that we look at power not as a raw, undifferentiated, instantaneous, mechanical manifestation of the state, but as a continuous social relationship not only occurring over time but also impacting all ranks in society.\textsuperscript{99}

Foucault once said, « Nous avons tous du fascisme dans la tête. Mais nous avons tous pouvoir sur le corps. »\textsuperscript{100} I would translate this as, “We all have a little fascism in our head. But we also have all-power over our body.”\textsuperscript{101} This reflects his ontology, his conception of power. Power is knowledge, and the mind and body are one. Foucault was working toward liberation of the physical body by pointing out the malleability of the assumptions and foundations of the body politic.\textsuperscript{102} Foucault, in my opinion, was not at all a dualist: he saw the body and mind as an integral whole.\textsuperscript{103}

\textsuperscript{97} See Michel Foucault, Language, Counter-Memory, & Practice: Selected Essays & Interviews 199–217 (Donald F. Bouchard ed., 1977) (discussing the interrelation of knowledge and power, often in tandem with the work of Gilles Deleuze) [hereinafter Language, Counter-Memory, Practice].

\textsuperscript{98} See generally Michel Foucault, Discipline & Punish: The Birth of the Prison (1979) [hereinafter Discipline & Punish].

\textsuperscript{99} See Language, Counter-Memory & Practice, supra note 97, at 205–17 (delineating the various intersections of power, where it lodges and who it commands, with Gilles Deleuze).

\textsuperscript{100} See Michel Foucault, Preface to Gilles Deleuze & Felix Guatarri, Anti-Oedipus: Capitalism & Schizophrenia, at xiii (Robert Hurley et al. trans., 1983).

\textsuperscript{101} A literal translation would be, “We all have the fascism in the head. But we have all power over the body”, or perhaps more prosaically, “We all have a little fascism in our head. But we all have power over our bodies.” Aphorisms always carry at least two meanings and are thus most difficult to translate. I offer the translation in the main text as it is more poetic and better conveys the mind-body contrast and Foucault’s opinion that the liberation of the body would overcome fascist tyranny. However, so there is no doubt, the literal and prose translations are also included.

\textsuperscript{102} See generally Discipline & Punish, supra note 98.

\textsuperscript{103} See id. at 30 (writing most famously, regarding the uses of the “soul” as a tool of power, that “the soul [is] the illusion of theologians. A ‘soul’ inhabits him [the condemned subject of power] and brings him to existence, which is itself a factor in the mastery that power exercises over the body. The soul is the effect and instrument of a political anatomy; the soul is the prison of the body”).
Foucault wanted us to change our perspective on power from a dualistic, mechanistic, rationalist, instrumentalist view—the view that allows power to be easily exercised by distorting relations between humans separating them into categories and disposing of them accordingly—to a more monist and materialist perspective. However, he does not center his discourse on monism versus dualism, or materialism versus philosophical idealism, since that would simply recreate the very intellectual mechanism from which he was struggling to help us escape. Instead Foucault focuses on power in all varieties of intricate, organic, and even intimate relationships—with multiple subtle implications and nuances that manifest pervasively throughout a society.

Likewise, he invites us to reconstruct our focus on power in a similar manner. He would not just want us to look at torture as a fist smashing a face. Rather, he would want us to understand why this face, why this fist: who is directing the fist? Why? He would ask, who is applying power, when, where, and how? He would look not only at the rough visible aspects of power—which had already been thoroughly analyzed before Foucault but almost always within a dualist rationalist perspective—but also at the social implications, consequences, and causes thereof. Foucault's perspective gives us a better understanding of the outcomes of power—and also allows us to escape from mechanistic dualism by identifying the interstices of power—where dualism creates false dichotomies, and exposing those false dichotomies to attacks from the materialist perspective.

A genealogy of torture using Foucault's methodology enables us to escape both dualism and philosophical idealism, and forces us to place contemporary events in their historic context and reveals much about our own preconceptions. For example, this methodology would allow us to evaluate whether electrocution is torture, cruel and unusual; whether rape is torture; and whether non-state actors can torture. I don't propose to answer any of those questions here, but I do think these are some of the places where battle-lines could and should be drawn.

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104 See POWER/KNOWLEDGE, supra note 96, at 1972–77 (giving a comprehensive overview about the types of questions to be asked about the nature of power in Western society).

105 Many thanks to South African scholar and activist Ms. Bonita Meyersfeld, J.S.D. candidate, Yale, for raising this interesting argument. Her article, Reconceptualizing Domestic Violence in International Law appears in this volume of the Albany Law Review.

106 It should be obvious to the reader that I favor an expansive view of what state acts should be considered torture, and a restrictive view of what the state can do to its citizens and
IV. THE ROOTS OF TORTURE IN MEDIEVAL EUROPE: A SHAMEFUL CHAPTER IN THE HISTORY OF EUROPEAN SOCIETY

A. The Practice of Torture in Medieval Europe

A brief look at the history of torture in Europe is necessary to fully understand what it is that modern society purports to reject. When one looks at medieval Europe and the types of torturous acts committed during that era, what we expect to see, perhaps unconsciously or semi-consciously, is the Inquisition. When we think of the Inquisition, we usually envision arbitrary, capricious violence, terrible violence, grounded thoroughly in death. But was it really so? Actually, when we look at the history of torture we discover that torture was applied according to gradations of seriousness, from the mere threat of being tortured, to branding, to bodily injury, to greater bodily injury, to bodily injury which would induce death. When we look at the history of torture, we discover it was not, in fact, an undifferentiated, raw, irrational fist. Rather, it was an oper-rational exercise of crude but well defined church-state power.

How did this rational instrument of church-state power disappear? If torture was commonplace in medieval Europe, even as recently as the 1600s, by the late 1800s it was effectively abolished. When an instrument of church-state power exists for hundreds if not thousands of years and suddenly disappears—practically overnight—it really is remarkable. The fact that society can change its methods of distributing power, both radically and rapidly under certain conditions, is the fulcrum which Foucault attempts to illustrate and employ. Foucault would agree with Marx that social practice is malleable and would point out its evolution is based on changes in productive forces which in turn are

what “private” power corporations have over individuals. Here, humanism and individualism in the dualist world often get locked into self-defeating conflicts over issues that simply are not—due to dualism—susceptible of proof. So, identifying how power in a dualist and especially a dualist noetic world functions not only to illustrate lines of conflict and points of attack, but also those self-defeating conflicts which lie within those who claim to be on the “left”.


108 See DISCIPLINE & PUNISH, supra note 98 (outlining the shift from state power manifest on the body of the condemned to the internalized self-regulation depended upon by the modern state).
reflected in changes to relations of production.\textsuperscript{109} The history of torture bears that out: it is clear that the social practice was malleable, and it changed rapidly as a consequence of changes in productive forces.

The disappearance of torture is one mark of the transition from the feudal mode of production to the industrial mode of production. Why did this change occur? Justice in feudal society is very much by word of mouth. Modern society, in contrast, has both the technical means and economic surplus to literally afford to be less cruel; or more exactly, to be cruel in highly-refined and subtle ways.\textsuperscript{110} If we look at industrial societies, they fairly uniformly reject torture. And if we look at feudal societies, even contemporary feudal societies, they fairly consistently use torture.\textsuperscript{111} The reason why feudal societies use such a rough instrument, such a blunt, violent instrument is because they simply don’t have other instrumentalities of power. In contrast, modern society can afford both economically and in terms of actuating power, to distribute power in ways that appear more subtly—if they are visible at all.

There are still remnants of such rough instruments—for instance, police brutality. Though police officers often kill people who don’t need to be killed, particularly in the United States, people tend to look the other way.\textsuperscript{112} Here, Foucault’s methodology would direct our attention to the instruments by which the state propagates its ideology in order to encourage us to ignore unpleasant facts which, if challenged, would threaten the state’s existence. When we study

\textsuperscript{109} DAVID MCLELLAN, KARL MARX: HIS LIFE AND THOUGHT 308–09 (1973).


\textsuperscript{111} For an excellent discussion on the history of torture, see Matthew Lippman, \textit{The Development and Drafting of the United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment}, 17 B.C. INT’L & COMP. L. Rev. 275, 275–89 (1994) (tracing the history of torture from ancient Greece and Rome through the first half of the 20th century).

the differences of power between the industrial and feudal systems of production, we see that though the instrumentalities of the feudal system are generally less refined and rougher, modern, industrial society is also capable of deploying power in very crude ways that are no less horrific: for example, no feudal despot ever had the ability to napalm entire cities; only an industrial society can engage in industrialized killing.

**B. The Theory of Torture in Medieval Europe**

We have seen that in practice, medieval torture, while violent, was also governed by an *operation-rational* logic. Yet, the question remains as to the theory underlying the practice. Was the practice of torture coherent with the inner logic of medieval theories of man, the church, and the state? While there was a theoretical explanation and justification, to fully understand those ideas, one needs to assume the mindset of zealous medieval prelates, who would say, generally, well, what does it matter that we tortured you to death, for we have saved your immortal soul. The system was designed to deter dissent by punishing it, and its practice was what I call a mixture of the interrogatory phase and the punitive phase of law.

The system was the result of an ontological dualism—which sees the spirit as divine and immortal and the body as corrupt and wicked. It was not merely *operation-rational*, i.e., following certain procedures with a fair degree of predictability. It was also self-consistent: if one accepted the system’s presumptions, one would be compelled to the same conclusions. And thus the system was capable of rationalizing burning people to death and just about anything else. But before we get self-righteous, we should realize modern systems also use dualism to burn people to death, only now

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113 See Karen Farrington, Hamlyn History of Punishment and Torture 48–49, 51 (1996) (describing how the Inquisitors were ordered to investigate allegations of heresy and to torture those accused to extract confessions).

114 Consider the following thought experiment. Put yourself in the mind of a medieval prelate, with a zealous love of God and a righteous fear thereof. You see death, disease, starvation, and corruption all around you. So you can very easily buy into this ontological dualism: though the flesh is weak and corruptible, the spirit is eternal. No doubt this dualism helps people survive, otherwise it would never have existed in the first place. However, that dualism also lets the system torture and kill. A modern example of this type of attitude is the suicide-bombers in the Middle East. I present this illustration not to excuse either medieval torturers or modern-day kamikazes, but to help the reader understand what might seem at first to be an alien viewpoint, to explain it so that we as a society can escape from it.
using jet bombers instead of wooden stakes. The faith of modernity was that progress would liberate humanity, not that it would enable mass killing. The fact that modern technology is often applied to mass killing is in this sense a chilling one: it puts into question the last three hundred years of human civilization. While most who have experienced the wealth of industrialized society would reject a return to feudalism, if the progress of such a society carries with it a double edged sword, how should modern society deal with those unintended consequences? That question cannot be answered here but should be posed because it is a key question to understanding contemporary society—one element of which is the rise of persons like Alan Dershowitz who are calling for a reintroduction of torture, a measure, in my opinion, which most fascists would approve of.115

Punishment and deterrence were central concepts to medieval penology. Imprisonment as a punishment was highly exceptional, and rehabilitation did not figure at all into medieval concepts of criminality; as such, the idea of repentance also did not figure as prominently in medieval times as we tend to think today. After being punished, generally corporally, one said one’s penance and was then forgiven. If prison was not the main form of medieval punishment, what was? Medieval punishment was just that—medieval. Branding was one common punishment, so that others would know that the criminal was a thief; neither maiming nor lashings were unusual. Such punishments required fewer resources and carried lower information costs than imprisoning criminals. Despite the natural revulsion most of us have to these forms of punishment, they were not necessarily crueler than current punishment.116

Punishment in the industrial mode of production is also distinguishable from punishment in the feudal system by the fact that industrial societies at least claim to not inflict violent, cruel and barbaric punishments, but claim, rather, to seek to reform and rehabilitate the “sick” criminal. Though this rehabilitative function has not been taken very seriously in the United States since about 1980, most of the rest of the industrialized world does take the rehabilitative function of penal law very seriously.

115 See Wolf Blitzer, Al Qaeda Leader Captured, at http://www.cnn.com/2003/US/03/03/wbr.al.qaeda.capture/index.html (Mar. 3, 2003) (reporting that Alan Dershowitz had taken the position that torture could be used under certain circumstances) [hereinafter Dershowitz].

116 If you had the choice of being put in stocks, or whipped, or wasting away in jail for months or even years, which would you choose?
C. Four Reasons Why Torture Essentially Disappeared in the Industrialized World

We have seen that medieval torture was not nearly as one-dimensional as we may have thought, that it was an *oper*-rational practice, and that the practice, however violent, also had rationalizations and justifications in theory—albeit ones rejected by modernity. How did this widespread institution so suddenly and nearly completely disappear from penal systems in the industrial world? We just looked at explanations based on the mode of production, but there are also practical reasons. Simply put, torture is inefficient as a tool of social control and for getting reliable information. Thus, torture disappeared for four main reasons. The first reason is that since people who were tortured would lie, it was an ineffective method of obtaining information. Second, not only do victims lie, they also die. And when they die, the victim is no longer providing the police or the government with information.

The third reason I posit that torture has, for the most part, been eradicated, and why today it is a jus cogens norm, is because the victims of torture are wonderful martyrs. These martyrs generate great sympathy. One such victim was Stephen Biko,\(^{117}\) a South African activist who opposed the police state and the apartheid regime of South Africa.\(^{118}\) The police denied having killed him while he was in prison, yet via the Truth and Reconciliation Committee, it was revealed that he was killed by the police while in prison.\(^{119}\) He became a wonderful martyr. A final reason for the disappearance of torture in industrialized societies is that just as it creates martyrs, these martyrs motivate not only the victims’ families, but also their friends, distant relatives, and people they never met to resist the system that is trying to oppress.

In understanding the history of torture, its theoretical underpinnings as well as the four main reasons for its disappearance, one has an even greater appreciation for the level of


\(^{118}\) See id.

social change contemporary society has achieved in this area of human rights. Yet, despite how far we have come, clearly there is work left to be done.

V. TORTURE AND CONTEMPORARY INTERNATIONAL EVENTS

Until September 11th, it cost nothing for the United States to reject torture. Rejecting torture also meshed with the tendency of the American people to idealize and rationalize the fact that their government is the global hegemon. The United States foreign policy elite do nothing to discourage these tendencies. Foreign policy naïveté prevents a lot of potential domestic dissent from even getting off the ground. Many Americans fail to realize that the CIA had funded Osama bin Laden and the Taliban120 prior to the Bush administration’s declaration of the war on global terrorism, which of course has those very same people as its primary target. Layered on top of this almost unforgivable level of disconnect is the massive reactionary wave which engulfed American attitudes post-September 11th. An icon of the American legal community, Alan Dershowitz, spoke out in favor of torture warrants; according to a recent poll of Americans, such use of torture would be accepted by many.121 The naïveté of most Americans—cultivated by the foreign policy elite—allows the American government to play dirty,

120 Sara N. Scheideman, Standards of Proof in Forcible Responses to Terrorism, 50 SYRACUSE L. REV. 249, 253–54 (2000).

While currently perceived as embodying the terrorist threat, the United States once relied on bin Laden as a trusted partner in the strategy of Cold War containment. Beginning in 1979, the CIA joined with bin Laden to fight a covert war against Moscow’s occupation of Afghanistan. Bin Laden ran Maktab al-Khidmar—known as the MAK—which funneled money, arms and fighters from Egypt, Pakistan, Lebanon, Syria, and Palestinian refugee camps into the Afghan war. MAK was nurtured by Pakistan’s Inter-Services Intelligence Agency, which in turn was the CIA’s primary vehicle for undertaking covert operations against the Soviet Union. Despite warning signs that his activities were no longer purely anti-Soviet, the CIA’s confidence in bin Laden continued during the 1980s.

121 See Dershowitz, supra note 115; see also Dana Blanton, Poll: Steady Support for Action Against Iraq, at http://www.foxnews.com/story/0,2933,81923,00.html (Mar. 13, 2003) (reporting that 44% of those polled supported the use of torture to force prisoners to divulge information related to possible terrorist activities).
hardball politics overseas all the time, and the American people to rationalize and deny the fact that it does so. This would whipsaw the establishment if those facts ever came to light.

A cursory examination of a few contemporary events demonstrates that for all the anti-torture rhetoric apparent in American statutory and case law, there are serious questions as to the commitment of the United States government to securing the basic human right of all persons to live free of torture. The actions of the United States government must be assessed in the context of the international jus cogens norm against torture.

Currently, in my opinion, the United States is moving from a *categorical* rejection of torture in all forms to a *qualified* rejection of torture. The TVPA clearly defines torture as any form of coercion, including mental coercion. Yet recently reported incidents allow one to speculate that the United States itself is engaging in torture. There is a facility in Afghanistan called “Hotel California” and two Afghan prisoners, apparently under exclusive United States control, died from blunt force trauma while in custody at that facility.

From this, one can fairly infer that the detained prisoners, who were presumably being interrogated, were tortured. The detention facilities run by the United States in Guantánamo Bay, Cuba, are another example of persons accused of terrorism dying while in U.S. custody. It was reported in August, 2002, that a senior Taliban official died after being subjected to severe torture while in custody at that facility; another recent report from the detention facility stated that the United States plans to construct a “death chamber” on the base.

Recently, the Board of Immigration Appeals (BIA) tried to reduce the United States’ obligations under the Convention against

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122 See TVPA § 3(b)(1) (defining torture as intentionally inflicting severe pain or suffering, whether mental or physical); see also 8 C.F.R. § 208.18(a)(1) (2003). An example of mental coercion would be leaving the lights on twenty-four hours a day, seven days week. I believe solitary confinement would probably qualify as well because if you keep somebody in a cell and don’t expose them to humans for long periods of time, it will make them go insane.


Torture.\textsuperscript{126} Though in this particular instance, the court intervened to overturn the BIA’s decision,\textsuperscript{127} a decision clearly in contravention to the Convention, it may be indicative of a future trend. If the United States gradually begins to accept small or insignificant amounts of torture, it will likely generate even more enemies. To justify this progression, the United States might try to draw on foreign case law. In looking at the European Court of Human Rights, one finds cases that arguably support finding exceptions to international law’s absolute prohibition of torture.\textsuperscript{128}

Perhaps equally disturbing is the United States’ willingness to extradite prisoners held in the United States or those locations under United States control to countries that do torture.\textsuperscript{129} Because the norm against torture is a jus cogens norm, extradition of a person to a country that tortures is itself a violation of the Convention Against Torture.\textsuperscript{130} No state is required to remedy a violation of a jus cogens norm, but every state is obligated to obey it.\textsuperscript{131} The administration’s willingness to extradite prisoners to countries that torture illustrates its flagrant disrespect for and clear operation outside of international law norms.\textsuperscript{132}

Acts of aggression committed by the United States in violation of

\textsuperscript{126} Zubeda v. Ashcroft, 333 F.3d 463 (3d Cir. 2003) (finding the Board’s reversal of a stay of deportation erroneous because of the high likelihood that plaintiff would be detained and raped upon being deported to her home country); Convention against torture and other cruel, inhuman or degrading treatment or punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465.

\textsuperscript{127} Id. at 480.

\textsuperscript{128} In a famous decision, Ireland v. United Kingdom, a majority of judges found that hooding detainees—except during interrogation—making them stand continuously against a wall spread-eagle, subjecting them to continuous monotonous noise, depriving them of sleep, and restricting them to a diet of bread and water to extract information and confessions did not constitute torture under Article 3 of the European Convention of Human Rights. 2 Eur. H.R. Rep. 25, 59–60, 107 (ser. A, No. 25) (1978). The court did find that these acts were inhumane and thus a lesser breach of the terms of the Convention, but this practice is evidence of what European courts might consider to be the threshold of torture under international law—for after all, the decisions of the court must be consistent with international law.


\textsuperscript{130} Convention against torture and other cruel, inhuman or degrading treatment or punishment, Dec. 10, 1984, art.3, S. TREATY DOC. NO. 100-20, 1465.

\textsuperscript{131} See Richman, supra note 67.

\textsuperscript{132} The administration has also openly admitted its willingness to assassinate. See Eric Krol, Bush Talked of Assassinating Hussein; Senator Says President Might Repeal 27-Year Ban on Killing Foreign Leaders, CHI. DAILY HERALD, Feb. 25, 2003, at 1, 2003 WL 14952499. However, assassination would obviously constitute an improper intervention in the domestic affairs of another state, and thus would be internationally problematic.
international law also raise the question whether the United States is committed to the rule of law in international affairs. From an international law perspective, it is relatively clear that the war waged by the United States against Iraq constituted a criminal act. United Nations Resolution 1441 did not, on its own terms, authorize the use of force against Iraq; force was nonetheless used. The Nuremberg trials determined that planning, plotting and executing wars of aggression constitutes a crime against peace. It is at least arguable that since Iraq holds a vast amount of the world’s oil supply, the war waged by the United States against Iraq amounts to a war of aggression, motivated by the United States’ desire to reduce the price of oil by controlling its production. One can ask whether the Bush administration’s acts should be characterized as crimes against the peace.

Violations of an individual’s rights under international law provide yet another example of United States’ lawlessness. In the case of Robert LaGrand, LaGrand, a German national, was awaiting execution in the United States on the charge of capital murder. Prior to execution of the death sentence, the International Court of Justice ruled that the United States could not execute him as Texas had violated his right under the Vienna Convention to access the German consulate. The United States chose to ignore the Court’s ruling against it, and summarily executed LaGrand. As a result, his execution was illegal as a flagrant violation of international law.

These instances do not stand alone. The United States has also

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133 Oliver Burkeman and Julia Borger, War Critics Astonished as U.S. Hawk Admits Invasion was Illegal, GUARDIAN NEWSPAPERS, Nov. 20, 2003, http://www.guardian.co.uk/Iraq/story/0,2763,1089158,00.html (reporting statements recently made by Richard Perle, former defense policy board advisor to the Bush administration, which indicate the position that compliance with international law would have prevented the U.S. attack on Iraq). In spite of Bush’s declarations that the United States was acting under UN Resolution 1441, or in the alternative, acting in self-defense, UN Secretary Kofi Annan is reported as arguing that a ruling was required to determine if the United States and its allies were under imminent threat; the Bush administration never sought such a ruling. Id.


136 See Energy Information Administration, U.S. Dept. of Energy, Country Analysis Briefs: Iraq, Aug. 2003, at http://www.eia.doe.gov/emeu/cabs/iraq.html (estimating that Iraq holds more than 112 billion barrels of oil, and offering that such a number might be a gross underestimate because so little of the country has been explored for oil).

either conferred with or signed treaties that it later refused to effectuate or to enforce; two excellent examples of this are the United States’ respect—or lack thereof—for the International Criminal Court\(^\text{138}\) and the Kyoto protocol\(^\text{139}\).

VI. CONCLUSION

When we were young, we all had a tendency to see the world in simplistic terms: the “heroes” always defeated the “villains”. However, as adults, we know these simplistic descriptions of reality are almost never accurate. This discussion attempts to present a complex yet accurate description of the objective reality of this area of law, with the hope that it might have some humanizing influence on American foreign policy. It is our collective responsibility, as members of an increasingly global society, to look in the mirror and, with candor, see our own errors and mistakes. Then we must take the courageous next step and begin the arduous process of correcting those mistakes. The law, with all its faults and flaws, may be the best way to do that.

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\(^{138}\) See International Criminal Court, at http://www.icc-cpi.int/php/stateparties/all_regions.php (last visited Nov. 2, 2003) (indicating that despite the ratification of the Rome Statute by ninety-two countries, including most of the EU, the United States has not ratified the statute which empowers the International Criminal Court).