

**ON “TORTURE AND DIGNITY - AN ESSAY ON MORAL INJURY” BY JAY M.  
BERNSTEIN**

Olivier de FROUVILLE<sup>1</sup>

*“C’est seulement en appliquant  
mais aussi en transgressant la loi  
des lumières que l’esprit accédera  
à ces sphères dans lesquelles “la  
Raison” cesse de se confondre  
avec le raisonnement plat.”  
Jean Améry, *Par delà le crime et  
le châtement. Essai pour surmonter  
l’insurmontable.**

I would like to start by warmly thanking Géraldine Muhlmann for giving us this extraordinary opportunity first to read Jay Bernstein’s book *Torture and Dignity* and then to discuss the book in the presence of the author. I must confess that as I very often do, I started my reading with the conclusions, and I was immediately struck by the proximity of some of the conclusions of the author to some of the conclusions I drew myself from my experience as a human rights expert in the United Nations. I was particularly interested to see how Jay Bernstein relied on article 6 of the Universal Declaration of Human Rights (UDHR), which is also article 16 of the International Covenant on Civil and Political Rights (ICCPR), that is, the right of everyone to recognition everywhere as a person before the law.

The interpretation of this article has been the subject of a controversy between the members of the Human Rights Committee, and I have signed, with some other colleagues, a number of dissenting opinions in cases of enforced disappearances or secret detention and torture, to explain why I disagreed with the then interpretation of the majority which, I thought, misunderstood the content and the centrality of this right in human rights law.

For a long time, the Committee has taken the position that, for a violation of article 16 to occur, it had to be shown that the person was deprived of his or her liberty with the intention to remove

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<sup>1</sup> Professor at University Paris II Panthéon-Assas, Member of the UN Human Rights Committee.

him or her from the protection of the law *for a prolonged period of time*, and the efforts of the relatives of the disappeared person to gain access to potentially useful remedies have been systematically hampered. Conversely, I supported the position that the fact itself of placing people in secret detention, thus removing them from the protection of the law, even for a short period of time, is a violation of article 16. In the case of *John-Jacques Lumbala v. Democratic Republic of Congo* for instance (views adopted on the 5<sup>th</sup> November 2015), the author was arrested by the intelligence agency in Congo, placed in an unofficial place of detention, then in a cell located in the basement of the administrative office of the intelligence agency. He was kept there for 7 days, during which he was severely tortured and then raped. As his health was deteriorating rapidly, he was fortunate enough to be transported to hospital, and was able to escape. Having found a violation of article 9 (arbitrary detention), 7 (torture) and 10, par. 1 (right to be treated with humanity and respect for human dignity), the Committee decided *not* to examine separately the author's claim under article 16. The dissenters argued as follow:

“This type of practice means that the person is plunged into a legal vacuum, not only because the deprivation of liberty itself has no legal basis, but because it is organized so that the person does not have access to any remedy, cannot assert any right and is thus completely at the mercy of the persecutor. If a police officer tortures a detainee in a police station, the victim is treated “as an object” at the hands of the torturer, but the idea of the law is still present as a third party in that relationship, because the victim can hold on to the hope of escape and of complaining about the treatment suffered to a superior officer, a judge or to his or her lawyer. In secret detention, however, this possibility is completely absent, leaving nothing but a cruel and intimate exchange between the persecutor and the victim, which reduces the latter to the status of an object: the very idea of the law offering mediation and protection is removed.”

I found a lot in Jay Bernstein's phenomenology of torture, inspired from Jean Améry's account of his own torture, that helped me clarify what I really meant to say in this opinion. I think in particular that the concepts of *existential helplessness* and of *lost of trust in the world* are particularly significant in accounting for the experience of a victim of enforced disappearance. But before coming back to this phenomenology of torture (II), I would like to question the overall project of the book, which Jay Bernstein himself qualified as “immodest” – that is reconstructing the fundamentals of moral life from the experience of torture and rape – a

reconstruction which relies on the premise that for us moderns “morality is a victim morality” (I).

## I. A victim morality?

This premise is firmly asserted in the very first page of the essay. The project is

“to attempt to restructure moral experience and understanding on the basis of the formations of suffering they make salient. Morals, I will argue, emerge from the experience of moral injury, from the sufferings of the victims of moral harm. For us moderns, morality at its most urgent and insistent is, finally, a victim morality.”

A second important assertion comes on p. 3, which is:

“It is not the magic of obligations... that moves us to heed the ideal of doing unto others as we would have them do unto us; rather it is our robust understanding of our own vulnerability, our own fear of pain and suffering, our deeply personal sense that these things should not happen... If moral principles matter to us at all, it is because they capture and reflect primitive experiences of individual worth in relation to experiences of moral injury, and thus to our shared awareness of a pervasive and unavoidable vulnerability.”

I would like to question these important premises. I am submitting that it 1) gives too much weight to the experience of victims as a founding structure for morals; 2) too little weight to law as a tool for regulating emotions in society.

### 1. Limited relevance of victims' experience

A main thread in the book is that *moral rules* originate in emotions or at least in some ideas based on emotions like disgust, outrage or sympathy: be it awareness of our shared *vulnerability*; or be it *love*<sup>2</sup>.

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<sup>2</sup> See *Torture and Dignity*, p. 267: “Love and respect are *forms* of recognition: love is the attitude responsive to another’s lovability as respect is the attitude that acknowledges another’s human dignity.” Paul Ricœur makes a similar distinction between what he calls “solicitude” and respect but more clearly emphasizes that solicitude belongs to the realm of sentiments and affection. See Paul Ricœur, *Oneself as Another*, Transl. K. Blamey, Paris, University of Chicago Press, 1992, p. 192.

In other words, morals are somehow premised on the victims' experience: norms themselves that prescribe conduct are meaningless, without this awareness that I and others can suffer terrible bodily injuries.<sup>3</sup>

I would like to question this assumption. My submission is that rules (either moral or legal) do not find their basis in our experience of suffering or the understanding of our shared vulnerability. Emotions, or ideas based on emotions, are essentially fragile and precarious.<sup>4</sup> They do not last and moreover, they do not result in consistent positive conducts that could serve as a fertile ground for the growth of elaborate sets of rules.

In most situations, the only long lasting effect of a traumatizing experience – for instance an eruption of violence like a terrorist attack – is *fear*. And this fear can lead me, so as to preserve myself, to search for *protection and care*, and the quest for protection and care can lead in turn to a demand for *authority*. In this regard, Hobbes' anthropology is of course accurate: we all have an extreme fear of violent death and we are all in search of protection – which probably explains why in times of trouble most people will agree to live under a permanent state of emergency entailing widespread restrictions of freedom.

Of course, as Améry rightly points out, we all have an expectation that we will get some help from somebody when we are in danger or when we suffer. But this expectation or the fact that it has been sadly misguided is not enough to serve as a foundation for the formulation of either moral or legal norms that could be anything other than the unconditional obligation to abide by the command of the sovereign power.

So my submission would be rather that morality (and legality) is not based on awareness of vulnerability, but that our awareness of vulnerability is made possible only through moral rules and, even more effectively in a secular society, through legal obligations.

This does not mean that in certain exceptional circumstances, the extreme experience of victims cannot provoke a *shock* of sufficient magnitude to create the momentum for changing moral rules or adopting new legal rules. Certainly, in the wake of World War II, the Universal Declaration of Human Rights (UDHR) was partly a reaction to the atrocities during the War. But the shock itself and the emotion did not presuppose how the reaction would be shaped: the vision of the massacres did not lead directly to the articles of the UDHR. Rather, the UDHR is

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<sup>3</sup> *Torture and Dignity*, p. 4: “When terrible moral events occur, it is living people who are injured, harmed, demeaned, and degraded. It is not broken rules that matter, but broken bodies and ruined lives.”

<sup>4</sup> Following Martha Nussbaum, Paul Ricoeur, in *Oneself as Another*, acknowledges the *fragility of feelings*, the precariousness of goodness that characterizes solicitude. See Martha Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, Cambridge University Press, 2001.

the product of a whole philosophical and legal history, more concretely, of a negotiation between people whose thoughts were still influenced by the debates of the inter-war period, that is, during the prolific (although largely unsuccessful) era of the League of Nations.

## 2. Law comes first

*Torture and Dignity*, in my humble submission, gives too little attention to law and too much to moral rules. The book does not develop the distinction between moral rules and legal rules. It seems to be admitted that in secular societies the “backdrop of a framework of law and command” is necessary to enforce moral rules which, in its absence, would be “useless and empty” (p. 4). But no firm conclusions are drawn from this regarding the centrality of law in today’s secular society and the reasoning remains centred on morality.

Emotions like compassion and sympathy towards the victims’ suffering are weak and precarious and cannot be sustained in modern societies and modern capitalist States where solidarity is based essentially on the division of labour, as opposed to organic solidarity. The assumption according to which (p. 30) “the pain of others now calls for identification; the pained bodies of others call for sympathy and pity” is no truer today than it was when Rousseau was conceptualizing the idea of *imagining one’s fellow* (*imagination du semblable*): pity, Rousseau demonstrated, is a natural virtue that disappears in the social state, where interests prevail and citizens lose their ability to identify with their fellows:

“Nothing but such general evils as threaten the whole community can disturb the tranquil sleep of the philosopher, or tear him from his bed. A murder may with impunity be committed under his window; he has only to put his hands to his ears and argue a little with himself, to prevent nature, which is shocked within him, from identifying with the unfortunate sufferer.”

The place of morals itself is reduced in such societies: strong moral conceptions are limited to sub-groups in society which, provided the State’s constitution is sufficiently pluralistic, leaves room for minorities and other groups to develop and express their own moral conceptions. However, public morals at the level of the State itself are reduced to a nucleus of limited concepts that concern basic day-to-day relationships between the members of the society in the private or public spheres. A whole range of moral rules are in fact assimilated into the legal realm either under cover of the broad concept of public order, or through more prescriptive rules. Even, for instance, civic obligations, which have been perceived as belonging to a public

morality, are now increasingly being taken over and sanctioned by law, in societies where responsible citizenship is no longer a given.

Law lays down a general and mutual obligation of *respect* between members of the society – which is also an obligation to consider the other’s body not as an “animate body” (*Körper*) – a piece of flesh – but as a lived body, a social or voluntary body (*Leib*). I think this distinction, which comes from the book by Helmut Plessner – but which can also be found in Husserl’s phenomenology of the relation with the other – is extremely important and explicit – not from a moral but a legal point of view. That is: at least in a liberal society, morals impose on me a modest obligation to maintain congruence between my animate body and my lived or voluntary body. But I may easily choose, even deliberately, to give up maintaining this congruence, for instance if I get intoxicated to the point I am not able to walk in the street anymore, or for the sake of expressing myself. See for instance these two images where congruence between the voluntary and involuntary bodies is voluntarily breached:



*Russian artist Pyotr Pavlensky cutting his ear sitting nude on a wall outside a mental institution in Moscow*



*FEMEN activist disrupting the speech by the Minister of culture of Canada, Ms Helen David in the House of Nation, 30 April 2015.*

At least in liberal societies, we don't want morality to place too heavy a burden on us all to care about our vulnerability because part of our freedom lies in putting our life and bodies at risk, exposing ourselves to the risk of having our bodies "broken" and our lives "ruined". At the same time, in all societies, we enact legal obligations either to prescribe helping someone who involuntarily cannot maintain the congruence, or to prohibit destroying someone's efforts to maintain the congruence. Such obligations do not originate in our shared awareness of our vulnerability, but in the belief that life in society is simply impossible if the State does not impose the legal obligation to consider the other's body as a lived body and not as a piece of flesh, unless the other himself freely exposes him- or herself to such objectification.

Conversely, law may also regulate emotions the other way around and lay down the duty to despise the other's body and regard it as a piece of flesh to be either exploited or disposed of.<sup>5</sup> All the very interesting developments in the book on the Nuremberg laws clearly show precisely that. It is by *law* that the Nazi regime imposed the sentiment of the unlovability of the Jews' bodies, which Améry rightly perceived as a death sentence passed on him. But *law came first* and framed the sentiment of unlovability among the German population. This is why the following sentence should be reversed (p. 271): "The moral and legal expulsion *on the basis* of their unlovability made Jewish lives essentially fungible". The moral and the legal expulsion were in fact *the cause* of unlovability of Jewish lives.<sup>6</sup> And even though today we watch with horror and disgust the shocking images in Resnais' *Nuit et Brouillard* of bulldozed bodies, it is quite likely that a Nazi would have watched these images with a sense of satisfaction and accomplished civic and legal duty – despite the fact that its **underlying** moral conceptions would inspire in him disgust and repulsion.

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<sup>5</sup> The same reasoning applies to rape and reducing women to the "abject body" which can either be encouraged or combatted by law (on rape and the abject body, see p. 161).

<sup>6</sup> As Prof. Bernstein points out, H. Arendt's description accurately reflects this process (p. 273): "Arendt contends that these were "politically intelligible" practices because their preparation followed a comprehensible logic: the destruction of the juridical person [...], followed by the murder of the moral person in man [...], followed by the destruction of unique identity, the spontaneity through which a person might still call an action "mine" [...]. Arendt's analysis reveals that the meaning of this final destruction of individuality had systematic significance only as the conclusion of the destruction of the human that began with the ruin of the juridical and moral persons." Law comes first.

## II. Phenomenology of torture and rape: the torturer, the solipsist self and sovereignty

As I said, I found particularly helpful and convincing the way the book articulates a phenomenology of torture and rape and in particular the fact that in the end, the book relies on article 6 of the UDHR and the “right to have rights” to summarize the experience of both the victim and the torturer. I would like to come back to this experience, as I think it reveals an important aspect and in a way a deficiency of the law of Modernity (I will call it “modern law” hereafter), which may help us to understand why torture can be perpetrated even in advanced democracies.

### 1. The victim as flesh

*Existential helplessness* and *lost of trust in the world* are, I think, accurate features of the experience of the torture’s victim.

So it is the idea of the radical and forced reduction of the person to its animate body (*Körper*), a reality about which Améry gives a clear testimony:

“C’est seulement dans la torture que la coïncidence de l’homme et de sa chair devient totale: hurlant de douleur, l’homme torturé et brisé par la violence, qui ne peut espérer aucune aide, qui a perdu le droit de légitime défense, n’est plus qu’un corps et absolument rien d’autre.”

What is striking in this sentence is the emphasis placed on the *right to self-defence*: even placed in secret detention and totally subjected to the power of the torturer, with no expectation of help from anybody, keeping the right to self-defence would have meant keeping humanity (and thus the right to be treated with respect for one’s dignity).<sup>7</sup> But the prisoner is stripped of all rights, including this “natural” right to reclaim those rights when they are violently flouted by the other. The right of self-defence is the ultimate right for which the right to have rights can be claimed. But in Améry’s experience, he was stripped even of his right to have rights: he was

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<sup>7</sup> In this contribution, I will not deal with the controversial notion of “dignity” or “respect for dignity”, which is one of the issues examined in *Torture and Dignity*. If I had the time to do so, I would probably question the more or less clear assumption according to which the Kantian notion of respect for dignity is not appropriate or not entirely satisfactory. I personally tend to find it convincing and useful, and feel that Kant’s condemnation of torture in the *Metaphysics of Morals* (463) is a logical consequence flowing from the concept. I also think that Kant’s categorical imperative gives a philosophical foundation to article 6 of the UDHR.



denied his “legal personality”, that originate right to recognition as a “person before the law”. It is precisely this denial that makes unavoidable the reduction of the person to its flesh: without legal rights, without the law, the person is only a piece of flesh for the other. No sentiment or sympathy can stop the torturer from asserting his power. As prof. Bernstein notes in another part of the book, which echoes our dissenting opinion in *Lumbala v. the DRC* (p. 78):

“Whatever the external goals or ends of torture are, torture now is a relation between two individuals (where the second individual stands for the State or some other collective body); that is, torture is now (...) an exemplary exposition of the fate of the relation between a self and his other, nothing but self and other in a form whose characteristic articulation elaborates the very idea of being a self with an other. *To be human is to be subject to devastation through another.*”

With the denial of the legal status of the victim as a person before the law comes the denial of the person as such, obliterating any possibility of identification with one’s fellow, any sympathy or solicitude: the body is the flesh to be tortured.

## 2. The “sovereign” torturer

The book draws very interesting conclusions from Jean Améry’s phenomenology of the torturer, when it comes to comparing the torturer’s power to sovereign power (p. 104):

“Modern police torture exemplified in Nazi torture, is an existential ritual through which the torturer seeks to establish “his own total sovereignty” by rendering his other (...) nothing but a nothing who can nonetheless testify to and be the sign of his authority.”

I agree with this description and I would like to make the link with a notion often used in phenomenology which is solipsism, namely the attitude of the subject who constitutes the world *in and from* his or herself. The world and in particular the others are nothing but intentional objects. Husserl’s phenomenology attempts to reconcile solipsism of the transcendental subject with the imagination of the other but according to all his followers, it is a failure. In subsequent phenomenological accounts – like those of Sartre and Merleau-Ponty – solipsism is described as particular attitude where the subject is unable or unwilling to perceive the other’s otherness. Solipsism I submit, is the attitude of all subjects that think of themselves as absolutely sovereign, that is, as an absolutely autonomous person not bound by law:

“The sovereign is he who believes that he is absolutely autonomous and self-sufficient, that nothing about his being depends upon others; the more different others are, and the closer to him they appear, then the more they threaten the fantasy of independence.” (p. 106).

The position of the torturer is a pure solipsism, as the world and the others become purely functional, they become *tools* to accomplish a number of goals. The main goal of the solipsist self is to confirm and strengthen its solipsist perspective and thus dominant position over the world and the others through a destructive dynamic, which reminds us of Freud’s negative impulses.<sup>8</sup>

It is thus appropriate, as the book does, to make a connection between torture and rape: solipsism gives way to the subject *invading* the world or, more exactly, making the world its own. Rape is the paroxysmal expression of such an invasion. In *La torture et l’armée pendant la guerre d’Algérie (1954-1962)*, Raphaëlle Branche notes, based on the testimonies of torturers, the centrality of the sexual dimension of torture. Torture, be it inflicted on a man or a woman, with or without rape, is understood by the torturer as strengthening his virility.<sup>9</sup>

As noted in *Torture and Dignity*:

“the torturer *depends* upon the “nothing” to which he reduces his victim for his independence; the torturer lives off the victim’s helplessness and the certainty of the victim’s pain as the source and confirmation of his absolute being, his authority over living being.” (p. 106.)

With rape, specifically, the male solipsist subject “pins a woman to her bodily being in its abject mode, in the very mode that men have repudiated and devalued.” (p. 160).

Levinas’ *Totality and infinity* is relevant to this regard not only because he makes a strong connection between modern law based on freedom (which I will turn to in a minute), but also

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<sup>8</sup> Freud has nothing to object to Hobbes’ anthropology, as can be read in this passage of *Malaise dans la civilisation* (1930), ed. 2010, Petite bibliothèque Payot, trad. Aline Weill, p. 117: « ... l’homme n’est pas une douce créature qui a besoin d’amour et peut, tout au plus, se défendre quand on l’attaque, mais (...) il doit également compter une part considérable d’agressivité parmi ses tendances pulsionnelles. Par conséquent, son prochain est pour lui non seulement un aide éventuel et un objet sexuel, mais aussi une tentation de satisfaire son agressivité à ses dépens, d’exploiter sa force de travail sans dédommagement, de l’utiliser sexuellement sans son consentement, de le dépouiller de ses biens, de l’humilier, de lui infliger des souffrances, de le torturer et de le tuer. *Homo homini lupus* : l’homme est un loup pour l’homme ; qui, au regard de toutes les expériences de la vie et de l’histoire, aurait le front de contester un tel adage ? »

<sup>9</sup> Raphaëlle Branche, p. 334 : « Pour le tortionnaire, l’état d’épuisement dans lequel le laisse la séance de torture est parfois comparé à celui qui s’empare de l’homme après l’acte sexuel : celui qui a possédé l’autre et sort vainqueur de cette confrontation des corps, conçoit comme une lutte, est alors rassuré sur sa virilité. »

because he underlines the gendered dimension of modern law: modern State, he writes, through its “manly virtues” produces “an isolated and heroic being” – the one who is incapable of living its own freedom without respecting the infinity of the other.

And this leads me to my last point, which is the issue of the role of law in the production of solipsist sovereignty, and thus torture.

### **3. The black hole of sovereignty: Sovereign law as the source of legal vacuum**

*Torture and Dignity* ends with a vigorous denunciation of the persistence of rape in today’s societies. It relies on the uncontested fact that most of the rapes are never reported. The persistence of a rape culture, Jay Bernstein argues, “depends essentially on what I am calling the moral disconnect between abstract moral knowing and concrete moral experience, especially among the perpetrators, with the further lemma that one element in the moral disconnect is a failure to appreciate how morally injurious rape is.” (p. 325)

I personally take this a confirmation that the experience of victims and the awareness of victims’ vulnerability (here potentially *all women*, which makes an extraordinarily broad group of victims – half of the population) have no major or decisive influence over the creation of moral or legal norms. But this leaves open the question of the persistence of rape, including in societies where torture is effectively prohibited. Jay Bernstein gives several explanations, among them “the abuse of the public/private distinction in the understanding of fundamental rights”. This touches upon an important aspect of modern law, the potentially excluding effect of the principle of universality embodied in modern law. Universality is a principle of inclusion but is well-known to have been interpreted in practice as a tool for exclusion of all sorts of groups in society. This is of course the main criticism that has been levelled at human rights, and indeed still is; their so-called universality serves merely to mask the exclusion of those that are “different” from the dominant majority, including women.

Lévinas touches upon this problem of modern law in the modern state in *Totality and Infinity*: freedom as an event that constitutes the self should maintain a relation with exteriority which morally resists any appropriation and totalization of the being. If freedom is to neglect this

relation with the other considered in absolute otherness, then all relationships would only be the *seizure* (la *saisie*) of one being by another.<sup>10</sup>

This (mis?)interpretation of freedom in modern law can be the product of either a philosophy based on the primacy of the *ego* (subjectivism which leads to solipsism) or a philosophy of history for which the passage of time necessarily leads to the suppression of multiplicity (the realization of Being). *Totality and Infinity*, in contrast, proposes another philosophy based not on appropriation but on *respect*. Lévinas immediately responds to a possible objection: this does not mean being against freedom but rather against the irrationality of freedom: freedom must be justified. Limited to itself, freedom is achieved not through sovereignty but through arbitrary power.<sup>11</sup>

Lévinas makes an interesting distinction here between *sovereignty* and *arbitrary power*<sup>12</sup>, which is crystal clear to all international lawyers: sovereignty, in international law, means power as limited by international law. Sovereignty means primarily the power to consent to international legal obligations, and thus is necessarily distinct from arbitrary power.

However, I submit that the difficulty of modern law is precisely to draw clear limits between sovereignty as power conditioned by law, and absolute sovereignty as arbitrary power, insofar as the frontiers and the meaning of universality, which is supposed to characterize modern law, are blurred by subjective perceptions. This issue concerns not only the law within the state – domestic law – but also international law.

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<sup>10</sup> In the French version (the only one I have with me): « La liberté, événement de séparation dans l'arbitraire, qui constitue le moi, maintient en même temps la relation avec l'extériorité qui résiste moralement à toute appropriation et à toute totalisation dans l'être. Si la liberté se posait en dehors de cette relation, tout rapport, au sein de la multiplicité, n'opérerait que la *saisie* d'un être par un autre ou leur participation commune à la raison où aucun être ne regarde le visage de l'autre, mais où tous les êtres se nient. » Emmanuel Lévinas, *Totalité et infini. Essai sur l'extériorité*, Martinus Nijhoff, 1971, Livre de Poche, coll. "Biblio Essais", p. 337.

<sup>11</sup> "L'irrationnel de la liberté ne tient pas à ses limites, mais à l'infini de son arbitraire. La liberté doit se justifier. Réduite à elle-même, elle s'accomplit, non pas dans la souveraineté, mais dans l'arbitraire." *Totalité et infini, op. cit.*, p. 339.

<sup>12</sup> It is worth noting that Jean Améry similarly distinguishes between the power of the torturer and the power of a government – that is sovereignty in the classical meaning of the term: « La domination du tortionnaire sur sa victime n'a rien à voir avec le pouvoir exercé sur la base de contrats sociaux, tel que nous le connaissons tous (...) Ce n'est pas non plus la souveraineté sacrée des chefs ou des rois absolus, car même s'ils éveillaient la crainte, ils étaient en même temps objet de confiance. Le roi pouvait être terrifiant dans son courroux, mais aussi bienveillant dans sa clémence ; exercer l'autorité équivalait à gouverner. Tandis que le pouvoir du bourreau dans les mains duquel le supplicié gémit n'est rien d'autre que le triomphe illimité du survivant sur celui qui est jeté hors du monde dans la souffrance et dans la mort. »

a) Sovereignty is protective for all those “subjects” that are included within its reach, but at the same time *arbitrary* for all those that are not included. Depending on the reach of “universality” and on the exclusion that are implicitly imposed under its veil, sovereignty takes either the figure of the force of law or of the law of force.

The disturbing reality of torture and rape in democratic societies is that they are perpetrated *under the cover of the law*: they are strictly illegal, but the law creates vacuum through which the solipsist subject – which is by essence the modern subject, the reflecting *ego* – can exert its *absolute sovereignty*, that is, arbitrary power on others that are excluded from the circle of universality. The trouble is that this exclusionary effect of sovereignty may well be intrinsically linked to its very concept, as it was developed in a nation state-centric international system. This is why I agree with Jay Bernstein when he writes (p. 108):

“My hunch is that the sovereignty structure is the essence of sexual and racial domination; it is why these forms of domination become rape, torture, slavery, and genocide. In each case an otherwise threatened or fragile system of self-worth is translated into the illusory ideal of individual or collective self-sufficiency. The sovereign structure represents the attempt to resolve the dilemma of self-worth by negation.”

In democracies, torture is practised against colonial peoples and prisoners or mentally ill persons. And rape remains covered by the still-prevailing division between private and public spheres and the stereotypes that confine “women’s issues” to the private sphere. Does it mean that modern law is doomed to fail in its universalist claim? I don’t think so. Habermas noted that human rights and the principle of equality and non discrimination act as “censors” to identify exclusions that are pronounced in their names.<sup>13</sup> Only through social struggles in the name of human rights and modernity can universality become a reality.<sup>14</sup> But these social struggles will have limited consequences if they are confined to the national level and if they

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<sup>13</sup> Jürgen Habermas, « Le débat interculturel sur les droits de l’homme », in *L’intégration républicaine*, Paris, Fayard, 1998, p. 247.

<sup>14</sup> Jürgen Habermas, « La lutte pour la reconnaissance dans l’Etat de droit démocratique », in *L’intégration république*, *op. cit.*, p. 205 en part p. 210 : « Les personnes en général, y compris les sujets de droit, ne deviennent des individus que grâce à la socialisation. Sous cette prémisse, une théorie des droits bien comprise requiert précisément une politique de la reconnaissance qui protège l’intégrité de l’individu, y compris dans les contextes de vie qui forment son identité. Il n’est pas nécessaire, pour cela, de recourir à un contre-modèle qui corrige la structure individualiste du système des droits par d’autres critères normatifs ; il suffit de réaliser ce système de façon conséquente. Toutefois, sans les mouvements sociaux et sans les luttes politiques, cette réalisation serait difficile à traduire dans les faits. »

take for granted another dimension of the “sovereign structure” which is the interstate system and international law.<sup>15</sup>

b) *International law is also part of modern law.* The universal reach of the law (however partial and limited) at the national level is built on the separation from the other beyond borders: the non-national. The creation of modern states themselves, as Carl Schmitt described, is a process of *land-appropriation (prises de terre)*<sup>16</sup>, that is, to echo Lévinas, *seizure of the being*, negation of plurality and of the other’s otherness. The sovereign modern State is a solipsist modern state that constitutes the world *in and from* itself: conquered space is part of its “territory” and conquered peoples are parts of its “population” as “constitutive elements” of the state. The process of sovereignty negates plurality by interiorizing exteriority. International sovereignty excludes while it includes: states *recognize* some states and do not recognize other states. In this process, their interiority (population, territory) remains out of reach of international law: the national from another State is not a human but a non-national, subject to killing in times of war, that is, in times of conflict between two States. States recognize each other but ignore human beings, downgraded to the rank of “objects” of international law.

Again, the solution to the drawbacks of modern law as applied to international law is not to renounce the promises of universality but to fight to get them fulfilled. Carl Schmitt made an apology of the “classic” interstate system which, in his view, established civilized relations of war and peace between European nations, while allowing savagery and massacre to blossom in the relationships with colonized peoples. He was concerned with the intrusion of humanity as a category in this well-thought architecture that maintained if not peace but stability and, he claimed, humanity, in the relations between European states: by claiming to establish universal peace and introducing the idea of *crimes against humanity*, contemporary international law was in fact destabilizing the system based on the sovereign and solipsist state – it was contrary to the *Nomos* based on land-appropriation.

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<sup>15</sup> See our contribution “La lutte pour la reconnaissance: une nouvelle théorie explicative de l’évolution du droit international?”, in E. Tourme Jouannet, H. Muir Watt, O. de Frouville, J. Matringe, *Droit international et reconnaissance*, Paris, Pedone, 2016, pp. 93-137.

<sup>16</sup> Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, Telos Press Publishing, 2006, particular Part I, Chapter V: « The Land-Appropriation as a Constitutive Process of International Law », translated in French as « La prise de terres comme événement constituant du droit des gens ».

The universal prohibition against torture, recognized as a customary and *jus cogens* norm, among other factors, has since contributed further to this destabilization. For the better. And it has produced a more authentic understanding of modern law.