

## Apologising for Torture

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### 1. Introduction

On 14 May 2004 the British satirical magazine *Private Eye* had a memorable cover. Splashed across the top tabloid-style was the banner ‘The Picture That Shamed America’. What was the picture that shamed America? Was it a picture of someone standing on a box, with a hood over his head and wires attached to his body? Was it a picture of a woman trailing a naked man, dog-like, at the end of leash? No, it was a picture of George Bush and Donald Rumsfeld, standing quite close and smiling as if sharing a private joke. Bush is saying to Rumsfeld, “Iraqi prisoners are being tortured”. To which Rumsfeld replies, “You see – things are getting back to normal”.

This article is concerned with what’s normal and what’s exceptional and how those two things relate to one another and to human rights. I’m going to approach those issues from a slightly oblique angle, starting with the concept of apology. To apologise for something can be to do a number of different, and apparently antithetical, things, and in the first part of the article I’ll highlight two of these in particular. In the remainder of the discussion I’ll try to show how those two sorts of apology correspond to, and can elucidate, two ways of marking out bad situations as exceptional. I’ll use the term ‘exceptionalism’ to refer to that process of marking out bad situations as exceptional. And as my example of a bad situation, I’ll take torture. So I’ll be talking about apologies for torture, exceptionalist arguments with respect to torture, and in connection with them the contribution and limits of human rights. Along the way, I’ll be referring both to old human rights cases and to very recent discussions and events. Among other things, I’ll be referring to what Rumsfeld actually said about the torture of Iraqi prisoners at Abu Ghraib. As usual, satire speaks a kind of truth – or so I’ll be suggesting – but of course *Private Eye* puts its own words into Rumsfeld’s mouth. What he actually said was ‘I apologise’.

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## 2. Apology

If I asked you to give me some synonyms for the word ‘apology’, you would probably come up with quite a long list, which would be likely to include, among other words, acknowledgement, confession, defence, exculpation, excuse, explanation, justification, and vindication.<sup>1</sup> Each term no doubt points to a different shade of meaning, but for our purposes it will be enough to notice two key senses reflected in this list. One is the earliest meaning of apology as a defence of one’s beliefs, engagements or actions. Plato’s *Apology* tells of the speech made by Socrates in which Socrates defends himself against the charges of his accusers. In a famous medieval apology, St Bernard of Clairvaux justifies his decision to support and organise the disastrous second crusade. Sir Philip Sidney’s late 16th century text *Apologie for Poetrie* presents a vindication of the poet’s art in the face of recent challenges to it. And the *Apologia Pro Vita Sua* of Cardinal John Henry Newman, published in 1864, explains and accounts for Newman’s conversion from Anglicanism to Roman Catholicism. Since the overall aim here is to refute criticism, deny blame, or at any rate show how what has been questioned is in fact justified, let’s call apology in the sense in which it is used in these works *apology as justification*.

The other key sense of the word apology is, of course, the more common contemporary meaning of apology as a regretful acknowledgement of failure or wrongdoing. If apology as justification involves self-exculpation, apology in this sense is an act of self-inculpation. Here you accept blame, rather than denying it or claiming warrant for what you did. At the level of private relations, apologising must surely be one of the most frequently performed speech-acts there are, even if it can sometimes be difficult and cost you a lot in pride. But public apologies, addressed to the world at large or some group within it, are also and perhaps increasingly a familiar feature of life today. These may be given by businesses to their customers following commercial complaints, or they may be given by state officials to citizens in their own or some other country. And where they are given by state officials, the apology may be tendered in a personal capacity, as when Bill Clinton apologised to the American people for lying over Monica Lewinsky. Or it may be tendered in a representative or official capacity. Thus on the tenth anniversary of the beginning of the Rwandan genocide, we heard the Belgian Prime Minister Guy Verhofstadt apologise to the Rwandan people for allowing the genocide to happen. Queen Elizabeth II has apologised to the Maoris for violations of the Treaty of Waitangi by officials of the Crown in New Zealand. And in 1998 the then

<sup>1</sup> In the discussion that follows, I draw on the illuminating account in Marina Warner, ‘Sorry: the present state of apology’, <[www.opendemocracy.net](http://www.opendemocracy.net)>.

Japanese Prime Minister Keizo Obuchi apologised for the Japanese colonial occupation of Korea. Since the main point of all these statements is to assume responsibility and avow fault, let's call apology in this second sense *apology as avowal*.

What is the relationship between these two kinds of apology? An apology in the first sense I mentioned – apology as justification – is certainly not an apology in the second sense. Although Socrates delivered to the gathered Athenians an apology for his conduct, he most definitely did not say he was sorry. On the contrary, he remained defiant to the end, and, even after he was convicted, refused to make the customary plea for banishment rather than the death penalty, on the grounds that he had been doing a great service to the state and deserved not punishment but reward. What if we turn things around and consider whether an apology in the second sense – apology as avowal – can serve as an apology in the first sense? Offhand we may say that these two kinds of apology are, again, antithetical. To inculpate yourself cannot simultaneously be to exculpate yourself. On further reflection, however, this may not be so clear. Apparently the French have a saying '*qui s'accuse s'excuse*', and certainly there is something redemptive about the act of apologising, something akin to the process by which in Christian doctrine confession can lead to the shriving of sins and the lifting of guilt. I will return to that in a moment.

But there is also another aspect to this. To avow wrongdoing in relation to one matter can be implicitly to defend your conduct or present it as justified in relation to another matter, at least where the latter is the subject of public knowledge and concern. Indeed, public apologies are often as notable for what they leave out, or pass over, as for what they cover. The Japanese Prime Minister has apologised for the occupation of Korea, but not for the sexual slavery of Korean 'comfort women'. The Queen has said sorry to the Maoris for violations of the Treaty of Waitangi in the 19th century, but has failed to explain to the British people today why she and her family, for all their fabulous wealth, have never paid taxes. The Pope, who has apparently apologised on nearly a hundred different occasions, has acknowledged blameworthiness in relation to the crusades and the inquisition, but has omitted to say anything about the complicity of the Church in relation to Italian fascism and nazism in Germany during the 20th century. The fact that non-apologies can often express as much as apologies, if not considerably more than them, is also reflected in the ongoing debates that surround the various high-profile 'refusals' of recent years: the refusal of the Australian Prime Minister John Howard to apologise to the 'stolen generation' of Aboriginal Australians, the refusal of the United States Administration to accede to demands for an apology for slavery, and so on.

I have so far been focusing on the perspective of the apologist – the person who offers the apology – but, in a recent study of the literature of apology,

Marina Warner reminds us that apology is always a relationship, a “compact between parties, not a lone initiative”.<sup>2</sup> It is made “in relation to an object, which then bears back on the subject” in an act of “mutual self-fashioning”. In the case of apology in the sense of avowal, the apologist “accepts responsibility – or takes the blame – and speaks of regret”.<sup>3</sup> But the desired redemption or reconciliation cannot occur without forgiveness on the part of the person to whom the avowal of guilt is made, the apologee. Drawing on St Augustine’s *Confessions*, Warner explains: “[A]pology turns into atonement and shrives the apologist only when it meets and merges with the consent of the respondent. It is by agreeing to the spell, by the one who grants pardon, that the spell takes hold.”<sup>4</sup> Continuing the metaphor, she refers to public apologies as a kind of “evolved, secular verbal magic”.<sup>5</sup> Indeed, perhaps not so secular, for she also proposes that state officials who make public apologies cast themselves into a priestly role. “Their verbal retractions are magical sacramental acts, designed to ease and soothe” and heal.<sup>6</sup> And “[i]f healing is the consequence,” then “surely apology, as in Augustine’s *Confessions*, adds to the sum of justice in the world? Or does something trickier lie within the public act?”<sup>7</sup>

### 3. Justification

Let us leave that question there for the moment, and begin to consider how what I have said about apology relates to exceptionalism and human rights. To provide focus for this enquiry, I will be looking, as I mentioned, at arguments relating to torture. In particular, I want to review two arguments relating to torture, both of them exceptionalist in character and both of them apologies – but apologies in different senses. The first, which I shall take up now, is an apology in the first sense I highlighted earlier – apology as justification. This is the claim that torture is sometimes, exceptionally, justified. When we as human rights lawyers discuss exceptionalism with respect to issues like torture, it is this kind of exceptionalism – let us call it *justificatory exceptionalism* – that we most commonly have in mind. Of course, as I shall note presently, international

<sup>2</sup> M. Warner, ‘Sorry: the present state of apology’, Part 1 (The Present State of Apology), p. 2.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*, Part 3 (Scene Two: St Augustine’s Confessions), p. 4.

<sup>5</sup> *Ibid.*, Part 1 (The Present State of Apology), p. 4.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, Part 3 (Scene Two: St Augustine’s Confessions), pp. 3–4.

human rights law offers a very clear rebuttal to this argument. But, equally obviously, that does not mean it does not get advanced. On the contrary, it is safe to assume that wherever and whenever torture occurs, this argument is there, albeit usually implicitly. At the same time, recent years have seen the apparent return to respectability of *explicit* arguments along these lines, to the point where in January 2002 the British weekly *The Economist* – not an organ noted for crankiness – ran a cover story posing the question “Is torture ever justified?”<sup>8</sup>

Since no-one today claims that torture should be the norm, it may be helpful at this point to recall something of the context in which all justificatory arguments for torture have come to be framed in exceptionalist terms.<sup>9</sup> In medieval and early modern Europe torture was part of ordinary criminal procedure. Suspects would be ‘put to the question’ on the basis that only confessions could establish truth, and only torture could produce valid confessions. In the 18th and early 19th centuries, however, most European states enacted legislation to abolish the use of torture. This reform had been urged by Voltaire, Montesquieu and perhaps most famously Cesare Beccaria, who wrote at length on the immorality and irrationality of treating torture as the ‘crucible of truth’. When abolition came, it was widely celebrated as a sign of newly enlightened consciousness. More recent historiography offers a somewhat different perspective, relating the abolition of torture to the changing structure of power in the late modern world and, in particular, to the emergence of a new system of social control which no longer depended on hurting people’s bodies, but set its sights instead on the more ambitious project of reprogramming their minds. Either way, the upshot was that by the end of the 19th century torture had been largely displaced from the ordinary criminal law.

Of course, this did not lead to the disappearance of torture. Quite the reverse, as things turned out. From Soviet Russia to French Algeria and beyond, regimes of systematic torture were established in the 20th century that dwarfed in scale, scope and sophistication the more limited uses of torture of earlier times. Even then, however, torture did not generally become part of ordinary criminal procedure. Rather, it now belonged to a much more shadowy arena, inhabited by ‘security police’, ‘military investigators’ and ‘secret service agents’, using ‘extraordinary powers’ to carry out ‘intelligence operations’ for the sake of ‘national security’. Hence the emergence of non-governmental organisations like Amnesty International, with publicity and exposure as key goals of their work. In the second half of the 20th century, and partly through

<sup>8</sup> *The Economist*, 11–17 January 2002.

<sup>9</sup> On the history of torture, see further E. Peters, *Torture* (Philadelphia: University of Pennsylvania Press, 2nd ed., 1996).

the influence of non-governmental organisations of this sort, the process of formally banning torture which had been initiated at the national level was reinforced through international human rights law. Article 5 of the Universal Declaration of Human Rights affirms that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”, and this is reiterated in the International Covenant on Civil and Political Rights and its regional counterparts, and elaborated as well in the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In all of these treaties torture is prohibited in absolute terms. That is to say, there are no qualifying conditions under which restrictions may legitimately be imposed. Nor is there the possibility of modified application or ‘derogation’ in time of war or other national emergency. Pointing to these features, human rights courts and supervisory bodies have repeatedly stressed the absolute, unqualified and non-derogable nature of the right not to be subjected to torture or to inhuman or degrading treatment or punishment. To quote just one representative statement, the Human Rights Committee has declared that “no justification or extenuating circumstance may be invoked to excuse a violation” of this right.<sup>10</sup>

Plainly, international human rights law rejects the exceptionalist argument I stated a moment ago, the claim that torture is sometimes, exceptionally, justified. Is it right to do this? Should torture be prohibited at all times and for all purposes? In 1971 General Jacques Massu, a soldier in the French Army who had been in charge of Algiers at the time of the Algerian War, published memoirs in which he acknowledged that torture had been used under his command, and claimed that this was “the only way he could get advance knowledge of terrorist plans and avert the deaths of innocent people”.<sup>11</sup> Sixteen years later, a Commission of Inquiry in Israel, led by retired judge Moshe Landau, reported on interrogation practices then being used by the Israeli security service in connection with counter-terrorism. The Commission approved official directives which in certain circumstances authorised investigators to apply what was referred to as ‘moderate physical pressure’. (Among the practices encompassed within that phrase were some that constitute torture under international human rights law.) Explaining this decision, the Commission quoted a statement by a security service investigator who had characterised the situation he faced in the following terms. “We are talking about the ‘cleaning of sewers’ the existence of which endangers state security”,

<sup>10</sup> Human Rights Committee, General Comment 20 (Article 7), 1992, para. 3.

<sup>11</sup> D. Johnson, ‘General Jacques Massu’ (Obituary), *The Guardian*, 28 October 2002. According to Johnson, Massu later expressed regret at his use of torture, following the publication of the memoirs of one of his victims in 2000.

the investigator had said, “and this unpleasant mission has been imposed upon us. One cannot clean sewers without dirtying oneself.”<sup>12</sup>

The directives approved by the Commission of Inquiry were later challenged before the Supreme Court of Israel, and in a judgment rendered in 1999 the Supreme Court ruled that security service investigators were *not* lawfully authorised to use what for the Court’s part it called “physical means”.<sup>13</sup> Since there was “no statutory instruction endowing a [security service] investigator with special interrogating powers that are either different or more serious than those given the police investigator”,<sup>14</sup> counter-terrorist investigators had to follow normal procedures, and these excluded the practices in question. However, the Court did not rule out that such statutory instruction might be provided in the future, adding that “[i]f it will nonetheless be decided that it is appropriate for Israel, in the light of its security difficulties to sanction physical means in interrogations . . . this is an issue that must be decided by the legislative branch which represents the people. We do not take a stand on this matter at this time”.<sup>15</sup> There was also another rider. The Court drew a distinction between “the granting of permission to use physical means for interrogation purposes *ab initio*” and “the ability to potentially escape criminal liability *post factum*” by invoking the defence of “necessity”.<sup>16</sup> With respect to the latter, the Court made clear that, in the event of criminal charges being brought against a security service officer in connection with counter-terrorist investigations, its judgment was not to be read as precluding reliance on the necessity defence. Thus, the Court left open the possibility that security service officers involved in torture might be exonerated from criminal liability.

In setting out the issues it had had to consider, the Court reported that the state’s attorneys, like the Commission of Inquiry before them, had invoked the ‘ticking time bomb’ argument. The Court’s account of the well-known scenario which underpins this argument went like this. “A given suspect . . . holds information respecting the location of a bomb that . . . will imminently explode. There is no way to defuse the bomb without this information. If the information is obtained, however, the bomb may be defused. If the bomb is not

<sup>12</sup> Report of the Commission of Inquiry Regarding the General Security Service’s Interrogation Practices With Respect to Hostile Terrorist Activities, cited in *Public Committee Against Torture and Others v. State of Israel and Others*, Judgment of the Supreme Court of Israel, 6 September 1999.

<sup>13</sup> *Public Committee Against Torture and Others v. State of Israel and Others*, Judgment of the Supreme Court of Israel, 6 September 1999.

<sup>14</sup> *Ibid.*, para. 32.

<sup>15</sup> *Ibid.*, para. 39.

<sup>16</sup> *Ibid.*, para. 14. The Court stated that this distinction had been accepted by all the applicants in the case.

defused, scores will be killed and maimed. Is [an investigator] authorized to employ physical means in order to elicit information regarding the location of the bomb in such instances?"<sup>17</sup> As I just said, the Court decided that the answer was no. However, its concern to leave open the possibility for security service investigators to be excused from eventual criminal liability suggests that it did not find the ticking time bomb argument wholly unpersuasive. Indeed, the judges made plain their unease about the consequences of barring the security services from employing a tool which the latter had said was "indispensable to fighting and winning the war on terrorism".<sup>18</sup> "We are", they wrote, "aware of the harsh reality of terrorism in which we are, at times, immersed. Our apprehension . . . that this decision will hamper the ability to properly deal with terrorists disturbs us."<sup>19</sup>

Since September 11 many influential commentators have proposed that the ticking time bomb argument likewise needs to be considered in the United States. According to Judge Richard Posner of the Seventh Circuit Court of Appeals, "only the most doctrinaire civil libertarians . . . deny [that] if the stakes are high enough, torture is permissible. No one who doubts that this is the case should be in a position of responsibility."<sup>20</sup> For Harvard law professor Alan Dershowitz, the absolute prohibition of torture is not only naïve, but also hypocritical and ultimately illiberal. As he explains, "I have no doubt that if an actual ticking bomb situation were to arise, our law enforcement authorities would torture. The real debate is whether such torture should take place outside our legal system or within it. The answer to this question seems clear: if we are to have torture, it should be authorized by law."<sup>21</sup> Dershowitz has proposed that legislation should be introduced, under which judges would have to issue a 'torture warrant' before torture was used. This would be more honest, he suggests, than quietly condoning torture in counter-terrorist investigations while publicly condemning it. More importantly, it would protect those affected from unregulated and arbitrary action. In his words, "[d]emocracy requires accountability and transparency, especially when extraordinary steps are taken. Most important, it requires compliance with the rule of law. And such compliance is impossible when an extraordinary technique, such as torture, operates outside the law."<sup>22</sup> From this perspective, the absolute prohibition of

<sup>17</sup> *Ibid.*, para. 33.

<sup>18</sup> *Ibid.*, para. 9.

<sup>19</sup> *Ibid.*, para. 40.

<sup>20</sup> Quoted in S. Levinson, 'The Debate on Torture: War Against Virtual States', *Dissent*, Summer 2003 (endorsing the arguments put forward by Alan Dershowitz in the article cited at the succeeding footnote).

<sup>21</sup> A. Dershowitz, Commentary, *Los Angeles Times*, 8 November 2001.

<sup>22</sup> *Ibid.*



torture may make sense as a response to the practice of torture in tyrannical regimes. But – so the argument runs – torture is not only used to prop up tyrannical power. In today’s world it is also used in democratic states to save innocent people from being killed or maimed, and it behoves such states to ensure that this is not left to the discretion of secret policemen in underground cells, but instead operates within a framework of law.

These proposals and the analysis which informs them have not, of course, gone unchallenged.<sup>23</sup> Among the various objections that have been or might be raised, let me highlight now four. The first and simplest to state is the claim that torture is just wrong, and should never be regarded as legitimate, whatever the consequences. The playwright Ariel Dorfman makes this argument, and, in doing so, evokes the famous passage in Dostoevsky’s *The Brothers Karamazov* in which Ivan invites his brother Alyosha to imagine that he is “charged with building the edifice of human destiny, whose ultimate aim is to bring people happiness, to give them peace and contentment at last, but that in order to achieve this, it is essential and unavoidable to torture just one little speck of creation”, just one little child. Imagining this, Ivan asks, “[w]ould you agree to be the architect under those conditions?” “No”, replies Alyosha quietly, “I wouldn’t agree”.<sup>24</sup> For Dorfman, Alyosha’s ‘no’ expresses the sense that acts of torture will “eternally corrode and corrupt us”.<sup>25</sup> “What Alyosha is telling Ivan”, Dorfman writes, “in the name of humanity, is that he will not accept responsibility for someone else torturing in his name”.<sup>26</sup> He will not accept to have paradise for all bought at the cost of hell for even one – one, moreover, Dorfman reminds us, who on at least some occasions, we must assume, will be as innocent and harmless as the child in Ivan’s hypothetical.

A second objection revolves around the practical significance of what was referred to in that *Economist* article I mentioned earlier as the “taboo against torture”.<sup>27</sup> If we must expect that torture will occur, the claim here is that it is nonetheless important that it should remain contrary to the law. Those committing acts of torture should know those acts are wrong. And those who are victims of acts of torture should not be delivered by the law to their tormentors. Israeli legal scholar Mordechai Kremnitzer has developed this argument

<sup>23</sup> For a hilarious satire of the proposals, see J. Gray, ‘A Modest Proposal For Preventing Torturers in Liberal Democracies From Being Abused, and For Recognising Their Benefit to The Public’, *New Statesman*, 17 February 2003, p. 22.

<sup>24</sup> F. Dostoevsky, *The Karamazov Brothers* (I. Avsey, trans.) (Oxford: Oxford University Press, 1994), p. 308.

<sup>25</sup> A. Dorfman, ‘Are there times when we have to accept torture?’, *The Guardian*, 8 May 2004.

<sup>26</sup> *Ibid.*

<sup>27</sup> ‘Is torture ever justified?’, *The Economist*, 11–17 January 2002, p. 23.

in a response to the report of the Commission of Inquiry on the authorisation of torture in Israel. Where the use of torture is authorised, he writes, “[t]he law, which generally grants protection, permits the suspect’s injury, obligates him to suffer it (as he may not resist) and thus renders him legally helpless. More significant than the actual physical blow and suffering themselves – which should not be taken lightly – is that knowledge that . . . ‘one has given one’s back to the smiters’ . . . The law itself, intended for one’s protection, has turned its back and dealt one a blow.”<sup>28</sup> From this perspective, the idea of legalised torture is a travesty of the rule of law, inasmuch as the law is supposed to protect citizens from violence and treat them as innocent until proven guilty, yet in Alan Dershowitz’s proposal it is made to vindicate their serious injury at the hands of state agents.

A third objection to the legalisation of torture concedes that torture *is* perhaps justified in a ticking time bomb situation, but observes that in practice it is all too often used in other, less extreme situations. On this analysis, torture should not be legalised because no law could prevent the inevitable slide from exceptional use into a routinised system of torture. Indeed, Amnesty International has reported that, after the Israeli Commission of Inquiry approved the authorisation to use “moderate physical pressure”, thousands of people were tortured for stone-throwing and similar acts, and the use of torture became “routine and systematic”.<sup>29</sup> According to Amnesty, this development has proved difficult to reverse, even after the Supreme Court’s decision in 1999. American legal scholar Richard Weisberg highlights that “the dividing of an abhorrent practice into ‘good torture’ and ‘bad torture’ sets the stage for a full-blown acceptance of the practice”.<sup>30</sup> He writes: “No one . . . wants to seem wide-eyed when facing the ‘ticking bomb’ hypothetical . . . [but] it may be the instrumentalists who are being naïve”. After all, you can’t know whether you have the right person. And even if you do have the one who knows where the bomb is, you can’t be sure he or she will tell you the truth. Information gained through torture is notoriously unreliable. “Because of this, you end up sanctioning torture in general.”<sup>31</sup>

A final argument is of a different order to the three I have just mentioned. Rather than arguing that torture is or is not justified in a ticking time bomb situation, the contention here is that the question of whether or not torture is

<sup>28</sup> M. Kremnitzer, ‘The Landau Commission Report – Was the security service subordinated to the law, or the law to the ‘needs’ of the security service?’, 23 *Israel Law Review* (1989) p. 251, quoted in N. Belton, *The Good Listener*, p. 415.

<sup>29</sup> See ‘Ask Amnesty’, <[www.amnestyusa.org/askamnesty/torture200112.html](http://www.amnestyusa.org/askamnesty/torture200112.html)>.

<sup>30</sup> R. Weisberg, ‘Response to Sanford Levinson’, *Dissent*, Summer 2003.

<sup>31</sup> *Ibid.*, quoting David Cole.

justified in this situation is the wrong question. It misses the point that torture is not about getting information, but about asserting power. On this argument, to treat the question ‘Where is the bomb?’ as the *motive* for torture is to take the torturer’s self-justification too seriously. It is to credit his cruelty with a rationale that could ultimately be found in the ‘answer’. Historian Edward Peters recalls that in George Orwell’s *Nineteen Eighty-Four* the information extracted from Winston Smith is already known to his interrogators. Their aim in torturing him is simply to establish his co-operation.<sup>32</sup> Peters contends that this is indeed the way torture works. “It is not primarily the victim’s information”, he writes, “but the victim, that torture needs to win – or reduce to powerlessness”.<sup>33</sup> In her celebrated study of the ‘body in pain’, Elaine Scarry concurs. On her account, the torturer’s ‘question’ and the victim’s ‘answer’ form part of an elaborate ritual for converting “absolute pain into the fiction of absolute power”.<sup>34</sup> With torture, she writes, the ‘interrogator’ stages a performance of overwhelming power in which the victim’s “[w]orld, self and voice are lost, or nearly lost”. The ‘answer’ becomes “a way of saying, yes, all is almost gone now, there is almost nothing left now, even this voice, the sounds I am making, no longer form my words but the words of another”.<sup>35</sup>

In a book about the life and work of a British activist who set up an organisation to help victims of torture, Neil Belton warns of the danger of taking torturers’ self-exculpations too seriously. The ticking time bomb scenario is a fantasy, he writes, “exhumed and revived whenever torture needs a justification”.<sup>36</sup> Belton calls it “one of the most insidious and durable of post-war fantasies”.<sup>37</sup> Rather than going along with the claim that torture is the unfortunate duty of those charged with the task of getting the information to avert the catastrophe, rather than accepting the representation of torture as the thankless work of those who descend into the political sewers so that the rest of us can move safely about the streets, he contends that we should resist these ideas, and hold on instead to the *philosophes*’ vision of a world without torture. In his words, “[t]he vision of a world that does not include torture is essential, and possible; the fantasy of the melancholic healer who imagines that he is saving the world, finding the bomb, curing the plague, is what we have to fear.”<sup>38</sup>

<sup>32</sup> E. Peters, *Torture* (Philadelphia: University of Pennsylvania Press, 2nd ed., 1996), p. 161.

<sup>33</sup> *Ibid.*, p. 164.

<sup>34</sup> E. Scarry, *The Body In Pain* (Oxford: Oxford University Press, 1985), p. 27.

<sup>35</sup> *Ibid.*, p. 35.

<sup>36</sup> N. Belton, *The Good Listener* (London: Phoenix, 1998), p. 216.

<sup>37</sup> *Ibid.*, p. 411.

<sup>38</sup> N. Belton, *The Good Listener*, p. 399.

#### 4. Avowal

I have so far been talking about a kind of exceptionalism with respect to torture that corresponds to apology in the first sense I recalled earlier – apology as justification. As I noted, this is the kind of exceptionalism we tend to focus on in the field of human rights: our discussions of exceptionalist arguments mostly revolve around questions about the circumstances in which departure from normal human rights standards is, or should be, justifiable – questions of derogation and restriction, in human rights terminology. But recent events have surely reminded us that there is also another form of exceptionalism to be considered, which corresponds to apology in the second sense I recalled earlier – apology as avowal. Rather than claiming exceptional warrant for acts of torture, this other kind of exceptionalism – let us call it *avowal apologetics* – starts from the proposition that the acts in question are not justifiable. More than that, it starts from the proposition that those acts are thoroughly reprehensible and absolutely without any shred of justification. On this basis, the apologist acknowledges responsibility, avows fault, and expresses regret. The exceptionalism comes with a further step, in which it is stated or implied that what happened was an isolated departure from normal practice. In avowal apologetics, then, the claim is that acts of torture are unjustifiable, but exceptional.

On 19 May 2004 US army reservist Jeremy Sivits appeared before a United States court martial in connection with a series of now familiar photographs he had taken of Iraqi detainees being tortured at the Abu Ghraib prison outside Baghdad.<sup>39</sup> He was sentenced to one year's imprisonment and was discharged from the army, the first of seven US soldiers to be court-martialled in connection with these events. At his hearing in Baghdad, Sivits was reported to have choked back the tears as he apologised “to the Iraqi people, his mum and dad and to the prisoners he had unwisely photographed in a naked human pyramid”. “I would like to apologise”, he said. “I have let everyone down. It isn't me. I shouldn't have photographed those detainees”. A couple of weeks earlier, on 5 May, US President George Bush was interviewed for al-Hurra TV, an Arabic-language channel funded by the American government.<sup>40</sup> President Bush told viewers that the treatment of prisoners by some members of the US military had been “abhorrent” to him.<sup>41</sup> The people of Iraq “must understand”,

<sup>39</sup> See L. Harding, ‘I'm sorry. It just isn't me.’, *The Guardian*, 20 May 2004.

<sup>40</sup> See B. Whitaker *et al.*, “Arab world scorns Bush's TV ‘apology’”, *The Guardian*, 6 May 2004.

<sup>41</sup> *Ibid.*

he said, “that what took place in that prison does not represent the America that I know”.<sup>42</sup> He continued: “In a democracy everything is not perfect – mistakes are made”.<sup>43</sup> But, he promised, there would be a thorough investigation, and the perpetrators would be brought to justice. Bush contrasted this approach with that of the former Iraqi leader Saddam Hussein, whose “trained torturers were never brought to justice – there were never investigations about mistreatment”. Though Bush stopped short of an explicit apology, White House spokesman Scott McClellan is reported to have later used the “word ‘sorry’ half a dozen times”.<sup>44</sup> “The president is sorry for what occurred and the pain it has caused”, McClellan said.<sup>45</sup> Shortly afterwards, on 7 May, Donald Rumsfeld added his voice to this chorus of contrition. In a US Senate committee hearing, Rumsfeld denounced the abuses at Abu Ghraib as “un-American”, and extended his “deepest apologies” to the prisoners concerned, telling senators that he accepted full responsibility for what had happened.<sup>46</sup> “These events occurred on my watch”, he said, “As secretary of defence I am accountable for them. I take full responsibility”.

These statements illustrate the kind of exceptionalism I described a moment ago at both an individual or personal level and a national or official level. Sivits asserts that this conduct is exceptional for him. It isn’t him. He does not recognise himself in it. Meanwhile, Bush and Rumsfeld condemn the conduct as ‘un-American’. It does not represent the America they know, but is rather the work of a few wreckers, who properly belong, and will now be removed, outside American institutions. In the favoured clichés, these were rotten apples, overheated sadists, trailer-park trash. And yet, just as commentators have argued that justificatory exceptionalism can lead to the sanctioning of torture in general, so too they have questioned the attempt to depict the events at Abu Ghraib as exceptional, and have expressed concern that avowal apologetics may help to sustain the conditions in which acts of torture are enabled and even normalised. I will focus on three arguments that have been or might be put forward in this regard. Each directs attention to the way exceptionalism obscures some aspect of current realities. To this extent, each also directs attention to the way exceptionalism perpetuates that aspect, for we are not likely to investigate, challenge and potentially mobilise to change something we cannot see.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> See S. Jeffrey, ‘Rumsfeld apologises for Iraq jail abuse’, *The Guardian*, 7 May 2004.

The first and most straightforward argument is that the language of exceptionalism obscures the normality of abuses of this sort. If the acts of torture threatened to blur the boundary between the American forces and the Saddamite regime, whose abuses formed a central pillar of the justification for the war and hence the victims' detention in the first place, President Bush left us in no doubt that the apology – with its promise of investigative action and punishment of the perpetrators – was meant to resharpen that boundary. Yet, as many have observed, the events at Abu Ghraib may not be so abnormal. The most obvious dimension of this has to do with allegations that torture was far more widespread and systematic at Abu Ghraib and elsewhere in Iraqi detention facilities than the Bush Administration cared to admit. Beyond that, however, it has been contended that the abuses in Iraq fit with a larger pattern of routinised violence. Many have called attention to links between the treatment of detainees at Guantánamo Bay and the treatment of detainees in Iraq. Some have also highlighted the prevalence of brutality in ordinary US prisons. As one journalist puts it, the “trouble with Abu Ghraib was that it was all too consistent with America’s models of incarceration”, characterised as they now are by “overcrowded prisons, administered by private, unaccountable contractors”.<sup>47</sup> And some have pointed to a more pervasive phenomenon still, the reflection of what Slavoj Žižek has termed the “obscene underside of US popular culture” – or what Rush Limbaugh has called “having a good time”.<sup>48</sup> In Žižek’s account, “[y]ou can find similar photographs in the US press whenever an initiation rite goes wrong in an army unit or on a high school campus and soldiers or students die or get injured in the course of performing a stunt, assuming a humiliating pose or undergoing sexual humiliation.”<sup>49</sup>

A second argument is that the language of exceptionalism also obscures the conditions that lie behind, and provide the context for, these acts of torture. What was it that brought those who perpetrated these acts into the US military? Who taught them to smile and give the thumbs up in the midst of all that misery? And where did they get the idea that there was no need to treat Iraqis humanely? How did it become possible for them to believe that these acts were acceptable and even part of their duties? In an article entitled ‘Children of Bush’s America’ Naomi Klein traces the employment history of a number of those involved in the acts of torture in Iraq.<sup>50</sup> Some were factory workers who

<sup>47</sup> G. Younge, ‘Brutality: the home truths’, *The Guardian*, 11 May 2004.

<sup>48</sup> S. Žižek, ‘Between Two Deaths’, *London Review of Books*, 3 June 2004, p. 19. For the comment by Rush Limbaugh, see S. Sontag, ‘What have we done?’, *The Guardian*, 24 May 2004.

<sup>49</sup> S. Žižek, ‘Between Two Deaths’, *London Review of Books*, 3 June 2004, p. 19.

<sup>50</sup> N. Klein, ‘Children of Bush’s America’, *The Guardian*, 18 May 2004.

had become unemployed when factories had closed and moved their operations to Mexico. Klein reports that nearly 900,000 manufacturing jobs have been lost in the United States since the signing of the North American Free Trade Agreement in 1994. Some of those involved had joined the swelling prison sector I referred to earlier. A number had joined the military to enable them to go to college. According to Klein, US state college fees have risen by more than 50 per cent since 1990, and the army agrees to pay these fees in return for military service. Klein concludes: “Of course, the poverty of the soldiers involved in prison torture makes them neither more guilty, nor less. But the more we learn about them, the clearer it becomes that the lack of good jobs and social equality in the US is precisely what brought them to Iraq in the first place . . . [T]hese are the children George Bush left behind, fleeing dead-end McJobs, abusive prisons, unaffordable education and closed factories.”<sup>51</sup> What, then, of the high-spirited thumbs ups and holiday-snap grins? Klein recalls that this is the “quintessential George Bush pose”. The Bush Administration has “learned to use optimism as an offensive weapon”, she writes. “[N]o matter how devastating the crisis, no matter how many lives have been destroyed”, there have always been smiles. Adamant that everything is for the best in this best of all possible worlds, the Bush administration has “consistently given the world the thumbs up”.<sup>52</sup> That still leaves the question of how those involved here came to believe that there was no need to treat Iraqis humanely. But there is surely little mystery in that. Susan Sontag proposes that the torture of prisoners at Abu Ghraib is a “direct consequence of the doctrines of world struggle with which the Bush administration has sought to fundamentally change the domestic and foreign policy of the US”; it is another outcome of the so-called “war on terror”, with its “demonising and dehumanising of anyone declared . . . to be a possible terrorist”.<sup>53</sup> And if we must situate these events in the context of the Manichean vision and racist ideology that underpin current superpower doctrines, we must also place them within the much longer history of torture by people from countries with imperial ambitions seeking to establish or retain control of tropical places.

This points to a third argument, which is that the concentration on acts of torture serves to obscure problems associated with the occupation of Iraq *apart from torture*. Fixated on cruelty, obsessed with pity, and distracted by pornography, we again forget to ask a range of pertinent questions. Who were these detainees? On what basis were they detained? It was reported that those who perpetrated the acts of torture believed themselves, rightly or wrongly, to

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> S. Sontag, ‘What have we done?’, *The Guardian*, 24 May 2004.

have instructions to ‘soften up’ the detainees for the benefit of military interrogators. What kind of information did these military interrogators expect to receive? To initiate enquiry into those issues is, in turn, to prompt a host of further and larger questions. By what right was Iraq occupied? How has the war affected people’s lives? To what extent has it caused their deaths? Alongside these acts of torture, as many have pointed out, large numbers of people have been killed since 20 March 2003. According to one influential estimate, approximately 10,000 civilians have been killed as a result of the military intervention in Iraq,<sup>54</sup> along with many thousands more soldiers. Beyond those deaths, there have been serious and presumably long-term health and environmental impacts, exacerbating a situation that was already poor by international standards. And there have been social impacts, as foreign contractors have driven local concerns out of business, and the public sector scarcely survives. One could multiply these observations, but my point is hopefully clear. In all the fervent apologies tendered by the United States Administration, a very great deal was left out. The events at Abu Ghraib were cabined, and firmly detached from related and overlapping concerns. In this way a gesture of self-inculcation was turned into a gesture of self-exculpation, an avowal of responsibility for some matters into a disavowal, and an implicit claim to justification, in respect of all those other matters. Perhaps we might characterise the Administration’s apology for the events at Abu Ghraib as a kind of inoculation, immunising the United States authorities from criticism for everything else. Yet that ‘everything else’ was the context in which those events became possible.

Let me now draw international human rights law back into the discussion. In addressing justificatory exceptionalism, I referred to the very clear rebuttal in international human rights law of the argument that torture is sometimes, exceptionally, justified. To what extent does human rights law likewise provide protection against avowal apologetics? Does it similarly dismiss appeals to the exceptionality of acts of torture? It seems to me that international human rights law leaves us significantly more exposed to exceptionalism of the second sort I have described – the claim that acts of torture are exceptional – than to exceptionalism of the first sort – the claim that there is (exceptional) justification for acts of torture. This can be considered at a number of different levels. At one level, one could point to the general tendency in international human rights law to decontextualise problems, and focus on events, as distinct from social processes and conditions. At another level, however, what is striking in the case of Abu Ghraib was the tendency to focus on images or representations, rather than even events. As many have remarked, the scandal was the pictures, and only secondarily the activities revealed in those pictures.

<sup>54</sup> As at 30 June 2004. See [www.iraqbodycount.net](http://www.iraqbodycount.net).



Hence Jeremy Sivits's apology for taking the photographs. Hence perhaps too the fact that Sivits was the first of those involved to be court-martialled. That this was *not* perceived as a case of shooting the messenger is a vivid exemplification of the phenomenon of hyperreality of which Jean Baudrillard has written. According to Baudrillard, the "medium is the message" today, not just in the sense that form has absorbed and neutralised content, but also in the much more far-reaching sense that form has absorbed and neutralised the *empirical referents* of content.<sup>55</sup>

An important aspect of this concerns changes in the visibility of abuses. I mentioned earlier the shadowy arena of security police and intelligence operations that became the setting for torture in the 20th century. In connection with that, I also highlighted the emergence of non-governmental organisations with publicity and exposure as key goals of their work, beginning with the establishment of Amnesty International in the early 1960s. Of course, secrecy remains a problem. But, with digital photography and networked communication, it has come under strain, and some analysts are beginning to argue that our more pressing problem may now be transparency. Abundantly informed, we may be made to feel as if there is nothing more to demand, nothing more to criticise, nothing more to do. As American political theorist Jodi Dean explains, publicity may become a tool of ideology.<sup>56</sup> Whether intentionally or not, the provision of information may help to demobilise opposition and constrain change, not by concealing abuses but more subtly, by revealing them. In her words, "[a]ll sorts of horrible political processes are [today] perfectly transparent. The problem is that people don't seem to mind, that they are so enthralled by transparency that they have lost the will to fight (*Look! The chemical corporation really is trying . . . Look! The government explained where the money went . . .*)."<sup>57</sup> Though this comment is addressed to a different context, Dean's concern is relevant to human rights law, and serves as a salutary reminder that publicity can become demobilising when it is treated as an end in itself.

There is also a further level at which we can consider the point that international human rights law leaves us exposed with regard to exceptionalism. This has to do with the idea – emphasised by the European Court of Human Rights but perhaps latent to some degree as well in the work of other supervisory bodies – that a 'special stigma' attaches to torture. An early statement of this appeared in the well-known *Irish* case, decided by the European Court in

<sup>55</sup> J. Baudrillard, 'The Implosion of Meaning in the Media' in *Simulacra and Simulation* (S. F. Glaser, trans.) (Ann Arbor, University of Michigan Press, 1994), esp. pp. 81–83.

<sup>56</sup> See J. Dean, 'Why the Net is Not a Public Sphere' 10 *Constellations* (2003) p. 95.

<sup>57</sup> *Ibid.*, p. 110.

1977.<sup>58</sup> The European Commission on Human Rights had earlier expressed the view that the interrogation methods challenged by Ireland involved torture. For the Court, “it appears . . . that it was the intention that the Convention, with its distinction between ‘torture’ and ‘inhuman or degrading treatment’, should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.”<sup>59</sup> With respect to the conduct in issue in this case, the Court accepted that it constituted inhuman and degrading treatment, but considered that it “did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood”.<sup>60</sup> Accordingly, the United Kingdom Government was adjudged responsible for inhuman and degrading treatment, but not torture. In a short story describing the experience and after-effects of the interrogation techniques from the perspective of those interrogated, John Conroy recalls that the conservative *Daily Telegraph* pronounced the judgment “a triumph”.<sup>61</sup> As this confirms, attaching a special stigma to torture can help to sanctify the idea that other forms of violence are broadly acceptable. In this way, international human rights law may be taken to signal that, despite prohibitions of inhuman and degrading treatment, all that is really necessary for governments is to avoid torture. Indeed, it may be taken to signal that all that is necessary is for governments to avoid the *word* ‘torture’. Thus, state officials may be encouraged to believe they can hide behind euphemism: “moderate degree of physical pressure” and “physical means”, in the case of the Israeli Commission of Inquiry and Supreme Court; “abuses” and “incidents of physical violence”, in the case of the United States Administration in its response to the ill-treatment of detainees at Abu Ghraib. Yet, as Neil Belton remarks with the Israeli context in mind, “out of the fog of earnest language emerges the fact of torture”.<sup>62</sup>

Towards the beginning of this discussion I referred to Marina Warner’s characterisation of public apologies as a kind of “evolved, secular verbal magic”, designed to ease and soothe and heal. In the case of apology as justification, we saw that, where torture is concerned, the healer is melancholic, psychically burdened by the unpleasant and maligned methods he must use. In the case of apology as avowal, by contrast, the healer manifests the opposite humour. As one journalist has written of Donald Rumsfeld, “he sounds sanguine”.<sup>63</sup> With the expression of regret comes reassurance that there is nothing more to worry

<sup>58</sup> *Ireland v. United Kingdom*, Judgment of the European Court of Human Rights, 13 December 1977.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> J. Conroy, ‘The Internment’, *Granta*, Spring 1992, p. 223.

<sup>62</sup> N. Belton, *The Good Listener*, p. 409.

<sup>63</sup> M. Riddell, ‘A new monster-in-chief’, *The Observer*, 9 May 2004.

about; all is now well. Here, then, the tone is upbeat, optimistic and spirited. Whether in the mode of Rumsfeld calming the senators or Jeremy Sivits hamming it up in court, the apologist wants to speak of terrible, shameful deeds but have us smiling again when he is done. What are we to make of this sanguine posture, this *yang* to the melancholic's *yin*? Let us listen to Michael Berg, the father of a young American man murdered in Iraq in May 2004. In a remarkable article, which is worth quoting at some length, Berg gives his assessment of avowal apologetics.<sup>64</sup>

Berg begins by observing that people often ask him why he focuses on putting the blame for his son Nick's atrocious end on the Bush administration. They ask: "Don't you blame the five men who killed him?" Berg says that he blames them too, but that he takes comfort from the thought that "when they did the awful thing they did, they weren't quite as in to it as they might have been". He continues: "I am sure that one the who wielded the knife felt Nick's breath on his hand and knew that he had a real human being there. I am sure that the others looked into my son's eyes and got at least a glimmer of what the rest of the world sees. And I am sure that these murderers, for just that brief moment, did not like what they were doing." By contrast, he suggests, George Bush and Donald Rumsfeld are never in the position of not liking what they are doing. They are always fully in to it, and spin discrepant elements by denying, repudiating or excluding them. That wasn't us, they say. It wasn't me. You must understand that that's not the way we really are. Berg explains: "George Bush, though a father himself, cannot feel my pain, or that of my family, or of the world that grieves for Nick, because he is a policymaker, and he doesn't have to bear the consequences of his acts . . . Donald Rumsfeld said that he took responsibility for the sexual abuse of Iraqi prisoners. How could he take that responsibility when there was no consequence? Nick took the consequences." If the melancholic healer is at least melancholic, Berg alerts us here to the special dangers of the sanguine healer, whose apology enables him to carry on doing awful things while remaining upbeat, optimistic and ultimately unburdened by their consequences. "Even more than those murderers who took my son's life", Berg declares, "I can't stand those who sit and make policies to end lives and break the lives of the still living".

## 5. Rejection

It is now time to return to the question I put aside earlier, the question of whether apology adds to the sum of justice in the world, or whether something

<sup>64</sup> M. Berg, 'George Bush never looked into Nick's eyes', *The Guardian*, 21 May 2004.

trickier lies within the public act of apologising. This article began by distinguishing between two key senses of the word apology: apology as justification and apology as avowal. Linked to those two senses, I then highlighted two kinds of exceptionalism: on the one hand, the argument that bad things are sometimes, exceptionally, justified; on the other, the argument that bad things are unjustified, but exceptional. Against this background, I have tried to bring into focus two processes that need to be taken into account in assessing the significance of apologies.

One is the process by which *avowal may collapse into justification*. In avowing blameworthiness with respect to particular concerns, public apologists may disavow blameworthiness with respect to remaining concerns by insisting that what happened was aberrant, isolated and anomalous. Admission of fault on one issue may serve as a kind of inoculation, which immunises the speaker against criticism with regard to everything else. Thus, an exceptionalist claim of the second sort I have described may lay the basis for a justificatory claim of the first sort. (At the same time, of course, a claim of the first sort may encourage or embolden those whose acts create the need for an apology of the second sort.) The other process which I have tried to bring into focus is that by which *the exception may reshape the norm*. This is a process to which theorists and activists have called attention in many different contexts. In the case of arguments relating to torture, we have seen that, for all its emphasis on exceptionality, justificatory exceptionalism may in fact lead to the sanctioning of torture in general. Likewise, avowal apologetics may contribute to the normalisation of torture by obscuring the conditions that enable and include acts of torture. At the same time, it may contribute to the normalisation of a global system that enables and includes other forms of violence, domination and exploitation. In a memorable passage composed in 1940, Walter Benjamin writes that insisting on the normality within exceptionalism is a crucial emancipatory move. “The tradition of the oppressed teaches us that the ‘state of emergency’ in which we live is not the exception but the rule. We must attain to a conception of history that is in keeping with this insight.”<sup>65</sup>

But my concern in this article has not only been with the normal and the exceptional and their interrelation. I have also sought to bring out their relation with human rights. From the perspective of Benjamin’s ‘tradition of the oppressed’, we may note that international human rights law gives close attention to the dangers of justificatory exceptionalism where torture is concerned. It emphatically refutes the argument that torture is sometimes, exceptionally, justified. However, it gives only limited attention to the dangers of avowal

<sup>65</sup> W. Benjamin, ‘Theses on the Philosophy of History’, Thesis VIII, in *Illuminations*, H. Arendt, ed.; H. Zorn, trans. (London: Pimlico, 1999), p. 248.

apologetics, doing little to resist the argument that torture is unjustified but exceptional. At the same time, it lends credence to a number of the ideas upon which both justificatory exceptionalism and avowal apologetics rely: the idea that torture is about getting information, rather than about asserting power; the idea that secrecy is the problem and publicity the answer; the idea that the rule of law is always a check on abuses of power, and not sometimes also a prop for them; the idea that emergency can be kept apart from normality; finally, the idea that acts of torture can be detached from the wider context of coercive and non-coercive relations in which they occur. In consequence of these features, I have suggested, human rights law risks being drawn into justificatory exceptionalism even as it sets its face against it.

Does apology add to the sum of justice in the world? No doubt it can do so, but the thrust of my discussion is that something trickier may equally lie within the public act of apologising. On the other hand, as everyone knows, trickiness only works up to a point, and before resting with that conclusion, there is one last element we should recover from Marina Warner's analysis. This is her emphasis on the character of apology as a relationship, a compact between parties, rather than a lone initiative. If, as she explains, the desired redemption cannot occur unless it meets and merges with the consent of the apologee, then that leaves open the possibility of withholding consent. We can reject the apology. Public apologies thus bring with them a critical lever, as Michael Berg makes very clear. Following his lead, we can use that critical lever to assert the irresponsibility of those who pretend responsibility, the impunity of those who promise punishment, and the impenitence of those who profess regret. At the same time, we might take the opportunity to make known to all healers, whether sanguine or melancholic, that the world is not for healing. For the global polity is not sick, but oppressive, and what is needed is not medicine, but justice.