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The horror of the 'enemy of humanity' – on pirates, terrorists and states

Fear, Horror & Terror
1st Global Conference
September 10-12, 2007
Mansfield College, Oxford

Abstract: There are a number of interesting parallels between the pirate and the terrorist when seen from the viewpoint of the state. They are both named the 'enemy of humanity' and a global war is declared against them in which all means are legitimated. This paper will explore the construction of the pirate as the opposite of the state and the orderly society in the works of Bodin, Grotius, Gentile and others up to the Achille Lauro affair, trying to understand what it means in practice to name someone, as Francis Bacon did in 1629: "such routs and shoals of people, as have utterly degenerate from the laws of nature; as have in their very body and frame of estate a monstrosity; and may be truly accounted ... common enemies and grievances of mankind; or disgraces and reproaches to human nature". The paper then explores how the American administration has used the idea of an totally disrecognized and illegimate combatant developed against pirates in the present war on terror, saying (and acting) as the former deputy assistant attorney general John Yoo did: "Why is it so hard for people to understand that there is a category of behavior not covered by the legal system?" he said. "What were pirates? They weren't fighting on behalf of any nation. What were slave traders? Historically, there were people so bad that they were not given protection of the laws. There were no specific provisions for their trial, or imprisonment. If you were an illegal combatant, you didn't deserve the protection of the laws of war."

This paper is an extract from a forthcoming book on pirates and terrorists
– comments are very welcome

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In the US National Security Strategy from September 2002 it states that the US will supplement its military war on terror with a ‘war of ideas’ which includes:

[...] using the full influence of the United States, and working closely with allies and friends, to make clear that all acts of terrorism are illegitimate so that *terrorism will be viewed in the same light as slavery, piracy, or genocide*: behaviour that no respectable government can condone or support and all must oppose (NSC-US 2002: 6, my italics)

This had an obvious reference to a speech made to the US Congress almost exactly 100 years before, on December 3, 1901, when president Theodore Roosevelt spoke after an alleged anarchist Leon Gzolgosz had shot and killed president McKinley in September the same year. Roosevelt said:

Anarchy is a crime against the whole human race; and all mankind should band against the anarchist. His crime should be made an offense against the law of nations, like piracy and that form of manstealing known as the slave trade (quoted from Jensen 2001: 19)

The anarchist may have been the first actual international terrorist but it was the pirate who became the object of the first international or global war on terror, that is, a war against a non-state user of force described as the enemy of humanity, treated and hunted as such.

This paper explores the pirate as a terrorist figure and the anti-pirate discourse as a way to understand not only the present war on terror but the more general connection between state and non-state violence. At first glance there doesn’t seem to be much in common between our romanticized image of the pirate and then present day mass terrorism, between Johnny Depp and Osama bin Laden, but the pirate as well as the terrorist are in their day consistently described as a global threat from a non-state, non-conventional enemy whose sole purpose in life is evil and whose defeat legitimizes all actions. The pirate and the terrorist are enemies of humanity and in that capacity outside the legal and moral boundaries that normally regulates our intercourse. It’s the authorization of force and extraordinary measures from the label ‘enemy of humanity’ which interests me in the following.

I

Unlike the pirates al Qaeda has tried to alter its status from an unconventional to a conventional combatant (one could, perhaps, say that a privateer did just that). They have tried to create a horizontality between themselves as representative of the Islamic umma and the West, between al Qaeda and the US as two equal combatants. One of the ways of trying that has been a series of ‘peace proposals’. In January 2006 Osama bin Laden issued a peace proposal urging a relation of “security and stability” (Laden 2006). The US response to this ‘proposal’ was to let vice president Dick Cheney go on Fox News on January 19, 2006 and say:

I don't think it's possible to negotiate any kind of a settlement with terrorists like this. [...] This is not an organization that's ever going to sit down and sign a truce. I think you have to destroy them. It's the only way to deal with them. (Cheney 2006)

Cheney is denying bin Laden's attempt to describe the situation as a war between equals. Al Qaeda, according to Cheney, is not an organization that one can engage in dialogue or negotiation, only in force. Then British prime minister Tony Blair said on the Labour party conference on October 2, 2001: “There is no diplomacy with Bin Laden or the Taliban regime” (Blair 2001) and the American president, George Bush, said on October 9, 2003: “These committed killers will not be stopped by negotiations; they won't respond to reason. The terrorists who threaten America cannot be appeased – they must be found, they must be fought, and they must be defeated” (Bush 2003a).

He made the scenario completely clear in a speech to the UN on November 10, 2001: “Civilization itself, the civilization we share, is threatened [...] The only alternative to victory is a nightmare world where every city is a potential killing field” (Bush 2001). And in March 2003 he said about the war in Iraq: “Against this enemy, we will accept no outcome but complete and final victory” (Bush 2003b). The opponent is stripped of every other motivation than the desire to kill. He is completely depoliticized and dehistoricized: “The best way to describe the people who are conducting these attacks are cold-blooded killers, terrorists. That's all they are. They're terrorists. [...] They hate freedom. They love terror” (Bush 2003c).

These statements which deny any symmetry or points of contact between us and them; who rhetorically denies them humanity and reason; who proclaim them to be enemies of humanity; who denies their actions and motivations any political or moral content, is exactly parallel to centuries of anti-pirate discourse which we will now investigate up through what we could call the history of state philosophy.

II

The Roman philosopher and politician Cicero (106-43 BC) was one of the first (and one of the most influential) to formulate the dominant position of the organized political community against the pirate. In *De Officiis* from 44 BC Cicero writes: “[W]e have laws regulating warfare, and fidelity to an oath must often be observed in dealings with an enemy” (Cicero 1991: 385). But, he writes, suppose a man gives his word to a pirate, who has captured him, that, if set free, he will pay him a sum of money upon his return home, then that man is not obliged to keep his word “for a pirate is not included in the number of lawful enemies, but is the common foe of all the world [communis hostis omnium]; and with him there ought not to be any pledged word nor any oath mutually binding” (Cicero 1991: 385-7).

The pirate, according to Cicero, is no lawful or just enemy, meaning there exists an asymmetrical relationship between him and the organized political community, which doesn’t allow any reciprocity in exchange or commitment. The lawful enemy is an enemy with whom one can be engaged in fierce combat but he is one’s equal which regulates the violent intercourse. There can, in principle, be no moral superiority or reference to a higher justice by either party to the conflict. The war is just and lawful on both sides and the other is recognized through diplomacy, religious ritual, code of honour and the laws of war. In the case of the unlawful enemy or the asymmetrical enmity there is (on at least one side) no recognition of equality between the combatants. In this case the state or political community does not recognize the pirate as an equal and therefore doesn’t feel obligated to observe rules of humanity, law and honesty. This is an enemy one can kill without committing murder; this is an enemy one can totally destroy without moral problems.

The symmetrical enmity develops in the West into the interstate system of mutual recognition which allows but regulates war. At the same time a steady stream of unrecognized enemies follows the consolidation of what becomes the state monopoly on legitimate violence: pirates, mercenaries, outlaws, duellists, poachers, war lords etc who at various times are used or destroyed by the state but, from the creation of the territorial state, consistently criminalized. The symmetrical enmity is conditioned upon that only like entities can use armed force and the history of the territorial state is also the history of the outlawing of private violence. The pirate is a very interesting case in point because the pirate appears to have existed since man entered out on the sea and he has always stood in a precarious relationship to the organized political community.

Cicero’s line became the dominant one, which is evident when looking upon a number of legal and political scholars, ‘state philosophers’ starting from the early modern period. The

Italian soldier and jurist, Pierino Belli (1502-1575) wrote in 1563 *De Re Militari Bello Tractatus* [Treaty on the military matters] inspired by among others Cicero and Plutarch and their position that one should not start a war without a formal declaration of war but that “it is customary to make an exception in the case of pirates, since they are both technically and in fact already at war; for people whose hand is against every man should expect a like return from all men, and it should be permissible for any one to attack them” (quoted from Rubin 1997: 26). The pirate is always already at war with everyone; there is a permanent state of war between the pirate and humanity which makes a formal declaration of war meaningless.

The pirate is everyone’s enemy but obviously a different kind of enemy than the lawful one which prompted Balthasar de Auyala (1548-1584) from Antwerp to write in his *De Iure et Officiis Bellicis et Disciplina Militari* from 1581 that “all the modes of stress known to the laws of war may be employed against them [pirates], even more than in the case of enemies, for the rebel and the robber merit severer reprobation than an enemy who is carrying on a regular and just war and their condition ought not to be better than his” (quoted from Rubin 1997: 27).

The Italian jurist, Alberico Gentili (1552-1608) continued the line in his masterpiece *De Iure Belli Libri Tres* [Three Books on the Law of War] from 1589:

‘The enemy are those who have officially declared war upon us, or upon whom we have officially declared war; all others are brigands or pirates’, says Pomponius. Ulpian uses the same language: ‘The enemy are those upon whom the Roman people has officially declared war, or who have themselves declared war upon the Roman people. All others are termed brigands or pirates.’ That is to say, the war on both sides must be public and official and there must be sovereigns on both sides to direct the war. (Gentili 1933: 15)

Pirates and robbers are not included in the law of nations: “With pirates and brigands, who violate all laws, no laws remain in force” (Gentili 1933: 24). In another work, *Hispanicis Advocationis Libri Duo* [Two Books on Defence in the Service of Spain], published posthumously in 1613 he wrote: “To pirates and wild beasts no territory offers safety because pirates are the enemies of all men [hostes omnium]” (quoted from Rubin 1997: 33). The unlawfulness of the pirates puts them outside the protection of the law and commits all nations to their annihilation: “Piracy is contrary to the law of nations and the league of human society. Therefore war should be made against pirates by all men, because in the violation of that law we are all injured, and individuals in turn can find their personal rights violated; is it not so?” (Gentili 1933: 124). And he continues with a rejection of

their status as equals which has striking similarity to Cheney: “A war with pirates has never been terminated by agreement or brought to an end by a treaty of peace, but the pirates have either saved their lives by victory, or have been conquered and compelled to die.” (Gentili 1933: 22). A war against pirates has then an exterminist expression which the interstate, regulated war between lawful enemies has not. The war against pirates has only one acceptable outcome: total victory. Either the pirates win (an option never contemplated) or they are exterminated

In 1629 the English statesman and philosopher Francis Bacon (1561-1616) wrote an article, ‘Advertisement touching an holy warre’ in which he states that there never has been any doubt that every nation may lawfully conduct a war against pirates, even if they have not been attacked by them. Bacon denies that it should make any difference that they have “receptacle and mansion in Algiers” because “b]easts are not the less savage because they have dens” and just “as there are formal and written leagues, respective to certain enemies; so is there a natural and tacit confederation amongst all men against the common enemy of human society” (Bacon 1963: 32).

Bacon makes a distinction between the human societies and the beastlike pirates, who only as a result of their very existence is legitimate objects of persecution. They are:

[...] such routs and shoals of people, as have utterly degenerate from the laws of nature; as have in their very body and frame of estate a monstrosity; and may be truly accounted (according to the examples we have formerly recited) common enemies and grievances of mankind; or disgraces and reproaches to human nature. (Bacon 1963: 36)

The French philosopher and politician Jean Bodin starts his *Les six Livres de la République* [Six Books on the Political Society] from 1577 by distinguishing

[...] a commonwealth from a band of thieves or pirates. With them one should have neither intercourse, commerce, nor alliance. Care has always been taken in well-ordered commonwealths not to include robber-chiefs and their followers in any agreements in which honour is pledged, peace treated, war declared, offensive or defensive alliances agreed upon, frontiers defined, or the disputes of princes and sovereign lords submitted to arbitration, except under the pressure of an absolute necessity. Such desperate occasions however do not come within the bounds of normal conventions. *The law has always distinguished robbers and pirates from those who are recognized to be enemies legitimately at war, in that they are members of some commonwealth founded upon that principle of justice that brigands and pirates seek to subvert.* For this reason brigands cannot claim that the conventions of war, recognized by all peoples, should be observed in their case, nor are they entitled to those guarantees that the victors normally accord to the vanquished. (Bodin 1955: 1, my italics)

Ignoring Bodin's opening in regard to the case of 'absolute necessity' we get an already familiar description between legitimate and illegitimate enemies. In a later chapter on treaties and alliances (book 5, chapter 6) Bodin mentions such an extreme case, the Roman general Pompey the Great (106-48 BC) and his deal with the pirates who in 67 BC controlled much of the Mediterranean Sea. The deal gave them some sanctuaries and was made because the pirates had a fleet of 900 ships and access to 500 ports leaving Rome no room for military victory (one can think of the difference between the US approach to the militarily weak Iraq under Saddam Hussein and the bizarre diplomacy with North Korea). The impossibility of victory made the deal honourable but, Bodin adds: "In normal circumstances however we do not hold that one should either give or receive pledges where pirates are concerned, for one should have no dealings with them, nor observe the rules of the law of nations where they are concerned" (Bodin 1955: 180; see Grotius 1925: 533).

Pirates and robbers are the enemies of the principle of society and humanity. They are therefore outside any normal relation based on mutuality. They cannot claim the protection that the laws of war and the law of the land provide and they cannot expect any mercy. Bodin acknowledges that one often sees pirates and robbers living harmoniously among themselves but this constitutes no actual society. The friendship, community and sharing of spoils of criminals is rather to be seen as "*conspiracies, robberies, and spoliations*. Such associations lack that which is the true mark of a community, a rightly ordered government in accordance with the laws of nature" (Bodin 1955: 2). The all-important distinction is the one between the organized political community and the pirate. The pirate is defined not so much by what he does but by who he stands in opposition to, whose claim to exclusivity he challenges.

Some 50 years after Bodin, in 1625, the Dutch jurist Hugo Grotius (1583-1645) recognizes in his *De Jure Belli ac Pacis* [On the Law of War and Peace] the same distinctions as Gentili formulated by Cicero, Pomponius and Ulpian which distinguishes between public and lawful enemies on one side and all other enemies as pirates and robbers (Grotius 1925: 440, 630). There is a defining difference between "public enemies on the one side, with whom by the agreement of nations we have, as he [Cicero] says, many rights in common, and on the other side pirates and robbers" (Grotius 1925: 436).

Grotius agrees with Bodin, who said that a promise, even to an outlaw, must be upheld and criticizes Cicero who, as we saw above, had the opposite opinion. One should keep one's word because the promise is given not only to the person but also to god and a breach of

promise become then an affront to god (Grotius 1925: 48). This doesn't however change his description of pirates and robbers as the complete opposite of the lawful community, which may at times commit injustices but which doesn't thereby cease to be a well-ordered society. Pirates and robbers, on the other hand, cannot constitute a good society, even when living in peace amongst themselves, because they are "banded together for wrongdoing" whereas legitimate society is "united for the enjoyment of rights" (Grotius 1925: 631).

He compares pirates amongst others with cannibals against whom one can wage a just war: "Regarding such barbarians, wild beasts, rather than men, one may rightly say what Aristotle wrongly said of the Persians, who were in no way worse than the Greeks, that war against them was sanctioned by nature; and what Isocrates said, in his *Panathenaic Oration*, that the most just war is against savage beasts, the next against men who are like beasts." (Grotius 1925: 506). Even if the terminology isn't quite clear it's evident that the pirate is in opposition to nature itself. He has placed himself outside the bounds of the laws of both nature and man. He does, admittedly, write elsewhere that the enemies of a well-ordered community, even if they have no part in the regulations of public and lawful enmity, should at the very least be treated with some clemency as their basic humanity places them within the bounds of natural law (Grotius 1925: 794). Even if their actions merit and sanctions an exterminist response we should refrain from it, allowing some adherence of basic humanity.

In an earlier work from 1609, *Mare liberum* [Freedom of the Seas] he states the main reasons for the opposition to piracy. He asks

Is it not then an incalculably greater injury for nations which desire reciprocal commercial relations to be debarred therefrom by the acts of those who are sovereigns neither of the nations interested, nor of the element over which their connecting high road runs? Is not that the very cause which for the most part prompts us to execrate robbers and pirates, namely, that they beset and infest our trade routes? (Grotius 1916: 14)

And in a defense of chapter of *Mare liberum* from about 1615 he writes that "All peoples or their princes in common can punish pirates and others, who commit delicts on the sea against the law of nations" (Grotius 2004: 128).

The perhaps most explicit description of the pirate as a special kind of enemy is found in a very interesting work from the English jurist Richard Zouche (circa 1590-1661), *Iuris et Idicij Feicialis, sive, Iuris Inter Gentes, et Quastetionum de Eodem Exolicatio* [An Exposition of Feacial

Law and Procedure, or of Right between Nations and Questions concerning the Same] from 1650 which is a sort of commented collection of examples from Europe's legal and political history. Zouche defines lawful enemy as the opponent one owes to uphold all the laws of war and in the line of Cicero and Ulpian he characterizes the necessary characteristics of the lawful enemy as a political entity with institutions and capacities for entering into agreements. The war is lawful, if it is declared beforehand and conducted by a legitimate authority (Zouche 1911: 32).

He firstly distinguishes between 'unfriendly persons' and 'enemies'. Unfriendly persons are the political communities with whom there is no friendship or legal bond. They can then either be 'strangers' (what the Greeks called barbarians and the Romans 'peregrini'), with whom no commonality is recognized or they can be 'opponents' with whom there formerly was a common bond. Unfriendly persons are one category of adversaries outside the community of lawful enmity but Zouche then makes a distinction within the category of enemies between the lawful enemies and the unlawful enemies:

Enemies proper are those whom it is lawful to offend and destroy utterly; some of whom are of a worse and others of a better condition. Of the worse condition are those to whom the laws of war do not apply, such as *traitors* and *robbers*. *Traitors* are those who have taken up arms against their prince or commonwealth with hostile intent, and include *rebels* and *deserters*, who have revolted from the prince to whose government they were subject. *Robbers* are those who go about in the manner of enemies without the authority of a state, as *brigands* on land, and *pirates* at sea. [...] Lastly, lawful enemies are those to whom are due all the rights of war; whom Ulpian defines in these words: 'Enemies are those against whom the Roman people has decreed war, or who have decreed war against the Roman people'; and Cicero says of them: 'An enemy is one who has a State, Senate, Treasury. Citizens consenting and agreeing, and some method of making peace or war, if occasion requires'. (Zouche 1911: 37-8)

To count as a lawful enemy one must have a recognizable and stable political-institutional form, "a State, Senate, Treasury" which resembles that of other lawful enemies.

These have all been 'state philosophers', naming and legitimizing a state discourse, and this is no less true of the Swiss philosopher, diplomat and jurist Emerich de Vattel (1714-1767) who in 1758 published *Droit des gens* [Law of nations] where he writes, that "[l]egitimate and formal warfare must be carefully distinguished from those illegitimate and informal wars, or rather predatory expeditions, undertaken either without lawful authority or without apparent cause" to which he reckon:

[...] buccannery without commission, and in time of peace; and such in general are the depredations of pirates. To the same class belong almost all the expeditions of the Barbary corsairs: though authorized by a sovereign, they are undertaken without any apparent cause, and from no other motive than the lust of plunder. (Vattel 1883: §67)

Although we here see a recognition of the Barbaresque-states as sovereign their practice is still considered illegitimate, being warfare without legitimate purpose, that is, just an excuse for plunder. This is also why he later states: “Who can doubt that the king of Spain and the powers of Italy have a very good right utterly to destroy those maritime towns of Africa, those nests of pirates, that are continually molesting their commerce and ruining their subjects?” (Vattel 1883: §167). And elsewhere he says that “[t]he Christian nations would be no less justifiable in forming a confederacy against the states of Barbary, in order to destroy those haunts of pirates, with whom the love of plunder, or the fear of just punishment, is the only rule of peace and war.” (Vattel 1883: 78). After which he criticizes the Christian nations for using the Barbaresque pirates against each other in an attempt to monopolize trade.

There are some very interesting connections between the Barbaresque pirates, Muslim pirates operating from ports in the North African part of the Mediterranean, the European and later also American war against them and then the present day terror/antiterror-confrontation but elaborating on this particular case requires more space than this paper allows.

The destruction of the pirates is, according to Vattel, so that:

[...] whoever can seize them, even in a free place, executes summary justice on them himself. Such is the mode observed towards pirates: and, in order to obviate all misunderstandings, it is generally agreed that the same treatment be given to all private individuals who commit acts of hostility without being able to produce a commission from their sovereign. (Vattel 1883: §52)

As a last comment, neatly summarizing the state approach to the pirate Vattel says:

[...] although the justice of each nation ought in general to be confined to the punishment of crimes committed in its own territories, we ought to except from this rule those villains, who, by the nature and habitual frequency of their crimes, violate all public security, and declare themselves the enemies of the human race. Poisoners, assassins, and incendiaries by profession, may be exterminated wherever they are seized; for they attack and injure all nations by trampling under foot the foundations of their common safety. Thus, pirates are sent to the gibbet by the first into whose hands they fall. (Vattel 1883: §233)

III

The anti-pirate consensus has been what the priest Cotton Mather told a group of pirates in 1717 in Boston just before their hanging: “All Nations agree to treat your Tribe, as the *Common Enemies of Mankind*, and [to] extirpate them out of the World. (quoted from Rediker 2004: 127). The concept of ‘enemy of humanity’ shouldn’t obscure the fact that it is not humanity proclaiming its enemy but the state taking it upon itself to do just that. The pirate doesn’t oppose humanity as such but the state. The state is the important antipole to the state, although of course state history is full of authorized pirates: privateers, just like other authorized, non-state users of force such as death squads, militias etc. – but this is beyond the scope of this paper.

The description of the pirate as the enemy of humanity makes possible a global and total war with exterminist intent. Just like Cotton Mather the judge of the Vice-Admiralty and Chief Justice of the Province of South Carolina, Nicholas Trott, said in 1718 in a statement to a group of pirates just prior to their execution that draws heavily on the rhetoric explored above:

As to the crime you are convicted of, which is piracy, the evil and wickedness of it is evident to the reason of all men. So that it needs no words to aggravate the same: it is so destructive of all trade and commerce between nation and nation, that pirates are called enemies to mankind with whom no faith nor oath ought to be kept; and they are termed in our law brutes and beasts of prey, and therefore it is in the interest, as well as the duty, of all governments to bring such offenders to punishment. (quoted from Bingham 1932: 804)

This, as I’ve called it, state consensus on the pirate was echoed some 270 years later in the 1985 Achille Lauro-terrorist incident where, among others, the US state department and then American president Ronald Reagan alleged the hijackers were pirates giving the Americans carte blanche on the use of force (McGinley 1985; Constantinople 1986; Stephens 1987). During the UN Security Council debate Reagan compared the hijackers with pirates and stated:

The terrorist has put himself beyond the pale of civilized humanity. He should be shunned by all. If he seeks sanctuary he should be turned away. If he claims support he should be denounced. If he is apprehended he should be prosecuted. Every terrorist attack is an attack on the world community. Every justification offered for terrorism undermines the rule of law. Every concession to the terrorist diminishes our humanity. (quoted from Cassese 1989: 70)

Bringing, finally, the discussion up to present day, we can start by quoting the former American minister of defence, Donald Rumsfeld who said that the goal of the Afghanistan attack was to “kill as many Taleban soldiers and al Qaeda members as possible” (quoted from Žižek 2002: 91) and one former secretary of state, Lawrence Eagleburger who said: “There is only one way to begin to deal with people like this, and that is [...] to kill some of them even if they are not immediately directly involved in this thing [9-11]” (quoted from Ismael & Ismael 2002: 161). Statements like these does not belong to the rhetoric of conventional warfare (reality is something different) but they are easily recognizable in a state’s conflict with a non-state enemy.

One of the most significant aspects of the current war on terror is the degradation of the opponents. The terrorists are a kind of abstract representation of pure evil. There is no attempt being made to understand the motives or history of the enemies (this goes, obviously for both sides). They are beyond reason and comprehension. A representative voice is the otherwise very careful defender of human rights Michael Ignatieff who wrote:

But September 11 was not politics by other means. There were no demands, and there never will be. No one took political responsibility for the act, and no one ever will. This was a deed committed without any expectation of attaining a political objective. What we are up against is apocalyptic nihilism. The nihilism of their means - the indifference to human costs - takes their actions not only out of the realm of politics, but even out of the realm of war itself. The apocalyptic nature of their goals makes it absurd to believe they are making political demands at all. They are seeking the violent transformation of an irremediably sinful and unjust world. Terror does not express a politics, but a metaphysics, a desire to give ultimate meaning to time and history through ever-escalating acts of violence which culminate in a final battle between good and evil. People serving such exalted goals are not interested in mere politics. (Ignatieff 2001)

Even before 9-11 al Qaeda was probably the most talkative terrorist organization in history, so it seems odd, especially if one has read their texts, to claim that they don’t ‘express a politics’, which is exactly what they do (Thorup 2006). We may not like it but it’s a politics all the same. There may be no justification for their acts but there is an argument for it in their texts which we ought to pay attention to, not least because it does convince a not insignificant part of the Muslim communities.

Ignatieff wanted to warn about doing either too little (understand) or too much (all out war) but it would appear that the kind of rhetoric he employs opens up for the total war on terror, lending itself to a complete rejection of any understanding, of any appreciation of their humanity, of any comprehension that they may, however distorted, have a point in their critique and, finally, of

most brakes on the prosecution of the war. When the consensus in the decision-making centres of the war becomes that: “They have no justification for their actions. There’s no religious justification, there’s no political justification. The only motivation is evil” (Bush, September 25, 2001; quoted from Johnson 2002: 221) – then there is only the military response. A former officer in the American Marine corps and neoconservative, Adam Mersebau, wrote in May 2002 in the *National Review Online* the obvious consequence of the reasoning outlined above:

By definition, limited war can achieve only limited results. If we are going to win a total victory in the war on terrorism while deterring other major wars around the globe, we will first have to rid ourselves of our aversion to total war. By ‘total’ war, I mean the kind of warfare that not only destroys the enemy’s military forces, but also brings the enemy society to an extremely personal point of decision, so that they are willing to accept a reversal of the cultural trends that spawned the war in the first place. A total-war strategy does not have to include the intentional targeting of civilians, but the sparing of civilian lives cannot be its first priority. By contrast, ‘limited’ war is the use of surgical military force to accomplish discreet foreign-policy goals without mobilizing the entire nation, and while minimizing casualties. The purpose of ‘total’ war is to permanently force your will onto another group, while the purpose of ‘limited’ war is to temporarily deter or discourage an enemy, or to impede the policy of another country long enough to accomplish particular goals. Limited war pits combatants against combatants, while total war pits nation against nation, even culture against culture.

(quoted from Deranty 2004: note 7)

The war against the absolutely disrecognized enemy has a strong tendency to become total, making the horror of the enemy of humanity an enemy who both can’t win and one who threatens civilization itself. When in war to save civilization against an enemy standing outside any human community and morality, why not take the war all the way? Wouldn’t it be immoral not to?

IV

The suppression of piracy became an agreed international obligation, codified in international law and as the state expanded its force capabilities and build up a regular navy, privateering too was abolished, the latter most explicitly stipulated in the Paris declaration of April 16, 1856 whose first paragraph states: “Privateering is and remains abolished” (Paris declaration 1856). This declaration created a third legal subject next to the state and the individual, namely people who neither had the rights of the citizen nor the sovereignty of the state (Neocleous 2003: 103). We have here an obvious parallel to the present day concept and figure of ‘illegal enemy combatant’. One of the

authors of this new ‘legal’ creation was the then White House lawyer, the deputy assistant attorney general, John Yoo, who in 2004 asked in a way directly drawing on the quotes from Bush and Roosevelt and secondarily from the state philosophers of which he is a current one:

Why is it so hard for people to understand that there is a category of behavior not covered by the legal system? What were pirates? They weren’t fighting on behalf of any nation. What were slave traders? Historically, there were people so bad that they were not given protection of the laws. There were no specific provisions for their trial, or imprisonment. If you were an illegal combatant, you didn’t deserve the protection of the laws of war. (quoted from Mayer 2005)

Later in a Frontline interview on October 18, 2005, he says: “War has different rules for a nation and different rules for people who choose to fight kind of like pirates who are outside the control of a nation” (Frontline 2005).

Yoo had before this been instrumental in drafting memos giving the president almost unlimited powers in the war on terror, not least a disregard of the Geneva conventions, which are not applicable to al Qaeda as a “non-state actor” nor to the Taleban militia as coming from a failed and unrecognized state (Yoo & Delahunty 2002), and as Jane Mayer writes: “[A]n August, 2002, memo written largely by Yoo but signed by Assistant Attorney General Jay S. Bybee argued that torture required the intent to inflict suffering ‘equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death’ and he has argued that the US Congress doesn’t have power to “tie the President’s hands in regard to torture as an interrogation technique. It’s the core of the Commander-in-Chief function. They can’t prevent the President from ordering torture.” (Mayer 2005; the ‘torture memo’: Bybee 2002; see more on Yoo at http://en.wikipedia.org/wiki/John_Yoo#_note-MsNbc050515; see also Isikoff 2004).

A parallel to the anti-pirate war policy of hanging captured pirates on the spot finding it “necessary for the greater Terror to hang up four of them in Chains” (Governor Spotswood, 1720, quoted from Rediker 1989: 274) is the current method of rendition, targeted killings and not least killing people by AGM-114 Hellfire missiles fired from unmanned Predator drone airplanes, as it for instance happened in Yemen’s desert on November 4, 2002 when a missile hit a car and annihilated its four passengers, of which one allegedly was an al Qaeda-member (Calhoun 2003). The other three were just unlucky; still the alleged but never identified suspect was never put on trial but just summarily executed on the spot.

The pirate now became in law what he had long been in fact: a law- and stateless subject. The pirate and now the terrorist are actual examples of Giorgio Agamben's *Homo Sacer* (1998), people whom everyone can kill without fearing neither punishment nor moral anguish.

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