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The Enemy of All  
*Piracy and the Law of Nations*

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## Justifying Humanity

“Humanity” is an obscure word, especially in the fields of law and politics. Today, however, it can hardly be avoided, for it plays a decisive role in many of the dominant phrases of our age. From discussions of human rights and crimes committed against humanity to controversies surrounding humanitarian associations, policies, wars, and “interventions,” the name of our natural kind remains crucial. That there may be little about this designation that is self-evident can be gleaned from the rapid recollection of one fact in the history of words: in the West, “humanity” is a late addition to the set of basic legal terms. Not that the ancient authors, for example, lacked all understanding of the idea whose implications we now so easily assume. It is instructive, from this perspective, to consider the practice of the Roman lawyers, whose influence on legal terminology far exceeds that of any other single set of authorities. In their expositions of the code of civil law, the scholars of the Digest often employed the term “human being” (*homo*), and from their various usages one might well deduce a theory of such a general thing as “humanity.” But that account would be fundamentally at odds with most contemporary conceptions. The expression “human being” (*homo*), for the Roman scholars, pointed neither to positive rights nor to their ground. On the contrary, it signified the near absence of juridical titles. “Human being” (*homo*) was for them the name of a dimension in individual existence that the law, in principle, excluded from its complex considerations.

This is why the ancient jurists consistently opposed the terms “human being” (*homo*) and “person” (*persona*). They wrote of “human beings” when designating living individuals, considered in the near absence of legal qualification, while they invoked “persons” or “personalities” (*personae*) when alluding to individuals insofar as they laid claim to rights, titles, and prerogatives. Characters such as those of the debtor, the owner, the inheritor, and defendant, for instance, were for the Romans all “persons,” in that they permitted individuals to represent themselves and their various entitlements before the law. These were legal constructions, which could be attached to living individuals according to a number of possible forms. A single “human being” could possess several “personalities” over the course of time as well as in a single moment. An individual could be, for example, in succession an owner, husband, inheritor, and testator; he could also simultaneously lay claim to the multiple personhood of substituted heir and instituted heir. Inversely, the Romans also admitted that a single “person” might be partitioned among several individuals. Thus the rights of a master could be shared among his servants, and the title to a single degree of succession divided among inheritors.<sup>1</sup>

When the ancient jurists alluded to humanity by employing the technical expression “human being” (*homo*), they designated what one might well consider a largely extralegal being: the material support for the attribution of all rights, or, more simply put, the physical individual to whom legal titles could be linked. As late as the sixteenth century, Hugo Donellus, faithful to this tradition, could therefore recall that “the expression *human being* [*homo*] refers to nature; *person* [*persona*] refers to civil law” (*homo naturae, persona iuris civilis vocabulum*).<sup>2</sup> It is no doubt also for this reason that in Roman legal discourse, the term *homo*, when used in isolation, meant simply “slave” or “servant.” In the idiom of the ancient authors, the term “human being,” taken on its own, designated an individual without positive rights. One might well go so far as to wager that had they employed the abstract noun “humanity” in any technical sense, the Roman jurists would have done so, therefore,

to designate the specific quality of human life largely lacking in juridical qualification. "Humanity" might have been, for them, a natural element common to all individuals that must be strictly distinguished from positive legal claims and titles.

Such a usage was hardly propitious for the elaboration of a legal and political theory of humanity, at least as a doctrine of the foundation of rights and entitlements. The situation took some time to change. When it did, the architecture of the law established by the Romans acquired a new shape. Introducing their great legal system, the classical jurists had famously distinguished three varieties of codes, which they termed "natural law" (*ius naturale*), the "law of nations" (*ius gentium*), and "civil law" (*ius civile*). It is worth considering the position that "humanity" might occupy in this tripartition. The species clearly could find no place within the last of the types, which dictated the rules pertaining to one group of human beings, namely, the inhabitants of a single city. But the abstract principle of humanity could also not be easily inscribed in the order of "natural law," since that law, for the Roman jurists, was by definition indifferent to the peculiarities of human life. As Ulpian stated in the opening chapter of the *Digest*, "natural law is that which nature has taught to all animals; for it is not a law proper to the human species but is common to all animals—land animals, sea animals, and the birds as well."<sup>3</sup> If there was to be a domain of the law in which "humanity" might acquire some consistency, therefore, it could only be in "the law of nations." But there, the Latin authors had posited a plurality of collective subjects: "nations" (*gentes*). That term seems, by virtue of its number, to exclude the generic oneness of a species. It is as if the Roman jurists accepted that human beings might well be united as instances of a type, but only within the vast domain of natural law, whose principles long precede the foundation of cities; it is as if, in other words, the ancient lawyers believed the human species to be of real significance only from a biological or zoological perspective. Once there are cities and positive legal institutions, the Roman jurists suggested, the unity of the natural kind can no longer clearly be identified.

Then the members of the one species share above all their division into plural “nations” (*gentes*), each with its own rules and traditions.

This ancient vision came to be contested by the modern philosophers of law who aimed, in distinction to the ancients, to elaborate a properly Christian legal theory. The first among them was most likely the late Scholastic thinker Francisco Suárez. His treatise *On Laws* of 1612 announced a new and decisive departure in the law of peoples by positing a thing largely unknown to earlier Latin legal theorists: a unity of the human species, which founded, as he argued, a universal community of all men. “The human species,” Suárez wrote,

while divided in different peoples and sovereignties, always conserves a kind of unity, which is not only specific but also almost political and moral, namely, that commanded by the natural precept of mutual love and pity, a precept that applies to all, even to those who are foreigners, no matter the nation to which they belong. Therefore, although a given sovereign state, commonwealth or kingdom may constitute a perfect community in itself, consisting of its own members, nevertheless, each one of these states is also, in a certain sense, and viewed in relation to the human species, a member of that universal society; for those states when standing alone are never so self-sufficient that they do not require some mutual assistance, association, and intercourse, at times for their own greater welfare and advantage, but at other times because also of some moral necessity or need.<sup>4</sup>

With these words, Suárez did not go so far as to assert that “the unity of the species” immediately furnishes any positive legal principle. It is worth noting that he shied away from maintaining that the oneness of humankind is even strictly of ethical or political significance, writing cautiously that the species possesses “a kind of unity, which is not only specific but also almost political and moral” (*habet aliquam unitatem non solum specificam, sed etiam quasi politicam, & moralem*).<sup>5</sup> But the implications of his considerations are nonetheless quite apparent. To understand the law of nations fully, he suggested,

one must refer to a principle that transcends the divisions of peoples, being founded on the unity of the kind.

Treatises of international law from the following century take one step further. They begin to lend to the “unity” conceived by Suárez the substance of a legal entity, which founds a specific set of customs and obligations. One may take as illustration Wolff’s compendium of 1749. Classical in its broad outlines, Wolff’s *Jus gentium* duly treats the three varieties of law known to the Romans. But in its discussion “Of the Duties of Nations Toward Each Other and the Rights Arising Therefrom,” Wolff’s work defines one class of obligations not enumerated by the ancient and medieval theorists. Just as every Christian individual ought to love and cherish his neighbor, the German jurist reasons, so “every nation ought to love and cherish every other as itself, even though it be an enemy.”<sup>6</sup> It would be “inhumane” for nations to act otherwise. From this remark, Wolff proceeds to derive a new class of “duties” (*officii*), which ought to assure that peoples remain faithful to their common nature: “duties of humanity” (*officiis humanitatis*). “Since every nation ought to promote the happiness of another nation,” Wolff declares, “since, moreover, the duties of humanity are those by which the happiness of another is promoted, the duties of a nation also toward other nations, by which the happiness of those nations is promoted, are duties of humanity.”<sup>7</sup> That Wolff himself was aware that such legal “offices” were of an unusual character may be inferred from his passing comment, in a note, that such obligations, while natural, “are generally but little considered” (*vulgo parum attenduntur*).<sup>8</sup> He refrained, however, from saying more.

If one turns to Vattel’s *Law of Nations* (*Le droit des gens*), one finds a far fuller consideration of these fledgling obligations. In the opening chapter of his book, “The Nation, Considered in Its Relation to Others,” the Swiss jurist offers an extended treatment of “Common Duties, or Offices of Humanity, Between Nations.”<sup>9</sup> As in Wolff, the analogy of the interaction of peoples to that of individuals dominates the discussion. “The *offices of humanity*,” Vattel asserts, “consist in the fulfillment of the duty of mutual assistance

which men owe to one another because they are men, that is to say, because they are made to live together in society, and are of necessity dependent upon one another's aid for their preservation and happiness, and for the means of a livelihood conformable to their nature." So, too, the jurist reasons, there exist "offices of humanity among Nations," which "are not less subject to the laws of nature than are individuals."<sup>10</sup>

Such duties demand that all peoples assist each other, since none could survive entirely on its own. Vattel does not hesitate to offer examples of instances in which such "offices" ought to be discharged. If "a powerful enemy" unjustly attacks a nation, "threatening to crush it," an obligation of humanity enjoins its neighbors to come to its aid. The natural calamities that may always befall peoples provide Vattel with similar illustrations. A nation may be struck with famine, fire, and disaster on its territory, as was the case with the earthquake in Lisbon; in such cases, it is then incumbent on more fortunate peoples to aid it.<sup>11</sup> Since such imperatives result not from contracts or treaties but from a common nature, they extend, Vattel specifies, even to public potentates of diverse religions. The thinker approvingly recalls how a sense of such a duty spurred on the "wise Pontiff who at present occupies the Roman See" to come in succor of "several Dutch vessels, detained at Civita Vecchia through fear of Algerian corsairs," sending papal frigates to escort them safely on their way.<sup>12</sup>

The precise legal status of Vattel's "duties of humanity" is tellingly ambiguous. On the one hand, the *Law of Nations* asserts that such obligations are universal, being dictated to all nations by the common nature of the human species. On the other hand, however, the treatise also specifies that the right by which peoples may lay claim to such offices must remain "imperfect." "If another nation refuses them without good reason," Vattel writes, "it offends against charity, which consists in acknowledging an imperfect right of another; but it does no injury thereby, since injury or injustice results from denying a perfect right."<sup>13</sup> One people might well be inconvenienced by others's neglect of the offices of humanity, but

no nation could pretend to be thus harmed, since none, strictly speaking, could ever demand that they be accomplished. Universal in extension without being perfectly binding, the duties of humanity, for Vattel, occupy a curious position before the law. Their discharge is to be recommended, but not commanded; their neglect, conversely, is to be discouraged, but never condemned. One might well detect in such an account the traces of some uncertainty. The eighteenth-century jurist may have hesitated to advance his theory of the offices of the species beyond certain limits, because no matter how “natural” the status it claimed for itself, the doctrine represented, as he well knew, a decidedly novel proposition in the field of law. “These sacred precepts,” Vattel observes, in conclusion, “have been for a long time unknown among nations.”<sup>14</sup>

They were soon to become much more accepted, and by the end of the eighteenth century, the term “humanity” had acquired a central place in legal theory. As evidence, it suffices to recall the decisive importance given to the term by Vattel’s slightly younger contemporary, Immanuel Kant. One may take as the single most important illustration *The Metaphysics of Morals* of 1797, which contains both “The Metaphysical First Principles of the Doctrine of Right” and “The Metaphysical First Principles of the Doctrine of Virtue.” In both parts of this late work, the new legal notion plays a crucial role. But it consistently implies obscurities. Kant defines the term “humanity” (*Menschheit*) as “the capacity to set oneself an end, any end whatsoever.”<sup>15</sup> That this “capacity” is of a curious legal and ethical status can be gleaned from the philosopher’s apodictic assertion that “man has a duty [*Pflicht*] to raise himself from the crude state of his nature, from his mere animality (*quoad actum*), more and more toward humanity [*immer mehr zur Menschheit*], by which he alone is capable of setting himself ends.”<sup>16</sup> Kant’s distinction between the idea of human being and that of animal being, if not evident, is doubtless highly traditional. Far more striking is the philosopher’s indication in this proposition that “humanity,” while the characteristic of human beings, remains for them something always still to be achieved, that “man,” in other words, must “raise

himself [...] more and more” toward the very quality he must by definition possess. One might well ask how such an operation could ever be accomplished, for means and end, in such terms, necessarily grow indistinct. To move toward the ideal of “humanity,” one must possess it, yet to be marked by the quality of “humanity,” it seems, is only ever to approach it. The argument implies a circle that can hardly be avoided.

In his treatise on the principles of right, Kant asserts more than once that “humanity,” whether considered as given or ideal, possesses for all human beings indubitable “dignity” (*Würde*).<sup>17</sup> As such, humanity, the philosopher claims, is deserving of the pure moral feeling that is “respect” (*Achtung*). That principle may seem a familiar moral precept, but in truth it, too, contains an unfamiliar proposition: namely, that “humanity,” while inhering in human beings, may also be distinguished from them, so as to become the object of their constant ethical and juridical attention. The vision that defines this critical distinction finds its classic expression in the Kantian formula “humanity in our person” (*Menschheit in unserer Person*).<sup>18</sup> The philosopher appears to have held this phrase to be of decisive importance, and in one passage he even dubs it, in Latin, the very “law of right” (*lex iusti*).<sup>19</sup> But its exact significance cannot easily be defined. From an historical, legal perspective, it is worth noting that the formula sets in motion a striking inversion of two ancient concepts. Whereas the Roman jurists defined the “person” (*persona*) by attributing it to a “human being” (*homo*), Kant characterizes the quality of “humanity” (*Menschheit*) by locating it “in our person” (*in unserer Person*). It seems undeniable that Kant thereby intends to ground positive legal statuses or personalities in a universal principle, “humanity,” which transcends them. It is all the more striking, therefore, that the syntactic structure of his formula suggests precisely the contrary, inscribing “humanity” within the very “person” that it should, in principle, enable. To conceive of the legal terms according to the exact Kantian expression, one would be obliged to imagine a relation of considerable logical complexity. According to a transcendental *proteron hysteron*, “humanity” would be a primary

principle to be identified as such in a secondary institution alone. It would be locatable solely in that which it must, in all transcendental terms, precede.

Kant drew several consequences, moral and ethical, from the “right of humanity in our person.” In his doctrine of virtue, he showed how the title of the kind founds the principle of external duty. Each human being is bound to others, in whose persons the figure of humanity unceasingly demands respect, thus forbidding “arrogance,” “defamation,” and “ridicule.”<sup>20</sup> The right of humanity also grounds the principle of internal duty, which links each being to the higher principle within him. Acts contrary to the obligation to elevate oneself “more and more toward humanity” may then be defined, from a transcendental perspective, as vices. These are all inherent wrongs: “murdering oneself; the unnatural use of one’s sexual organs; and such excessive consumption of food and drink as weakens one’s capacity for making purposive use of one’s powers.”<sup>21</sup> No doubt the most well-known principle Kant derived from his conception of moral and legal humanity is the fundamental rule on which he so often insisted, and which he recorded in the *Groundwork of the Metaphysics of Morals*: “Act in such a way that you always use humanity, whether in your own person or in the person of any other, never simply as a means but always at the same time as an end.”<sup>22</sup> Of the many striking features that mark this statement of the Kantian “minimal program” in ethics, one of the most obvious has rarely attracted attention.<sup>23</sup> The “categorical imperative” rests entirely on the possibility of isolating, in human beings, an abstract principle of the species, humanity, which is to be “used” in accordance with its intrinsic “worth.” The formula thereby conceals a striking axiom. It is the proposition that stipulates that it is possible, and indeed necessary, to deduce the basic principles of law and ethics from a transcendental feeling for a natural kind, from a sentiment Kant, in a telling phrase, calls “respect for the species” (*Achtung für die Gattung*).<sup>24</sup>

One might well wonder as to the reasons for which Kant chose to identify the defining faculty of the ethical and legal agent with as

obscure a thing as “the species.” By what reasoning could the philosopher bind the unconditioned freedom of the will — “the capacity to set oneself an end, any end whatsoever” — to a single type of nature? Answers in Kant’s works could certainly be sought. But it is likely that the thinker’s choice of diction also reflects a broader historical development in moral and political terminology. In a study of the fate of the term “humanity,” Reinhart Koselleck has observed that in the era of the Enlightenment, appeals to human beings as a whole and to humanity in political, social, and theological debates grew increasingly widespread. The ancient Stoic belief that rational individuals should see themselves as the inhabitants of a single “world state” (κοσμοπόλις) began to achieve some success. The critical meaning of the term “humanity,” however, now simultaneously changed. Traditionally, the word referred to the entire species, in general and without distinctions among its members. By the second half of the eighteenth century, however, “humanity” became a powerful instrument of polemic, which effectively divided the collectivity it once simply seemed to designate. The generic expression now acquired “a critical, even a negating function with respect to the contrary position.”<sup>25</sup> When employed in debate, “humanity” constituted a legitimating title, capable of contesting the various divisions of human beings imposed by class, Church, and the forms of old political association and hierarchy. “Whoever was concerned with ‘humanity,’” Koselleck writes, “could claim for himself in this way the greatest degree of generality, which was contained *eo ipso* in the concept ‘humanity.’”<sup>26</sup> Whoever opposed this abstraction consequently set himself against a fundamental enlightened principle. He risked being branded with the quality that the idea of humanity presupposed as its own negation: the quality, namely, of “inhumanity.”<sup>27</sup>

None who lived at the close of the eighteenth century could afford to doubt the reality of that risk, since the French Revolution had staged it for all to see. After the arrest of the Bourbon king on August 10, 1792, a public trial had begun in which the legal concept of humanity played a central, if not ultimately determining, role. Summoned to court, the erstwhile sovereign was charged not only

with tyranny, a political crime as old as ancient times, but also of having acted, with intent, against humanity itself. Robespierre made himself the spokesman of this radical position. In the final words of his speech in condemnation of the aristocrat on December 3, 1792, he declared: "As to Louis, I ask that the National Convention declare him, from this moment on, a traitor to the French nation, a criminal toward humanity [*traître à la nation française, criminel envers l'humanité*]." <sup>28</sup> The relation between those two iniquitous titles—"traitor to the French nation," "criminal toward humanity"—merits some reflection. At the time Robespierre invoked them, the charges may have seemed hardly distinct. Referring to the 1791 penal code, the members of the National Convention ultimately weighed in favor of the traditional accusation, judging Louis XVI guilty of treason. But in the language of the law, this first appearance of the new crime was not to prove the last.

European legal practice, however, took time to accept the Jacobin's formulation. Only in the twentieth century did the category of "crimes against humanity" acquire an accepted place in the law of nations. It is customary to date the emergence of the penal notion to the aftermath of the Second World War, when the victorious Allies tried former German National Socialist authorities for the commission of "crimes against humanity," as well as "war crimes" and "crimes against peace." But the idea that the human species constituted a legal subject that might be illegitimately assaulted predated the International Military Tribunal in Nuremberg. In an illuminating essay, Sévane Garibian has shown that the idea of crimes committed against humanity already played a notable role in the First World War, when the Allied states publicly denounced the acts of violence committed by Turkey against its Armenian civilian population. The so-called Martens Clause introduced into the preamble of the 1899 Hague Convention with Respect to the Laws and Customs of War on Land (Hague II) contained the earliest mention in modern international law of "humanity." "Populations and belligerents," the declaration read, "remain under the protection and empire of the principles of international law, as they result from the usages

established between civilized nations, from the laws of humanity, and the requirements of the public conscience.”<sup>29</sup> The first reference to “crimes against humanity” was probably intended as shorthand for crimes against such laws. It can be found in a statement issued in May 1915 by France, Britain, and Russia, in which the three world powers condemned the mass murder of Armenian civilians as “new crimes of Turkey against humanity and civilization.”<sup>30</sup> It seems that, in drafting the statement, there was some debate among the Allied powers as to the most pertinent term for the legal subject that had been assaulted in the persons of the Armenians. Sazonov, the Russian minister of foreign affairs, had suggested that the statement denounce “new crimes against Christianity and civilization.” Ultimately, however, the assembled officials decided otherwise. In consultation with the British and the French, the Russian government agreed that the word “Christianity” would be best replaced by the abstract name of the species. “Crimes against humanity” thus entered the books of the law.<sup>31</sup>

That penal category was to remain and become the basis of new proceedings. At the close of the First World War, in 1919, the Allied forces enjoined the Ottomans to establish an “extraordinary” martial court in Constantinople to prosecute high-ranking military officers for offenses that, “being contrary to the rules of law and humanity, [...] are of such a nature as to make the consciousness of humanity forever tremble in horror.”<sup>32</sup> The Turkish trial that ensued broke little ground, and despite the Allies’ bold declarations, the legal proceedings it involved were familiar in form. Officers were charged before military tribunals with violations of rules of internal law and, soon after the pronouncement of the sentences, most of those judged guilty either escaped detention or obtained pardon from the new régime.<sup>33</sup> But in retrospect, the terms with which the victors called for the courts did mark a turning point, for the international appeals established a place for humanity in positive international law. They announced the concept that would famously enter the law of nations on August 8, 1945, in article 6(c) of the Charter of the International Military Tribunal at Nuremberg. This was the

concept of “crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”<sup>34</sup> That statute enabled the international court to judge the unprecedented acts of violence committed by the officials of the German National Socialist régime, not least the systematic mass murder of Jewish civilians. As Bert Röling later recalled, “persecution of a group of people, on the basis of race or religion, in occupied territory would already have been covered by the concept of the conventional war crimes.”<sup>35</sup> But now the annihilation of German Jews could also be considered international in import. Developing the idea of illegal assaults against the single species, the Allies thus succeeding in establishing the legitimacy of what Sazonov had only a few decades earlier defined as “crimes against Christianity.” Henceforth, the mass murder of Jews would be the first internationally accepted case of “crimes against humanity.”<sup>36</sup>

In the complex history of the development of these new offenses, at least one feature of twentieth-century legal history cannot be doubted: “humanity” emerged as a technical term in the course of efforts to define atrocities with respect to which traditional categories in the law of war seemed patently inadequate. This fact may well lie at the root of the apparent paradox according to which the charge of “crimes against humanity,” while in theory independent of that of “crimes of war,” has proven consistently most effective when referred to deeds committed by warring states. But the extremity of the circumstances in which twentieth-century lawyers sought to inscribe the name “humanity” in the register of the law also raises the question of the nature of the now accepted juridical entity that is the species. What is the “humanity” of the law of nations, such that it appears above all as the victim of atrocious crimes? One wonders why it is that the abstract legal principle of the natural kind seems less to generate a positive right than to furnish the crucial term by

which perpetrators of violent deeds against civilian masses may be judged as criminals—where, it is perhaps unnecessary to add, the judges are the victors, and the accused, of course, the vanquished. One wonders, in short, why the most defined of all relations to legal “humanity” should be that of crime or enmity, if not both.

It is certain, however, that such developments came to grant an unexpected importance to the one figure in the history of the law in whose definition “humanity” assumed the semblance of generic unity. Through the first half of the twentieth century, the pirate could largely be considered a minor figure in the law of nations. An ancient lawyer, statesman, and philosopher such as Cicero might allude to him as “the common enemy of all,” in order to mark the outer limits of the domain of duties. A medieval glossator such as Bartolus could exclude him from his discussion of *ius belli* on the grounds that lawful enemies are always sovereign public persons, while the pirate, by contrast, is no more than “the enemy of the human species.” Enlightened jurists, such as Wolff and Vattel, might on occasion invoke the specter of the pillager’s unruly criminality, conjuring images of “wild monsters of the human species,” “unworthy of the name of men,” whom all must remove from their midst. But those were all references to marginal antagonists, allusions to bands of exceptional criminals and unlawful enemies who emerged, from time to time, at the edges of the sphere of European public right. That such figures could be opposed to a thing as abstract as “humanity” meant precisely that they were of relatively little importance, at least with respect to the political and legal authorities of the classical, medieval, and modern epochs, whether they held principalities or cities, kingdoms or commonwealths.

All this changed, however, with the slow but certain justifying of humanity. Once the species had achieved a place of honor in the law of nations, once the name of the natural kind was no longer the sign of a being outside the domain of right but a crucial term in the public conflicts of states, the old antagonist—criminal and enemy—stepped forth in a new and unfamiliar light. His former insignificance now concealed an unexpected relevance. On account

of the indeterminate hostility that defined him as “the enemy of the human species,” the pirate was suddenly the agent of the political and legal moment. The evidence suggests that this interval has yet to pass. That such a thinker as Hannah Arendt could ask in what sense Adolf Eichmann had become, by virtue of his administrative deeds, “like the pirate in traditional law, *hostis humani generis* [“enemy of the human species]”; that such a judge as Bert Röling could consider whether the law of piracy might be applied to new “criminals against humanity”; that such a jurist as M. C. Bassiouni could observe that the “universal jurisdiction” discussed in the second half of the twentieth century has its legal roots in the old status of the plunderer of the seas, whom all powers might apprehend, prosecute, and punish—these are but some of many signs that a new age has begun.<sup>37</sup> This is an age of legally established humanity and inhumanity, in which “the concept of piracy,” as Schmitt feared, has “changed its place in the system of international law.” Today, now that major legal and political deeds committed in the name of the species are increasingly not the exception but the rule, figures of the “common enemy of all” will for this reason necessarily continue to appear and reappear. Each time, the pirates of our time will confront the wishful representatives of our common kind with the same undeniable, if discomfiting, reality: that of humanity irreconcilably at odds with itself.

## Toward Perpetual War

Late in life, Kant conceived the idea of a single global order, which was one day to unite the many nations of the earth in a lawful condition of perpetual peace. The thought was in itself not altogether novel, since earlier writers had also imagined a world without war; the most famous of Kant's immediate predecessors was the Abbé of Saint-Pierre, whose "Project for Perpetual Peace" of 1712 attracted the attention of both Leibniz and Rousseau.<sup>1</sup> But it is likely that Kant was the first thinker to consider thoroughly the conditions and consequences implied by the idea of a state of everlasting peace. There can be little doubt that he shared the sentiments of those writers before him who viewed war as the expression of a primitive state, ideally to be surpassed by law. "We look with profound contempt upon the way in which savages cling to their lawless freedom," Kant observed in "Toward Perpetual Peace," which he first published in 1795.<sup>2</sup> "They would rather engage in incessant strife than submit to a legal constraint which they might impose on themselves, for they prefer the freedom of folly to the freedom of reason. We regard this as barbarism, coarseness, and brutish debasement of humanity."<sup>3</sup> There are good reasons, Kant suggested, to view the practices of warring states as no less inhumane. But the philosopher of Königsberg did not limit himself to recalling a moral condemnation of all belligerent activity as unruly, ignoble, and needlessly destructive. He also argued strenuously for the necessity of peace on altogether different grounds. These might well strike the student of transcendental philosophy as surprisingly empirical—if, that is, the shape of

the earth may be judged by its inhabitants to be “empirical.” Kant cited the decisive geophysical evidence more than once. At the close of his *Doctrine of Right*, he suggested that the “rational idea of a *peaceful*, even if not friendly, thoroughgoing community of all nations on the earth” could be derived from the simple fact that “Nature has enclosed all nations together within determinate limits (the spherical shape of the place they live in, a *globus terraqueus*).”<sup>4</sup> In “Toward Perpetual Peace,” he was more explicit about the juridical repercussions of the planetary form. “On account of the spherical surface [*Kugelfläche*] of the earth,” he asserted, “human beings cannot be infinitely dispersed [*ins Unendliche zerstreuen*]; rather, they must necessarily tolerate each others’ company.”<sup>5</sup>

The formal properties of Kant’s *globus terraqueus* are well worth pondering. The philosopher expressly noted that the earth is not infinite; thus no matter how misanthropic they may be, human beings can only extend outwards to a certain point, after which they are, Kant claimed, bound by necessity to encounter each other again. For this reason, however, it does not suffice to assert that the globe is finite in extent. One must add that it is also unlimited in structure, since no one dwells outside it.<sup>6</sup> Kant himself, however, did not pause to consider the qualities of the spherical object he so blithely called to mind; nor did he justify his curious argument, which yoked the earthly aster in the unlikely service of the transcendental doctrine of objective right. The critical philosopher was more interested in deducing the legal and political consequence that the “spherical surface” implied. This was, for him, quite simple. “There is only one rational way in which states coexisting with other states,” he wrote, “can emerge from the lawless condition of pure warfare. Just like individual men, they must renounce their savage and lawless freedom, adapt themselves to public coercive laws, and thus form an *international state (civitas gentium)*, which would necessarily continue to grow until it embraced all the peoples of the earth.”<sup>7</sup> But Kant hastened to add that this one obvious solution would most certainly fail. “Since this is not the will of the nations, according to their present conception of international right (so that they reject *in hypothesi*

what is true *in thesi*), the positive ideal of a world republic cannot be realized.”<sup>8</sup> Kant therefore proposed an alternative: “a negative substitute in the shape of an enduring and gradually expanding *federation* likely to prevent war.”<sup>9</sup> In the *Metaphysics of Morals*, he described such an association as “a league of nations,” an “alliance” among states that would be analogous, while distinct, to the union of individuals within a single civil code.<sup>10</sup> Such a union would entail no “sovereign authority (as in a civil constitution),” being an association founded, as Kant noted, with a telling aside, “not in order to meddle in one another’s international dissensions, but to protect against attacks from without.”<sup>11</sup>

Writing at the close of the eighteenth century, Kant was well aware, of course, that such a federation of nations also could hardly be an institution of the present. Perhaps it would arise sometime in the future, once pacific tendencies had sprouted. In the meantime, peoples remained at odds with each other and Kant, faithful to the legal tradition, provided a set of principles to regulate the relations between states. These rules defined “the Right of Nations.” They were exclusively principles of war. While resolutely committed to the ideal of an eternal establishment of peace, Kant now also offered a summary treatment of the prerogatives of present sovereign states, each of which he considered, “as a moral person, as living in relation to another state in the condition of natural freedom and therefore in a condition of constant war.”<sup>12</sup> First he enumerated the grounds by which a state may lay claim to “the right to go to war [...] if it believes it has been wronged by another state”: when, for instance, it has been “actively violated,” or even merely “threatened,” by the other state’s military “preparations, upon which is based the right of *prevention* (*ius praeventionis*), or even just the *menacing* increase in another state’s power (by its acquisition of territory) (*potentia tremenda*).”<sup>13</sup> Next, Kant considered the rights of nations during war, which he defined as “the waging of war in accordance with principles that always leave open the possibility of leaving the state of nature among states (in external relation to one another) and entering a rightful condition.”<sup>14</sup> Here Kant forbade various forms

of belligerent activity: wars of “punishment,” “extermination,” and “subjugation,” he argued, all contradict the peaceful ends of war and must therefore always be avoided. So, too, must the law of nations exclude any measures of a state which “would make its subjects unfit to be citizens”: espionage, assassination, poisoning, and spreading false reports are of such a kind.<sup>15</sup> Finally, Kant specified the rights of states following the end of war. A victorious nation may not exact compensation, “since then he would have to admit that his opponent had fought an unjust war”; nor ought the triumphant state to impose a state of servitude on the vanquished, for “if it did, the war would have been a punitive war, which is self-contradictory.”<sup>16</sup>

In the absence of a league of nations, these various rules aimed to limit the violence of armed and public confrontations. But they were to do so only to a point. After specifying the principles that were to obtain between equal and antagonistic states, Kant turned his attention in the *Metaphysics of Morals* to a different foe. “There are no limits [*keine Grenzen*] to the rights of a state against an unjust enemy,” he wrote, in a single, decisive paragraph, explaining, in parentheses: “(no limits with respect to quantity or degree, though there are limits with respect to quality); that is to say, an injured state may not use *any* means *whatsoever* but may use those means that are allowable to any degree that it is able to, in order to maintain what belongs to it.”<sup>17</sup>

An apparent exception to the restriction of legal war, Kant’s “unjust enemy” naturally drew the notice of Carl Schmitt. In a central section of *Nomos of the Earth*, Schmitt recalled how by the eighteenth century, modern European public law had in principle excluded the “punitive war,” the “war of extermination,” and the “war of subjugation” as legitimate forms of belligerency. But with Kant’s doctrine of right, Schmitt argued, that early modern juridical achievement began to come undone. In the place of the classic modern doctrine of the “just war,” whose legality lies in its outer form, Kant, herald of a new age, set a war that admits of “just” and “unjust enemies.” Schmitt recalled Kant’s self-explanation:

What is an *unjust enemy* in terms of the concepts of the Right of Nations? It is an enemy whose publicly expressed will (whether by word or deed) reveals a maxim by which, if it were made a universal rule, any condition of peace among nations would be impossible and, instead, a state of nature would be perpetuated. Violation of public contracts is an expression of this sort. Since this can be assumed to be a matter of concern to all nations whose freedom is threatened by it, they are called upon to unite against such misconduct in order to deprive the state of its power to do it.<sup>18</sup>

Schmitt barely concealed his horror before this definition: "It suffices," he exclaimed, "for there to be a *publicly* expressed will, and it suffices, for this expression *to reveal a maxim*, in order to justify the action of those who feel themselves threatened in their freedom! A preventative war against such an enemy would be more than a just war. It would be a crusade."<sup>19</sup> In guise of elaborating a doctrine of right suited to the federation of peaceful states, Kant would thus have cleared the way for a battle of a kind long surpassed in European right. "Closer to the theologians than to the jurists," the enlightened writer would have formulated his doctrine of martial law as did the Scholastic thinkers, who conceived war to be just not in its form (*justa forma*) but in its final cause (*justa causa*). Unwittingly, Kant would have thus conceived, in the name of peace, a war of the most extreme violence, at once novel in scope and medieval in doctrinal justification: a battle which pitted the bearers of civilized humanity against a criminal antagonist, with respect to whom "there are no limits to the right of a state."<sup>20</sup>

On this point, Schmitt's sensitivity in reading exceeded his acuity in analysis. He clearly flagged the central figure of the exception in the Kantian law of nations, but he mistook the exact terms of its definition. Schmitt overlooked one technical but crucial fact. The lack of limitation invoked in the *Metaphysics of Morals* was most expressly limited. Against an unjust enemy, "there are no limits with respect to quantity or degree," the critical philosopher stipulated, with precision, before adding: "though there are limits with respect

to quality.”<sup>21</sup> This is a point of doctrine, which involves one categorical distinction that Kant considered by definition unsurpassable: the distinction, namely, between quantity and quality.<sup>22</sup> The philosopher clearly specified the terms by which the conceptual pair was to be applied to the state at war. In waging war on an “unjust enemy,” he argued, a legitimate public association may avail itself of any legal means of battle, which it may deploy with infinite intensity. But it may avail itself of such means alone. As the philosopher continued after declaring that “there are no limits to the rights of a state against an unjust enemy,” “that is to say, an injured state may not use *any* means *whatever* but may use those means that are allowable to any degree that it is able to, in order to maintain what belongs to it.”<sup>23</sup> Unlimited quantity of force may therefore be expended in the battle against the illegitimate opponent; but the quality of belligerency must remain limited. Kant did not hesitate to offer examples. Confronted with evidence of a violation of a contract, be it actual or merely threatened, “all nations,” he observed, “are called upon to unite against such misconduct in order to deprive the state of its power to do it.” The just may act without regard to degree in their response to the illegal opponent. “But they are not called upon to *divide its territory among themselves* and to make the state, as it were, disappear from the earth, since that would be an injustice against its people, which cannot lose its original right to unite into a commonwealth.”<sup>24</sup> Political and military pressures of a different sort ought instead, in such cases, to be envisaged. Kant offered only one example: an offending state, he reasoned, “can be allowed to adopt a new constitution that by its nature will be unfavorable to the inclination to war.”<sup>25</sup>

Kant’s theory of the unjust enemy lends itself to more than a single reading. Suspended between the restriction of quality and the non-restriction of quantity, between limitation in kind and non-limitation in degree, it is structurally ambiguous. One would be justified in interpreting it as imposing an implacable barrier to the violent means of battle, since it dictates that no partitioning of a territory, no extermination of a people, and no destruction of a

nation may ever be judged as legal. But one might also draw a different conclusion from the exceptional martial clause. One might argue that its distinction between quantity and quality provides the basis for a battle of new and obscure variety. Unlike old wars of conquest, the armed endeavor against an unjust enemy described by Kant cannot end with military defeat. More is required. The offending nation must renounce its iniquitous inclinations toward other peoples, and it must do so by an official change in politico-legal form: by the adoption of a constitution, likely one in keeping with Kant's republican ideal.<sup>26</sup> At least in this chapter of his doctrine of right, if not elsewhere, the philosopher of the self-determining freedom of the will seems hardly to doubt that a sovereign state may be forced, in such a way, into a position of liberty, coerced, so to speak, into deeds that, despite their dire and necessitating cause, still express a principle of spontaneity. The grammar of Kant's statement is to this degree significant. It stipulates that, while it is not permitted to annex the territory of the unjust enemy, to destroy its people, or to annihilate its state, the breaker of international contracts nevertheless "can be allowed to adopt a new constitution that by its nature will be unfavorable to the inclination to war." It is difficult not to perceive a note of euphemism in this "allowance" (*lassen*). What exactly could it mean to wage a war upon a state in order to "allow it to adopt a new constitution that by its nature will be unfavorable to the inclination to war"? Kant's formulation clears a legal space for wars declared with the express aim of obligating antagonists to renounce all war, where "renunciation" may be in truth a name for a new variety of subjection: acquiescence before the victorious armies of peace.

This much, in any case, is certain: when confronted with an enemy "whose publicly expressed will (whether by word or deed) reveals a maxim by which, if it were made a universal rule, any condition of peace among nations would be impossible," a war without limits of degree is not so much permitted as demanded. On this point, Kant's statement is unequivocal. In the restricted case of the unjust enemy—one presumes it is only in this case—a just state must

act without restriction in the quantity of its military efforts, while still continuing to restrict their qualities. Before the breaker of the oath, the guardians of contracts, representatives of the universality of the law, must not allow themselves to be swayed: with all their might, they must enter the throes of battle, not to take a terrain or to assassinate its people, but to “allow,” by military motions, the criminal state “to adopt a new constitution.” Then the battle for peace, a war against all war, simultaneously with and without the limits that define the confrontation of states, cannot be avoided. Kant maintains that such an operation is the surest means of anticipating an everlasting global order.

But there is more. To understand the sense of the Kantian imperative in all its implications, it is necessary to recall one fundamental rule in the critical philosophy. It may be simply formulated. Because of the absolutely unconditioned freedom of their will, human beings can always, in every condition, fail to keep their word. Were it otherwise, promises, pledges, and contracts would be not commitments but natural laws, physical and logical necessities shorn of ethical and moral significance. They might be true, even compelling; but they would not be the deeds of free agents. The only morally binding engagement, Kant taught, is the one that can be renounced. Of course, such a commitment need not be betrayed; it may always also be respected. But the possibility of the breaking of a contract—the possibility of the breaking of all contracts—cannot be set aside. A being of utterly bad faith may never be excluded. This elementary principle is of great consequence for the idea of a single global order. It dictates that the project for eternal peace be, in truth, a project for the perpetual preparation for peace through war. As long as human beings are liable to lie, as long as a state may always declare a “maxim by which, if it were made a universal rule, any condition of peace among nations would be impossible,” warfare remains imminent. Vigilance towards the virtual infraction of treaties must be constant. Anywhere where there are contracts, anywhere where there are international conventions, treaties and alliances, an unjust enemy may always suddenly emerge. Then the battle for peace, unbounded

in quantity but not in quality, must commence. It cannot end, for its aims are neither local in space nor discrete in the course of time. In this war, by definition, no single defeat—not even one involving the “allowance of a new constitution”—can ever last; no one victory may be considered permanent. Unlike the old, armed, and public conflicts of states, the modern confrontation against the enemy of all must each time, in each place, begin anew. Infinitely intense, preparatory, and provisional, it admits of no regions such as the high seas or the air, which would constitute stable exceptions to its rule; planetary in scope, it refuses to concede that there are elements of nature that lie beyond the line of the law of nations. A perpetual war in the name of a peace that cannot be, it is familiar only with mobile zones of transitory violence, their borders incessantly drawn and redrawn across the “spherical surface of the earth.”

“German Juridical Science in Combat with the Jewish Spirit.” This text has not been recently reprinted. See “Die Deutsche Rechtswissenschaft im Kampf gegen den Jüdischen Geist,” *Deutsche Juristen-Zeitung* 40.20 (1936), pp. 1193–99.

54. Schmitt, *Frieden oder Pazifismus?*, p. 509.

#### CHAPTER THIRTEEN: JUSTIFYING HUMANITY

1. See Yan Thomas, “Brève histoire de la notion juridique de la personne,” in Yan Thomas and Olivier Cayla, *Du droit de ne pas naître, À propos de l’affaire Perruche* (Paris: Gallimard, 2002), esp. pp. 126–27. Cf. Yan Thomas, “Le sujet du droit, la personne et la nature: Sur la critique contemporaine du sujet de droit,” *Le débat* 100 (1998), pp. 85–107.

2. Hugo Donnellus, *Commentaria Iuri Civilis*, vol. 1 (Naples, 1763), p. 65. There is a discussion of Donnellus’s distinction in Thomas and Cayla, *Du droit de ne pas naître*, p. 130 n.1.

3. “Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est.” Ulpian, *Institutes* 1, in *Dig* 1.1.3.

4. *Selections from Three Works of Francisco Suárez, S. J.: De Legibus, ac Deo legislatore 1612; Defensio fidei catholicae, et apostolicae adversus anglicanae sectae errors, 1613; De triplici virtute theologica, fide, spe, et charitate, 1612*, trans. Gwladys L. Williams, Ammi Brown and John Waldron, rev. Henry Davis, S. J. and an introduction by James Brown Scott (Oxford, UK: The Clarendon Press, 1944), vol. 2, pp. 348–49; *De Legibus*, in *Selections from Three Works of Francisco Suárez*, vol. 1, pp. 190–91. On the passage, see James Brown Scott, *The Catholic Conception of International Law: Francisco De Vitoria, Founder of the Modern Law of Nations, Francisco Suárez, Founder of the Modern Philosophy of Law in General and in Particular of the Law of Nations, a Critical Examination and a Justified Appreciation* (Washington, D.C.: Georgetown University Press, 1934), pp. 483–94. Cf. Jean-François Courtine, *Nature et empire de la loi: Études suáreziennes* (Paris: Vrin, 1999), pp. 115–61 and esp. 155–61.

5. *Selections from Three Works of Francisco Suárez*, vol. 2, pp. 348–49; *Selections from Three Works of Francisco Suárez*, vol. 1, p. 190 (italics mine).

6. Wolff, *The Law of Nations Treated According to a Scientific Method*, vol. 2, §161, p. 86; *Jus gentium*, p. 168.

7. Wolff, *The Law of Nations Treated According to a Scientific Method*, vol. 2, §161 p. 87; *Jus gentium*, p. 129.

8. Wolff, *The Law of Nations Treated According to a Scientific Method*, vol. 2, §164, p. 88; *Jus gentium*, p. 129.
9. Vattel, *The Law of Nations*, vol. 2, 1, §1–20, pp. 113–20; *Le droit des gens*, vol. 1, pp. 145–55.
10. Vattel, *The Law of Nations*, vol. 2, 1, §2, p. 114; *Le droit des gens*, vol. 1, p. 146.
11. Vattel, *The Law of Nations*, vol. 2, 1, §5, p. 115.
12. *Ibid.*
13. *Ibid.*
14. Vattel, *The Law of Nations*, vol. 2, 1, §20, p. 120; *Le droit des gens*, p. 155.
15. Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge, UK: Cambridge University Press, 1991), p. 195; *Gesammelte Schriften*, vol. 6, p. 392. Cf. the different definitions in *Kritik der Urteilskraft*, §60 and *Religion innerhalb der Grenzen der bloßen Vernunft*, in *Gesammelte Schriften*, vol. 6, pp. 21 and 26.
16. Kant, *The Metaphysics of Morals*, p. 191; *Gesammelte Schriften*, vol. 6, p. 387.
17. Kant, *The Metaphysics of Morals*, pp. 216 and 225; *Gesammelte Schriften*, vol. 6, pp. 420 and 429.
18. For references in the *Metaphysik der Sitten* alone, see Kant, *The Metaphysics of Morals*, pp. 62, 97, 185n, 219, 225, 230, 236; *Gesammelte Schriften*, vol. 6, pp. 236, 278, 379n, 423, 429, 435, 441.
19. Kant, *Metaphysics of Morals*, p. 62; *Gesammelte Schriften*, vol. 6, p. 236. On the formula *lex iusti*, see Byrd, Sharon B. and Joachim Hruschka, “Lex iusti, lex iuridica und lex iustitiae in Kants Rechtslehre,” *Archiv für Rechts- und Sozialphilosophie* 91.4 (2005), pp. 484–500.
20. See “The Metaphysical First Principles of the Doctrine of Virtue,” in Kant, *The Metaphysics of Morals*, pp. 254–59; *Gesammelte Schriften*, vol. 6, pp. 462–68.
21. Kant, *The Metaphysics of Morals*, p. 216; *Gesammelte Schriften*, vol. 6, p. 420.
22. Kant, *The Metaphysics of Morals*, p. 96; *Gesammelte Schriften*, vol. 6, p. 429.
23. The term is Walter Benjamin’s. See *Zur Kritik der Gewalt* in *Gesammelte Schriften*, p. 187.
24. Kant, *The Metaphysics of Morals*, p. 168; *Gesammelte Schriften*, vol. 6, pp. 362–63. On Kantian “humanity,” see Thomas E. Hill, “Humanity as an End in Itself,” *Ethics* 91.1 (1980), pp. 84–99.
25. Reinhart Koselleck, “The Historical-Political Semantics of Asymmetric Counterconcepts,” in *Futures Past: On the Semantics of Historical Time*, trans. Keith Tribe (Cambridge, MA: The MIT Press, 1985), pp. 159–97 and 189.

26. *Ibid.*

27. Koselleck notes that “among the Stoics, where *genus humanum* can be addressed most honestly as a political entity, the adjective *inhumanum* already appears as a means of defining the boundary at which a person ceases to be a member of universal human society.” *Futures Past*, p. 187.

28. Michael Walzer (ed.), *Regicide and Revolution: Speeches at the Trial of Louis XVI* (New York: Columbia University Press, 1993), p. 138.

29. The clause can be found in the Preamble to the 1899 Second Convention, in F. Stoerk (ed.), *Nouveau recueil général de traités*, vol. 26 (Leipzig: Librairie Dieterich, 1902), as well as in the Fourth Convention of 1907, in H. Triepel (ed.), *Nouveau recueil general de traités*, vol. 3 (Leipzig: Librairie Dieterich), p. 323.

30. See Sévane Garibian, “Génocide arménien et conceptualization du crime contre l’humanité. De l’intervention pour cause d’humanité à l’intervention pour violation des lois de l’humanité,” *Revue d’Histoire de la Shoah 177–178* (2003), p. 278.

31. See the discussion of the terms in Garibian, “Génocide arménien,” p. 279.

32. Garibian, “Génocide arménien,” p. 266. The Treaty of Sèvres of 1922, by contrast, appears to have omitted all reference to any abstract principle of the species; instead it introduced a distinction between breaches of the law of war, on the one hand, and “massacres,” where that term seems to extend to acts contrary to the laws of humanity. The general statements issued by the Allied powers against the Central Empires in the Preliminary Peace Conference of 1919 also included references to violations of “customs of war and the elementary laws of humanity,” though not “crimes against humanity.” Cf. Egon Schwelb, “Crimes against Humanity,” *British Yearbook of International Law* 23 (1946), pp. 178–226 and esp. 180–83.

33. See the summary in Garibian, “Génocide arménien,” pp. 286–87.

34. *Charter of the International Military Tribunal, Nuremberg Trial Proceedings*, vol. 1 (1945). On article 6 (c), see Schwelb, “Crimes against Humanity,” pp. 188–97.

35. V. A. Röling, “The Nuremberg and Tokyo Trial in Retrospect,” in M. Chérif Bassiouni and Ved P. Nanda (eds.), *A Treatise on International Criminal Law* (Springfield, IL: Thomas, 1973), p. 592. Cf. Röling and Cassese’s incisive remarks in *The Tokyo Trial and Beyond: Reflections of a Peacemonger* (Cambridge, MA: Polity Press, 1993), pp. 55–56.

36. Three years later, in 1948, an international convention adopted by the United Nations General Assembly confirmed that motion: “[A]cts committed

with intent to destroy, in whole or in part, a national, ethnical, racial or religious group," now officially termed "genocide"—or literally, "the killing of a kind"—were pronounced "a crime under international law." The term "humanity" does not appear in the text of the Convention (see *Convention on the Prevention and Punishment of the Crime of Genocide*, article 1). One might well wonder whether, and to what extent, the notion of "crimes against humanity" is indeed compatible with the idea of "genocide." The form of the first term insists on the unity of the species, grasped as one legal subject; the second term instead intends a "genus" that coincides with a single nation. The question of whether the murder of the Jews is better considered a "crime against humanity" or an act of "genocide," therefore, is far from trivial.

37. Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (London: Penguin Books, 1994), pp. 261–62; Röling and Cassese, *The Tokyo Trial and Beyond*, pp. 96–97; M. Chérif Bassiouni, "The History of Universal Jurisdiction and Its Place in International Law," in Stephen Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (Philadelphia: University of Pennsylvania Press, 2003), pp. 39–63.

#### CHAPTER FOURTEEN: EARTH AND SEA

1. Schmitt, *Der Nomos der Erde*, p. 13.
2. *Ibid.*, p. 12
3. Revelations 21:1.
4. John Locke, *Second Treatise*, ch. 8, §121.
5. Kant, *The Metaphysics of Morals*, vol. 1, §12; cf. vol. 1, §16.
6. See W. Schoenborn, "La nature juridique du territoire," *Recueil des cours de l'Académie de Droit International de La Haye* (1929), vol. 30, pp. 101–102.
7. Claude Blumann, "Frontières et limites," in *La frontière: colloque de Poitiers de la société française de droit international 1979* (Paris: SFDI, 1980), p. 4.
8. See Grewe, *Epochen der Völkerrechtsgeschichte*, pp. 374–81.
9. Schmitt, "The Theory of the Partisan: A Commentary/Remark on the Concept of the Political," trans. A. C. Goodson, *The New Centennial Review* 4.3 (2004), p. 3; *Theorie des Partisanen: Zwischenbemerkung zum Begriff des Politischen*, 4th ed. (Berlin: Duncker & Humblot, 1995), p. 11. A considerable body of scholarly literature on Schmitt's theory of the partisan exists. See, among others, Julien Freund, "Der Partisan oder der kriegerische Friede," in Helmut Quaritsch (ed.),

*Complexio Oppositorum: Über Carl Schmitt* (Berlin: Duncker & Humblot, 1988), pp. 387–91; Raymond Aron, *Penser la guerre, Clausewitz* (Paris: Gallimard, 1976), vol. 2, pp. 210–22; Jacques Derrida, *Politiques de l'amitié* (Paris: Galilée, 1994), pp. 162–71; Ernesto Laclau, "On 'Real' and 'Absolute' Enemies," *The New Centennial Review* 5.1 (2005), pp. 1–12; Rodolphe Gasché, "The Partisan and the Philosopher," *New Centennial Review* 4.3 (2004), pp. 9–34; Herfried Münkler, *Über den Krieg: Stationen der Kriegsgeschichte im Spiegel ihrer theoretischen Reflexion* (Weilerswist: Velbrück Wissenschaft, 2002), pp. 179–82. More material on Schmitt's theory may be found in Joachim Schickel, *Gespräche mit Carl Schmitt* (Berlin: Merve, 1983).

10. Schmitt, "The Theory of the Partisan," pp. 3–6; *Theorie des Partisanen*, pp. 11–17.

11. Schmitt's inventory of examples and the omissions it implies would be in itself worthy of investigation.

12. Schmitt, "Theory of the Partisan," p. 6; *Theorie des Partisanen*, p. 16.

13. Schmitt, "Theory of the Partisan," p. 13; *Theorie des Partisanen*, p. 26.

14. Schmitt, "Theory of the Partisan," pp. 13–14; *Theorie des Partisanen*, pp. 26–27.

15. Schmitt, "Theory of the Partisan," p. 20; *Theorie des Partisanen*, p. 35.

16. *Ibid.*

17. Schmitt, "Theory of the Partisan," pp. 49–50; *Theorie des Partisanen*, pp. 73–74.

## CHAPTER FIFTEEN: INTO THE AIR

1. See Attachment to Warrant for Arrest issued by the U.S. District Court, District of Columbia, October 12, 1985, which alleged "piracy as defined by the law of nations," 24 ILM 1554 (1985); Malvina Halberstam, "Terrorism on the High Seas: The Achille Lauro, Piracy and the Imo Convention on Maritime Safety," *The American Journal of International Law* 82.2 (1988), p. 270 n.7; and L. C. Green, "Terrorism and the Law of the Sea," in Yoram and Mala Tabori Dinstein (eds.), *International Law at a Time of Perplexity: Essays in Honor of Shabtai Rosenne* (Dordrecht: Martinus Nijhoff, 1989), p. 263 n.70.

2. Lassa Oppenheim, *International Law: A Treatise*, ed. H. Lauterpacht, 8th ed. (London: Longmans, 1955), pp. 608–609.

3. Halberstam, "Terrorism on the High Seas," p. 273 n.16, citing *In Re Piracy Jure Gentium* (1934), App. Cas. 586, 598.

4. Halberstam, "Terrorism on the High Seas," p. 274 n.20, citing *United States v. The Ambrose Light*, 25 F. 408, 412–13 (S.D.N.Y., 1885).

5. Hall, *A Treatise on International Law*, p. 312.

6. See L. C. Green, "The *Santa Maria*: Rebels or Pirates," *British Yearbook of International Law* 37 (1961), p. 496.

7. Paul Stephen Dempsey, "Aerial Piracy and Terrorism: Unilateral and Multilateral Responses to Aircraft Hijacking," *Connecticut Journal of International Law* 2 (1986–1987), p. 429.

8. Celine Y. November, "Aircraft Piracy: The Hague Hijacking Convention," *The International Lawyer* 6.3 (1972), p. 642. On "air piracy," see also, among others, E. du Pontavice, "La piraterie aérienne: Notion et effets," *Revue générale de l'air et de l'espace* 32.3 (1969), pp. 276–339; John B. Rhineland, "The International Law of Aerial Piracy: New Proposals for the New Dimension," in McWhinney, *Aerial Piracy and International Law* (Dobbs Ferry, NY: Oceana Publications, 1971), pp. 59–71; Rubin, "Terrorism and Piracy: A Legal View," *Studies in Conflict and Terrorism* 3.1–2 (1980), pp. 117–30; Jacon W. F. Sundberg, "Piracy: Air and Sea," *De Paul Law Review* 20 (1971), pp. 337–435.

9. De Watteville, *La piraterie aérienne*, p. 16.

10. De Watteville, *La piraterie aérienne*, p. 16. Cf. Jacobson, "From High Seas to High Air." Despite the technical imprecision of the expression, it remains in use in works of art, particularly in French. See Touret, *La piraterie au vingtième siècle: Piraterie maritime et aérienne*; McWhinney, (ed.), *Aerial Piracy and International Law*; Paul De la Pradelle, "La piraterie aérienne," *Annuaire de droit maritime et aérien* (1974), pp. 197–206; and De Watteville, *La piraterie aérienne*.

11. See T. Chetrit, "Le plan vigipirate," *Droit et défense* 4 (1995), pp. 57–60.

12. Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2008), p. 153. The literature on the notion of the "illegal enemy combatant" is already abundant. See, among many others, the contributions to Karen J. Greenberg (ed.), *The Torture Debate in America* (Cambridge, UK: Cambridge University Press, 2005).

## CHAPTER SIXTEEN: TOWARD PERPETUAL WAR

1. For an effective summary, see Alexis Philonenko, "Kant et le problème de la paix," in *Essais sur la philosophie de la guerre* (Paris: Vrin, 1976), pp. 4–20 and 26–27. A vast body of scholarly literature has been devoted to Kant's late project

for perpetual peace. An exceptionally illuminating treatment can be found in Peter Fenves's chapter "Under the Sign of Failure," in *Late Kant: Towards Another Law of the Earth* (London: Routledge, 2003), pp. 92–113.

2. Kant, "Perpetual Peace: A Philosophical Sketch," p. 102; "Zum ewigen Frieden," *Werke*, vol. 8, p. 354.

3. Kant, "Perpetual Peace: A Philosophical Sketch," pp. 102–103; "Zum ewigen Frieden," *Werke*, vol. 8, p. 354.

4. Kant, *The Metaphysics of Morals*, p. 158; "Zum ewigen Frieden," *Werke*, vol. 6, p. 352.

5. Kant, "Perpetual Peace: A Philosophical Sketch," p. 106; "Zum ewigen Frieden," *Werke*, vol. 6, p. 358.

6. As Jean-Claude Milner has recently recalled, "limited does not mean finite; unlimited does not mean infinite. The set of possible values for the variable  $x$  in the function  $1/x$  is infinite; but it is limited, since there is a value of  $x$  for which the function is not satisfied, namely  $x=0$ ." Milner, *Les penchants criminels de l'Europe démocratique* (Paris: Verdier, 2003), pp. 19–20. Conversely, one might well imagine a world, such as that conceived by more than one medieval philosopher, in which God created a finite set of beings; the transcendental terms, such as "being," would then apply to all created things without limitation, though these terms would be finite in extension.

7. Kant, "Perpetual Peace: A Philosophical Sketch," p. 105; "Zum ewigen Frieden," *Werke*, vol. 8, p. 357.

8. *Ibid.*

9. *Ibid.*

10. Kant, *The Metaphysics of Morals*, p. 151; *Werke*, vol. 6, p. 344.

11. *Ibid.*

12. Kant, *The Metaphysics of Morals*, p. 150; *Werke*, vol. 6, p. 343.

13. Kant, *The Metaphysics of Morals*, pp. 152–53; *Werke*, vol. 6, p. 346.

14. Kant, *The Metaphysics of Morals*, p. 153; *Werke*, vol. 6, p. 347.

15. Kant, *The Metaphysics of Morals*, p. 154; *Werke*, vol. 6, p. 347.

16. Kant, *The Metaphysics of Morals*, p. 154; *Werke*, vol. 6, p. 348.

17. Kant, *The Metaphysics of Morals*, p. 155; *Werke*, vol. 6, p. 349.

18. *Ibid.*

19. Schmitt, *Nomos der Erde*, p. 141. On Schmitt, Kant, and the "unjust enemy," see, Jürgen Habermas, "Kants Idee des Ewigen Friedens— aus dem historischen

"The Enemy of My Enemy" is the sixteenth mission of Call of Duty: Modern Warfare 2, during which the player controls Captain John "Soap" MacTavish during the battle in the airplane boneyard. John "Soap" MacTavish (playable). Gary "Roach" Sanderson (mentioned only in the cutscene). Simon "Ghost" Riley (mentioned only in the cutscene). John Price. Rook (K.I.A.) Nikolai. Vladimir Makarov (cutscene and heard). Shepherd (cutscene and mentioned). Imran Zakhaev (mentioned only). Enemy of the World is the third full-length studio album by American rock band Four Year Strong. It is the final album to feature keyboardist Josh Lyford prior to his departure from the band in April 2011. "It Must Really Suck to Be Four Year Strong Right Now" is the album's first single, released in the iTunes Store on December 21, 2009. "Wasting Time (Eternal Summer)" became available for streaming on AbsolutePunk on February 11. It was announced be the album's second single, and was released on