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“UNJUST ENEMY” OR “MONSTER DILEMMA” REVISITED. ON THE CONDITIONS AND THE PARADOX OF A THEOLOGICAL FICTION¹

ABSTRACT

The text once more reconstructs the perennially fashionable “figure” within public and international law, as well as a theologized construction: an evil-doer who must be destroyed in the conflict or war. The “unjust enemy”, always mutually recognized and often indicated as the other side in every conflict (and particularly ambiguously and obscurely in the current war between Russia and Ukraine), should satisfy certain conditions for them to be linked to “evil” and “the alliance of all against evil”, in the production of world peace and infinite restraint from war. By classifying various forms of hostile protocols, my intention is to show the substantive incompleteness and weakness of the term “enemy”, and thus the impossibility and myth of a symmetric use of force.

KEYWORDS

unjust enemy, monster, criminalization, hostility, destruction

It would be impossible to reconstruct the development and all the various shifts of the term ‘enemy’ and other ‘enemy protocols’ (among which the wonderous ‘institute’ of the ‘unjust enemy’) throughout history, especially given that history is itself a story of various forms of conflict and destruction. My intention, therefore, considering these unmanageable changes in the development of technology, science, and media, the reconstitution of geostrategic ideological constellations, and even in light of entirely new military interventions and forms of attack and destruction of the enemy (nuclear weapons, airplane bombing, drones, digital and laser technologies of inflicting damage, etc.), is to show the difficulty and inadequacy of the word ‘enemy’ and its theologized and criminalized figures and synonyms, such as ‘foe’ or ‘unjust enemy’ in protocols whose

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aim is the achievement and preservation of peace. My assumption is that the terms 'enemy' or symmetric use of force or symmetric conflict and war, are already obsolete and can therefore no longer be the regulating principles of war ethics and just use of force. Further, I think it is insufficient to differentiate these protocols from their complementary criminalized variations in order to preserve the possibility of a just war and conflict within the framework of law and justice. If so-called 'wars of choice' (Miklaucic 2016: 178) or 'wars of prestige' (Russell 1915: 140) are in fact prohibited (the argument for which 'prohibition' was best formulated by Immanuel Kant over 200 years ago), then the term itself 'enemy' is also in a sense suspended and delegitimized, along with the right to war or the overthrow of an unbearable situation by way of war. Legitimacy of the term 'enemy' cannot be achieved if the other side declares 'wars of reaction' or 'defensive wars' as just by making military interventions against criminals, unjust or unlawful aggressors or illegitimate combatants possible and justified. If a state uses the right to initiate a 'war of reaction' against another state by reducing it to a Nazi state and label its citizens and fighters Nazis ('Nazi' is here and in the context of the attack on Ukraine a synonym for evil, the devil, or an 'unjust enemy', and as the devil [evil] by definition cannot be criticized, resistance to it must be immanent and urgent), or if a number of states initiate a 'war of reaction' against the state starting the war, labeling it as having broken the peace and being an 'unjust enemy' who must be defeated at all cost – it is entirely unreasonable to insist on preserving the term (just) enemy, regular *soldat* or just war. In other words, if all border change is forbidden, if aggressive war or war for living space and occupation of territory is forbidden – which necessarily implies the existence of an enemy – then there is actually no more enemy. The latent existence of the unjust enemy in international and actual power relations becomes the only remaining capacity of justifying war, and thus the existence of just wars in general. This is of course true in the case of just wars based on unjust enemies, and not the enemy as such.

What remains of the term 'enemy' today, and how can we understand, paradoxically, the affirmation of the phrase 'unjust enemy'?

The protocol that places the enemy and enmity at the heart of any conflict is obsolete and needs revision on several points: a) the existence of different pacts and alliances among states that do not even border each other has devalued the figure of the enemy; when speaking of peace, I am in fact speaking of an alliance or a community of two or more agents or subjects of international law. b) The enemy is no longer an *a priori* entity and name for a neighboring country with a shared border and thus possibility of conflict and war. c) Technological development has made it difficult to restrain an enemy, marginalize, injure or destroy, without simultaneously calling into question one's own existence; the enemy possesses nuclear weapons and cannot be destroyed without damage to all. d) The world has become a common world, and the past and tradition of the world are global and common to all; the notion of a foreign or different is no longer alien to anyone participating in the world. e) A people is different to the government and is not the enemy; it has the right to exist and

reconstruct its government and elite (which is a modified idea from Kant that the people have a right to a new constitution and existence).

What is it that we are saying with the word ‘enemy’ and is it possible to upturn this figure and define it in an entirely new and unusual way? Another, always some other, who is being intervened with by force is to be named as the enemy; and vice versa: one who has declared us the enemy (enemies) and intervenes by force inflicting cardinal injury, could also be named as an enemy. Of course, what is to support this construction of use of force and violence is the history of the efficiency of violence and trust that certain desired changes can be introduced through violence, which then interrupt temporary enmity.

If, however, states are the ‘subjects and objects of enmity’, matters would be significantly more complicated: we would have to speak first of all about the nature of the intervention, quality and effect amount of force; we would implicitly already be in the domain of what we have here termed the ‘unjust enemy’.

Before I offer an explanation of the title and subtitle of this text, and then list the unconditional conditions for the existence of the unjust enemy in various military (and not only military) conflicts in order to thus show the affirmative and emancipatory potential for building peace contained in this phrase, here are a few preliminary introductory comments.

First, a drone and its use are certainly a novelty in the use of force and protocols of enmity. The drone is an instrument that produces force (or is itself force), while not having the capacity to have the status of enemy, because the one inflicting violence does not thus become manifest. Tamar Meisels’ unpublished text “Targeted Killing with Drones? Old Arguments, New Technologies”, a response to Michael Walzer’s critical text on the use of drones (Walzer 2016), has also inspired me to thematize the phrase ‘unjust enemy’. Of course, the question that immediately imposes itself is: can and should the drone also be used against a ‘just enemy’ and who would that be? Perhaps in the phrase ‘unjust enemy’ there is a pleonasm, a redundancy, since an enemy is by definition unjust, hating us, seeking to destroy us (Shell 2005). On the other hand, if the enemy is just, does that not mean that their enmity is justified and their goal fair, meaning that it is we who are unjust? Is it even possible to have a conflict or war with both enemies being just?²

2 Cf. Emer de Vattel’s phrase “*guerre réglée*” (Reichberg 2008: 193). In traditional (or pre-modern, classical) just war theory, soldiers are allowed to kill opposing soldiers because they are themselves endangered by them. Hence the moral status of war is completely irrelevant and does not determine the permission to kill the enemy. Various jurists of the 18th century (Protestants, among whom Kant) introduce a novelty which is carefully constituted today by the texts of (among others) Jeff McMahan. “Following him, the term ‘just warrior’ or ‘just combatant’ is used to signify a combatant (soldier, sailor, airman, or irregular fighter) fighting in a morally or legally just war. Similarly, ‘unjust warrior’ or ‘unjust combatant’ signifies a combatant fighting in a legally or morally unjustified war (Rodin, Shue 2008: 2). I am not so certain that the way in which one conducts war does not increase its “injustice”, especially, for example, the relation of

The second comment refers to the somewhat vague word 'enemy' (in the same phrase). The phrase comes not from the English, but the Latin, and was used later by jurists writing mostly in French and German.³ Considering the wealth of various terms for opponent and enemy in the Jewish tradition, it would hypothetically be interesting to see why the Hebrew translation of paragraph 60 of Kant's *The Metaphysic of Morals* (1797) (Kant 1991), where the phrase "unjust enemy" appears, is *ojev* or *tzar* (I also wonder what is 'worse' between the two, given that there is no negotiation with *tzar*, no life with it; to illustrate, in English, 'foe' is much stronger than 'enemy'). Thus, is the word 'enemy' even necessary, and with it the phrase 'unjust enemy'?⁴

The third comment refers to Kant's famous book: in the first part, "Doctrine of Right", Kant makes a collage of quotations from various juridical texts he holds in his library. In it we find a few paragraphs that refer to the 'unjust enemy' and the right to preemptive attack. The usual assumption is that for Kant these protocols are completely incidental and secondary;⁵ Kant is above all the author of the famous tract about peace, cosmopolitanism, one of the first theorists suggesting the prohibition of aggressive warfare. Yet this is belied by his very own lectures.⁶ The analysis of some of Kant's claims and the potential difference between 'unjust enemy' and 'monster' ought to refer us back to the Swiss jurist Emer de Vattel who considers all this in meticulous detail in *The Law of Nations* from 1758.

The fourth comment could refer to my assumption that if we define what makes an enemy unjust (which includes not only the struggle's aim, but, I think, the means that are potentially criminalizing), then it is possible to specify the first (what, *in concreto*, is an unjust enemy?⁷ Or who is a monster and how does

an unjust combatant toward non-combatants. In that sense, does the number of "unjust acts" or "bad acts" criminalize the unjust enemy?

3 I believe that only Fernando Teson uses this phrase in "What is a Terrorist?" (Teson 2013) differentiating between seven "categories of violent actors": The War Criminal, The Unjust Enemy, The Criminal Unjust Enemy, The Freedom Fighter Who is Also a Criminal, The Unblemished Freedom Fighter, The Subversive, The Terrorist.

4 These words are necessary because hostility mostly designates the distinction between combatants and non-combatants. Article 43 of the 1977 Additional Protocol (*Hags Regulations*) declares that "Members of the armed forces of a party to a conflict are combatants, that is to say, they have the right to participate directly in hostilities". The Protocol (in Article 51.3) declares that civilians shall enjoy immunity "unless, and for such time, as they take a direct part in hostilities".

5 Habermas calls this "*akzidentellen Stellenwert*." It is interesting that the first (and last) great discussion about Kant and the 'unjust enemy' appeared during the bombing of Serbia and Belgrade in the so-called 'Kosovo War' in 1999. A newspaper title of the time was "Was Kant zum Krieg im Kosovo zu sagen hätte?" Cf. Eberl, Niesen, 2011: 221.

6 Cf. Kant 1979; *Kant's Natural Right*, notes by Gottfried Feyerabend.

7 This question, 'who is the unjust enemy?' (*Wer ist dieser ungerechte Feind?*) is posed also by Carl Schmitt in this criticism of Kant's moralizing and criminalization of war. "An unjust enemy, would that be, for example, revolutionary France? or the naval power England? [...] How do we recognize this terrifying enemy before whom our right has no limits?" (*Woran erkennen wir diesen furchtbaren Feind, dem gegenüber unser Recht*

it manifest? Or “mad dog”⁸), and then possibly sanction and isolate it properly. In that sense, I am interested in who has the right in the first place to punish the ‘unjust enemy’,⁹ in what way, and how are *they* manifested? For example, my objection to the use of drones is the following: If “a drone strike against X would not be an assassination, or an extrajudicial execution, or a deprivation of life without due process of law, as prohibited by the Fifth Amendment” (Nagel 2016), then the collection of these actions in continuity could represent the unconditional condition for the improvement of common life in the city, in cities, in the world at large. Introducing the ‘unjust enemy’, and Kant speaks of my (or our) “right to his goods, person and life; to use them as means to my ends”,¹⁰ is an introduction into an entirely different understanding of war and victory in war. The single phrase and status of “unjust enemy” (status without status) implies the open right to be pursued, recognized (fixed), and destroyed (in military parlance, “find, fix and destroy”). My attention would rather be directed above all to the clear manifestation (“de-monstrualization”) of one who disposes of drones and completely transparently performs certain actions. I would advocate, for example, that only certain states – for example the member states of the Security Council of the UN – be allowed the right to use drones in the name of humanity (in the name of mankind) and conduct

keine grenzen hat?). Schmitt 1988 (1950): 141, 143. Once again, in 1950, Schmitt is dealing with Kant and the natural state, to which testifies the long diary entry from the previous year, 25 April 1949. Schmitt 1991: 233–236. He returns to the word criminal (*Verbrecher*) and very clearly with Kant says: “For we are not simply dealing with a criminal (*mit einem Verbrecher*), but with an unjust enemy (*einem ungerechten Feind*), with that which perpetuates the natural state (*mit dem Verewiger des Naturzustandes*)”, Ibid.: 141. Within Kant’s lectures from *Anthropology*, which have only recently been published, we find that Poland is his “unjust enemy” (the state) and should be preemptively attacked at its territory divided, as the Polish do not have a middle class and are incapable of writing a constitution. Also, his “league of nations”, has no room for the barbarous Turkey.

8 “The opponent is no longer referred to as the enemy (*der Gegner heisst nicht mehr Feind*), but rather is approached as a criminal (*als Verbrecher*), as a “mad dog”, while the war led for the preservation or expansion of financial power positions must, through propaganda, be turned into a Crusade (*Kreuzzug*) and “the ultimate war of humanity” (*letzter Krieg der Menschheit*) (Schmitt 1928: 34). This ‘forgotten’ and all too rarely cited second edition (and version) of Schmitt’s text was published together with the text of Hermann Heller, “Politische Demokratie und soziale Homogenität”. „[...] *aber dafür wird er als Verbrecher oder als ‘mad dog’ behandelt...*“.

Yet, even in 1932 and 1933, in the third and fourth editions, Schmitt corrects this sentence in the following way: “[...] but for this reason the peace breaker (*aber dafür wird er als Friedensbrecher und Friedensstörer*) is set (*gesetzt*) *hors-la-loi* and *hors l’humanité*?” Schmitt 1963 (1932): 77. Schmitt and Heller’s debate centered precisely on the destruction of the enemy or the return of the enemy to within their own bordered space (*in seine Schranken zurückzuweisen*). Cf. letter Schmitt-Heller 22 December 1928. Schmitt 2018: 503. On Schmitt and Heller, I write in *Violence, Figures of Sovereignities* (Bojanić 2007b: 47–62).

9 This is of course a modified version of Mill’s suggestion where one (in this case the unjust enemy) who does wrong, must be punished.

10 Kant 2003: 69 (1373) (semester 1784).

with them certain controlled and transparent actions. Further, all actions conducted would have to be announced and would have to have even the thinnest veil of secrecy removed. Transparency of action would reduce random victims. The one conducting violence must be manifestly responsible for it. Otherwise, drone actions have a religious character (conducted by one who appears no longer); citizens are hostages, targets of unjust enemies, forced to suffer violence for which centers of power have not taken responsibility. Most importantly, however, citizens have a reduced right to public gathering or grouping in city space. It seems to me that this transparency in, for example, conducting drone action would maintain their efficiency.

If we accept that in our cities or countries there are persons or perhaps small groups that will not participate in "democratic" or "patriotic games", and are therefore ready to randomly destroy already constituted groups or portions of a city – presently, various names are in circulation designating such persons or groups: 'illegitimate, unlawful or irregular combatants or soldiers',¹¹ 'unjust aggressors', 'willful wrongdoers' (Walzer), 'bad guys' (Walzer),¹² criminals or "criminal unjust enemy" (Tesón),¹³ terrorists (or terrorists as illegitimate combatants [Frowe])¹⁴ – then it is possible to say that we are in one way or another followers of the philosopher Immanuel Kant. Kant (and before him the jurists Vattel, Achenwall, but also and above all Cicero and others) thematized the phrase 'unjust enemy', claiming that "a right to war against them would be infinite" (*jus belli contra hostem injustum est infinitum*) (Kant 1784: 1372; Kant 2003: 69). Kant's defensive instrument ('unjust enemy' is the justification

11 "Whether we call them 'irregulars' or 'unlawful combatants', or simply describe them as 'civilians performing the function of a combatant', terrorists are active agents of an armed struggle". Meisels, "Targeted Killing with Drones? Old Arguments, New Technologies", Manuscript: 26. In *Contemporary Just War* Meisels uses the phrase 'unjust aggressor', 'unjust combatant', and 'unjust soldier' (Meisels 2017: 12–14).

12 Cf. Walzer 2013. If we ignore Walzer's designations of "good" or "bad" guys and the concept of victory, becoming ever more difficult to reconstruct, this text is important because it implies the latent existence of some kind of "acting" (obviously, such acting is 'unjust') performed by the bad guys that can be successful or efficient and disposable to those who are good. This is probably a brutal and certainly "unjust response" to an unjust act or an "act of terror" (A. Kasher & A. Yadlin). Interestingly, a forerunner or prototype of the new rules of engagement issued in 2010 (General Stanley McChrystal headed the group that constructed them) could be a paragraph in Fichte (Kant's contemporary). Namely, he allows for an "illegitimate aggression by another" (*der ungerechte Angriff*) to be answered by "one single unjust act" (*Eine ungerechte Handlung*) or "unjust violence" (*die ungerechte Gewaltthätigkeit*). Fichte 2000: § 8, 16.

13 For Tesón, "The Unjust Enemy" is one who pursues an unjust cause (connected to traditional theory of war, such as the Germans in World War I), while "The Criminal Unjust Enemy" is someone who pursues an unjust cause with immoral means (Germans in World War II) (Tesón 2013).

14 In the chapter "Terrorists as illegitimate combatants", Frowe lists four conditional requirements for combatants (Geneva Convention): be part of a hierarchical group, wear a distinctive emblem that is visible from a distance, bear arms openly, obey the rules of *jus in bello* (Frowe 2011: 192).

and condition of right to preventive attack),¹⁵ which in places and certain contexts looks truly terrifying, becomes efficient on one condition only: if all of humanity is united against them. This too is Kant's legacy, which is for us entirely lost and it would seem completely forgotten. I wish to argue that Kant is responsible for this oversight in giving proper significance to the unity of all in opposition to a new and unnamed enemy (and I would like to connect this problem with a revised version of the "monster dilemma").

What, then, are the basic characteristics of the 'unjust enemy'?¹⁶ What could be significant for us today in classifying various kinds of hostilities? Let us look at a portion of paragraph 56 of Kant's book:

In addition to active violations [of its rights] (first aggression, which is not the same as first hostility) (*der ersten Aggression, welche von der ersten Hostilität unterschieden is*), it may be *threatened*. This include another state's being the first to undertake *preparations* (*zuerst vorgenommene Zurüstung*), upon which is based the right of *prevention* (*das Recht des Zuorkommens*) [*ius praeventionis*], or even just the *menacing* increase in another state's *power* (by its acquisition of territory) [*potentia tremenda*]. This is a wrong (*eine Läsion*) to the lesser power merely by the *condition* of the *superior power*, before any deed on its part, and in the state of nature an attack by the lesser power is indeed legitimate. Accordingly, this is also the basis of the right to a balance of power among all states that are contiguous and could act on one another (*einander thätig berührenden Staaten*). (Kant 1968: 346; 1991: 152–153.)

I would leave aside what Kant in the passage refers to as "state."¹⁷ Is it thus justified to attack before any form of attack? Is it possible in this place to introduce law or principle (rule), introduce the *ius* as Kant does? In a word, is there right to respond to threat and who provides that right?¹⁸ Is fear of attack sufficient "legitimation" "*contra*" the attack? In legal theory history, *ius praeventionis* appears well before Kant (Legnano, Machiavelli, Gentili, Grotius, etc.), but only in relation one on one (meaning one state against one other state).¹⁹

15 I write about Kant and preventive war in Bojanić 2007a: 63–76.

16 Martin Frank interprets Kant's 'unjust enemy' within a few protocols: *ius ad bellum*, relations between states, 'unjust enemy' as spoiler, natural state, injustice (Frank 2011: 199–219).

17 Kant makes frequent use of analogies and alternates between considering the enemy a state and the assumption that an enemy can also be an individual. Elaborating, Kant seamlessly passes from third to first person singular. For the argument to be convincing (perhaps this is the only great trick in philosophy, and the great violence of its establishment as institution), we can easily follow the shifts from the 'neutral' form of exposition to a discourse filled with nonsensical examples, a personal tone and complicated uses of the pronouns 'I' and 'my'. In Kant, the state is often the object in the sentence, and then at once it becomes the subject of the exposition (Kant's *I* becomes the state).

18 This is the origin of Suzanne's Uniacke's argument about a threat as "unjust" or "objectively unjust". Cf. Rodin 2002: 83–87.

19 Kant copies and gently corrects the jurist Gottfried Achenwall whose work *Iuris Naturalis* he studies in detail in his lectures. It would appear that only an attacker who

In Kant (and before him, for Friedrich the Great) this institution (even though not an institution) appears for the first time as *all against one* or *all against a few*. I have the right to attack another or others if I feel that they are hostile to me. This is Kant's great novelty – that all ought to attack the one. For if there is no consensus about the threat of a single state, if there is no consensus about a potential future attack and swift arming of a state and dangerous arms that state possesses, then there is no armed threat at all. The enemy is the condition of alliance; but the reverse is true as well – the alliance assumes a dangerous enemy.

The following paragraph, 60, is interesting because it justifies, that is, assumes the right to preemptive attack based on the existence of the unjust enemy:

There are no limits to the rights of a state against an *unjust enemy* (*Das Recht eines Staats gegen einen ungerechten Feind hat keinen Grenzen*) (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 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. (Kant 1968: 350; 1991: 155)

The unjust enemy, here in the singular, represents a state that deserves to be eliminated along with its government. Throughout the passage it becomes clear that Kant is seeking a way of limiting an attack or occupation all the other states intend to this state (who is not an ordinary enemy, but below the level of the enemy). (Shortly, we will see how Kant deduces and adds to the prevention of *ius* – the *ius* ought to be possible probably because all, all states, unite against one, or in this case, one state.) The point of both passages I have quoted is that a confederative republic should be possible (and thus peace; the emphasis is important here) only if there is always some unjust enemy, if *a priori* there is one who ought to be in one way or another obstructed (limited) and eliminated. Paradoxically, the unjust enemy would also appear to be a chance for the cessation of war. The institution of the unjust enemy and the institution of preventive violence is Kant's *novum*, although a certainly unelaborated and never fully argued recipe, which allows for emerging beyond the natural state between countries.²⁰

did not attack, the enemy that threatens to injure and has not yet fully revealed his enmity, can be called an unjust enemy. He "allows" the right Achenwall calls *ius preventio-nis*. "Right to self-defense concerns also a single threatening injury (*eine drohende Verletzung; laesionem imminentem*). However, one defending is not obligated to wait for the first attacking moment, but has the right to deploy violence against the aggressor, prior to being really injured. This right is called *ius preventio-nis*. The aim of the right to defense – *iuris defensionis* is a state of security – *status securitatis*. However, the existence of the right to defense begins for us at the moment when the danger begins, that is, when some other shows hostile intent toward us (*bis eine feindliche Absicht gegen uns zeigt*); and the right to defense lasts as long as we are resisting danger, that is, to the point of return of the state of security. Achenwall, Pütter 1995 (1750): § 483, 484; 157–158.

20 "The state of nature is not the state of discomfort but the state of injustice", Kant 2003: 82.

Article 3 of paragraph 54 is interesting because it explains the passage from paragraph 56 I have cited:

3) A league of nations in accordance with the Idea of an original social contract is necessary, not in order to meddle in one another's internal dissensions but to protect against attacks from without (*aber doch gegen Angriffe der äußeren zu schützen*). (Kant 1968: 344; 1991: 151)

The Metaphysic of Morals, edited at the beginning of the 20th century by the great neo-Kantian Natorp, is brimming with mistakes. He himself found them in the manuscript, but did not remove them all. The writing is controversial because many sentences are unfinished. The sentence “to protect against attacks from without” has engendered a lot of polemic: who is on the outside? What is on the outside of something whole and comprehensive? There are several variants: Vorländer added a word to Kant's text, “to protect from enemies without” (*gegen Angriffe der äusseren Feinde*), while Natorp added the word ‘peoples’. The entire intrigue consists in that the alliance of peoples, if it is “an alliance of peoples” at all, does not have anything outside or beyond it (not even an enemy). If all peoples are joined in a confederation, then why does Kant leave the possibility of existence of something outside the community? How can they be “all” and also there be something outside them? How can it be that someone is still missing, that is to say, that the missing one brings danger and threatens? Is one not present, not presenting, showing themselves, the condition of community? Is this the crucial aporia of international law?

This mistake or shortcoming in Kant's text is actually a consequence of his reformulation and corrections of a few paragraphs about the enemy from the book *Le droit de gens* (*The Law of Nations*) by Emer de Vattel. Namely, Kant meticulously follows Vattel, transforming the conventional enemy from within a community into an unjust enemy;²¹ but he then neglects to reconstruct (and thus perhaps transform) one of the most original moves in international law and politics in modern times: the transformation of *communis hostis omnium* (by Cicero, *De officiis*, III, 29) into *hostis humani generis* (enemy of mankind or *ennemi du genre humain*) (Rech 2013). In other words, Kant hesitates and in one way or another misses the opportunity to follow and reshape Vattel's transformation of ‘the pirate’ into ‘the monster’.²² Who is a monster, and where should it show itself (Kant leaves a lacuna, thinking that it comes from

21 But who is the unjust enemy (*l'ennemi injuste*) for Vattel? This is first of all an aggressor, but also one whose motives are purely avarice (*motifs d'utilité seulement*), who has not justifiable reason to conduct war (*sans raisons justificatives*) and who acts illegitimately (*agit sans aucun droit*). The war of one such is unjust (*sa guerre est injuste*) (Vattel 1758: § 33). Just war or *guerre réglée*, on the other hand, opposes war that has not been declared (that can in fact not be declared at all, whose declaration cannot even be formulated), which does not seek just satisfaction, is without form (*la guerre informe*) and carried out only for pillage.

22 On the figure of the pirate, above all in Schmitt, I write in “The Figures of (a)Symmetry: ‘Pirates’”, (Bojanić 2011: 207–215).

somewhere 'without', from the 'outside')? Or else, does the monster (*monstrum*) portend something beyond itself? Who can be a monster in the first place, and can this nameless figure, protean and impossible to destroy, be replaced by other names (one of which is certainly terrorist)? Vattel writes:

Nations (*les peuples*) that are always ready to take up arms on any prospect of advantage, are lawless robbers (*des injustes, des ravisseurs*): but those who seem to delight in the ravages of war, who spread it on all sides, without reasons or pretexts, and even without any other motive than their own ferocity, are monsters (*des Monstres*), unworthy the name of men (*indignes du nom d'hommes*). They should be considered as enemies to the human race, in the same manner as, in civil society, professed assassins and incendiaries are guilty, not only towards the particular victims of their nefarious deeds, but also towards the state, which therefore proclaims them public enemies (*déclarés ennemis*). All nations (*nations*) have a right to join in a confederacy (*se réunir*) for the purpose of punishing and even exterminating those savage nations. Such were several German tribes mentioned by Tacitus, – such those barbarians who destroyed the Roman empire: nor was it till long after their conversion to Christianity that this ferocity wore off. Such have been the Turks and other Tartars, – Genghis-khan, Timur-Bec or Tamerlane, who, like Attila, were scourges employed by the wrath of heaven, and who made war only for the pleasure of making it (*pour le plaisir de le faire*). Such are, in polished ages and among the most civilized nations, those supposed heroes, whose supreme delight is a battle, and who make war from inclination purely (*qui font la guerre par goût*), and not from love to their country.²³

Without such monstrous abstractions or projects that unite all of us, I am not sure that it is even possible for our struggle against new monsters to remain just and disciplined. Vattel speaks of peoples (*les peuples*, the English translation is always problematic) or groups against which nations would have the right or can unite, unite their forces (*joindre leurs forces*) for the common weal of all (*pour le salut commun des hommes*), in order to punish or exterminate (*exterminer*) such peoples. Vattel even foresees the existence of some nation (*Nation malfaisante*) whose wrongdoing simply authorizes the human community to unite (*l'intérêt de la société humaine autoriserait toutes les autres à s'unir*). Further, the unjust enemy or aggressor – perhaps the crucial moment of description of this monstrous action – has no capacity to constitute and construct an entity that surpasses their individual or incidental activity (for example, they can have no love for their homeland). It seems to me that it is not now enough to list all the protocols that are put in place by this entirely vague institute of 'unjust enemy',²⁴ nor insist primarily on the instance that decides who *in concreto* is this enemy, what acts they produce, and what punishment is to be meted out. There are unconditional conditions that determine its existence, and then paradoxically, render this figure surprisingly justified in the

23 Vattel 1758: III, III, § 34; 2011: 487.

24 For example, Carl Schmitt says that this is not a legal, but political, moralizing, philosophical, theological, etc. institute.

construction of peace and a better world. If after Vatell, as well as Gentili and Pufendorf, we combine Kant's and Schmitt's arguments, we will clearly see that the institution of the unjust enemy or monster a) introduces a natural state into the very heart of the legal order, which is to say that the maxim according to which the monster's action is performed cannot be raised to the level of universality nor be the basis for any order. b) The unjust enemy never announces their action, but prepares it in secrecy, waiting for the right moment to perform it; which renders the response to it necessarily a reaction, even if the action has not yet taken place, meaning that we cannot treat preventive action as a reaction, although it is done in defense. And c) that the action of the unjust enemy are illegal in themselves, and can therefore be tied to crime and criminality. However, what makes the unjust enemy an exceptional innovation in the histories of public law is that their existence (which is really the existence of their intention to commit a criminal act) can never be decided on by a single entity, but must be done by the group or by all. Paradoxically, an unjust enemy exists if all or a great majority of international legal actors agree to their existence. When an alliance of states or a group of various actors confirm the existence of danger from an unjust enemy action, at that very moment peace that prevents such an action and erases its existence is institutionalized.

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„Nepраведni neprijatelj“ ili revidirana „Dilema o monstrumu“.

O uslovima i paradoksu jedne teoloske fikcije

Apstrakt

U tekstu jos jedanput rekonstruišem jednu uvek u modi „figuru“ javnog i međunarodnog prava, ali istovremeno i teologizovanu konstrukciju zlog zločinca koga treba uništiti u sukobu ili ratu. „Nepраведni neprijatelj“, uvek međusobno prepoznat i često imenovan od obe strane svakog sukoba (posebno dvosmisleno i opskurno u aktuelnom ratu između Rusije i Ukrajine), trebao bi da zadovoljava određene uslove koji bi onda opravdali analogiju i vezu „zla“ i „saveza svih protiv zla“, u proizvodnji svetskog mira i beskonačnog uzdržavanja od rata. Namera mi je da klasifikujući različite oblike hostilitetnih protokola, pokušam da pokažem supstancijalnu nedovršenost i slabost termina „neprijatelj“, a onda i nemogućnost i mit o simetričnoj upotrebi sile.

Ključne reči: nepраведni neprijatelj, monstrum, kriminalizacija, hostiliteti, uništenje