Cicero’s Ghost

The Atlantic, the Enemy, and the Laws of War

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Against “an unjust enemy,” Immanuel Kant asserts in a startling passage of The Metaphysics of Morals, “the rights of a state . . . are unlimited in quantity or degree.” The claim startles because in the immediately preceding passages of his text, in an extended section on “International Right,” Kant has been working to ameliorate his prior citation of Cicero’s famously bleak assertion “inter arma, silent leges” (in times of war, the laws are silent) by deducing a silent law resilient within the classical wartime silencing of the law, a set of wartime rights, restrictions, and principles that would grant “states . . . the possibility of abandoning” a purely anomic “state of nature in their external relations and [even in a state of war] of entering a state of right” with one another. Holding forth that possibility of mutually recognized right — between states — in wartime, Kant nevertheless insists that the universal he wishes to affirm has its condition of exception, a condition triggered when a “state” finds (or elects) itself ranged against an enemy of a particular, troubling, law-annulling sort: an “unjust enemy.” Having indicated that the simple existence of an enemy of this sort might evacuate the rule of law it is his fundamental purpose to affirm, Kant’s succeeding task is to identify who this aberrant, law-annulling foe might be. Who, he thus asks, is this “unjust enemy”? Who is this figure to whom the laws of war, by the procedures of their own immanent reasoning, fail, legally, to apply? “Someone,” he answers, “whose publicly expressed will, whether expressed in word or in deed, displays a maxim which would make peace among nations impossible and would lead to a perpetual state of nature if it were made into a general rule.”
To begin an essay within a volume that takes as it central problematic "the object of study in American studies" with a relatively obscure dilemma internal to Kant's late Enlightenment theory of international law seems, to put it simply, perverse. And, indeed, when I first came across this passage in the *Metaphysics*, I did not conceive of it as having any particularly "American" bearing. The problem (of the "unjust enemy") seemed, rather, akin to the type of problem in the generalized field of political theory or political theology that Giorgio Agamben has raised with reference to the figures of "homo sacer" and the concept of "bare life." What, I began to wonder, might the relation be between Agamben's "homo sacer" and Kant's "unjust enemy"? As history reminds us, however, theoretical dilemmas arise because of, and within, the discrete historical moment in which they appear. Or that, at least, is how I have come to understand the emergence of Kant's "unjust enemy" within his moment of Enlightenment war making and its pertinence to the moment contemporaneous with this volume's articulation and design, a moment still-recently conceived in some quarters of state-making power as inaugurating a new, global, "American Century," a moment in which a text seeking to further the radical renovation of American studies aptly takes as its title the title of Agamben's "State of Exception," a moment in which that phrase has been not just the name for a theoretical conundrum but for a condition of ruinous, global and historical fact.

Or let me put it this way. Who, from the perspective of such a moment (or from the vantage of the Enlightenment moment of Kant's writing) are the historical corollaries of the "unjust enemy"? Why, in the late eighteenth century, does this figure appear to haunt a project of international law that takes as its ambitious goal the establishment of a condition of "cosmopolitan right" and "perpetual peace"? What role has the unjust enemy been made to fill in the long modern history of law-making and law-preserving violence? What connections might the unjust enemy, and the exceptional legal space surrounding this figure, have to those accounts of the states of exception through which writers like Giorgio Agamben have been attempting to make sense of our contemporary experiences of law, violence, and sovereignty? What lines might there be running back from the appearance of this figure in Kant's late eighteenth-century text to earlier attempts to formulate a law of war and forward to the reappearance of the unjust enemy in the guise of the Bush administration's unprivileged belligerent and unlawful enemy?

Given the subtitle of this essay, it will, perhaps, come as no surprise that I have come to understand the genealogy of this figure to be crucially

*Cicero's Ghost*
Atlantic. More specifically, I argue, it is in the native Americans of the “new World” and the “Caapmen,” “Hottentos,” and other indigens of the South African Cape that both Kant’s “unjust enemy” and the prisoners now indefinitely detained in Guantánamo Bay, Cuba, find their haunting legal and discursive precedent. Kant’s Hobbesianism certainly points in that direction. For whoever else his unjust enemy might be, it is clear from the answer he provides to his own question that this figure is an analogue of sorts to Thomas Hobbes’s *homo homini lupus*, a belated Enlightenment double of the man-who-is-a-wolf-to-man, that Hobbesian man purportedly unwilling to abandon the state of nature and war of all against all. If, on Agamben’s reading of Hobbes, we should see in this wolfish, outlaw figure a modern reanimation of the Indo-European type of the “wargus,” a lupine figure traceable, in its turn, to the paradoxical Roman type of “homo sacer” in whose dual capture and exclusion by the law Agamben finds the secret to his concept of the political, then Karl Schmitt’s reading of Hobbes suggests that we should pay rather closer attention to Hobbes’s explicit willingness to identify the state of nature not with a moment exceptionally virtual within Roman religious and constitutional law but with the “short, nasty, brutish” way of life he saw explicitly embodied by the indigenous inhabitants of the Americas — the key exemplars, in his work, of a people living in the state of nature.

At issue in these two competing appraisals of Hobbes, I am suggesting, are not only two variant accounts of the origins of “the man who is a wolf to man” but two variant genealogies of the unjust enemy. Where a reading along Agamben’s line would find in the unlawful combatant, the unjust enemy, the man who is a wolf to man one serial incarnation after another of the original Roman type of “homo sacer,” a reading paying closer attention to the floating presence of America in Hobbes’s writings and to the development, contemporaneous with Hobbes’s career, of a body of international law that explicitly exempted the “free” “conflict zones” of the Americas and Africa from the normative regulations of the laws of war, implies that in Hobbes’s man who is a wolf to man, Kant’s unjust enemy, and the Bush administration’s unlawful combatant, we find something not simply reducible to Agamben’s “homo sacer,” but, rather, the trace of a figure entering modern legal and political discourse from the circum-Atlantic war-making projects of the European imperial powers and the states of exception written into their international laws of war. Or, to put things more simply: In answering the questions, “Who is the unjust enemy?” “What are the origins of this figure?” is it to ancient Rome or

**IAN BAUCOM**
to the Atlantic world of the late sixteenth through mid seventeenth centuries that we should be looking?

If my answer to these questions, as I have already begun to imply, is the Atlantic, then, in light of the full title of this essay, the subsidiary query certainly arises: what does Cicero (one of the key sources of Agamben's account of the extended historical unfolding of the "state of exception" as global rule) have to do not only with late Renaissance humanist law and Kant's Metaphysics but with those "unlawful combatants" languishing in the United States' Cuban holding cells? In what respect might this Roman ghost be said — then, as now, if not, perhaps, in the way that Agamben's has argued — to be haunting the long modern history of the Atlantic and its discourses of enmity?

By initial way of answer, let me shift register and scenes, away from the European and American outposts of the Atlantic triangle to a third corner of the Atlantic, the southern tip of Africa, where on the nineteenth of March 1660, nine years after having set sail from the Netherlands to establish a fort and gardens at the Cape of Good Hope, Commander Jan van Riebeeck sent a letter to the Council of Seventeen (the governors of the Dutch East India Company) announcing the successful conclusion to a "war" in which he and his garrison had been embroiled against the "Hottentos" and "Caepmen" living in the area around the company's settlement. Van Riebeeck's antagonists in this conflict had been, he wrote, an assortment of "tobacco thieves," "beach rangers and brigands," who, the winter before, had "suddenly" "attack[ed] us ... on all sides." In response to this attack, Van Riebeeck issued a proclamation giving "full permission" to "everyone to seize or shoot them [the Caepmen] wherever they are found," issued a bounty of twenty guilders for any "of these robbers" if taken alive, ten if dead, and "half price for women and children." Summarizing the outcome of this war, Van Riebeeck announced that his decisions had achieved the desired effect of "impressing" his foes "with a proper panic" and "terror" and led them to abandon their hostilities. Recapitulating one particularly gratifying incident in which a certain Corporal Giers, having killed two of these "brigands," captured another and then executed him, carrying to Van Riebeeck the "upper lip" of the men he had slain as proof of his actions, the commander explained to the Council of Seventeen the utter illegality of all the steps he had taken in licensing, and rewarding, the slaughter of men, women, and children "wherever they are found": "In consequence of the war made against us they had completely forfeited their rights and ... we were not inclined to restore them, as

Cicero's Ghost
the country had become the property of the Company by the sword and the rights of war."

What rights-canceling "rights of war," one might ask, did Van Riebeeck have in mind, and was he legally correct to claim them? In the event, he was—or, at least, arguably so: first, by the doctrine of "reprisals" which, according to the existing law of war, enabled the delegation of the punitive rights (and in situ personality) of a sovereign state to a private entity, such as the company and its representatives; And, second, by the productive vagueness in the definition of sovereign personhood provided by Hugo Grotius (former legal counsel to the company and author of the seminal 1625 volume, *The Rights of War and Peace*), a definition that in designating as sovereign "that power . . . whose actions are not subject to the control of any other power" reads uncannily like Schmitt’s theory of sovereignty *avant la lettre*. Most crucially however, Van Riebeeck’s claim to possess a law-sanctioned power of violence found authentication in the global "right of punishment" on which Grotius and a fellow company of late Renaissance humanist jurists had staked their claim to have defined for the European powers global jurisdiction over the "law of nature" (which meant in practice, jurisdiction over any territory beyond the boundaries of the European state-system). As Grotius quite unambiguously put it, "Those who are possessed of a sovereign power have a right to exact punishment not only for injuries affecting immediately themselves or their own subjects, but for gross violations of the law of nature and of nations, done to other states and subjects. . . . Upon this principle there can be no hesitation in pronouncing all wars to be just, that are made upon pirates, general robbers, and enemies of the human race. . . . [It is] a right resulting entirely from the law of nature."

Key to this assertion was not only the contention that any individual "sovereign power" possessed global jurisdiction over the "law of nature" but the question of what precisely might constitute a punishable "violation of the law of nature" (emphasis added). Grotius’s answer is contained in the elaboration he provides to the general "principle" he is insisting on. Primary among the grossest violations of the law of nature are piracy and general robbery, though why either should constitute not simply a civil crime but an affront to the law of nature is not yet clear; so, in a subsequent portion of his text, Grotius explains his reasoning by drawing a distinction not, as one might expect, between the types of action committed by pirates and robbers and those acts consistent with the law of nature but between the forms of social organization characteristic of the state, on one hand, and piracy on the other:
"A state, though it may commit some act of aggression, or injustice, does not thereby lose its political capacity, nor can a band of pirates or robbers ever become a state... For with the latter the commission of crime is the sole bond of union."* The pirate or the general robber, Grotius argues, violates the law of nature not in consequence of any discrete act of theft or violence but by a prior and continuing refusal to enter into the political, law-and-contract bound community of a commonwealth. To refuse the bond of union provided by the European state form is to violate the law of nature, to become an enemy of the human race, and so, on Grotius's opinion, to forfeit all right and become subject to sovereign punishment. Or, to put things in terms directly relevant to Van Riebeeck's actions, purely by virtue of their apparent form of social organization, by virtue of appearing to him in the guise of "brigands" or "beach rangers," the "Kaapmen" and "Hottentots," they could be said to be living in violation of that law of nature which demanded that they abandon the state of nature and consent to their sovereign governance and so (quite apart from and prior to any act of belligerence on their part) had "forfeited their rights" and rendered themselves punishable.

Nor was this opinion exclusive to Grotius and his fellow humanist jurists — it is central to Hobbes's own understanding of the complex interplay between the "state" and the "law" of nature, organizational, in fact, to his account of the ways in which the fundamental legal obligation of those living within the otherwise lawless anarchy of the state of nature is that they abandon that condition and enter into life within the commonwealth. Precisely because his first "right" of nature (which affirms "the liberty every man hath... for the preservation of his own nature") exists in irreconcilable tension with the warlike condition of the state of nature in which no man can guarantee his own preservation, the first "law" of nature is that man must abandon the insecurity of the war of all against all and enter into the protection of a commonwealth under the sovereign command of an overawing power. In anticipating or mirroring Hobbes's arguments, Grotius and his fellow humanists were not, therefore, so much inventing a law of nature that they held pirates, robbers, brigands, and other "such men" to be violating, as asserting its pertinence not only to the philosophical but also to the juridical domain, rendering violations of this law explicitly, legally, actionable, defining the failure to belong to a recognizable sovereign state as an offense punishable under the now twinned laws of nature and of war. And while the generic examples Grotius cites of these stateless "enemies of the human race" are those of the pirate and the robber, the historical example provided by Van Riebeeck's

*Cicero's Ghost
actions at the Cape suggests that the real enemies subject to this universally asserted right of punishment were the indigenous peoples of the expanding, formal, and informal European empires.

One problem, however, remained. For in affirming the right of punishment on which Van Riebeeck can be seen to have been relying, Grotius had put himself in a paradoxical position. Where in one section of his text he explicitly endorses the right of "a sovereign power" to wage war against precisely the type of foe the commander represented himself to be confronting (robbers, brigands, beach-rangers as he variously calls them), elsewhere in his text Grotius seems to insist upon the precise opposite.

"To what kind of war such an appellation ["just"] most duly belongs will be best understood by considering the definition, which the Roman Lawyers have given of a public or national enemy. "Those, says Pomponius, are public and lawful enemies, with whose state our own is engaged in war: but enemies of every other description, come under the denomination of pirates and robbers... So that by the opinion of the Roman Lawyers it is evident, that no war is considered lawful, regular, and formal, except that which is begun and carried on by the sovereign power of each country." 10

Grotius was not alone among the sixteenth- and seventeenth-century humanist jurists from whom the modern law of war derives in arguing thus. "War," Alberico Gentili had previously insisted in his 1588 De Iure Belli, "derives its name from the fact that there is a contest for victory between two equal parties, and for that reason it was first called duellum, a contest of two. ... In the same way we have perduellum, war; duelles and perduelles, enemies, whom we now call hostes. ... In fact, hostire means 'to make equal'... therefore hostis is a person with whom war is waged and who is the equal of his opponent." Thus, he concluded, any definition of war as "armed force against a foreign prince or people," is shown to be incorrect by the fact that it applies the term 'war' also to the violence of private individuals and of brigands." 11

Licensed by the right of punishment to wage war against pirates, robbers, and brigands "wherever they are found," while restricted from identifying "war" against "such men" as "war" in any just and proper sense, the humanist law of war thus found itself at an apparent impasse, one motivated by the twin, but conflicting, historical pressures to which Grotius, Gentili, and their intellectual companions were responding. For if the impulse to define war as a contest between formally equal sovereign counterparts had been motivated
by the need to resolve Europe’s otherwise irresolvable wars of religion, and
if the humanist key to solving that puzzle had been, as Schmitt and others
have argued, to have derived, from the sovereign equality of belligerent state
actors, the concept of the “just enemy” (justis hostis) with whom a peace
treaty could be concluded, the historical moment in which that legal puzzle
was solved was also one in which the continental powers were embarking
on an intensified global round of empire building and imperial war making
against an array of “peoples” whom they were distinctly disinclined to rec-
ognize as sovereign, much less equal, much less just. To balance the twin
imperatives of crafting a law of war that would strengthen the sovereignty
of European states without necessitating a recognition of the sovereignty of
the extra-European peoples on whom they were waging war, a second key
figure was thus required, one to set alongside but as a negative double to the
“hostis,” one, that is, to set within the law of war as legally outside the law of
war: the figure of the “unjust enemy,” against whom one could legally wage
war, but to whom, as Van Riebeeck had contended, the rights of war did not
apply.

It was in inventing this figure that the canon of Roman legal discourse
enters the Atlantic imperial scene as a vital supplement to the natural law
theory on which the humanists had otherwise relied. Most useful of all were
Cicero’s speeches and writings, specifically the Philippi. For in that series
of speeches denouncing the rebellious Mark Antony and asserting for the
Roman people the right to make war against this “bandit” and his “villain-
ous band of brigands,” while simultaneously denying that this stateless man
deserved any reciprocal recognition as a legitimate “public enemy,” Cicero
had identified the very legal figure the humanists were searching for: a non-
sovereign foe against whom a sovereign state could go to war while excepting
that enemy from the rights and protections stipulated by the laws of war.
The crucial passage appears in the fourth Philippi, and while it possesses
little of the burnished rhetorical luster of Cicero’s grim “inter arma silent
leges” (when arms speak, the law is silent), it is one which, through its re-
peated use and reuse by the sixteenth- and seventeenth-century founders of
modern international law, has exerted an immense influence on the modern
law of war, and — in consequence of that law’s unfolding over the past four
centuries — on those broadly imperial and specifically Atlantic discourses of
sovereignty, exceptionality, and enmity that are my primary subject.

The passage reads so: “Your ancestors, Men of Rome, had to deal with
an enemy who possessed a Commonwealth, a Senate-House, a treasury, a

Cicero’s Ghost
consensus of like-minded citizens, one with whom a treaty of peace could be concluded if events took that turn. This enemy of yours is attacking your commonwealth, but he himself has none. He is eager to destroy the Senate, the council of the world, but he himself has no public council... As for a united citizenry, how can he have that when no community calls him citizen? How can peace be made with an adversary whose cruelty taxes belief and whose good faith is nonexistent. So, Men of Rome, the whole conflict lies between the Roman People, the conqueror of all nations, and an assassin, a bandit, a Spartacus... [and his] villainous band of brigands. Given the dilemma they were confronting — the urgent need to define, and find classical warrant for, an unjust enemy against whom a sovereign state could legitimately and unreservedly wage war without, thereby, recognizing that foe as reciprocally sovereign — it is little wonder that the humanist jurists would have seized on this passage and cited it over and again. Grotius cites it. Gentili cites it at the close of a lengthy chapter on the unprotected place of “brigands” in the law of war, as does Richard Zouche, Gentili’s successor as professor of law at Oxford, in what might be the clearest exposition of the uses to which Cicero was put in resolving the legal paradox confronting the humanists. Concluding a section of his 1650 *Exposition of Civil Law and Procedure*, in which he distinguishes between the two types of “enemies” with whom a state might find itself at war, “some of whom are of a worse and others of a better condition,” Zouche identifies the latter as “lawful enemies... to whom are due all the rights of war” and then, quoting Cicero, clarifies who such a lawful enemy might be: “one who has a State, Senate, Treasury, citizens consenting and agreeing and some method of making peace.” Against these licit, protected foes, he posed all those other enemies “of the worse condition... [those] to whom the laws of war do not apply” — “robbers” “brigands” “pirates,” or, as his group name for this second type of belligerent, this less and worse than an enemy, “inimici,” those who are “inimical” — and inimical in a particular sense: inimical by virtue of failing to possess a state, senate, and treasury; inimical, as Grotius elsewhere makes clear, by virtue of having violated Hobbes first “law of nature”; inimical by virtue of having refused to abandon the insecurity of the state of nature for the wealth of life under the overawing power of a sovereign state; inimical, in Hobbes terms, by virtue of not having abandoned a condition in which “there is no place for industry... no culture of the earth, no navigation, no use of the commodities that might be imported by sea, no commodious building... no arts, no letters, no society, and which is worst of all, continual fear and danger of
violent death, and the life of man, solitary, poor, nasty, brutish and short.” Life, “solitary, poor, nasty, brutish, and short,” may be the most famous items of this litany of scandals, but as the preceding elements of Hobbes’s charge sheet make clear, and as the humanist jurists of the late sixteenth and early seventeenth century chose, by criminalizing, to emphasize, the true outrage of the unjust enemy was to exist outside the state form, and, by existing so, to refuse, in exchange for subordination to the ever-accumulating power of the commonwealth, to enter into a life of ever-accumulating industry, cultivation, and commodity exchange, life under the dual, reciprocal sovereignty of state and treasury, violence and money.

If van Riebeeck could find in his adversaries, in the “brigands and robbers” he reported to the Council of Seventeen, precisely such an unlawful, unprotected, rightless enemy, then he is certainly not the last to have done so. Over the intervening centuries this inimical enemy of the state, this strange hybrid of modern imperial history, humanist jurisprudence and ancient Roman law, this frightful admixture of Hobbes’s homo homini lupus, Grotius’s and Gentili’s “pirate” or “brigand,” Zouche’s homo inimicus, and Cicero’s man without a state, has recurred as a haunting figure in the legal and philosophical discourses and war-making projects circulating and criss-crossing the Atlantic and the globe, resurfacing not only in the guise of Kant’s unjust enemy but, in the same period of his writing, in the form of the Breton insurrectionists against Republican rule, whom Napoleon had proclaimed as “bandits” unprotected by the laws of war and who Honore de Balzac, in his novel of the Chouan revolt, characterized, with perhaps greater historical warrant than he realized, as appearing on the European scene as a type of “American redskin, or some savage from the Cape of Good Hope.” Balzac was not alone among his historical contemporaries in drawing that exact parallel. Walter Scott, in Waverley indulged it too, troping the highland insurrectionists against the English crown as “an invasion of African negroes, or Esquimaux Indians.” And Kant, too, allowed himself the same comparison, if through a more extended and indirect simile. I have already cited his explicitly Hobbesian definition of the unjust enemy as one “whose publicly expressed will, whether expressed in word or in deed, displays a maxim which would make peace among nations impossible and would lead to a perpetual state of nature if it were made into a general rule.” To that anterior philosophical model for his own homo inimicus (against whom, he insists, “the rights of the state are unlimited”), Kant, in the Metaphysics of Morals, adds

Cicero’s Ghost
a secondarily borrowed (but still thoroughly Hobbesian) anthropological
double: the “Hottentots” of the Cape and “most native American nations.”

It is only fair to note that in the section of the text (on “Cosmopolitan
Right”), in which Kant turns his attention to the indigenous subjects of the
Atlantic world, his apparent intention is to limit the implications of what his
immediately preceding discussion of the “unjust enemy” has just licensed (by
means of an extended meditation on the ways in which his theory of law
might or might not apply to the inhabitants of the Cape and the Americas).
The sum effect of that meditation, however, is to draw these “lawless” people
within a cosmopolitan theory of “right” only at the cost of exposing them to
a now universally warranted license of violence Hobbes had reserved for the
overawing power of the national state but which Kant now awards to the
international agents and sovereign representatives of the cosmopolitan ideal.

Kant’s thoughts on this matter, in their mix of clarity and torturous self-
hesitation, are worth citing at length:

[All nations are originally members of a community of the land.
But this is not a legal community of possession [communio] and utilization
of the land, nor a community of ownership. It is a community of
reciprocal action [commercium], which is physically possible, and each
member of it accordingly has constant relations with all the others.
Each may offer to have commerce with the rest, and they all have a right
to make such overtures without being treated by foreigners as enemies.
This right, in so far as it affords the prospect that all nations may unite
for the purpose of creating certain universal laws to regulate the intercourse
they may have with one another, may be termed cosmopolitan
[jus cosmopolitanum].

. . . With the art of navigation, [the oceans] constitute the greatest
natural incentive to international commerce, and the greater the
number of neighbouring coastlines there are . . . the livelier this commerce will be. Yet these visits to foreign shores . . . can also occasion evil
and violence in one part of the globe with ensuing repercussions which
are felt everywhere else. But although such abuses are possible, they do
not deprive the world’s citizens of the right to attempt to enter into a
community with everyone else and to visit all regions of the earth with
this intention.

. . . [O]ne might ask whether a nation may establish a settlement
alongside another nation [accolatus] in newly discovered regions, or

IAN BAUCOM
whether it may take possession of land in the vicinity of a nation which has already settled in the same area, even without the latter’s consent. The answer is that the right to do so is incontestable. . . . But if the nations involved are pastoral or hunting peoples (like the Hottentots, the Tunguses, and most native American nations) who rely upon large tracts of wasteland for their sustenance, settlements should not be established by violence, but only by treaty. . . . Nevertheless, there are plausible enough arguments for the use of violence on the grounds that it is in the best interest of the world as a whole. . . . But all these supposedly good intentions cannot wash away the stain of injustice from the means which are used to implement them. Yet one might object that the whole world would perhaps still be in a lawless condition if men had any such compunction about using violence when they first created a law-governed state. But this can as little annul the above condition of right as can the plea of political revolutionaries that the people are entitled to reform constitutions by force if they become corrupt.  

In summary terms, Kant’s fundamental argument is that a global right to commerce is not only irrefutable but foundational to the emergence of an international (indeed “universal”) legal order. Moreover, he contends, this cosmopolitan right to commerce and this universal international law extend (via a right to settlement and regardless of indigenous “consent”) into those regions of the earth inhabited by peoples (“like the Hottentots”) living in a “lawless condition.” It is on this point, though, that he runs into difficulties. For while it is also his argument that these “lawless” people should be made to enter into a universal cosmopolitanism only “by treaty,” it is a condition of their Hobbesian lawlessness that they are incapable of regarding treaties as instruments possessing binding contractual force. Hence, simultaneous to his proposition that international law (and cosmopolitan right) should be extended by treaty rather than by violence, we have his contention that the “consent” of the lawless is not, in fact, necessary (indeed, in a strictly legal and philosophical sense, it is impossible). Hence also, we have Kant’s ensuing, troubled set of arguments and counterarguments against and for the use of violence in subordinating such lawless people to law (in the interest of extending the operating spheres of global commerce). At the last, Kant finds himself at an impasse. Clearly wishing to express both a moral repugnance for (and refusal of) violence as a means of establishing, globally, the condition of cosmopolitan right, and, at the same time, compelled, by the

_Cicero’s Ghost_
Hobbesian logic of his own arguments, to acknowledge violence as the only copula between “a lawless condition” and “a law-governed state,” he seems at once to wish to deny and to find no way to avoid entertaining the efficacy of a recourse to what more recent theoretical discourse calls “constituting violence.”

And while, in the last sentence I have cited, Kant can find a way to reject such constituting violence in the national arena (on the grounds that, however corrupt, constituted power can at least be said already to exist within the national state), all his express moral qualms cannot allow him to explain how global commerce, international law, and cosmopolitan right can come into existence without it. It is his good fortune that he does not have to provide that explanation here. For he has, in fact, done so earlier in his text, in his discussion of the “unjust enemy,” which comes to his aid and solves his dilemma in much the same fashion that that figure had solved the dilemmas of Kant’s mid-seventeenth-century intellectual predecessors. For precisely to the extent that “lawless people” (like the Hottentots and the native inhabitants of the Americas) can be said to be living in a state of nature, living, that is, in a condition of the stateless, acommercial, acontractual “war of all against all,” they can be said, (as a pure fact of their apparent form of social organization and their exteriority to the realm of “public contract”) to represent “a threat to the freedom” “of all nations” to pursue their cosmopolitan right. Accordingly, in this situation, and this situation only, Kant’s text endorses a recourse to “constituting violence” or, as he puts it, affirms that against such “unjust enemies” “all nations” have the right to “unite” and “make them to accept a new constitution.”

If those final words seem uncannily pertinent to our own moment, then, in moving toward a close, I want very briefly to consider how that Kantian formula (or, more accurately, that Kantian reformulation of a mid-seventeenth-century Hobbesian law of war developed by the late Renaissance theorists of the “international”) has been not merely apposite but crucial to that global theory and project of war with whose consequences we are still living; crucial to a global “security” discourse that, in providing theoretical license for such war, claimed philosophical dignity for itself by claiming direct lineal descent from Hobbes and Kant. By way of example, let me turn to a text published by Thomas P. M. Barnett, following his period as director of the “New Rules Sets Project”: a collaborative venture jointly sponsored by the Naval War College and the investment consulting

Ian Baucom
firm Cantor Fitzgerald. The centerpiece of Barnett's argument is a map that was published, with a short accompanying essay, in the March 2003 issue of *Esquire* magazine under the title: "The Pentagon's New Map." (Lest his readers miss the urgent historical pertinence of that map, Barnett's opening sentences read: "Let me tell you why military engagement with Saddam Hussein's regime in Baghdad is not only necessary and inevitable, but good . . . a historical tipping point . . . the moment when Washington takes real ownership of strategic security in the age of globalization.") Subsequently expanded and published in book form, Barnett's article had a fairly straightforward argument: the contemporary world is divisible in two, though not in the terms that Samuel Huntington divides it. Instead of being antagonistically counterposed on civilizational lines, the two worlds of the global present, Barnett argues, split off from one another as zones of security and insecurity: zones in which stable, state-governed polities have realized Kant's "dream of perpetual peace" and zones in which stateless, rogue-state, or failed-state polities are condemned to Hobbes's "state of nature." Isomorphic to this political distinction, Barnett continues, is an economic distinction: in the global security zone, flows of capital and energy proceed unimpeded; in the zone of insecurity, finance capital is absent, energy is frequently abundant as a natural resource but unavailable to industry, and financial contracts are radically unenforceable, where they can be said to exist at all. The security zone, in short, is characterized by stable state structures, the thick presence of political and economic "rule sets," and its concomitant integration into networks of global capital (particularly global finance-capital); the insecurity zone is characterized by the absence of all three: states, rules, and investment capital. From these arguments, Barnett draws his fundamental conclusion: the boundary between the zones of security and insecurity, between the regions of capital flow and the dearth of capital, between the world that has achieved the dream of "perpetual peace" and the world living in a Hobbesian "state of nature" is not simply a new name for the borderline between the "developed" and "underdeveloped" worlds.\(^{18}\) It is, instead, the new borderland of global war, the conflict zone along whose curving global line the wars of the twenty-first century will and should be fought: not defensively, but preemptively, in order to "shrink the gap," or, as he puts it, to move the territories within this insecurity zone "from Hobbes to Kant."\(^{17}\) That task, he finally insists, should not however be left to the U.S. military alone. Rather the project of global war in the twenty-first century must become the shared project of the Pentagon and a multinational finance capital industry working in combination

*Cicero's Ghost*
as a new “Global Leviathan” to secure for the planet as a whole a Kantian “perpetual peace” whose unfolding moment of arrival will be marked, and measured, by the cross-planetary extension of political, legal, and economic “rule sets.”

The key argument central to the mid-seventeenth-century law of war (and central again, in overtly Hobbesian terms, to Kant’s own theory of international and cosmopolitan right) thus returns as key to Barnett’s new map of capital, law, and war. In response to the appearance of a “predatory” people living in a putatively real state of nature on the boundaries and beyond the outposts of stable nation states and the circulating flow of capital — people living in that “lawless condition in which man is a wolf to man” (homo homini lupus), the condition of human life one of a perpetual war of all against all, and the pursuit of commerce impossible in the absence of an overarching, law-and-contract-securing power — sovereign power can again extend itself as a law-constituting power of violence and, in so extending law and violence, extend the flow of global capital. And it is not at all an accident that at precisely the moment in which this Hobbesian-Kantian map of war should re-emerge, or that at the very frontier of its Gulf war testing ground, so too should the figure of the inimicus return to the law-suspending center of the law of war: now in the form of the “unlawful enemy combatant” identified in President Bush’s October 2001 order of war and subsequently written into U.S. law by the Military Commissions Act of 2006 — a figure, once again, distinguishable from the “lawful enemies” of the imperial state by the failure to “belong to a State party”; a figure, once again, iminical, rightful, legally exceptional, and languishing indefinitely, but by law, within yet another of the Atlantic’s legally free and empty zones; a melancholy successor figure in the long line of “Caapmen,” “Hottentoos,” “brigands,” “inimici,” and “unjust enemies,” against whom the imperial state has held its own “rights” to be “unlimited.”

IFI THE INIMICUS and the unjust enemy have returned, so too have Cicero and his Philippics, now as a centerpiece of Agamben’s State of Exception. What the figure of “homo sacer” has been to Agamben’s prior elaboration of bare life, the Roman institution of the “iustitium” is to this more recent work. Encompassing “a suspension not only of the administration of justice but of the law as such,” and articulating “the state of exception in its paradigmatic form,” the mechanisms, effects, and contemporary pertinence of the iustitium are best grasped, Agamben argues, if we take as its “exemplary case
... the one Cicero describes in *Philippics* 5.12.\textsuperscript{20} Agamben's purpose in turning to this speech is to isolate three key features of Roman constitutional law which he understands to have underpinned the classical origins of the state of exception and to govern its modern rearticulation. In the Roman tradition he argues these three features of the state of exception are the *senatus consultum ultimum* (the consultation through which the Senate was empowered to suspend the normal operations of law); the declaration of *tumultus* (a "state of disorder and unrest"); and the iustitium (or suspension of the law) itself. "The *consilium*," as Agamben puts it, "presupposes the tumultus, and the *tumultus* is the sole cause of the iustitium."\textsuperscript{21}

I note this, because in order in order to insist on these three features of the iustitium, Agamben must set aside a fourth feature of the Roman legal tradition, one that is also present in Cicero but does not fully fit into his genealogy of the passage from the Roman to the modern. Agamben's omission of this feature of law from *his* turn to Cicero, I believe, is symptomatic of a type of suppression consistent throughout Agamben's work: an omission whose effect is to locate exclusively within the domain of the constitutional the critique of sovereign violence it is Agamben's purpose to articulate. Or let me put it this way: just as it has been my suggestion that the modern genealogy and trajectory of Hobbes's *homo homini lupus* owes less to the *philological* descent of Agamben's "homo sacer" from ancient Rome to Guantánamo than to the strategic adaptation of Roman law by the sixteenth- and seventeenth-century humanist architects of modern international law, so too is it my sense that the Roman institution of the iustitium impinges upon contemporary manifestations of the state of exception not, as Agamben suggests, as the pure ground of an unbroken constitutional line coming to us under the Euro-American banner of the *translatio imperii et studii*, but as an emblem of the production of the constitutional by the international, the national by the imperial, the laws of the commonwealth by the law-constituting violence of the colony. Which is another way of saying that if we are to understand how Cicero's ghost, and the ghost of the Roman iustitium (like the ghost of the inimical) might continue to haunt our present we might need to begin by looking outside the constitutional and within the imperial rather than the other way around, might need to postulate that it is the practices of imperial war that generate an emergency of the constitution, not an emergency of the constitution that permits the practice of war.

That, at least, seems to be Cicero's argument as he develops it across the course of the *Philippics*. It is the case, as Agamben argues, that tumult

*Cicero's Ghost*
precedes the consultum ultimum and that the consultum ultimum licenses the iustitium. Integral to tumult, consultum, and iustitium, as Cicero makes clear, however, is bellum, war: though not just any kind of war but, rather, a type of war that arises upon and as an effect of the appearance on the imperial horizon of an inimical foe. That seems to be the clear conclusion of the speech Cicero delivered on the Senate floor, subsequently recorded as Philippic 8. "Let us examine the point at issue," he declared. "Certain persons thought that the name of war ought not to be in the motion (debated the previous day). They preferred to call it 'tumult,' showing their ignorance not only of facts but of words. For while a war can exist without a tumult, a tumult cannot exist without a war.… What else is a tumult but a commotion so serious that fear beyond the ordinary arises from it — that being the origin of the word tumult. Accordingly our ancestors spoke of an Italian tumult (because it took place within our own borders) and a Gallic tumult (because it was next door to Italy), and of no other tumult whatsoever. And that a tumult is something more serious than a war can be inferred from the fact that exemptions are valid in a war but not in a tumult. Hence, as I have just observed there may be war without tumult, but no tumult without war."22

But what is the form of war "more serious" than ordinary war, war with tumult, tumultuous war? Cicero identifies two examples: one Italian (in brief, a civil war) and the other Gallic (an anti-insurrectionary imperial war). Common to both the Italian and the Gallic tumult (and the extraordinary, exceptional form of "war-worse-than-war" they occasion) is a distinction in the form of the enemy with whom Rome finds itself confronted, the form of enemy Cicero identifies in Mark Antony: the enemy with whom one cannot conclude a peace treaty; the enemy who commands no senate, treasury, citizens agreeing and consenting; the enemy who does not represent a sovereign state; the unjust enemy, the inimicus, as Cicero also, finally, calls Mark Antony.23

If, as Agamben argues, we might find in this series of speeches and declarations not only the iustitium in its exemplary form but also, in that example, the authentic paradigm of the modern state of exception, then, I am suggesting that, to the chain tumult, consultum, iustitium, we must add the preceding and animating figure of the inimicus: the unjust enemy whose appearance triggers that "fear beyond the ordinary" whose twin effects are war worse than war and the suspension of the constitutional order. Key to both is the unjust enemy, the crisis figure looming up on the imperial frontier who throws the empire into exceptional war and the constitution into arrest.

IAN BAUCOM
It is *this* figure — whose Ciceronian avatar is Mark Antony but whose true Roman prototypes, as Richard Zouche suggested in his reading of Cicero, are the "brigands . . . who infested Cisalpine Gaul," and who Jan van Riebeeck, Zouche's exact contemporary, found in the "Hottentos" of the Cape — that I understand to have been haunting an Atlantic modernity's laws of war and projects of empire making. Most recently conjured back into existence as the "unprivileged belligerent" and "unlawful combatant," looming into the present not through an unbroken intraconstitutional line of inheritance but from the legally free and empty zones of the imperial frontier, it is this figure, this homo inimicus (and not Agamben's homo sacer) that I understand to provide the paradigm for our contemporaneity's global, war-making states of exception — and so, too, to provide a reconsidered "American studies" with renewed engagement with the *state of exception* as task.

NOTES


2. Ibid., 170.


4. Ibid.

5. Ibid., 21.

6. Ibid., 166.


8. Ibid., 2:1347.

9. Ibid., 3:315 (emphasis added).


*Cicero's Ghost*
16. Ibid., 172–73.
17. Ibid., 170.
19. Ibid., 166.
21. Ibid., 46 (emphasis added).
22. Cicero, *Philippics*, 215. Agamben, to be fair, addresses this very passage, but he does so in order to sunder the connection between war and tumult Cicero appears to be insisting on: “All evidence suggests that this passage does not mean that tumult is a special or stronger form of war . . . instead, at the very moment of affirming a connection between war and tumult, it places an irreducible tension between them . . . Tumult is not ‘sudden war,’ but the *magna trepidation* that it produces in Rome” (Agamben, *State of Exception*, 42). Separating what Cicero thus seems to link, Agamben can then go on, in the succeeding pages of his text, to remove bellum from the chain of operations resulting in the “authentic genealogical paradigm in Roman law . . . for the modern state of exception,” and so conclude, as I have noted previously, “the consultum presupposes the tumultus, and the tumultus is the *sole cause* of the iustitium” (ibid., 46, emphasis added). The question I am raising is whether it is the case that “all evidence suggests that this passage does not mean that tumult is a special or a stronger form of war”? Cicero’s full argument, I am suggesting (particularly his elaboration of “tumult” as something both “more serious than war” and productive of a war without “exceptions”) makes that reading difficult to sustain. (The exemptions to which Cicero refers are those freeing certain patricians and select others from obligatory military service during the course of a regular war [his “war without tumult”], exemptions not valid in the case of that form of war “more serious” than ordinary war [the war *with* tumult].)

23. The entire course of the preceding speeches leading up to the war declaration in *Philippics* 8 is governed by Cicero’s gradual rhetorical development of this point. While he begins by speaking of Marc Antony as an “enemy,” conferring on him the proper name of the licit public foe, from *Philippic 4* onward Cicero begins to move away from that term, to qualify or undercut it, adding to the name hostis (enemy), the epithets *latrones* (bandits), *parvicius* (traitor) (4.5), *perccuro* (assassin), and *Spartacus* (Spartacus) (4.15) until, at last, he arrives at that definition of Marc Antony as the stateless, treasury-less, senate-less foe Gentili, Greetius, and Zouche picked up on. And then, in his ensuing speech, *Philippic 5*, Cicero rechristens Antony as “*imicus*” (5.3), and with that definition in place, with that less-and-worse-than-an-enemy identified on the imperial horizon, he demands “that a state of tumult be decreed, suspension of business proclaimed, military cloaks donned, and a levy held with no exemptions in Rome and in the whole of Italy . . . to crush the madness of a felonious gladiator . . . who has taken up arms against the Commonwealth.”