CHAPTER TWO

THE BARBARY ISSUE IN EARLY-MODERN LEGAL DOCTRINE

This chapter gives an account of the doctrinal alternatives available to Vattel in developing the enemy of mankind concept and his doctrine of the repression of international crimes. To this end, the chapter presents a set of relevant views on the Barbary issue from the late sixteenth century until the mid-eighteenth century. It demonstrates that publicists in that period nearly unanimously embraced a tolerant and pluralist international legal paradigm which accorded the Barbary corsairs lawful enemy status. The paradigm first emerged when French jurist Jean Bodin, in his *Six livres de la République* of 1576, declared Barbary warfare to be legal and essentially different from piracy as it was carried out under sovereign commission.¹ In the view of Bodin and his followers, the Barbary corsairs might be morally responsible for assaulting Christian vessels without a just cause, and even be labelled as ‘enemies of mankind’ as a result, but they nevertheless qualified as lawful belligerents in point of law. This widely acknowledged opinion attests to the existence of an international legal pluralism of the laws of war in early-modern doctrine. When Vattel put forward his doctrine of the repression of international crimes for the sake of the ‘common security of nations’, he moved away from this pluralist tradition.

The chapter begins by illustrating Bodin's paradigmatic legalisation of Barbary warfare, which largely fitted with the traditional policies of France, in particular its alliance with the Ottomans. It then presents Gentili’s ambiguous position, which lay in between stigmatisation and tolerance towards Barbary, in the context of his activity as a practitioner. Gentili oscillated between sovereignty-based arguments apologetic of Barbary warfare, and the just war doctrine which disqualified it from being a legitimate form of warfare on the basis that it lacked a just cause. The chapter then describes Grotius’ original attempt to circumvent Gentili’s recourse to the just war doctrine by means of historical arguments. Grotius postulated that the conflict between the Barbary corsairs and the Europeans followed the rules of the ‘ancient law of nations’, according to

which all warring parties had the right to enslave captives. Therefore, the corsairs qualified as lawful belligerents although they appeared to lack a just cause for war.

The chapter goes on to analyse Pufendorf's approach. It argues that while Pufendorf tended to legalise Barbary warfare based on the sovereignty-argument, this argument became largely ineffective within his natural law system as a result of his idea of the just enemy's 'unlimited right' to harm the unjust enemy. This was problematic because, lacking a common superior, both the Barbary corsairs and their opponents might claim to be fighting a just war and push hostilities to extremes. The chapter then turns to Heinrich and Samuel von Cocceji, authors of an influential commentary on Grotius' *De iure belli ac pacis*.2 Heinrich was among the few writers radically to disqualify Barbary privateering, yet his son Samuel responded by providing an insightful treatment of the concept of piracy in which he aligned himself with Bodin and Grotius. However, the potential of Samuel von Cocceji’s, like Pufendorf’s, tolerant stance was conditioned by the ‘unlimited right’ concept, which might justify total warfare and obliterate any restraints on the conduct of hostilities. Samuel von Cocceji however attempted to evade this problem by arguing that between the Barbary corsairs and the Christians there existed a state of ‘perpetual war’ within which the warring parties’ responsibilities could not be determined. Here, the notions of just cause and just enemy, and hence of ‘unlimited right’ as well, could hardly apply. The chapter further presents the tolerant view of Cornelius van Bynkershoek, who, like Grotius, legalised Barbary warfare based on sovereignty and historical arguments. Both a scholar and a practitioner, Bynkershoek took a pragmatic approach and straightforwardly discarded any consideration of the corsairs’ lacking a just cause for war.

**Bodin and the Sovereignty Argument**

_Bodin’s Initial Reliance on a Thick Definition of the ‘Well-Ordered Commonwealth’_

As Vattel pleaded for collective military measures against the Barbary corsairs he simultaneously took issue with former scholars who had put forward a more tolerant view on the topic. In general, earlier scholars morally

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