Ottoman North Africa and ius publicum europæum

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Ottoman North Africa and ius publicum europaeum*: The case of the treaties of peace and trade (1600-1750)**

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Introduction

When historians examine diplomatic relations between European states and the Ottoman Empire, they usually focus on the Capitulations (*Ahdname*), the commercial and religious privileges granted by the Sultans to European merchants in the ports of the Levant.[1] Historians have, however, paid less attention to the legal dimension and diplomatic importance of the treaties made with the Ottoman Regencies of Algiers, Tunis and Tripoli from the seventeenth century onwards. This tendency probably comes from prejudices inherited from the early modern time and reinforced during the colonial period, according to which the so-called 'Barbaresques' did not respect treaties anyway.[2] Nonetheless, the agreements 'of peace and trade' made between North African governments and European States provide precious information about both the Ottoman administration of the provinces of the Empire and the balance of forces between European powers in the Mediterranean. From the beginning of the seventeenth century, Tunis, Algiers and, later, Tripoli – which displayed increasing autonomy from the control of the Sublime Porte – signed direct agreements with France, the Dutch Republic and Britain. Indeed, as Jörg Manfred Mössner explained in a seminal article: "for about 300 years, the Barbary Powers were connected

1. Halil İnalcık, "Imtiyāzāt," in: *Encyclopaedia of Islam, Second Edition*, eds. P. Bearman, Th. Bianquis, C. E. Bosworth, E. van Donzel, and W. P. Heinrichs (Leiden: Brill, 2011) <*http://brillonline.nl/*>; Susan A. Skilliter, *William Harborne and the Trade with Turkey: 1578-1582. A Documentary Study of the First Anglo-Ottoman Relations* (Oxford: Oxford University Press, 1977); Alexander H. de Groot, *The Netherlands and Turkey: Four Hundred Years of Political, Economical, Social and Cultural Relations* (Istanbul: Isis Press, 2008); Géraud Poumarède, "Jalons pour une nouvelle histoire des capitulations franco-ottomanes," in: *L'invention de la diplomatie: Moyen Âge- Temps modernes,* ed. Lucien Bély (Paris: Presses Universitaires de France, 1998), 71-85.

2. Christian Windler, "Diplomatic History as a Field for Cultural Analysis," *The Historical Journal* 44 (2001), 79-106.

with European states by commercial and treaty relations or by waging war. But they were obviously on the fringe of the European legal order, as seen from both the geographical and the juridical point of view".[3] This "fringe" status of the North African countries – in reality, more of a marginalization – found its clearest expression in what is usually known as the *ius publicum europaeum* of the seventeenth and eighteenth centuries, which originated from the wars of religion. This was a new context, in which states were now *personae morales* that considered war with another country to be the means to a political end, within a general 'European balance of power' where each state was regarded as a free *persona moralis*.[4] What was the role of the North African powers in that system? The term 'Barbaresque' that was used to describe them suggested incompatible legal standards, a complete otherness that put the North African states firmly on the side of savagery (barbarism).[5] However, the number of treaties between European and North-African states (as shown in the table below) demonstrates that it is impossible to write a history of European diplomacy in the early modern period without bearing in mind the complex negotiations with the Ottoman Regencies in the Mediterranean, for otherwise one would have to ignore the close links between diplomacy and commerce which characterised alliances between the Muslim and Christian worlds, beyond their economic, political, military and symbolic dimensions,[6] and to refuse to take into account actual diplomatic practices in the early modern period and how they shaped the law.

States regarded as *hostes humani generis*

The 1605 treaty of peace and trade between Tunis and France marked a new era in diplomatic relations between the European states and the North African Regencies. The French had become accustomed to asking the Porte to intervene in the resolution of conflicts which arose in the Maghrib, since Ottoman suzerainty and sovereignty extended theoretically to the coast of North Africa. The Capitulations granted in 1604 by Sultan Ahmed Ito King Henry IV of France reaffirmed, besides the privileges granted in the Levant, that the kingdoms of

3. Jörg Manfred Mössner, "The Barbary Powers in International Law (Doctrinal and Practical Aspects)", in: *Grotian Society Papers: Studies in the History of the Law of Nations*, ed. Charles Alexandrowicz (The Hague: Nijhoff, 1972), 197-221: 198.

4. Reinhart Koselleck, *Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society* (Cambridge: MIT Press, 1988), 41-50; Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (New York: Telos Press, 2003), 140-151.

5. Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992), 72-87; Ann Thomson, *Barbary and Enlightenment: European Attitudes Towards the Maghreb in the 18th Century* (Leiden: Brill, 1987); Windler, "Diplomatic History", 79-80.

6. Poumarède, "Jalons pour une nouvelle histoire", 72.

Algiers and Tunis were under the jurisdiction of the Empire.[7] However, Ottoman control appeared increasingly ineffective as French ambassador Savary de Brèves, who negotiated the renewal of the Capitulations in 1604 and the peace agreement with Tunis in 1605, underlined: "The corsairs from Barbary have become used to forcing the captains of French ships which they encounter at sea to confess that the goods they carry belong to their enemies […]. [They] abide by treaties and Capitulations only at will".[8] The ineffectiveness of the complaints presented to the Sultan led to a change of strategy: negotiations had to be conducted directly with the 'Barbary' states. It is difficult to establish whether the Sublime Porte sanctioned the actions of the Maghribi powers or whether it was actually incapable of imposing its will on them. Turkish pashas were still being sent to the North African provinces, but real power lay with the Janissaries, with the *taifas* of the *Rais* and with the bey and dey dynasties.[9]

The direct negotiation of treaties with Tunis, Algiers and Tripoli, which was a pragmatic decision of the European countries, confirmed the relative autonomy of the Regencies, albeit the Ottoman suzerainty over these areas was legally acknowledged in the preambles of the treaties, which mentioned the Capitulations specifically.[10] The interest of such bilateral relations was twofold: on the one hand, they limited the corsair operations of signatory states, and, on the other – and this has often been underestimated by historians – they provided merchants with trade outlets. Indeed, the Maghrib could provide European markets with many sought-after products, such as olive oil, leather, wax, chickpeas, dried meat, capers, saffron and couscous. It was possible to buy large quantities of wool in Tunis and Tripoli, wheat and barley in Tunis and sugar in Algiers. Ivory, ostrich feathers, myrrh, incense, precious minerals, even gold and diamonds, were imported to Tripoli and Tunis by caravans from Sudan. In exchange, European ships brought dried fish, calves, manufactured goods and textiles, coins, sometimes building materials and metals, in spite of the Pope's interdict expressed in the *In Coena Domini* bulls, which only Spain and the

7. (Ignaz) von Testa, *Recueil des traités de la Porte ottomane avec les puissances étrangères depuis le premier traité conclu en 1536, entre Suléyman I et François I, jusqu'à nos jours* (Paris: Amyot [then] Leroux, 1864-1911), vol. 1, 146 (art. 21).

8. François Savary, comte de Brèves, "Notes sur quelques articles du precedent Traicté," in: Id., *Relation des voyages de Monsieur de Brèves, tant en Grèce, Terre Saincte et Aegypte qu'aux royaumes de Tunis et Arger, ensemble un traicté faict l'an 1604 entre le roy Henry le Grand et l'empereur des Turcs, et trois discours dudit sieur, le tout recueilly par le S. D. C.* (Paris: N. Gasse, 1628), 29, 31.

9. Sadok Boubaker, *La régence de Tunis au XVIIe siècle: ses relations commerciales avec les ports de l'Europe méditerranéenne, Marseille et Livourne* (Zaghouan: CEROMA, 1987); André Raymond, *Tunis sous les Mouradites: la ville et ses habitants au XVII*ème *siècle* (Tunis: Cérès, 2006); Lemnouar Merouche, *Recherches sur l'Algérie à l'époque ottomane, 2: La course, mythes et réalité* (Saint-Denis: Bouchène, 2007).

10. For instance, in the treaties between Tunis and France in 1604, between Algiers and France in 1690, and between Tripoli and France in 1729. See Charles Henry Alexandrowicz, *The European-African Confrontation: A Study in Traty Making* (Leiden: A.W. Sijthoff, 1973), 146.

Italian states complied with.[11] From a commercial point of view, the treaties assured privileges to the European merchants settled in North Africa (theoretically the system of Capitulations allowed for such privileges to be reciprocated by the Europeans) and,[12] from that perspective, a number of French merchants in particular concluded agreements about the concessions of companies based in the North African trading posts (Bastion de France, La Calle, Le Cap Rose…). From a military, political and strategic perspective, the peace treaties served several purposes: besides putting an end to maritime conflict, defining the rights and privileges of representatives, and arranging for the restoration of goods and nationals captured during raids, they aimed at establishing rules of navigation and for the inspections of ships.

What value did these treaties have in the law of nations? Montesquieu famously wrote in *L'Esprit des lois* (1748-1750) that "all countries have a law of nations. Even the Iroquois, who eat their prisoners, have one. They send and receive ambassadors. They are acquainted with the laws of war and peace".[13] Still, this could not justify alliances with Infidels. For instance, Alberico Gentili, in his *De Iure belli* (1598), considered that "Commerce with Infidels is not forbidden; the law of God does not bid us withdraw from the world, and the law of man commands commerce among all men […] I say that a general agreement concerning commerce is lawful, and also a special treaty for that purpose."[14] Treaties of peace and trade were not prohibited by Gentili, unlike treaties of military alliance, whether the latter were against Infidels or Christians. Gentili specifically used the example of Capitulations: "I do not approve the treaty of the King of France with the Turks, because of which once so many thousands of men, boys and women were captured, and led off into everlasting and intolerable servitude. Moreover, you cannot trust the infidels".[15] However, the treaties with the North African states had not only trade elements, but also provided for what were objectively military alliances. The contracting parties were obligated to give one another protection in the ports, thus ignoring calls for solidarity among Christians (between European states) or Muslims (between the Regencies). Attempts at establishing a clear-cut opposition between Islam and Christendom in the Mediterranean are therefore completely misleading: in military as in political terms, alliances were both cross-religion and variable.

11. Géraud Poumarède, *Pour en finir avec la Croisade. Mythes et réalités de la lutte contre les Turcs aux XVIe et XVIIe siècles* (Paris: Presses Universitaires de France, 2009), 314-18.

12. Charles Henry Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th centuries)* (Oxford: Clarendon Press, 1967), 97-128.

13. Charles de Secondat, baron de Montesquieu, *Oeuvres complètes* (Paris: Éditions du Seuil, 1964), 531.

14. Alberico Gentili, *De Iure belli libri tres* (Oxford: Clarendon Press, 1933), 2, 401. See also: *Alberico Gentili and the Justice of Empire*, eds. Benedict Kingsbury and Benjamin Straumann (Oxford: Oxford University Press, 2010).

15. Gentili, *Iure belli*, 2, 402.

In *Hispanicae advocationis libri duo*, which was published posthumously in 1613, Gentili further detailed his views about the "Barbary" states. He re-used a syllogism regarding piracy that he had employed in his former work: "Pirates are the common enemies of all mankind and therefore Cicero says that the laws of war cannot apply to them".[16] And further down: "It is right to make war upon pirates […] Piracy is contrary to the law of nations and the league of human society. Therefore war should be made against pirates by all men, because in the violation of that law we are all injured."[17] Gentili used the classical image of 'pirates' as *hostes humani generis*, enemies of mankind, of nature, and more generally 'enemies of all'.[18] Such a premise was repeated in his defence of Spain, in which Gentili likened pirates to wild beasts, which natural law allowed to be 'hunted': "To pirates and wild beasts no territory offers safety. Pirates are the enemies of all men and are attacked by all men with impunity etc. Similarly the hunting of wild beasts is unrestricted."[19] From such a viewpoint, signing treaties with pirates seemed completely absurd. The North African states, whose fleets were active in the Mediterranean and as far as the Atlantic Ocean, were often considered as 'pirate' states by theologians, jurisconsults and diplomats. Savary de Brèves explained that he "had the Sultan accept that it would be lawful for the king to prevent [the Barbary corsairs] from using its ports, and to have them hunted like breachers of the public peace",[20] a phrase which was used explicitly in the 1604 Capitulations and which was directly borrowed from the vocabulary that the law of nations applied to *hostes humani generis*. The North African corsairs were described as pirates (*piratas*, ch. XV) by Gentili, which explained his assertion in *De Iure belli* that "With the Saracens (who are Turks) we have an irreconcilable war", where the phrase "irreconcilable war" suggested a relentless fight.[21] He also remarked – without necessarily sharing that view, as is shown further down – on the way the Venetians regarded the North African Regencies: "[Englishmen] have their trade with Tunis, Algeria and many another state taken from them by this claim of the Venetians that those states are nothing but piratical retreats and that there is none in them but pirates and that the very magistrates in them are pirates too".[22]

16. Gentili, *Iure belli*, 2, 24.

17. Gentili, *Iure belli*, 2, 124.

18. Daniel Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations* (New York: Zone Books, 2009), 105-7, 110 (and, more broadly, the whole chapter entitled "Younger Antagonists"); Peter Schröder, "Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations," in: Kingsbury and Straumann, *Alberico Gentili*, 163-186; Dan Edelstein, "War and Terror: The Law of Nations from Grotius to the French Revolution," *French Historical Studies* 31, 2 (2008): 229-62: 232-47.

19. Alberico Gentili, *Hispanicae advocationis libri duo* (New York: Oxford University Press, 1921), 2, 18.

20. Savary de Brèves, "Notes", 31.

21. Gentili, *Iure belli,* 56.

22. Gentili, *Hispanicae advocationis*, 2, 113.

However, should one conclude that the North African states were granted no sovereignty by Gentili?[23] Indeed, this is what Cornelius van Bynkershoek, who was influenced by Grotius, thought: "Albericus Gentilis, and several other writers are of the opinion, that those nations of Africa, whom we call Barbarians, are to be considered as pirates, and that captures made by them, work no change of property; but that opinion cannot be defended on any rational principle".[24] However, the issue of the sovereignty of the North African states in Gentili's writings is more complex than might appear when reading chapters 15 and 23 of *Hispanicae advocationis*, which at first sight introduced rather similar cases.[25] In the first case, Englishmen bought goods seized from the Spaniards by Barbary 'pirates'. According to Gentili, these merchants knew what they were doing and, acting in bad faith, tried to erase all evidence of Spanish ownership. This act alone would have been enough to nullify the purchase, but Gentili added two other arguments: firstly, the English probably purchased the goods directly from the pirates and therefore, according to him, the local authorities gave official cover to what was actually the handling of stolen goods; secondly, by thus encouraging the North Africans to raid Spanish ships, the merchants' action put Spain at direct risk and implicitly contravened the rules of neutrality established by the treaties; "if this legal principle is set up to govern the treasury of that land, the pirates will have indicated to them a very convenient place, which is quite close to the Spanish lines of trade and occupied by English merchants, where they may distribute their booty among their confederates. Does this make for trade?"[26] Chapter 23 showed that what applied to Spanish goods, namely that the capture by pirates did not change their ownership and did not apply to all nations. For instance, the British bought from "the highest Tunisian officer" goods taken from Venetians. The case was different here since, whereas in Chapter 15 'Barbary' and Spain were at war, the Ottoman Empire and Venice had diplomatic relations formalised in treaties. Venice should therefore have complained to the Sultan, since it could not complain about trade between Britain and the Barbary states. Although this contradicted somewhat the conclusions drawn in Chapter 15, Gentili now considered that the goods taken by

23. Jörg Manfred Mössner, *Die Völkerrechtspersönlichkeit und die Völkerrechts-praxis der Barbareskenstaaten, Algier, Tripolis, Tunis, 1518-1830* (Berlin: W. de Gruyter und Co., 1968), 150. He wrote: "Es dürfte feststehen, daß Gentili eine Völkerrechtspersönlichkeit der Barbaresken ablehnte."

24. Cornelius van Bynkershoek, *Quaestionum juris publici libri duo* [1737] (Oxford: Clarendon Press, 1930), ch. 17 <*http://www.constitution.org/bynk/bynk.htm*>.

25. On both cases, see: Lauren A. Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge: Cambridge University Press, 2010), 125-128 (here, attention was drawn to the issue of the freedom of the seas); for elements of context about the pleas see: Alain A. Wijfells, "Sir Julius Caesar and the Merchants of Venice," in: *Geschichte der Zentraljustiz in Mitteleuropa: Festschrift für Bernhard Diestelkamp zum 65. Geburstag*, eds. Friedrich Battenberg and Filippo Ranieri (Weimar: Böhlau, 1994), 195-219.

26. Gentili, *Hispanicae advocationis*, 2, 71-2.

enemy pirates – "Infidels", moreover – were lost and became the property of the pirates, which meant that nothing prevented other merchants from buying them.[27] He then used Ottoman suzerainty over North Africa to embarrass the Venetians: "These pirates are enemies, as I say, and the Turk along with them is an enemy of the Venetians, since he protects those pirates openly everywhere and always".[28] Gentili therefore acknowledged both the possibility of lodging a complaint with the "Turks", and the existence of a local tradition in Tunis of a local power (an administration and a treasury) which could appropriate (and therefore change the ownership of) goods seized at sea.

At the time Gentili was making his case, only the French had tried to deal directly with the North African provinces (namely Tunis and Algiers), and Ottoman sovereignty over North Africa still seemed real, at least to European eyes. The Regencies became increasingly assertive in the first thirty years of the seventeenth century, seen as a true 'golden age' for what Michel Fontenay has called the Mediterranean *corso* (corsairing).[29] The situation had therefore changed when Hugo Grotius wrote *De juri belli ac pacis* (1625). France and the Dutch Republic now had direct relations with Algiers, although raids which contravened the treaties – and ensuing 'breaks of the peace' – were numerous on both sides. Grotius mentioned a judgment by the Paris Parliament, of which he approved, about the seizure of a French ship by Algerian corsairs, "a people always engaged in predatory and maritime warfare with all other countries".[30] The French took the ship back and, as was the case for Gentili, the issue was that of the change of ownership or not of the ship which had been taken back (the right of *post liminium*, inherited from Roman law). The Parliament of Paris considered that the goods "had changed masters through the law of war" (*capta belli iure mutasse dominium*).[31] This amounted to acknowledging a form of sovereignty to Algiers,[32] in so far as the term "war" suggested legal enmity. Inter-

27. Gentili, *Hispanicae advocationis*, 2, 113 "[These pirates] are left beyond the reach of any public complaint. Accordingly, they are left in the general law which deals with infidelity and hostility.Then, too, no difficulty is presented by the fact that goods seized by pirates do not become their property; because this is true only of pirates who are not enemies, and not of pirates who are likewise enemies." It should be noted that this distinction between "enemy" and "non enemy" pirates is not clear in view of the definitions given elsewhere by Gentili. This explains Bynkershoek's perplexity at Gentili's position: "What Alberico Gentilis has written on all these subjects is full of obscurity and confusion." Bynkershoek, *Quaestionum*, ch. 12.

28. Gentili, *Hispanicae advocationis*, 2, 113.

29. Michel Fontenay, *La Méditerranée entre la Croix et le Croissant: Navigation, Commerce, Course et Piraterie (XVIIIème-XVIIIème siècle)* (Paris: Éditions Classiques Garnier, 2010), 212-75.

30. In Latin: "populo praedationibus maritimis in omnes alios grassari solito" (Hugo Grotius, *De jure belli ac pacis, libri tres* (Paris: apud Nicolaum Buon, 1625), 658). The word 'pirate' did not appear: the French translation by Barbeyrac was not accurate and created deceitful ambiguity: "people accustomed to carrying out acts of piracy on everyone else" (Hugo Grotius, *Le droit de la guerre et de la paix* (Amsterdam: Chez Pierre de Coup, 1729), 2: 366).

31. Grotius, *Jure belli*, 658.

32. Mössner, *Völkerrechtspersönlichkeit*, 148-49; Mössner, "Barbary Powers", 199-201; Alexandrowicz, *European-African Confrontation*, 19.

estingly, Jean Barbeyrac noted at the bottom of the paragraph that Heinrich von Cocceji referred in his *Dissertatio De Post liminio in pace et amnestìa* (1972) to the pirates as being outside of the law of nations, and therefore "thought this decision to be irrelevant and unjust, for the law of war d[id] not apply to pirates." However, Grotius specifically "supposed that [the Algerians] be not considered as pirates",[33] and therefore it was possible to establish diplomatic relations with them and to sign treaties according to the rules of the law of nation.

The jurisprudence of treaties

Although the recognition of the autonomy of the Barbary remained implicit in the writings of Grotius, it became an increasingly pressing question for law of nations scholars as the number of treaties signed between the Europeans and the Regencies increased. The Irish lawyer Charles Molloy was probably one of the first jurists to articulate the problem explicitly. In *De jure maritimo*, he used the notion of the pirates as *hostis humani generis* to question, as his predecessors had done, how the law of war applied to the "enemies to all".[34] After a first edition was published in 1676, Molloy added a new paragraph between the third and fourth paragraphs of the chapter entitled "Of Piracy" in the third edition in 1682.[35] This new paragraph was entitled "Whether capable of the Solemnities of War, and Right of Legation"[36] and it focused on the North African states, including the Kingdom of Salé, which was outside of the Ottoman Empire. It deserves extensive quotation:

> Again, Pirates that have reduced themselves into a Government of State, as those of *Algier*, *Sally*, *Tripoli, Tunis*, and the like, some do conceive ought not to obtain the rights of solemnities of war, as other towns or places: for though they acknowledge the Supremacy of the *Port*, yet all the power of it cannot impose on them more than their own wills voluntary consent to. […] Notwithstanding this, *Tunis* and *Tripoli* and their Sister *Algier* do at this day (though Nests of Pirates) obtain the right of Legation, and Sir John Lawson did conclude a Peace between his now Majesty by the Name of the most Serene and Mighty Prince Charles the Second by the Grace of God King of Great Britain, France and Ireland, defender of the Faith etc. and the most Excellence Signors Mahomet Bashaw, the Divan of the Noble City of Tunis, Hagge Mustapha Dei, Morat Bei, and the rest of the Souldiers in the Kingdom of Tunis; and with them of Tripoli by Sir John Narborough by the Name of the Halil Bashaw,

33. Grotius, *Droit de la guerre*, 2: 365-6.

34. Charles Molloy, *De Jure Maritimo et Navali: or, a Treatise of Affaires Maritime, and of Commerce in Three Books* (London: John Bellinger, 1676), 34; Heller-Roazen, *Enemy of All*, 113.

35. The second edition, which was published in 1677, is a re-edition of the first edition, without significant changes.

36. Charles Molloy, *De Jure Maritimo et Navali: or, a Treatise of Affaires Maritime, and of Commerce in Three Books* (London: John Bellinger, 1682), 54.

Ibrahim Dey, Aga, Divan, and Governours of the Noble City and Kingdom of Tripoli in Barbary. So that now (though indeed Pirates) yet having acquired the reputation of a Government, they cannot properly be esteemed Pirates but Enemies.[37]

The right of legation obtained de facto by the Regencies demonstrated that Ottoman control was only partial. It further indicated a change of status: the North Africans were no longer 'pirates' (enemies of mankind) but 'enemies'. One should act with them in accordance with the rules prescribed by the law of war and peace and the law of nations. Molloy substantiated his case with two treaties signed between Britain and North African powers. The first was an agreement with Tunis, signed on 5 October 1662 by Sir John Lawson and Hammūdah Pasha ("Mahomet Bashaw" in the text).[38] Its text explicitly mentioned the existence of a "Kingdom of Tunis" ruling over "dominions" and the last paragraph explained that its provisions should not contravene the Capitulations granted by the Sultan.[39] In spite of this final reference to Ottoman suzerainty, the treaty confirmed the authority and international recognition of the Regency of Tunis. Indeed, Hammūdah bey, the son of Murād Bey Qursū and founder of the Muradid dynasty, asked the Porte to grant him the title of pasha, which he obtained in April 1658.[40] Although Molloy did not draw attention to it, it is worth mentioning that the treaty between Britain and Tunis was not an isolated case in this period: Hammūdah also signed a treaty with the Dutch Republic on 20 September 1662 and another with France on 25 November 1665.[41] The European states demanded that such "treaties of peace and trade" be ratified in order to limit raids by the Tunisians that explain the shows of force by the European fleets arriving to 'negotiate' such treaties. Nevertheless they still contributed to the increasing autonomy of the Regency from the Porte, and were part of the Regency's diplomatic strategy, which took advantage of the military and political competition between European states in the Mediterranean to achieve favourable treaties. For instance, the secret conventions of 26 November 1665, settled by the French and the Tunisians, indicated the price to pay for buying back French captives (175 *piasters*), "supposing the English did not pay less".[42] Besides payments for captives, the conventions could also provide for the shipping of weapons, building materials or even cannons to the Regencies. Such shipments and exchanges drew criticism from competing European states, and also from Spain, Venice and other states at war with the

37. Molloy, *Jure Maritimo*, 54-5.

38. For the English version of the treaty, see: George Chalmers, *A Collection of Treaties between Great Britain and Other Powers* (London: John Stockdale, 1790), 2, 391-4.

39. Chalmers, *Collection*, 394.

40. Raymond, *Tunis sous les Mouradites*, 36-37.

41. See the table; see also Raymond, *Tunis sous les Mouradites*, 34.

42. E. (Edgard) Rouard de Card, *Traités de la France avec les pays de l'Afrique du Nord: Algérie, Tunisie, Tripolitaine, Maroc* (Paris: A. Pédone, 1906), 125.

'Barbaresques'.[43] Molloy also mentioned the agreement signed on 1 May 1676 with Tripoli.[44] The British were indeed the first Europeans to conclude a peace separately with the Regency of Tripoli.[45] In his presentation of the two treaties, Molloy also showed the plurality of the sources of power in the Regencies – what the Europeans called the 'powers' (pasha, dey, bey, divan…). Besides, the mention of the date of the Hijra in the margin of Molloy's text suggests a form of equivalence in the ratification of the treaty. It should, however, be noted that the recognition of the Barbary states in the law of nations did not completely erase the images of 'Barbaresque' corsairs and more generally of the major North African ports, still described as "nests of pirates."[46]

Molloy did not grant *a priori* sovereignty and moral personality to the North African states. Both stemmed from the treaty, from a positive development in the law of nations (and, subsequently, from all the treaties ratified by the European states which formed one of the sources of the law of nations). This pragmatic 'jurisprudence of treaties' can be found in other texts published after *De jure maritimo*, which was one of the great publishing successes of the period. Abraham de Wicquefort, for instance, in the last part of the chapter he devoted to the study of modern treaties (section XIV), used as examples the 1662 agreements between Britain and the "African corsairs", including the 5 October agreement mentioned by Molloy. He also mentioned several treaties with the "King of Morocco" as well as the Capitulations with the Porte, to which he gave the same status. He further alluded to the treaties between the Dutch Republic and Algiers signed on 26 March and 2 November 1662, while indicating that negotiations in 1674 only led to an agreement about payments for slaves on 25 September 1677.[47] Pufendorf's perspective was different. In book VIII of his writings about the law of nations, he did not accept positive sources and treaties as fundamental sources. As his predecessors, he considered that "bodies and clans of pirates and robbers", who violated the law of nature, also stood outside of the law of nations. However, he offered a nuance which referred implicitly to the North African "corsair-States": "But where States and Commonwealths are so Partial, as to be Just in the Observation of compacts

43. The 1680 treaty between Algiers and the Dutch was a good example. The Algerians waited for the delivery of a shipment of cannons by the Dutch to implement the terms of an agreement signed a year earlier. See: Gerard van Krieken, *Corsaires et marchands: les relations entre Alger et les Pays-Bas, 1604-1830* (Saint-Denis: Bouchène, 2002). I am currently writing an article about this specific treaty.

44. About the treaty, see Chalmers, *Collection*, 411-418.

45. See the table. These two treaties were also mentioned in James Edward Geoffrey de Montmorency, "The Barbary States in International Law", *Transactions of the Grotius Society* 4 (1918), 87-94: 90.

46. Mössner, "Barbary Powers", 205. About later uses of the image of the "pirates' nest" in the accounts which followed the 1830 French conquest of Algeria, see Merouche, *Recherches sur l'Algérie*, 12-13.

47. Abraham de Wicquefort, *L'Ambassadeur et ses fonctions* (The Hague: Jean & Daniel Steucker, 1680), 2, 374. Our table suggests different dates.

with some particular Allies, but to all other their Neighbours, or at least to certain Nations, show little Regard in the Observation of the Law of Nature, and scruple not, without just Provocation, to break it. Their credit, it is evident, must very much sink, but it would be too severe to deny them every degree of Esteem".[48] This *estime simple*, which is emphasised by Barbeyrac in his 1706 French translation,[49] included peoples who had made alliances with only a tiny part of Europe under the law of nations, no matter what actions they had committed towards other states.

Cornelius van Bynkershoek most certainly gave the clearest indication of the place of the North African Regencies in the law of nations.[50] It is not irrelevant to point out that his *Quaestionum juris publici* was published in 1737, six years after the release of the last volume of Jean Dumont's *Corps universel diplomatique*.[51] Dumont's wide-ranging compilation was an answer to pressing requests: in 1680, Wicquefort had written that "a collection of the treaties signed since the beginning of the century would be a most excellent and useful work".[52] The very title of Dumont's book illustrated the assumed universality of the law of nations, the centre of which was Europe, but whose reach had no bounds. Dumont could therefore grant treaties signed with Algiers, Tripoli and Tunis as well as Morocco, the same status as those concluded between European states. 1694 saw the release of the *Recueil des traités de paix, de trève, de neutralité*, which brought together the treaties signed between the King of France and "all the princes and potentates of Europe and elsewhere". This "elsewhere" included the "Barbaresques" and the Iroquois mentioned by Montesquieu, who were "granted" a series of "peaces" by Louis XIV in 1666.[53] Bynkershoek's reference was Cornelis Cau's *Groot Placaat-Boek*, which he used to substantiate historically and positively the existence of the treaties.[54] More than a century after Gentili, the context was very different and a whole series of cases encouraged Bynker-

48. Samuel Freiherr von Pufendorf, *Of the Law of Nature and Nations* [1672] (Oxford: L. Lichfield, 1710), 653.

49. Samuel Freiherr von Pufendorf, *Le droit de la nature et des gens, ou Système général des principes les plus importans de la morale, de la jurisprudence et de la politique* (Amsterdam: G. Kuyper, 1706), 1, 384.

50. Mössner, *Die Völkerrechtspersönlichkeit*, 150-2.

51. Jean Dumont, baron de Carlscroon, *Corps universel diplomatique du droit des gens; contenant un recueil des traitez d'alliance, de paix... de toutes les conventions... & autres contrats, qui ont été faits en Europe, depuis le regne de l'empereur Charlemagne jusques à présent ; avec les capitulations imperiales et royales... & en général de tous les titres... qui peuvent servir à fonder, établir, ou justifier les droits et les interets des princes et etats de l'Europe...* (Amsterdam: P. Brunel, R. et G. Wetstein, 1726-1731).

52. Wicquefort, *Ambassadeur*, 2, 331.

53. Frédéric Léonard, *Recueil des traitez de paix, de trêve, de neutralité, de confédération, d'alliance, et de commerce: faits par les Rois de France, avec tous les princes, et potentats de l'Europe, et autres depuis près de trois siècles* (Paris: 1693), 5, last part (Algiers, Tunis, Tripoli, Morocco, Iroquois).

54. Cornelius Cau, *Groot Placcaet-boeck, vervattende de placaten... van de... staten generael der Vereenighde Nederlanden* (s'Gravenhage: 1658-1664).

shoek to diverge explicitly from Gentili: "I do not think that we can reasonably agree with Alberico Gentili and others who class as pirates the so-called Barbary peoples of Africa, and that captures made by them entail no change in property".[55] Bynkershoek was referring here to the case dealt with in Chapter XV of *Hispanicae advocatio* and to the issue of the right of *post-liminium*. This remark was followed by the clearest recognition of the sovereignty of the North African states ever articulated by a theorist of the law of nations:

> The peoples of Algiers, Tripoli, Tunis, and Salee are not pirates, but rather organized states, which have a fixed territory in which there is an established government, and with which, as with other nations, we are now at peace, now at war. Hence they seem to be entitled to the rights of independent states. The States-General, as well as other nations, have frequently made treaties with them, and I may refer to our treaties of April 30, 1679, and May 1, 1680[56], by way of example. Cicero defines as a regular enemy "one that has a commonwealth, a senate, a treasury, the unified support of its citizens, and that shows some respect for treaties and covenants of peace when an occasion is offered to make one". All these requirements they satisfy.[57]

Bynkershoek unambiguously recognized the legal personality of the North African states, and went as far as releasing them from Ottoman control and granting them a form of independence (although there is nuance in his assertion). Besides the multiplication of treaties since the second half of the seventeenth century, the context was favourable to such a change of view about the 'Barbaresque' *rais*, as North African ships had considerably reduced their raids in comparison with the previous century and had partially reoriented their activities towards overseas trade.[58] Still, as was already the case with Grotius and Molloy, Bynkershoek made use of what we might term a jurisprudential law of nations, with the positive law of nations integrating the North African Regencies into a community of sovereign states.[59]

55. Bynkershoek, *Quaestionum*, ch. 17.

56. See the table.

57. Bynkershoek, *Quaestionum*, ch. 17.

58. Merouche, *Recherches sur l'Algérie*, 253-269.

59. It should be noted that, although Emer de Vattel recognised the sovereignty of the North African states, he expressed no esteem for their corsairs, and did not hesitate to outlaw them by declaring them to be "pirates": "The Christian nations would be no less justifiable in forming a confederacy against the states of Barbary, in order to destroy those haunts of pirates, with whom the love of plunder, or the fear of just punishment, is the only rule of peace and war […] To the same class belong almost all the expeditions of the Barbary corsairs: though authorised by a Sovereign, they are undertaken without any apparent cause, and from no other motive than the lust of plunder. These two species of war, I say – the lawful and the illegitimate – are to be carefully distinguished, as the effects and the rights arising from each are very different. […] At present, it would be in vain to claim back a ship taken by the Barbary corsairs, and sold to a third party or retaken from the captors; though it is very improperly that the piracies of those barbarians can be considered as acts of regular war": Emer de Vattel, *The Law of Nations, or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* [1758] (Philadelphia: T. & J.W. Johnson, 1852), book 2, ch. 6, § 78 and book 3, ch. 4, § 67 and ch. 13, § 196.

From the imposition of treaties to the "law of Barbary"

Does this mean that the eighteenth century witnessed a 'normalisation' of the diplomatic relations between Ottoman North Africa and the European states?[60] The form of the 'treaty' and its correlative *pacta sunt servanda*[61] had by the late seventeenth century become both the justification for and the end of European naval operations in Barbary. So-called breaches of treaties by North African corsairs made it possible to justify extremely violent military interventions, such as the bombing of Algiers by French fleets in 1682, 1683 and 1688. The point here is not to suggest that the Algerian corsairs actually did abide by the treaties, but rather to note that breaches of the provisions of the treaties were numerous on both sides.[62] For instance, the French consul in Livorno was authorised by his hierarchy to buy slaves from Algiers, at a time when the two countries were theoretically at peace.[63] The military imbalance between North African and European states increased as the European navies were consolidating their strength (the invention of the bomb vessel was a decisive breakthrough).[64] This was translated in diplomatic terms into the real *imposition* of treaties by the European states, particularly France and Britain: the treaties ratified by Sir John Lawson in 1662 with the three Regencies already fell into that category. The North African states were therefore only allowed partial sovereignty even if they were granted the right of legation.

It should be noted that the law of nations as an autonomous legal category only applied to the relations between a European state and 'another' state in the eighteenth century. Diplomatic relations between North African states were, for instance, completely ignored in the law of nations, as was illustrated in the collections of treaties. The notion of having a version of *jus publicum europaeum* established for them by the European states began to be articulated more and more explicitly. The expression could be found in the very title of Mably's *Principes des négociations pour servir d'introduction au droit public*

60. Merouche, *Recherches sur l'Algérie*, 256; Christian Windler, "De la 'normalisation' à la soumission. Les relations franco-maghrébines au XVIII[ème] et au début du XIX[ème] siècle", in: *Le Commerce des captifs. Les intermédiaires dans l'échange et le rachat des prisonniers en Méditerranée, XV[ème]-XVIII[ème]siècle*, ed. Wolfgang Kaiser (Rome: École française de Rome, 2008), 345-63: 347.

61. For the equivalent in Ottoman law, see Viorel Panaite, *The Ottoman Law of War and Peace: the Ottoman Empire and Tribute Payers* (Boulder: East European Monographs, 2000), 284-86.

62. The prescriptions of the Qu'ran are very clear: "fulfill the covenant of Allah when you have made a covenant, and do not break oaths after making them" (*Qur'ān*, XVI, 91-92). Regarding Islam and treaties, see Majid Khadduri, *The Law of war and peace in Islam, a study in Muslim international law. A dissertation...* (London: Luzac, 1940), 82-98.

63. AN, *AE*, B[I] 697, f. 35r.

64. Géraud Poumarède, "La France et les Barbaresques: police des mers et relations internationales en Méditerranée (XVI[ème]-XVIII[ème] siècles)", *Revue d'histoire maritime* 4 (2005), 117-46: 137-46.

de l'Europe (1757), one of the main legal textbooks in use in the eighteenth century.[65] Similarly, Georg Friedrich de Martens opened his *Recueil des principaux traités d'alliance…* (1791-1801) with a *Précis du droit des gens moderne de l'Europe*.[66] Although both texts did not focus exclusively on Europe, their titles illustrated the strictly European character of public law, as it was conceived at the time. What was the place of the North African Regencies in that system? In Chapter VI of his book *Droit public de l'Europe fondé sur les traités*, Mably dedicated a whole paragraph to the treaties concluded with the Ottoman Porte, and offered a brief history of the diplomatic relations between the major European powers and the Ottoman Empire, which he acquired from Paul Rycaut's *Present State of the Ottoman Empire*.[67] In a passage about France, he noted that the Capitulations granted it by the Sultan in 1673 softened the terms of the 1604 treaty and the idea of 'hunting' pirates: "it is only written that France will punish them by depriving them of their ports", and he believed that North African piracy was partly due to the naval weakness of the Ottoman Empire, and that European powers had to deal directly with Tunis, Tripoli and Algiers to make trade safer.[68] He observed that the situation benefited the major European naval powers (mostly Britain and France) which did not suffer excessively from North African corsair activity and which, anyway, chartered ships from the merchant fleets of the "smaller States" which consequently were the ones who suffered most from "African banditry".[69] Mably further indicated that "a power who want[ed] to keep a consul in Tripoli, Algiers etc. specif[ied] that the law of nations applied and explain[ed] what was meant by that".[70] In the 1764 edition of his book, this was complemented with the following: "for the Barbaresques d[id] not have the same ideas as we d[id] about these matters".[71]

65. Abbé de Mably, *Des Principes des négociations, pour servir d'introduction au 'Droit public de l'Europe fondé sur les traités'* (The Hague: 1757); Jochen Hoock, "Conflits religieux et droit public européen", in: *L'Europe en conflits. Les affrontements religieux et la genèse de l'Europe moderne vers 1500-vers 1650*, ed. Wolfgang Kaiser (Rennes: Presses universitaires de Rennes, 2008), 411-25: 411.

66. G.F. (Georg Friedrich) Martens, *Précis du droit des gens moderne de l'Europe, fondé sur les traités et l'usage* (Göttingue: J. C. Dieterich, 1789).

67. Rycaut regarded the North African Regencies as "almost independent […] because of late years the mutual Treaties with Barbary, and interchanges of War and Peace with those Countries hath made the State and condition of that people well known and familiar in England": Sir Paul Rycaut, *The History of the Present state of the Ottoman Empire, containing the maxims of the Turkish politie, the most material points of the Mahometan religion, their sects and heresies, their convents and religious votaries, their military discipline, with an exact computation of their forces both by land and sea, illustrated with divers pieces of sculpture, representing the variety of habits among the Turks...* (London: Charles Brome, 1686), 102.

68. Abbé de Mably, *Le droit public de l'Europe fondé sur les traitez conclus jusqu'en l'année 1740* (Amsterdam: M. Uytwerf, 1748), 1, 243-244.

69. Mably, *Droit public*, 245.

70. Mably, *Droit public*, 246.

71. Abbé de Mably, *Le droit public de l'Europe fondé sur les traités* (Geneva: La Compagnie des Libraires, 1764), 1, 399.

Although he mentioned the *de facto* and *de iure* inclusion of the North African Regencies in the *jus publicum europaeum*, he also acknowledged the existence of a different notion of the "law of nations", specific to the North Africans and the "Turks". The accusation of disrespect for treaties was therefore repeated, but Muslim practices were held responsible for it.[72]

Martin Hübner's approach,[73] by contrast, reflected the recognition of a specific law – namely a maritime law – of the 'Barbaresques'. In his book about the seizure of neutral ships, *Saisie des bâtiments neutres*, Hübner, a Dane, referred repeatedly to the North African corsairs. In the first volume, he considered, as Bynkershoek had, that the North Africans respected the law of nations only by waging war on their enemies (Portugal, Spain and other Christian states).[74] He explained clearly that the "Barbaresques […] never engaged in hostile behaviour with friendly and neutral ships regarding the ownership of their cargos […] the Danish, French, Swedish, English and Dutch flags provide adequate protection for the cargos."[75] He considered that the right board neutral ships should be restricted to the mere control of the documents, and again based his argument on the example of the North African corsairs (whom he still called disparagingly the "plunderers of the sea"), mentioning the fourth article in two treaties ratified on 8 September 1726 and 23 November 1757 between the Regency of Algiers and the Dutch Republic, which established the rules for simple formal visits.[76] Indeed, there was more at stake, namely the protection of goods by the neutral flag, on which Hübner looked favourably, except of course in the case of smuggling.[77] He then quoted extensively from a passage of articles 3 and 4 of the above-mentioned treaty of 8 September 1726, which specified that the flag protected all goods and passengers, wherever they came from.[78] The 'Barbaresques' were of course extreme cases for Hübner, examples aimed at showing the acceptance of his ideas and the universality of the rules of maritime law

72. Mably, *Droit public*, 236, quoted extensively from Rycaut's chapter about "The regard the Turks have to their Leagues with Foreign Princes", in which he explained that the Turks "ought not to regard the Leagues they have with any Prince, or the reasons and ground of a quarell, whilst the breach tends to the enlargement of their Empire, which consequently infers the propagation of their Faith": Rycaut, *Present state,* 180.

73. Regarding Hübner, see Koen Stapelbroek, "Universal Society, Commerce and the Rights of Neutral Trade: Martin Hübner, Emer de Vattel and Ferdinando Galiani", in: *Universalism in International Law and Political Philosophy*, eds. Petter Korkman and Virpi Mäkinen (*COLLeGIUM: Studies Across Disciplines in the Humanities and Social Sciences* 4 (2008), 63-89.

74. Hübner merely repeated Pufendorf's idea that no nation had the "right to consider as barbarians those whose mores and traditions" differed from its own: Martin Hübner, *Essai sur l'histoire du droit naturel* (London: 1758), 2, 58.

75. Martin Hübner, *De la Saisie des bâtimens neutres, ou Du droit qu'ont les nations belligérantes d'arrêter les navires des peuples amis* (The Hague: 1759), 1, 223-4.

76. Hübner, *Saisie des bâtiments neutres*, 2, 224-5.

77. Hübner, *Saisie des bâtiments neutres*, 2, 183-97 (chapter "if the goods are protected by the neutral flag, according to the conventions of the law of nations"). This principle was progressively established in the nineteenth century.

78. Hübner, *Saisie des bâtiments neutres*, 2, 196-7.

which he defended. Even so, his text bore witness to the growing recognition by Europeans of the specific nature of the required norms and practices established progressively with the North African states through treaties of peace and trade.[79]

Conclusion

Whether excluded from the law of nations by their description as *hostes humani generis* or included in it when positive law and treaties were regarded as the basis for the law of nations, the North African Regencies made it necessary to specify the boundaries and reach of European public law. From the right to trade with the Infidels to the recognition of the Infidels' law, the positions of the theorists of the law of nations varied, differed strongly or overlapped, in accordance with the various schools of thought and theoretical inspirations. However, it appears that, on the whole, the North African states were regarded as fully-fledged sovereign states free from Ottoman control and possessing a right of legation. Nonetheless, in material terms, this new sovereignty was diminished by the increasing military imbalance with the European states, which was exacerbated during the revolutionary wars of the end of the eighteenth century.[80] Similarly, in commercial terms, the North African merchant navy faced the hostility of powerful groups of European ship-owners who resented its development and did not hesitate to encourage raids and acts of piracy against it.[81] This quick survey of the theoretical opinions of a number of jurists should therefore be complemented by an in-depth examination of the negotiations and debates which surrounded the ratifications of treaties with the Regencies,[82] for these treaties shaped the diplomatic relations between Europe and North Africa for a long time, up to the colonial period.

79. Sartine, the French Secretary of the Navy, wrote to his colleague Vergennes, the Foreign Secretary, that it was a principle of "the maritime law of the Barbaresques" not to question "the right for the neutral flag to protect non-smuggling goods […] They recognise[d] that friendly flags protect[ed] enemy goods"; Windler, "De la 'normalisation' à la soumission", 347.

80. Windler, "Diplomatic History".

81. Jean Mathiex, "Sur la marine marchande barbaresque au XVIII^{ème} siècle", *Annales. Économies, Sociétés, Civilisations* 13 (1958): 87-93.

82. Concerning negotiations and Capitulations, see Poumarède, "Jalons pour une nouvelle histoire".