# ARTICLES

# The *Nationality Decrees Case*, or, Of Intimacy and Consent

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**Keywords:** colonialism; legal history; jurisdiction; nationality; Permanent Court of International Justice.

**Abstract:** International lawyers, especially human rights lawyers, praise the *Nationality Decrees* decision as a watershed in the progressive expansion of international jurisdiction. Reexamination of the case challenges this understanding. The case proves to have involved a confrontation between rival colonial conceptions: French stress on the *intimacy* of an imperial *tuteur* with its protégés *versus* British focus on *consent* to subordination. Reexamination also reveals the decision as highly restrained, rejecting a French call for a judicially formulated colonial code. The case's protagonists bequeathed a conflicted conceptual legacy concerning international authority and nationality policy in whose wake debates about today's new internationalism follow.

> [Un protectorat] reste encore, à quelques égards tout au moins, au dehors, en marge, de façon qu'il y ait un dernier effort, un dernier acte à accomplir pour que ce territoire, qui reste nominalement, par une subtilité juridique, séparé du territoire national, s'y touve enfin réuni.
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> [A protectorate] remains, in certain respects at least, outside, in the margin; so that a final exertion, a final act remains to be performed; in order that this territory which remains by a legal nicety nominally separated from the national territory may be finally united to it.
>
> *Alfred de Lapradelle,*
> *French Oral Argument, Nationality Decrees Case*[2]

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1. This article is intended as a contribution to the recent body of scholarship on international law which takes as its focal point the colonial and post-colonial dimension. Among the writers who have been most influential on my work are Antony Anghie, Bhupinder Chimni, James Gathii, David Kennedy, Hope Lewis, Vasuki Nesiah, Annelise Riles, and Amr Shalakany. I thank David Kennedy and Julie Stone Peters for their comments.
2. Speech by M. A. de Lapradelle (French Oral Argument), Advisory Opinion No. 4, 1923 PCIJ (Ser. C) No. 2, at 96 (hereinafter French Oral Argument). Where available, I have used the English trans-

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## 1. COERCION, IDENTITY, AND THE INTERNATIONAL: AN EQUIVOCAL CENTURY

**1999:** Ethnic Albanians flee Kosovo in their hundreds of thousands. Serb forces meet them at the border and often allow them to pass. On one condition: they must hand over all proof that they are Kosovars, including identity cards and license plates. NATO leaders announce that a primary goal of their bombing campaign is the return of all refugees to the province – *internationalizing the restoration of national identity.*

**1938:** Following the *Anschluss*, Switzerland seeks to exclude Austrian and German Jews fleeing the Nazis. Switzerland threatens to impose visa requirements on all holders of passports issued by the expanded Reich. On September 29, a German-Swiss Protocol is concluded, whereby Germany agrees to stamp passports of Jews with a 'J'. Switzerland refuses entry to most Jews. The 'J' stamp also makes it easier for other states to exclude Jews – *internationalizing the imposition of ethnic identity.*

**1923:** France becomes concerned about the growing number of non-French Europeans in its North African Protectorates. It decides to impose French nationality on most second-generation Europeans in Tunisia and Morocco. France objects to the League Council's competence over the ensuing dispute with Great Britain – arguing that the matter is a question of domestic jurisdiction. The Permanent Court rejects the domestic jurisdiction claim – *internationalizing the construction of colonial identity.*

## 2. JUDGING THE *NATIONALITY DECREES CASE*: ALLIANCE FOR PROGRESS OR COLONIALISM'S 'FINAL ACT'?

A broad range of international lawyers concur in the enduring significance of the Permanent Court's dicta in the 1923 *Nationality Decrees Case*[3] – which famously proclaimed that the "question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations". The Court issued these dicta in the course of upholding international scrutiny of French treatment of Europeans in Tunisia and Morocco. They have been hailed as a milestone in the inexorable march of modern international law towards the attenuation of sovereign privilege. For example, Judge Stephen Schwebel declared that the *Nationality Decrees* opinion was among the Court's "several seminal contributions to the con-

lations of French material provided in the Court's documents. I have, however, occasionally modified the translation to conform to the strict sense of the French.

3. Nationality Decrees Issued in Tunis and Morocco (French Zone), Advisory Opinion of 7 February 1923, 1923 PCIJ (Ser. B) No. 4.

temporary international law of human rights".[4] An international jurist with a very different perspective, Judge Fouad Ammoun, praised the decision for initiating legal adaptation to the "growing internationalization of the life of the peoples of the world, involving a corresponding constant loss of ground by the concept of absolute sovereignty".[5] For Ammoun, the Court's 1923 decision foreshadowed the acceleration of this legal process after World War II, a development for which he primarily credited "the contribution of the representatives at the United Nations of the countries of the Third World".

Upon first reflection, the reasons for this broad celebration of the *Nationality Decrees* opinion seem clear. The Permanent Court's pronouncements have helped human rights advocates expansively interpret conventional and customary authority for international review of state behavior. Like many famous legal dicta, those in the *Nationality Decrees Case* have acquired a life of their own, far beyond the case which served as their occasion. They seem to provide authority for links between internationalism, humanitarianism, and a contextualized approach to sovereignty. As a result, many have viewed these early dicta as continuing to set a progressive agenda for international law.

To be sure, jurists such as Schwebel and Ammoun differ on the interpretation of such an agenda – the former focusing on a general mitigation of unfettered sovereignty, the latter on a specific shift from Europe to Africa, Asia, and Latin America. Nonetheless, despite these differences, the dicta perform the feat of bringing together strikingly different international lawyers – such as these two judges, whose identification with the United States' leading international role, on the one hand, and Third World reappropriation of international law, on the other hand, goes far beyond the mere accident of their respective nationalities. This consensus in support of the dicta's progressive, if not prophetic, significance should be cause for further reflection. In this paper, I reconsider this consensus through a close examination of the arguments in the *Nationality Decrees* case – both in view of the stage of "international relations" during which they were made and in view of their structural persistence in international legal reasoning in a wide variety of circumstances. This reconsideration raises the question of whether the association among internationalization, contextualism, and humanitarianism is necessarily either coherent or beneficial – as well as problematizing a neo-formalist stance that would offer the converse of these positions as an alternative to the current consensus.

One technique to initiate reconsideration of the case might be simply to reverse the received view of its place in international legal history. This technique would mandate that we read the case in relation to its past, rather than its future

4. S.M. Schwebel, *The Roles of the Security Council and the International Court Of Justice in the Application of International Humanitarian Law*, 27 NYUJ Int'l L. & Pol. 731, at 748 (1995).
5. Barcelona Traction, Light and Power Company, Limited (Belgium *v.* Spain), Second Phase, Judgment of 5 February 1970, 1970 ICJ Rep. 313 (Sep. Op. Ammoun).

– specifically, in relation to colonialism. Both the British and French arguments took for granted the normativity of colonialism, though they conceptualized the legal subordination of North Africa in quite different ways. The Court's decision, limited as it was to a jurisdictional question, also implicitly accepted this normative consensus.

Subsequent commentators on the case have undoubtedly not been ignorant of its colonial background. Indeed, the full title of the case, *Nationality Decrees Issued in Tunis and Morocco (French Zone)*, declares this background – a particular moment in the history of colonialism. A moment so close and yet so far – close enough that the dicta can serve as a creed for human rights lawyers in the year 2000, yet far enough that the "international relations" upon which they affirmed law to "depend" took for granted that which law has since proclaimed to violate its foundational principles.

My point in reexamining the decision is not to convict it for its tainted origins, still less to render its dicta unfit for citation by idealistic lawyers. Rather, I believe that the case forces us to rethink the way some of the central quandaries of law and politics have come to be posed since 1989, particularly after Kosovo. A whole range of issues have come to be framed as arising out of conflict between a contextualist expansion of the international community in the name of broad ideals and its formalist restriction to tasks to which states have explicitly consented. Advocates of unified international authority confront defenders of a decentralized world; promoters of human rights enforcement encounter skeptics who point to its entanglement with the skewed international distribution of power; defenders of local or transnational identities struggle against partisans of unitary state nationality policy. At the same time, it has become commonplace to reject any simple dichotomy between such general approaches. Close examination of an individual dispute challenges the terms of such debates by showing how historically specific composites of divergent legal approaches have been constructed and the ways these constructions have been embedded in particular configurations of power.

In the *Nationality Decrees Case*, both parties elaborated such legal composites, embodying rival political and cultural postures towards the projection of power in North Africa. I call these alternative postures, these distinct relationships of power to its objects, *intimacy* and *consent*. The posture of *intimacy* – in this case of a Protecting Power with its Protégés – will seem, at first, to embody the use of contextualism to justify and deploy far-reaching exercises of power; the posture of *consent* – in this case of the Protégés to the dominance of the Protector – will seem to restrict power within formally authorized and defined limits. Yet, as we shall see, each of these alternative postures was composed of a set of heterogeneous elements – contextualism *and* formalism, as well as internationalism *and* sovereignty, humanitarianism *and* subordination, the primacy of territory *and* the primacy of ethnicity. In ways far more decisive than conceptual gynmnastics, it is these complex postures through which the competing imperial

powers sought to reconcile the contradictions in their legal justifications of European supremacy – and to construct images of international legal authority based on that supremacy. Such postures, with their competing configurations of heterogeneous elements, find their current variants among both proponents and critics of today's new internationalism.

It may seem simple to show the inextricability of rights and power in a case like the *Nationality Decrees Case*, precisely because of its evident entrenchment in colonialism – the parties offering the Court no position outside the colonial system from which to choose. The ease with which one can identify the raw interests at play in the legal arguments, however, also makes it all too easy to imagine that one can simply separate the case's "colonial power side" from its "internationalization/human rights side" – rescuing the dicta from their unseemly context. Yet, the entanglement of power and humanitarianism in a world in which power is concentrated in a few strong states, and in which central international institutions like Court and Council participate in that distribution of power, is hardly unique to some bygone colonial era. Moreover, as examination of the parties' positions in the *Nationality Decrees Case* shows, alternative constructions of international law are deeply implicated in competing strategies for the international *deployment* of power, not merely for its justification. Such constructions continue to shape rival strategies for the direction of international law and politics in our post-1989 era. The normative task is not to seek an illusory innocence outside of power but to reflect critically on its irreducibility.

The modern sound of the arguments in the *Nationality Decrees Case* stems from their participation, both on their "human rights" side and on their "colonial power" side, in the renewal of international law between the wars. Some familiar features of this renewal in which the case played a role included: the justification of heightened international authority on the basis of its ability to give legal structure and order to national, ethnic, and cultural conflict – rather than a view of nationalism as antithetical to internationalism; the affirmation of normative criteria for "new" states' admission into the international community – rather than an agnostic acceptance of statehood on the basis of effective control; the construction of sovereignty as a bundle of rights that can be variously reconfigured in light of substantive goals – rather than a conceptualization of sovereignty with an indivisible essence. These features tended towards a general relativization of legal dichotomies as articulating a range of options among which policymakers may shift in light of circumstances – rather than as posing clear choices between whose terms the lawyer must decide in light of principle. Yet, the parties always deployed these modernizing argumentative techniques in tandem with their more formal counterparts. Such tensions may be found, unresolved, in such recent documents as Security Council Resolution 1244 (1999) establishing the international administration for Kosovo – an administration many refer to as a "protectorate", often with the sly intent of arousing an international legal *frisson* through invocation of the taboo colonial past. The range of

interpretations of such documents as Resolution 1244 can be analyzed, *mutatis mutandis*, along the intimacy-consent axis I explore in this paper.

The central themes of the *Nationality Decrees Case* could not be more familiar today: the relationship between an emergent internationalism and traditional sovereign prerogatives, between humanitarian ideals and realist skepticism, between secular citizenship and ethnic self-determination – as well as between Western supremacy and Third World challenge or between community and competition within Europe. The difficulty in avoiding both anachronism and complacency in our judgment of the *Nationality Decrees Case* is further mitigated by the fact that the 1920s are not utterly remote from us in time or attitude. In writings from that decade, one can find every conceivable view on the international distribution of power and wealth – from ringing defenses of empire to passionate and categorical anticolonialism. The arguments in the *Nationality Decrees Case* occupied a specific range of positions within those debates. Yet, the shape they gave to discussions of power and rights continues to set the parameters of international legal debate across a wide spectrum – from Schwebel to Ammoun and beyond. Close examination of the case in light of the parties' argument not only compels us to reconsider the meaning of the decision and its place in international legal history, but to rethink the internationalist legal agenda as a whole.

## 3. THE FACTS

The basic facts of the case are easily stated. In the nineteenth century, the relationship of Europe to North Africa was marked by increasing inter-imperial rivalry[6] and the formalization of Capitulatory concessions. The Capitulatory concessions, guaranteeing inviolable status and consular jurisdiction for resident Europeans, were embodied in such agreements as the Anglo-Moroccan treaty of 1856 and the Anglo-Tunisian treaty of 1875. A crucial change in the balance of power occurred in the decades before World War I, with the establishment of formal French protectorates through treaties with Tunisia in 1881 and Morocco in 1912. France secured recognition from other European states of its predominant position only through a complicated set of deals, embodied in such documents as the 1897 Anglo-French Convention on Tunisia and the 1904 Anglo-French Declaration on Egypt and Morocco.

By 1921, France had become concerned about the potential challenge to its dominance posed by the growing number of non-French Europeans in the protectorates. If non-French Europeans in North Africa came to outnumber their French counterparts, one contemporary French observer even suggested, the "principle of nationalities" might require the divestiture of French rule in favor

6. *See generally*, A. Marsden, British Diplomacy and Tunis 1875-1902 (1971).

of the state of the predominant immigrants' origin.[7] (He did not, of course, consider whether the application of this principle to the North Africans themselves would pose a similar challenge). The French sought to remedy this situation through a set of nationality decrees. For each protectorate, a decree was issued by the French President and by the sovereign protégé – the Bey in Tunisia, the Sultan in Morocco. The Tunisian decree provided that:

> Every individual shall be Tunisian who was born in the territory of Our Kingdom and one of whose parents was also born there, with the exception of the citizens, subjects, or nationals of the Protecting Power, other than our subjects, unless otherwise provided for in the provisions of conventions or treaties binding the Tunisian Government.[8]

The French decree provided that

> Every individual shall be French who was born in the Regency of Tunis and one of whose parents was himself born in the Regency and was justiciable as a foreigner before the French tribunals of the Protectorate [...][9]

Similar decrees were issued in relation to Morocco. The upshot of these decrees was that second generation Europeans in the protectorates, who were not otherwise protected by treaty,[10] were deprived of their original nationality and bestowed with French nationality.

The British protested against these decrees, basing their protests, in particular, on the fate of the Maltese population of Tunisia – British nationals by virtue of British rule in Malta since the early nineteenth century. This hybrid community, both colonizer and colonized, was a somewhat sporadic object of British solicitude, depending on the British geopolitical strategy of the moment. The British claimed that both the French and the North African decrees were invalid. The French defended both the French and the North African decrees and claimed that the imposition of French nationality ultimately rested on a combination of the two.

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7. P. Winkler, La Nationalité dans les Protectorats de Tunisie et du Maroc 187 (1926).
8. *Quoted in* Nationality Decrees Issued in Tunis and Morocco (French Zone), *supra* note 3, at 16 [hereinafter PCIJ Decision]: "Est Tunisien, à l'exception des citoyens, sujets ou ressortissants de la Puissance protectrice autres que nos sujets, tout individu né sur le territoire de Notre Royaume de parents dont l'un y est né lui-même, sous réserve des dispositions des conventions ou traités liant le Gouvernement tunisien."
9. PCIJ Decision, at 16-17: "Est Français tout individu né dans la Régence de Tunis de parents dont l'un, justiciable au titre étranger des tribunaux français du Protectorat, est lui-même né dans la Régence [...]."
10. The Italians in Tunisia were protected by the Franco-Italian Consular Convention of 1896. The British argued that the provisions of this treaty should be extended to British nationals by virtue of a most-favored-nation clause in the 1897 Anglo-French Convention. I will not discuss this claim in this paper.

Both the French and the British claimed that the loyalties of the Maltese were with them. The British pointed to petitions protesting the decrees, allegedly signed by a substantial number of Maltese in Tunisia. They also claimed that the French police had hauled away several young Maltese in shackles to be inducted into the French army. The French, by contrast, claimed that most Maltese had demonstrated their loyalty to France. The French portrayed a scene of Maltese going *en bloc* to the civil registry to enroll as French citizens, all the while singing the *Marseillaise*. Perhaps it is fitting that this scene recalls a famous moment from the film *Casablanca*, another cultural icon in which the colonial dimension of French policy in North Africa was uncritically portrayed as the background against which the real action – intra-European conflict – took place.

The British brought the dispute to the League Council. The French protested that the domestic jurisdiction clause of Article 15(8) of the Covenant barred League competence. The Council referred the domestic jurisdiction question to the Permanent Court. The parties agreed to submit the merits of the dispute to adjudication if the Court rejected the Article 15(8) claim.

## 4. *INTIMACY* AND *CONSENT*: COLONIAL POSTURES, LEGAL ARGUMENTS

Judging from the reception of the famous dicta by later international lawyers, one would think that the dispute must have cast one party advocating League competence on the basis of a broad internationalism against another rejecting that competence on the basis of a narrow statism. This impression would be false. On the contrary, the British and French based their arguments on equally strong, though competing, affirmations of vigorous internationalism, inter-imperial regulation, proper relations between European and non-European sovereigns, and defense of individual rights. Nor would one's expectations about the formal aspects of the arguments be confirmed. One might have anticipated that the French argument for the applicability of Article 15(8) would be based on an insistence on the letter of treaty texts – with the British arguing for a customary law expansion of the Covenant's provisions for international competence. Yet, these formal expectations, like those on the level of substance, are not borne out by the actual arguments.

In fact, the French urged the Court to uphold its domestic jurisdiction claim on the basis of the broadest internationalist considerations. The French declared that

> the true solution of the question depends upon the determination by the competent judicial authority which, in the present case, is the Permanent Court of International Justice, of the nature and extent under international law, of a protectorate régime established by a highly civilized nation over an undeveloped state which is none the less a sovereign State [...] [and that] a complete code of rules [*un statut complet*], or at least, a general principle applicable to the various protectorates [...] be laid down by

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> means of the authoritative opinion of the Court of Justice. [...] Whereas this general principle should above all be based upon the lofty aims of the protectorate, [...] above all a work of civilization, [...] a matter in which all [nations] have an equal interest [...][11]

By contrast, the British, who argued for international competence, stressed that the jurisdictional question could be decided by a much more restrained and traditional inquiry – specifically, whether the issues implicated the interpretation of valid international treaties.[12] Nonetheless, the arguments did not simply reverse our expectations. The French supplemented their call for a broad-ranging inquiry about East-West relations with close readings of treaties; the British supplemented their treaty arguments with general pronouncements about East-West relations.

It would be no easier to predict the parties' stances on sovereignty than on international authority. Again, one might have thought that the British must have defended Tunisian and Moroccan sovereignty in order to condemn the imposition of French nationality as well as to internationalize the dispute – and that France must have asserted its full sovereignty in order to justify its decrees as purely domestic acts. And, again, the actual arguments were far more heterogeneous. The arguments' complexity must be understood in light of the fact that the French validated, and the British invalidated, *both* the North African and French decrees. This double goal seemed to require each side to take internally inconsistent positions: for how could either both sovereigns (for France) or neither sovereign (for Britain) possess supreme power, including the power to determine nationality, in a single territory? These seeming contradictions in the arguments of both parties go beyond litigation strategy in this particular case – all the way to the complex heart of competing postures in relation to colonial or quasi-colonial subordination.

I call these competing postures those of *intimacy* and *consent*. France defended its thesis of the simultaneous, yet domestic, authority of France and its protégés through the portrayal of their relationship as one of "the intimacy of daily relations which exist between Protector and Protégé".[13] The French compared this intimacy, hierarchical yet benevolent, to that of a "*tuteur*", who "en-

11. Final Conclusions of the French Government, *supra* note 1, at 242: "[L]a solution véritable de la question dépend de la fixation, par l'autorité judiciaire compétente qui est dans le grand débat actuel la Cour de Justice Internationale, de la nature et l'étendue en droit international, du régime de protectorat établi par une Nation d'ordre supérieur sur un Etat non encore dévélopée mais pourtant souverain [...] [et qu']il soit enfin établi par l'avis autorisé de la Cour de Justice, sinon un statut complet, du moins une règle générale de principe applicable aux divers protectorats [...] Attendu que cette règle générale doit s'inspirer avant tout du but élévée du protectorat [...] une oeuvre de civilisation [...] avantage auxquel toutes [les nations] sont également intéresséés [...]."
12. Final Conclusions of the British Government, *supra* note 1, at 245.
13. French Oral argument at 148-149: "l'intimité des relations journalières qui sont celles de Protégé à Protecteur."

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tirely absorbs [*couvre*] the personality of his pupil",[14] a "*curateur*", who "stands in his place",[15] and at times as something even more personal. Pursuing the theme of intimacy, the French suggested that this relationship would be ended by a "premature withdrawal" [16] if the French failed to achieve a "complete reform" of Tunisian "civilization".[17] Presumably, the withdrawal would be premature if the French failed to complete the "final act" necessary for its full consummation ["*le dernier acte à accomplir*"][18] – no matter, as we shall see, if that "final act" were annexation or independence as a state in the image of its tutor.

For the French, this intimacy was both grounded in internationalist considerations and yet constituted a bar to any international intervention – much like the traditional legal status of marriage, established by the state, yet shielded from legal scrutiny during its duration. And, like marriage, this intimacy, though grounded in communal considerations, was established through a moment of consent – explicit in the treaties of protectorate, tacit evermore.

By contrast, the British rejected this French claim of privileged intimacy with the North African sovereigns in favor of something rather more promiscuous. For the British, the North Africans had never relinquished their ability to consent to a variety of relationships with different European states. The North African sovereigns had subordinated themselves to France, it was true – yet their prior consent to subordination to others remained intact. Nonetheless, the British argument also depended on an intimate relationship – that among European sovereigns, as trustees for one another's interests in the colonies.

The parties proceeded on the basis of a common conundrum: how to put together the relationship between a) the confrontation of a generalized "East" and "West"; and b) particularized relationships both among Western powers and between individual Western and Eastern states. The French foregrounded the generalized hierarchical relationship between East and West and claimed that virtually unlimited powers over its protectorates inhered in that relationship. Yet, they based their argument in favor of excluding other European powers from their intimate relationship with the North Africans on the latter's initial consent to French power expressed in the protectorate treaties.

Conversely, the British foregrounded particularized, consensual relationships between sovereigns. They defended the sovereignty of individual North African states, the continuing validity of specific treaties concluded with those sovereigns, the unique status of each European power in North Africa, and a restrictive interpretation of the protectorate treaties. Yet, they sought to interpret those specific treaties and statuses in light of a generalized subordination of East to West; all consent had to be interpreted in light of this subordination.

14. French Oral Argument, at 127.
15. *Id.*
16. French Oral Argument, at 139 ["retrait prématuré"].
17. *Id.*
18. French Oral Argument, at 96.

These positions, which may be called the "French paradox" and the "British paradox", may be reformulated in terms of the jurisdictional questions posed to the Court: the French sought to exclude international competence precisely by casting the issues as shared concerns for the new international community, however grounded in fundamentally different roles for specific European states. The British sought to create international competence precisely by casting the issues as particular disputes between sovereign states, however grounded in a fundamental subordination of North Africa to Europe. I will now explore these competing paradoxical positions in relation to the specific legal issues in the case.

## 5. The Legal Issues: Internationalism and Sovereignty, Subordination and Independence, Territory and Blood

There were three main legal issues in this case: the status of sovereignty in the French protectorates (and hence the identity of the government that could impose nationality), the continuing validity of the Capitulation treaties to which the North Africans were bound (and hence the international violability of the status of British nationals); and the *jus soli / jus sanguinis* conundrum (the ultimate substance of the case). One might think that specific positions on each of these issues belonged together: advocacy of the sovereignty of Tunisia could be viewed as entailing the continuing validity of Tunisia's treaties, as well as the ability of Tunisia to impose its nationality by *jus soli*. Conversely, advocacy of French sovereignty could be associated with the obsolescence of the Capitulation treaties (by *rebus sic stantibus*), as well as the ability of France alone to impose its nationality by *jus soli*. Neither string of positions, however, could satisfy either side. The British wished to uphold North African sovereignty, but not to the extent that this could have granted the North Africans power to override the *jus sanguinis* nationality of Europeans. The French sought to uphold an expansive position for France in North Africa, but not to the extent that it would have had to grant French citizenship to all North Africans.

### 5.1. The French paradox

The French argued for the validity of both the French and North African decrees and for their common inscrutability to international law. This argument seemed to pose a logical problem for a view of sovereignty as indivisible – as intrinsically limited to one-sovereign-per-territory – and for a view of inter-sovereign relations as the international *par excellence*. France argued that it had full authority to represent Tunisia and Morocco internationally and that its actions in these territories were "domestic" as far as third parties were concerned. At the same time, however, France claimed that the North African states were truly sovereign and that their decrees were also fully valid.

The French resolved the seeming contradictoriness of this position with their claim that France and its sovereign protégés formed one unit as a result of their exclusive intimacy. To view Franco-Tunisian relations as international, to allow League scrutiny of their joint exercise of power, would be to establish the League illegitimately as a "super-State, in calling upon it to intervene in the most intimate part of legislation [...]".[19] In support of this view, the French quoted Westlake (at the price, to be sure, of trading the sensual French idiom for the abstract English): protector and protégé "constitut[e] a single system [...]not subject to the interference of any third state."[20]

Nonetheless, this intimacy was created through a momentary exercise of North African consent. Thus, the general sovereignty of the Bey "revived in its plenitude before it was distributed between Protector and Protégé." In relation to nationality, "if France has jurisdiction over foreigners, it is in virtue of the unilateral decision of the Bey [...]. [B]etween the creation of French justice and the renunciation of foreign powers of their consular jurisdiction, *in the interval*, a decisive act took place, an act of the territorial sovereign".[21] The intimacy of Franco-Tunisian relations, an intimacy giving France supreme power to wholly reform Tunisian society, was sustained by a fleeting, yet crucial, act of Tunisian consent, an act occurring in an "interval." This interval of consent was so fleeting that it easily became merely virtual. Thus, the agreement of the Bey to most French decisions hardly required explicit consent; under conditions of the "daily intimacy" of Franco-Tunisian relations, "tacit agreements"[22] tended to prevail.

This general portrayal of legal process in the protectorates allowed the French to formulate their "re-transfer" theory[23] of the relationship between the French and North African nationality decrees – a theory described by one contemporary French commentator as "ingenious and elegant".[24] The French argued that their protégés, the Bey and the Sultan, could validly impose their nationality on all those born in their territory as a sovereign exercise of *jus soli*, and that the French decrees were based on a delegation, a "re-transfer", by the Bey and Sul-

19. French Mémoire, Advisory Opinion No. 4 (Additional Volume), 1923 PCIJ (Ser. C) No. 2 [hereinafter French Mémoire], at 23: "[...] un sur-Etat en l'appelant à excercer dans la partie la plus intime de la législation une ingérence [...]. "
20. French Oral Argument, at 153.
21. French Oral Argument, at 134 (emphasis added): "Si donc la France, en Tunisie, juge les étrangers, c'est en vertu de la décision unilatérale du Bey [...] [E]ntre la création de la justice française et la renonciation des Puissances étrangères à leur juridiction consulaire, il y a eu, dans l'intervalle, un acte décisif de la souveraineté territoriale [...]."
22. French Oral Argument, at 149.
23. *E.g.*, French Contre-Mémoire, at 250-251.
24. R. Redslob, *Le Litige franco-brittanique*, 2 Revue de droit international et de sciences diplomatiques 5, at 12 (1924). The French also argued that the French decree, standing alone, would be sufficient to bestow French nationality on Europeans in North Africa. However, since that argument contained auxiliary assumptions similar to those in the 're-transfer' theory, and since it is not quite so 'ingenious and elegant' as 're-transfer', I focus on the latter.

tan of their *jus soli* power to France. Thus, the Maltese first became "virtual"[25] Tunisian citizens under the Tunisian decree and then instantly became French under the French decree. The French decree operated in "a subsidiary manner [*à un titre subsidiaire*], complementary of another reform, which in this case is the principal reform, that is to say, the reform of Tunisian law."[26] The French decree served as a "legislation of succor" ["*législation de secours*"][27] for the Maltese – who would otherwise lose "a Christian status, a status of Western civilization, a status corresponding to their moral and social condition" and be subject to what "to our European eyes" is "an inferior status, that is to say, the status of subjects of the Bey of Tunis".[28] This entire dynamic system was within the sphere of Franco-Tunisian intimacy, not subject to international scrutiny.

The French justification of their intimacy with their protégés was based on their internationalist conception of their role as Protecting Power. The French often claimed that their goal in Tunisia and Morocco was to establish a true independence; reform of the North African nationality laws was crucial to fulfilling this goal. The French declared that nationality law reform would bring about "the firming up of the concept of nationality, the basis and substance of the State's independence"[29] – giving the sovereign protégé "a sound constitution [...]of the people of his kingdom".[30] The French assistance in "firming up" the sovereign protégé, assistance only an intimate could provide, thus extended beyond the improvement of his conceptuality to the constitution of his very body – because "for a State, to declare who is a national is to determine its very substance".[31]

In the case of Tunisia, nationality law reform would accomplish this solidification of sovereignty on two fronts – vis-à-vis Islam and vis-à-vis Europe. First, by creating the basis for a sovereign Tunisian state, France was doing away with Tunisia's subordination to Muslim cosmopolitanism. According to France, Islamic law did not know the concept of a "continuous nationality". Each Muslim owed allegiance to the Muslim prince in whose territory he or she happened to reside. Each change of residence brought about a change in allegiance. By contrast, French reform of the nationality laws, begun in 1914, created a continuous Tunisian nationality. Tunisians living in other Muslim countries could now retain their Tunisian nationality – and, therefore, benefit from *French* diplomatic

25. Winkler, *supra* note 6, at 201.
26. French Oral Argument, at 124: "[...] à un titre subsidiaire, complémentaire d'une autre réforme qui est ici la réforme principale, la réforme de la loi tunisienne."
27. French Oral Argument, at 126.
28. French Oral Argument, at 123: "[...] un statut chrétien, un statut occidental, un statut conforme a leur état moral [...] un statut inférieur, le statut des sujets du Bey."
29. French Mémoire, at 4: "l'affermissement du concept de la nationalité, base et substance de l'indépendance de l'Etat."
30. French Oral Argument, at 148: "la bonne constitution [...] du peuple de son royaume".
31. French Mémoire, at 20: "Dire qui naît national, c'est de la part de l'Etat, déterminer sa propre substance."

protection. Thus, "for the first time in its encounter with Islam", French diplomatic protection after the 1914 reform did "not fear to assert itself, which g[ave] to the independence of Tunisia, under the French protectorate, its full value in relation to the Ottoman Empire."[32] In short, French protection of Tunisia, and, in particular, French diplomatic protection for Tunisians abroad, made Tunisian independence real.

Secondly, the French protectorate in Tunisia rendered obsolete the prevailing Capitulatory privileges for resident Europeans, thus recovering for Tunisia its sovereignty vis-à-vis Europe. The Capitulatory privileges for Europeans were "maintained by restricting territorial sovereignty, where there is a population which is still indisciplined, an authority which is still backward, a government which is a fanatical government".[33] But now that France had set up French courts for all Europeans, "how can [a foreigner] claim in an oriental country into which a Western civilization is penetrating any other sort of treatment than that which is normally his in every Western country?"[34] Thus,

> thanks to [the French] protectorate, [the Bey of Tunis] is free; free in his regained sovereignty, if not against [the French], at all events as against foreign Powers; for in all reason there is no longer any practical necessity for maintaining the regime of the Capitulations from the moment that a new order of things is instituted by the French protectorate.[35]

This is the core of the French paradox: the claim that *Tunisia had recovered its freedom through its subordination to France*. In fact, vis-à-vis the Islamic world, Tunisia had done more than merely "recover" its sovereignty – it had acquired it for the first time. To be sure, it had recovered this sovereignty by leaving behind its Islamic past, establishing a state freed from all "*contingences religieuses*".[36]

France's argument depended on an expansive interpretation of its duties as Protecting Power. The power to reform the protégé's nationality laws was nowhere mentioned in the protectorate treaties. Rather, the French based this authority on the powers that inhered in a Protecting Power by virtue of its "civi-

32. French Mémoire, at 5: "[...] face à l'Islam, ne craint pas, pour la première fois, de s'affirmer, ce qui donne a l'indépendance de la Tunisie, au regard de l'Empire ottoman, sous le protectorat français, toute sa valeur."
33. French Oral Argument, at 127: "[...] une restriction de la souveraineté territoriale [...] lorsqu'on se trouve en présence d'une population qui est encore indisciplinée, d'une autorité qui est encore attardée, d'un gouvernement qui est un gouvernement fanatique."
34. French Oral Argument, at 128: "Comment peut-il [un étranger] réclamer, dans le pays d'Orient où l'Occident pénètre, un autre traitement que celui qui, normalement, est le sien dans tout pays d'Occident?"
35. French Oral Argument, at 126-127: "Grâce à notre protectorate, il est libre, libre dans sa souveraineté retrouvée, sinon vis-à-vis de nous, du moins au regard des Puissances étrangères, car, en raison, il n'y a plus de nécéssité pratique de maintenir le régime des Capitulations dès l'instant qu'il y a sur le territoire de la Régence un ordre de choses nouveau, institué par la protection française."
36. French Mémoire, at 3.

lizing mission"[37] – of being "called upon by the treaties" of protectorate to guide the protégés "in the paths of civilization and progress", by helping them to "establish, on the foundation of territory, the firm basis of a homogeneous, coherent population [...] a nationality which would evolve in the broader framework of Western conceptions [...]".[38]

This broad role for their general conception of East-West relations allowed the French to argue that the Capitulations were rendered obsolete in principle through the westernization entailed in the establishment of French courts for Europeans – beyond any positive acts of renunciation by other states.[39] In fact, the French claimed that the very origin of the special status of Europeans in non-European states mainly lay not in treaties of Capitulation, but rather, in customary principles. These principles reflected the need of Christian states to protect their nationals in "countries which were not as morally advanced as they."[40] The establishment of a European protectorate abolished this need. A protectorate, therefore, was "inconsistent with Capitulations". Other states had either to refuse to recognize the protectorate or to accept its "necessary consequences"[41] – including the abolition of privileges for their nationals. The French maintained that the British had recognized these consequences, when, by the 1897 Anglo-French Convention, it had agreed to "abstain from claiming for its consuls, its subjects, and its establishments in the Regency of Tunis other rights and privileges than those secured for it in France".

We find the core of the French paradox – the emancipation of North Africa through its subordination – operating just as fully when we turn to the substance of the reform, the replacement of the *jus sanguinis* British nationality of the Maltese with French nationality through the complex "re-transfer" of *jus soli* power. Again, one might have expected the French to support the *jus soli* principle to uphold the territorial sovereign's power to determine nationality and the British to defend *jus sanguinis* to maintain British citizenship even for long-time residents in Tunisia. Indeed, the French denounced the *jus sanguinis* principle, "which has its origin in pride of caste and is a profound source of xenophobia, which fans the flames of blood quarrels by perpetuating racial distinctions."[42] This association of *jus sanguinis* literally with blood, with the irrationality of or-

37. French Oral Argument, at 58.
38. French Mémoire, at 3: "[...] prendre, sur l'assiette du territoire, la base ferme d'une population homogène, cohérénte [...] d'une nationalité qui évoluerait [...] dans le cadre élargi des conceptions occidentales [...]."
39. To be sure, the French conceded that a positive act of renunciation might be needed from the other states – but their position of principle meant that acts which might possibly be construed as a renunciation should be viewed as such.
40. French Oral Argument, at 221: "qui n'avaient pas leur avancement moral".
41. French Oral Argument, at 226.
42. French Oral Argument, at 69: "Issu de l'orgueil de caste, source profonde des xenophobies, le jus sanguinis en perpetuant les distinctions de races, attise les querelles de sang."

ganic community, cast *jus soli* as the rational alternative, a secular citizenship beyond racial and religious difference.

Yet, as we have seen, the French criticized the traditional Islamic conception of nationality for what they claimed was its rule that any change of residence brought about a change of allegiance. One could call this doctrine of ephemeral allegiance the French attributed to Islam an extreme form of territoriality, a super-*jus soli*. The "continuous nationality" which the French sought to institute for their protégés, by contrast, one that could survive a change of residence, moved away from strict territoriality. (The relationship of such a reform to *jus sanguinis* depended on the *degree* of such a nationality's "continuity" – i.e., whether it would be transmissible to the next generation.) Thus, in relation to its interpretation of Islamic law, France insisted on the dignity of personal continuity beyond the contingency of territorial residence; in relation to other Europeans, it insisted on the primacy of territory over the atavism of blood.

Read as a whole, however, the point of the French argument was not to favor either principle, but rather, to reject a formalistic attachment to either. Instead, they argued that a choice between the two approaches depended on the policy goals of the state. France described the pragmatic reasons for a variety of naturalization policies. A densely populated state might wish to reserve the privileges of citizenship to those of its majority race; another state, declining in population but with an excellent "*douceur de vie*", might also wish to control the admission of foreigners; finally, a state with a small population but a large territory might wish to encourage immigration, on condition that the immigrants assimilate with their new nation. The latter state, by incorporating these newcomers, would draw from immigration "its strength and its vital fluid *[sa force et sa sève]*".[43]

It was this pragmatic approach to nationality policy that enabled the French to say of the two approaches: "*Jus sanguinis* or *jus soli*, the two principles between which the law oscillates, are thus, for each State, essential rules".[44] The hallmark of modernity was not the adoption of the one or the other, but the state's ability to see them both as potential instruments of policy. In an intriguing twist, the policy rationality of this approach was directed by a vitalistic conception of the state, its need for "*la sève*" – pragmatism in the service of an organicist myth.

In the case of the North African protectorates, sound policy required *jus soli*, due to the particularities of the colonial situation. Tunisia and Morocco were "countries which have not yet attained a full measure of civilization, and which are at times disturbed or likely to be disturbed by movements directed against

43. French Mémoire, at 21.
44. *Id.*: "Jus sanguinis ou jus soli, les deux principes entre lesquels oscille le droit, sont ainsi, pour chaque Etat, des règles essentielles."

foreigners".[45] In such a place, *jus soli* was a "matter of international necessity". *Jus sanguinis* did more than

> fan the flames of blood quarrels by perpetuating racial distinctions. On these are grafted religious distinctions, which combine with them to strengthen xenophobic hostility. In this way, difficulties arise in a country where Western civilization stands face to face with Oriental civilization, and it is the duty of the Protecting State to prevent them by striking at their source, that is to say, by developing the equalizing [*égalitaire*] and leveling principle of soil, as opposed to the arrogant and overbearing [*querelleur*] principle of blood.[46]

The "oscillation" between two principles equally "essential" was thus decisively stabilized by the exigencies of the colonial situation. The policymaker had to deploy the legal doctrine most capable of preventing the fragmentation of the population along racial and religious lines. In the face of these exigencies, one of the two "essential" principles came to appear as clearly "*égalitaire*" and the other as "*querelleur*".

The colonial stabilization of policy oscillation was directed at enabling the French to reach their two goals in relation to the population of North Africa: 1) equality among Europeans; 2) difference between the Europeans and the North Africans. Equality among Europeans: "the principle of an equal distribution of duties among families living similar lives on the same territory from generation to generation". Difference between Europeans and North Africans: "the principle of difference of status in accordance with social conditions".[47] This configuration of the relation between the European and North African *residents* was the converse of the configuration that we discerned in the French portrayal of the relationship between the pertinent *sovereigns*: in the case of the sovereigns, the French wished to preserve *difference* among European sovereigns and *intimacy* between the North Africans and the French, the exclusive embodiment of Europe.

This stabilization of modern legal flexibility through colonial exigency enables us to reach a full comprehension of the French approach. The French stressed the crucial importance of naturalization policy: it was not merely "con-

45. French Oral Argument, at 69: "des pays qui ne sont pas encore pleinement entrés dans la voie de la civilisation, qui sont, à de certains moments, ou travaillés ou susceptibles d'etre travaillés par des mouvements dirigés contre les étrangers."

46. French Oral Argument, at 69: "perpetu[e] les distinctions de races, attise les querelles de sang. Sur lui viennent se greffer des distinctions de religion, qui, s'unissant à lui, renforcent l'hostilite xenophobe. Ainsi se créent, dans un pays ou la civilisation de l'Occident s'affronte avec celle de l'Orient, des troubles et des conflits que le devoir de l'Etat protecteur est d'atteindre à la source en développant le principe égalitaire et niveleur du sol, a côté du principe orgueilleux et querelleur du sang."

47. French Oral Argument, at 148: "le principe de l'égalité des charges, entre familles vivant la même vie, sur le même sol, de génération en génération [...] le principe de la distinction des statuts, suivant l'état social."

stitutional" but "constitutive".[48] For a state to abdicate control over its naturalization policy would be "to compromise its strength and weaken its life".[49] It is precisely this vital essence, "*la sève*" of a nation, that the French sought to "penetrate" with Western influence. This penetration of North Africa by Europe constituted the "intimacy" of Franco-Tunisian relations. In the intimacy of the tutelage relationship, a country that began with "fanatic" ideas, such as the extreme territoriality imputed to Islam, could be guided toward legal modernity, with its flexible oscillation between instrumental policy options. Nevertheless, the exigencies of the colonial situation stabilized this oscillation: the French intimate knew the needs of his North African pupil – specifically, his organic need for the inorganic rationality of *jus soli*. Thus, modernization had to be undertaken with a firm hand: during tutelage, the protégé must precisely not exercise the policy freedom taught by its tutors. Though a protectorate regime is "naturally unstable,"[50] though in a protectorate "all combinations" of the respective rights of Protector and Protégé were possible, one element could not change: the international representation of the Protégé by the Protector.[51] This one invariant element guaranteed the power of France to protect North Africa by exercising firm control over the influx of those not part of the "intimacy", above all, non-French Europeans.

### 5.2. The British paradox

The British paradox grew out of their desire to invalidate both the French and the North African decrees – thus seemingly denying the existence of any supreme sovereignty in the protectorates. The British needed to preserve enough sovereignty in the Bey and the Sultan to exclude the possibility of a French right to impose nationality on the basis of *jus soli*. Yet, they also sought to limit the North African sovereigns at least to the extent of excluding their *jus soli* power over Europeans. The British resolved this paradox with a foregrounding of particularized consent by the North Africans to a variety of relationships with European states. At the same time, the British, too, relied strongly on a general conception of East-West relations, with consequences both for the interrelationship of Western powers and for their relations with Eastern sovereigns.

The British goals in reconciling the images of a generalized confrontation between East and West with that between particular Eastern and Western states were quite different than those of the French. Above all, they rejected the French claim of an exclusive intimacy with their protégés. Rejecting this privileged

48. French Mémoire, at 21.
49. *Id.*: "compromettre sa force, affaiblir sa vie."
50. French Oral Argument, at 151.
51. *Id.*, at 153.

place of France in North Africa, the British sought to secure their stature as an independent global empire, rather than as part of a European generality:

> What [...] could be of greater importance or more serious for a nation with a great Moslem Empire, than that it should be said that she was either unable or unwilling to defend her subjects, and that a claim to British nationality in a Moslem protectorate caused those invoking such nationality to be subject to indignity [...]?[52]

The British stabilization of the paradox in their position was thus directed at a different set of colonial anxieties than that of the French – not the fragmentation of the population of a specific colony, but the inter-colonial fragmentation of the British image in their far-flung possessions.

The British stressed the unbroken continuity of the sovereignty of Morocco and Tunisia. They refused to acknowledge that the establishment of the protectorates had any "necessary consequences" beyond the letter of the protectorate treaties. Rather, the British advanced sovereignty-based arguments to urge that the terms of all the relevant documents, the Anglo-French as well as the Protectorate treaties, be interpreted strictly. Thus, France had only such rights in North Africa as were specifically enumerated in the treaties:

> The position of France in the two countries is that of Protecting Power and not territorial sovereign, the rights and duties flowing from that position being defined in the relevant treaties between the Protecting and Protected States.[53]

With this emphasis on the letter of the treaty texts, the British refused all notions of an exclusive Franco-North African intimacy. On the contrary, the protectorates were divided up among a variety of legal regimes. They were "penetrated" by several distinct European powers, rather than by a generalized West.

Nevertheless, the British combined this portrayal of the plurality of Western influences in Tunisia and Morocco with a distinctive deployment of the generalized relationship of East to West – juxtaposing their emphasis on the specificity of particular agreements about a particular territory to an assertion that these agreements must be interpreted in light of global imperial concerns and that the territory must be viewed as an instance of a whole category of similar territories:

> The imposition by France of its nationality upon the persons affected in Tunis and Morocco raises the question of the rights of a Protecting Power in virtue of its protectorate over a Mahommedan State within the territory of which another European Power enjoys extraterritorial rights over its subjects.[54]

52. British Oral Argument, at 194.
53. British Counter-Case, at 463.
54. British Case, at 63.

The North African sovereigns thus became merely particular instances of "Mahommedan States" in relation to which an imperial power like Britain must be allowed to safeguard its position. This general East-West dimension did not entail an expansive role for the Protecting Power, as the French would have it, but rather, the protégés' continuing availability for a variety of consensual, if subordinating, relationships.

In fact, rather than an exclusive Franco-Tunisian intimacy, the generalized subordination of East to West entailed a set of expansive obligations for France towards *other European sovereigns*. For example, the British acknowledged that they had agreed to give up the exercise of Capitulatory rights in Tunisia in the 1897 Convention. In line with their narrow interpretation of consent to restrictions on sovereign rights, however, the British stressed the strict meaning of the odd language of this provision (to "abstain from claiming"). They argued that this formulation meant that Britain had not renounced its "rights and privileges", but rather, had delegated the exercise of those privileges to France. For Britain,

> France is the trustee of those rights and cannot either by the purported exercise of sovereign power in the Protectorates or by agreement with the local sovereign, infringe or override those rights, including the right to British nationality, without the consent of Great Britain.[55]

A French withdrawal from North Africa would not be a "premature withdrawal" from a Franco-Tunisian intimacy, but rather, a disruption of an Anglo-French trust: the role of the fiduciary (France) on behalf of the beneficiary (Britain) would end and the latter's right to protect its own interests would "revive".[56] The British conception of the relationship of the Western powers *inter se* in their confrontation with the East thus crucially supplemented their consent-based arguments.

Similarly, the British argument for the continuing validity of Capitulatory privileges for British nationals also ultimately depended on a general conception of East-West relations. To be sure, their argument for the continued existence of Capitulatory privileges, and hence for the invalidity of the North African decrees (and of the "re-transfer" theory), foregrounded the language of the relevant treaties. Yet, they supplemented this focus with a general conception of the position of Europeans in non-Christian lands, based on customary norms which extended beyond any treaty:

> [E]ven apart from the existence of capitulatory rights, it is contrary to long and unbroken international usage for a Mussulman State to impose its nationality upon the subjects of a European power.[57]

55. British Counter-Case, at 463.
56. British Oral Argument, at 39.
57. British Counter-Case, at 460.

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This "international usage" enshrined "the *inherent relationship* of Mussulman states to Christian Powers and the immiscibility, according to Mussulman law, of Christian populations with a Mussulman nation".[58] They accompanied this "Mussulman law" justification of "immiscibility" with a reference to a famous Napoleonic War-era British case, *The Indian Chief*[59] — a telling reference in 1923.

*The Indian Chief* had long furnished a key, if controversial, historical reference in the common law world on the status of Europeans living in quasi-colonial enclaves.[60] The case involved the legal status of a "Mr. Millar" who lived in Calcutta. Calcutta was under nominal Indian sovereignty, but was effectively controlled by the British East India Company. Mr. Millar claimed to be an American and thus to be exempt from the British law prohibiting trade between "British subjects and the enemy." Lord Stowell's opinion held that Mr. Millar was to be treated as British for purposes of this law.

The British introduced *The Indian Chief* into the *Nationality Decrees Case* to attack the legitimacy of the North African decrees and thus defeat the French "re-transfer" theory. In the *Indian Chief*, Lord Stowell had articulated the immiscibility theory as follows:

> In the western parts of the world alien merchants mix in the society of the natives, access and intermixtures are permitted, and they become incorporated to almost the full extent; but in the East, from the oldest times, an immiscible character has been kept up. Foreigners are not admitted into the general body and mass of the society of the nation; they continue strangers and sojourners as all their fathers were. [...]It is a rule of the law of nations [...][61]

The British cited the immiscibility principle as a customary law limitation on the power of the Tunisian and Moroccan sovereigns to decide the nationality of British nationals, at least in the absence of an explicit British concession to them. They thereby sought to buttress their restrictive interpretation of the British agreement to "abstain" from the exercise of Capitulatory rights in the 1897 Anglo-French Convention. Above all, this general "rule of the law of nations" reinforced their consent-based argument that the 1897 Anglo-French Convention could not be interpreted as having any consequences for Anglo-Tunisian relations, but must be restricted to Britain's relation to France.

Still, while *The Indian Chief* supported the British attack on the Tunisian decrees, it seemed to support the French decrees. If Mr. Millar had to be considered English, not American, then, by the same logic, the Maltese in Tunisia should be considered French. The French, in fact, gleefully seized on this

58. British Oral Argument, at 41 (emphasis added).
59. 3 C. Rob. 12; 165 Eng. Rep. 367 (Adm. 1801).
60. *See generally*, D. Bederman, *Extra-Territorial Domicile and the Constitution*, 28 Va. J. Int'l L. 451 (1988). *Cf. Mather v. Cunningham*, 105 Me. 326 (1909) (rejecting the *Indian Chief*'s holding).
61. 3 C. Rob. 29; 165 Eng. Rep. 374.

point.[62] They argued that *The Indian Chief* meant that the nationality of all Europeans in a colonial or quasi-colonial enclave is that of the European state exercising actual control over the territory – regardless of whether the indigenous state maintains formal sovereignty. Or, in the words of Lord Stowell:

> [T]aking it that such a paramount sovereignty, on the part of the Mogul princes, really and solidly exists, and that Great Britain cannot be deemed to possess a sovereign right there; still it is to be remembered, that wherever even a mere factory[63] is founded in the eastern parts of the world, European persons trading under the shelter and protections of those establishments, are conceived to take their national character from that association under which they live and take on their commerce.[64]

Indeed, *The Indian Chief* seemed to support both sides of the bifurcated French position on nationality – Tunisian nationality for the Tunisians, French for the Europeans. As Lord Stowell stated:

> It is nothing to say that some particular parts of our civil code are not applicable to the religious or civil habits of the Mahomedan or Hindoo natives [...]. I say this is no exception; for with respect to internal regulations there is amongst ourselves a particular sect, the Jews, that in matters of legitimacy, and on other important subjects, are governed by their own particular regulations.[65]

To be sure, it completely contradicted the "re-transfer" theory of how this bifurcation was to be preserved – the immiscibility theory seemed to negate the notion that the Europeans could have been subject to the imposition of North African nationality, even for a virtual "interval."

The British failure to notice *The Indian Chief*'s apparent support for the subsumption of all Europeans under the nationality of the dominant European power seems puzzling. One must understand their use of this precedent in light of the vigorousness of their denial of a privileged French status in the protectorates that would transcend the letter of the protectorate treaties. From the British perspective, the British community in Tunisia, no less than the French, was one equal European community among others. It had to be viewed as one of those "factor[ies] [...]founded in the eastern parts of the world" and the Anglo-Maltese as "European persons trading under the shelter and protections of those establishments" who should be "conceived to take their national character from that association under which they live and take on their commerce." If the French sovereign had some set of consensual agreements subordinating the Tunisian sovereign, so had the British. From this perspective, *The Indian Chief*'s bifurcation served the British paradox perfectly – the local sovereign retained sover-

62. French Oral Argument, at 142-145.
63. In the archaic sense of "an establishment for factors and merchants carrying on business in a foreign country". Random House Dictionary of the English Language 510 (1969).
64. *Indian Chief*, 3 C. Rob. 28-29; 165 Eng. Rep. 373-374.
65. *Indian Chief*, 3 C. Rob. 29; 165 Eng. Rep. 374-375.

eignty and yet the various sorts of Europeans would still take on their national identity from their respective communities, their "associations".[66]

With this pluralized vision of the European position in Tunisia and Morocco, we reach the full statement of the British view of the legal status of Tunisia and Morocco. The British, who were arguing for international competence, paradoxically foregrounded a pro-sovereignty framework within which to understand the case. Yet, due to their background conception of East-West relations, they were able to arrive at a vision of a legally pluralized North African territory, governed by a variety of regimes of subordination – all freely consented to by the local sovereigns. Disputes concerning the relative spheres of competence of these overlapping internationalizations of North Africa eminently transcended the sphere of domestic jurisdiction.

## 6. '*DÉDOUBLEMENTS*': INTERNATIONALISM ACTIVE AND PASSIVE, TERRITORIALITY LITERAL AND FIGURATIVE

I turn to the parties' rival visions of the distribution of legal authority – between international judicial and political bodies and between international institutions and the dominant states – and their correlation with different ways for making dependent territories available for the deployment of power. The parties' allocations of international authority were no less paradoxical than their other arguments. The French called for restricting the sphere of international competence precisely by judicial activism, an activism which would sanction nearly unlimited power for Protecting States. The British sought to expand international competence precisely by urging a relatively passive role for the Court, a role which would nonetheless circumscribe the power of Protecting States. This analysis will complete my argument that the choices the parties offered to the Court were not between "more or less" international law, "more or less" entanglement of humanitarianism with power, "more or less" contextualism or formalism. Rather, the Court faced competing visions of the *distribution* of international legal authority and their implication in rival bids for the organization of international power. This conclusion will necessitate a reconsideration of the place of the Court's decision in legal history, which I take up in the paper's final section.

As we have seen, the French argued *both* that the dispute should be viewed as "domestic" under Article 15(8) *and* that the Court should lay down "a complete code" under international law for the governance of protectorates. The French vision was one in which the international legal community provided an overarching framework within which powerful states assumed the role of legal,

66. Indeed, this interpretation would conform to the transformation in general British views on "extra-territorial domicile" in the early twentieth century. *See* Bederman, *supra* note 55.

political, and cultural modernization. For the French, this structure applied just as much to protectorates as to Mandates. The French position led to the paradoxical vision of a Court restricting international competence through the broad-ranging activism involved in the formulation of a "complete code" – and of dominant states exercising unreviewable power by virtue of the internationalist mission laid out in this broad legal charter.

By contrast, the British vision was one of clear legal demarcations of sovereign power in the light of cultural difference – pre-existing demarcations which the Court need only recognize and apply. The Court did not need to formulate its own "complete code of rules". Rather, the territories of Tunisia and Morocco were already governed by a variety of international legal regimes, codified in the various treaties with the Bey and the Sultan, as well as in customary law principles. For the British, the fact that the underlying issues were always already internationalized meant that the Court could play a relatively passive role: that of the implementation of existing rules, rather than the articulation of an overarching conception. The British vision of a pluralized North Africa was quite different than the exclusive tutelage granted to Mandatory Powers. The British paradox ended in a vision of the Court enlarging the sphere of international competence precisely by passively deferring to pre-existing legal relationships – and of the dominant states exercising privileges specified by treaty, albeit treaties whose codification of deeply unequal relationships should both be interpreted in light of imperial "usage" and survive in perpetuity.

This dispute between the parties about the distribution of international authority correlates with their differences about the legal status of dependent territory. As we have seen, both the British and French argued that North African territory was simultaneously autonomous and internationalized. Yet, their dispute about the meaning of this equivocal status entailed very different processes for making the territory legally available for the deployment of international power.

In making their argument for *jus soli*, the French stressed the territorial unity that it provided. Yet, this unity was paradoxically *doubled* due to the bifurcation of North African "soil" – its simultaneous subjection to French and North African sovereignty. The French rejected a premodern, literal notion of "soil", a notion they deemed appropriate to the feudal era. In accordance with their "re-transfer" theory, they argued for a flexible, modernized understanding of "soil" – one which understood that territory is "neither an object, nor a substance, but a framework [*ni un objet, ni une substance, mais un cadre*]".[67] Accordingly, it was not birth within literal French territory that was the basis for *jus soli*, but rather, birth within "the sphere of French domination [*l'étendue de la domination française*]", which, at least for Europeans, included the French protectorates. Their

67. French Oral Argument, at 106.

figurative notion of territory allowed the French to offer this striking formulation of the legal status of the land mass of Tunisia and Morocco:

> It may be said that the same geographical area, without losing its physical form, can become, from the legal standpoint, either the territory of the protected State or the territory of the protecting State.[68]

This "*dédoublement*"[69] of North African territory complemented the bifurcation the French were urging in relation to persons in the nationality decrees – Tunisian nationality for non-Europeans, French nationality for Europeans. It meant that North African territory was made available for the deployment of internationally authorized French power, while simultaneously retaining its subjection to the local sovereigns. The former notion enabled the territory to be represented on the international stage – the irreducible essence of the French view of "protection"; the latter preserved the particularity of the territory and provided the justification for its subordination.

The British position was the converse of the French. The British stressed the plurality of legal regimes in the territory of North Africa. Yet, in denying the French ability to exercise *jus soli* power in North Africa, the British argued for a literal interpretation of the "soil" of *jus soli* – restricting extraterritoriality in the name of a pluralized internationalization. Where the French *both* emphasized the national unity that *jus soli* provided *and* figuratively split the territory of North Africa between two sovereigns, the British *both* emphasized the pluralization of North Africa among various legal regimes *and* insisted on the uniqueness and indivisibility of the "soil" of *jus soli*. The British rejected the "fictitious prolongation of a state's territory beyond the limits of its actual territory".[70] Instead, they preserved the literal unity of the North African locale in order the more thoroughly to fragment it – rendering North Africa available for the deployment of a variety of internationally authorized regimes.

The French and British thus arrived at two visions of international legal authority correlative to their rival strategies for the deployment of power in North Africa. These two visions had procedural and institutional dimensions – concerning the distribution of legal authority – as well as substantive dimensions – the opposition between an overarching international code and pluralized internationalization. The activist judicial vision of the French called both for a restricted role for the Council and an intimacy posture for states who administered a legally bifurcated territory; the passive judicial vision of the British called both

68. French Oral Argument, at 98 : "C'est plus ou moins le même espace qui, géographiquement, sans perdre sa figure physique, devient au point de vue juridique, ou bien un territoire de l'Etat protégé ou bien un territoire de l'Etat protecteur."
69. Winkler, *supra* note 6, at 65, quotes de Lapradelle in the passage I have just cited as having referred to a "déboublement du territoire en deux". Winkler cites the speech from the *Revue de droit international privé* (1922-1923). This phrase is absent from the court's transcript of de Lapradelle's speech.
70. British Oral Argument, at 201.

for an expanded role for the Council and a pluralized, consensual dependency. Both visions thus concerned the manner in which dependent territory appeared on the international stage – its particularity mediated by a "*tuteur*" or its unity disciplined through a variety of "immiscible" superiors. In the circumstances of the organization of power in the 1920s, both parties constructed the procedural and substantive dimensions of international law in relation to distinctive *colonial* visions. Yet, this approach to understanding the differences between alternative visions of international law in relation to dependency should be adapted, *mutatis mutandis*, to today's conceptualizers of international authority over administered territories, "failed states", "economies in need of adjustment", and other regions under close scrutiny – and the distribution of that authority among the variety of international political, judicial, and financial institutions, as well as dominant states.

## 7. AFTERMATH: THE COURT IN HISTORY

> Ainsi, tant par l'armée que par le juge, l'Etat protecteur prend sur le territoire de l'Etat protégé le pouvoir décisif [...]
>
> Thus, as much by the army as by the judge, the protecting State obtains supreme power in the territory of the protected State [...]
>
> *Alfred de Lapradelle,*
> *French Oral Argument*[71]

The Court famously rejected France's Article 15(8) objection to international competence – on the basis that each of the issues under dispute involved matters of treaty interpretation. In view of the foregoing analysis of the two positions presented to the Court, we can now reconsider the place of this decision in international legal history. As I stated initially, the two positions offered to the Court were hardly what one would have expected from the reception of the decision by subsequent commentators. Indeed, an analysis of the parties' arguments has seemed almost to reverse our understanding of the Court's decision. In adopting the British position on the jurisdictional question, the Court seems to have rejected the French plea for an extremely broad internationalist statement, a "complete code" for Great Power behavior. In declaring that the scope of domestic jurisdiction depended on the "development of international relations", the Court referred to "obligations [...]undertaken towards other States" – a statement wholly in line with a positivist view of sovereign obligations based on explicit consent. Rather than, in the words of Ammoun, transforming international law in accordance with "growing internationalization", the Court seems simply to

71. French Oral Argument, at 100.

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have restated that most banal of traditional axioms – *pacta sunt servanda*. Rather than making a "seminal" contribution to human rights law, in the words of Schwebel, the Court appears to have rejected an opportunity to formulate a "complete code".

Nevertheless, I suggest two hypotheses about how an evaluation of the parties' positions can shed light on why a judge such as Ammoun would embrace the decision as part of the progressive development of international law. The first hypothesis concerns the desire of someone like Ammoun to construct a history of twentieth century international law that would allow him to affirm its general direction, while condemning its past misdeeds – crucial for someone who was an international judge, and thus thoroughly a part of institutionalized international law, yet who took the oppositional stance of a polemical advocate for the Third World. The characterization of the decision as part of an incipient interwar departure from the thorough complicity of international law with colonialism in the nineteenth century[72] would allow Ammoun to place himself in a tradition whose beginnings extend at least as far back as his own court's predecessor.

This hypothesis would focus on the kind of "code" that the French had in mind and that the Court rejected (at least in the jurisdictional phase). The French asked the Court to lay down a framework within which "civilizing missions" of colonial, Protecting Powers could conduct their activities freed from the interference of the political organs of the League. Specifically, using the language of their intimacy posture, the French invited the Court to declare that recognition of a protectorate "virtually" entailed recognition of "all measures uniting in a fruitful unity [*réalisant dans une féconde unité*] a community of legislation between the Protector and Protégé, and the progressive assimilation of the customs and laws of the Protégé to those of the Protector".[73]

In refusing this invitation, under this first Ammounian hypothesis, the Court would have actually been expressing a reluctance to lend its full imprimatur to colonialism. It would have been rejecting the French view that the treaties of protectorate necessarily incorporated by reference a whole philosophy of colonialism, with its entire political, economic, and cultural apparatus. It would have been rejecting the French invitation to enshrine a colonial code in international jurisprudence. The Court's casting of the dispute as a quarrel about treaty interpretation, and hence within the competence of the Council, allowed it to stay clear of further miring international law in colonial ideology. This hypothesis has a strong appeal – if one wants to look for signs of the beginning of an evo-

72. *See generally*, A. Anghie, *Finding The Peripheries: Sovereignty And Colonialism In Nineteenth-Century International Law*, 40 Harv. Int'l L.J. 1 (1999).

73. Final Conclusions of the French Government, at 242: "toutes les mesures réalisant dans une féconde unité la communauté de législation entre les deux pays protecteur et protégé, et l'assimilation progressive du protégé aux moeurs et aux lois du protecteur."

lutionary progress away from colonialism in the jurisprudence of the first permanent international court.

Appealing as it is, this hypothesis seems to depend on inaccurate and anachronistic premises. First, the Court did not necessarily reject the substance of the French interpretation of the treaties. Rather, it rejected the notion that the French interpretation was so obvious as a matter of law that the Council was barred from considering the British interpretation. For example, the Court explicitly discussed the French "re-transfer" theory of an agreement between Protector and Protégé to divide sovereign powers between themselves. The Court declared that it "will be necessary to have recourse to international law to decide the value of an agreement of this kind."[74] The French would not really have disagreed with that narrow formulation. Indeed, the French urged the Court to lay down a set of overarching *international legal principles* – albeit principles that would clearly establish that Protector-Protégé relations fell under "domestic jurisdiction" in the very special sense for which the French were arguing. In its decision, therefore, the Court was not necessarily rejecting the substance of the French position, but rather, the distribution of procedural and institutional mechanisms for considering it.

Moreover, as we have seen, the alternative vision offered by the British was just as colonial in its assumptions as the French; it was just *differently colonial*. The British sought to restrict the protectorate treaties to their letter, *in order to* expand the treaties of Capitulation in line with their spirit. They sought to restrict the exercise of *jus soli* power, *in order to* expand the operation of *jus sanguinis*. They sought to minimize France's privileged position in North Africa, *in order to* preserve the position of other European states. Thus, under the (speculative) assumption that the Court's acceptance of the British jurisdictional position implied sympathy for the substantive British position, we would find the Court expressing support for the subjection of North African territory to subordinating relationships with a variety of European powers. International jurisdiction based on the preservation of the kind of unequal treaties at stake in the *Nationality Decrees Case*, as the British urged, was hardly better from an anti-colonial standpoint than an arrogation by the Court of the power to lay down a "complete code" of the colonial mission, as the French urged. Nor is it clear whether a human rights perspective would necessarily lead one to prefer the kind of overarching judicially formulated code sought by the French or the specific, treaty-based supervision sought by the British.

I turn then to a second hypothesis for an Ammounian affirmation of the decision. This second hypothesis both attributes to a judge like Ammoun a more minimalist view of the decision's benevolence and sees his praise for the decision as more of a deliberate strategic move. For this second hypothesis, Ammoun's praise for the decision would not involve attributing to the Court any de-

74. PCIJ decision, at 28.

sire to avoid complicity with colonialism. Rather, it would merely be tacitly expressing relief that the Court did not, *in fact*, formulate a general colonial code.

Judge Ammoun would presumably have preferred that the Court *accept* the French invitation to lay down a "complete code" – *if* the content of that code had been to invalidate colonies, protectorates, and Capitulations on the basis of fundamental human rights to equality and freedom from alien domination. There were certainly articulate expressions of principled anti-colonialism in the 1920s, both in Europe and in the colonized world. But not on the Court. And, in retrospect, since it was implausible that the 1923 Court would have taken such a bold action, a minimalist involvement with colonialism was preferable.

In fact, there is reason to think that Ammoun's affirmation of the decision was part of his shifting, *strategic deployment* of international legal history, a strategy in which he might praise an aspect of legal history in one context and denounce it in another. For example, in line with his affirmation of the *Nationality Decrees Case* as foreshadowing Third World-inspired changes in international law, Judge Ammoun was willing to declare in the 1971 *Namibia (South West Africa) Case* that the "institution of tutelage [here referring to the Mandate system], succeeding colonialization and preceding and preparing the way for sovereign independence, has its place in [the] upward march [of mankind]."[75] To be sure, this kind of affirmation seems to conform to my first hypothesis. It seems to assert that 20th century international law embarked, immediately after World War I, on a gradual process of emergence from colonial complicity. The harbingers of this process would be such judicial decisions as the *Nationality Decrees Case* and such institutions as the Mandate system. Ammoun seems to be asserting that the historical sequence "colony-tutelage-independence" is part of a story of a seamlessly and progressively evolving international law.

Yet, Ammoun himself vehemently rejected this smooth progress narrative the year before his *Namibia* opinion. In his *Barcelona Traction* opinion, the very opinion in which praised the *Nationality Decrees Case*, Ammoun declared that mandates and trusteeships "disguis[ed], by means of a verbal fiction, a colonialist practice and doctrine, the unlawfulness of which has been stigmatized at the United Nations".[76] Ammoun seems to have been either deeply ambivalent about the tutelage era or deliberately strategic in his various references to it.

Indeed, the relationship between the tutelage regimes and independence was equivocal from a variety of perspectives. One site for an examination of this uncertainty may be found in the seemingly inconsistent French statements in the *Nationality Decrees Case* about the ultimate purpose of tutelage. One such statement is found in the passage I quoted at the head of this paper:

75. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, 1971 ICJ Rep. 73 (Separate Opinion Ammoun).
76. *See* Barcelona Traction Case, *supra* note 5, at 309 (Separate Opinion Ammoun).

> [A protectorate] remains, in certain respects at least, outside, in the margin [*au dehors, en marge*]; so that a final exertion, a final act remains to be performed; in order that this territory which remains by a legal nicety [*une subtilité juridique*] nominally separated from the national territory may be finally united to it. [77]

In this passage, it would seem that the French envisioned the evolutionary destination of the protectorates to be annexation by the Protecting State. Only the "*subtilité juridique*" of the protectorate regime kept the protégé "*au dehors, en marge*". The French text did not explain in relation to what the protégé remained "outside" – perhaps, one may initially assume from the conclusion of the passage, outside the full sovereign embrace of the protector.

In another passage, which I have also had occasion to cite in this paper, the French seemed to announce that their goal for North Africa was independence, as long as that independence proceeded along certain lines:

> Called upon by the treaties [of protectorate] into Tunisia and Morocco to guide them in the paths of civilization and progress, France has taken from this mission a duty to help them to establish, on the foundation of territory, the firm basis of a homogeneous, coherent population, attached by a direct tie to the Prince, be he Bey or Sultan, by awakening in these States who were completely penetrated by the principles of a theocratic civilization, the free, independent, stronger, and more durable idea of nationality which would evolve in the broader framework of Western conceptions, freed from all religious contingencies."[78]

Absorption by France or westernizing independence: the French were willing to suggest both alternatives in their description of the goals of their protectorate – without even noticing the tension between them.

Here we should look again at the phrase "*au dehors, en marge*", the situation in which the protectorate regime left the protégé "*par une subtilité juridique*". Perhaps we should read the "margin" in which the protégé resided as the margin of international law and of an international community dominated by Europe. The protectorate regime brought non-Europe into the system, while simultaneously leaving it "*au dehors*." And "*en marge*" was indeed a good description for one who was both inside and outside. What could have brought the protégé truly inside, out of the "margin" of the international legal text and into its main body?

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77. Speech by M. A. de Lapradelle, *supra* note 2, at 96: "[Un protectorat] reste encore à quelques égards tout au moins, au dehors, en marge, de façon qu'il y ait un dernier effort, un dernier acte à accomplir pour que ce territoire, qui reste nominalement, par une subtilité juridique, séparé du territoire national, s'y touve enfin réuni."

78. French Mémoire, at 3: "Appelée par les traités [de protectorat, dans la Tunisie et dans le Maroc] à les guider l'une et l'autre dans les voies de la civilisation et du progrès, la France tenait de cette mission le devoir de les aider à prendre, sur l'assiette du territoire, la base ferme d'une population homogène, cohérénte, attachée au Prince, Bey ou Sultan, par un lien direct, en éveillant dans ces Etats, tout pénétrés des principes d'une civilisation théocratique, l'idée, indépendante, libre, plus durable et plus forte, d'une nationalité qui, dégagée de toutes contingences religieuses, évoluerait [...] dans le cadre élargi des conceptions occidentales."

Westernization – and from this point of view, subsumption under French sovereignty or the achievement of western-style statehood were equally satisfactory. And it is this ambivalent meaning of independence – both a break with "tutelage" and its potential continuation – with which such post-colonial writers as Judge Ammoun wrestled: both "inside" and "outside" the system, writing in its margin, producing their contradictory statements about international law, condemning its indelible crimes one year, celebrating its smooth evolution the next.

And it is in such colonial and post-colonial 'margins' that the famous dicta of the *Nationality Decrees Case* must be read.

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