


ORIGINAL ARTICLE

INTERNATIONAL LEGAL THEORY: SYMPOSIUM ON GLOBAL SOUTH  
PERSPECTIVES ON METHODOLOGY AND CRITIQUE IN INTERNATIONAL LAW

# The two faces of Franco-Sudanian Treaties: The peripheral practice of ratification as evidence of transregional international law in the nineteenth century

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## Abstract

Legal scholars continue to revisit historical treaties between Western and non-Western nations to challenge long-standing accounts of non-Western peoples' engagement with international law. Following this trend, new scholarship has stressed African agency in Euro-African treaty-making. However, legal scholars have generally overlooked African perspectives, pointing to a lack of sources. Focusing on nineteenth-century treaty-making between France and the polities of the Western Sudan in West Africa, this article excavates African perspectives through a novel reading of Euro-African treaties in an African context. This reading analyses treaties within the Western Sudan's broader diplomatic corpus in both French and Arabic. By focusing on markers of translation, transcription, and negotiation left on different copies of treaties, this method brings to light arguments and practices that have been obscured in published European-language versions. Reading Franco-Sudanian treaties in a Sudanian context reveals that different norms governed the ratification of treaties in the Western Sudan and Europe. Treaties that scholars have long considered unratified were in fact ratified according to Western Sudanian norms, which designated the governor of French Senegal rather than the French president as the official competent to ratify treaties for France. However, when French officials sought to use treaties to claim sovereign rights in West Africa against Great Britain, they pressed the president to ratify them again. Presidential ratification thus served to transpose Franco-Sudanian treaties from an African to a Western normative order. Uncovering the African origins of Euro-African treaties thus reveals their differential operation across autonomous inter-polity orders.

**Keywords:** history of international law; peripheral practice; ratification; treaties; West Africa

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\*I am deeply grateful to the many friends, colleagues, and mentors who contributed to this article. I am especially thankful to Judge Abdulqawi Ahmed Yusuf and Mamadou Hébié who helped me develop my ideas over a series of conversations. I benefited from workshopping a much earlier version of this article at the Asser Institute Workshop on Method, Methodology and Critique in International Law. I thank the organizers, Dimitri Van Den Meerse and Geoff Gordon, for encouraging me to pursue this project and submit it for publication. Tom Westland, Roy Bar Sadeh, Rabiat Akande, Jealool Amari, Rhiannon Stephens, Conor Wilkinson, and the anonymous reviewers provided insightful comments that significantly improved the article. My thanks also go to the diligent editors at LJIL who worked on this article.

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## 1. Introduction

The imperial turn in the history of international law since the 2000s has brought renewed attention to the nineteenth century as a formative period in the development of the contemporary international legal order. Early works focused on the intellectual history of an exclusive circle of jurists specialized in international law.<sup>1</sup> However, more recent scholarship has exposed a gap between the doctrines presented in the writings of eminent jurists and the ‘peripheral practice’ of international law on the ground.<sup>2</sup> Here, practice is used in contrast to authoritative, abstract statements of law by central state authorities or eminent jurists. It is described as peripheral because it often took place in extra-European settings and far from the congresses and other summits that have long been recognized as shaping international law. Peripheral practice thus includes legal acts, interpretations, arguments, and decisions, particularly by mid- and low-level officials.<sup>3</sup>

Among the richest sources for studies on the peripheral practice of international law are treaties between Western and non-Western polities. The pioneering work of Charles Henry Alexandrowicz on the topic in the 1960s and 1970s cast the nineteenth century as a transitional period when the basis of legal relations between Western and non-Western nations shifted from equality to hierarchy. Published as it was in the era of decolonization, Alexandrowicz’s work offered a historical precedent for efforts to establish a post-colonial international order based on principles of equality and reciprocity.<sup>4</sup> In recent years, as international lawyers once again reckon with the legacy of imperialism in their discipline, scholars have revisited historical treaties between Western and non-Western nations. Through close studies of these treaties, as well as the correspondence surrounding their conclusion and enforcement, scholars have challenged doctrinal accounts of non-Western peoples and their place in Western international law in the nineteenth and early twentieth centuries. Within this scholarship, treaties between European and African polities have garnered particular attention. Their sheer number and their role in shaping the present-day borders of African states explain the sustained interest in Euro-African treaties.<sup>5</sup>

Through their research, scholars such as Isabelle Surun, Mamadou Hébié, and Inge Van Hulle have convincingly refuted many common generalizations about Euro-African treaties in older scholarship. Notably, they have shown that European officials generally recognized treaties with Africans as valid legal instruments and that the transfer of territorial sovereignty was far from the

<sup>1</sup>See, e.g., A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2005); M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (2002). While early works focused almost exclusively on European jurists, later works applied a similar approach to internationalists outside Europe. See, e.g., A. Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (2015); A. Yusuf, *Pan-Africanism and International Law* (2014).

<sup>2</sup>See, e.g., L. Benton and L. Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800–1850* (2016) as well as the various articles in the 2018 Leiden Journal of International Law symposium on ‘Imperial Locations’, 31 LJIL 469.

<sup>3</sup>For debate on the benefits and shortcomings of an approach that focuses on peripheral practice see A. Fitzmaurice, ‘Context in the History of International Law’, (2018) 20 *Journal of the History of International Law* 5; L. Benton, ‘Beyond Anachronism: Histories of International Law and Global Legal Politics’, (2019) 21 *Journal of the History of International Law* 7. See also M. Hébié, ‘The Role of the Agreements Concluded with Local Political Entities in the Course of French Colonial Expansion in West Africa’, (2015) 85 *British Year Book of International Law* 21, at 24–6; I. Van Hulle, *Britain and International Law in West Africa: The Practice of Empire* (2020), at 19–22; I. Surun, ‘Une souveraineté à l’encre sympathique? Souveraineté autochtone et appropriations territoriales dans les traités franco-africains au XIXe siècle’, (2014) 69 *Annales: Histoire, Sciences sociales* 313, at 313–17.

<sup>4</sup>C. H. Alexandrowicz, *The European-African Confrontation: A Study in Treaty Making* (1973); C. H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries)* (1967). See also S. Touval, ‘Treaties, Borders, and the Partition of Africa’, (1966) 7 *Journal of African History* 279 (reflecting on the role of treaties on postcolonial borders in Africa).

<sup>5</sup>See, e.g., M. Hébié, *Souveraineté territoriale par traité: Une étude des accords entre puissances coloniales et entités politiques locales* (2015), at 10; see Surun, *supra* note 3, at 317–18 and note 7. See also M. van der Linden, *The Acquisition of Africa (1870–1914): The Nature of International Law* (2017); Touval, *ibid.*

sole purpose of these treaties.<sup>6</sup> These scholars have also highlighted African agency in Euro-African treaty-making while acknowledging Europeans' pervasive recourse to force and coercion.<sup>7</sup> In light of their findings, the notion that African leaders who signed treaties with European powers were usually ignorant of their contents, passively accepted European conditions, or willingly signed away their people's rights for trifles, is no longer tenable.<sup>8</sup> Cases of ignorance, fraud, deception, and corruption did occur in the nineteenth century. However, these circumstances must be proven with respect to particular treaties rather than presumed.<sup>9</sup>

Despite stressing African agency, these scholars have primarily analysed treaties as instruments of Western international law or of the developing imperial legal practice of European powers. Ironically, their work thus results in depicting Africans as having consented to their integration on unequal terms into a Western-dominated international normative order. Aware of this shortcoming, Surun, Hébié, and Van Hulle all point to the difficulty of recovering African perspectives due to a dearth of sources.<sup>10</sup> Hébié notably affirms that '[a]s far as West African political entities are concerned, their reports and other internal documents regarding their agreements with colonial powers are difficult, if not impossible, to find a century after the facts'.<sup>11</sup>

In this article, I take up the challenge of recovering African perspectives by proposing a new method of reading Euro-African treaties in African contexts. I use this method to study ratification in treaties between France and polities in the Western Sudan. This region of West Africa forms a belt that extends from the Atlantic coasts of modern-day Mauritania, Senegal, Gambia and Guinea-Conakry to the middle course of the Niger River in modern-day Mali. It is delimited to the north by the Sahara Desert and to the south by West Africa's tropical forests. Ultimately, I highlight the contrasting insights generated by analysing Franco-Sudanese treaties as instruments of distinct inter-polity normative orders, one in the Western Sudan and the other in Europe.

Scholars of Euro-African treaties have long noted inconsistencies in European approaches to ratification. European authorities sometimes ratified treaties years, even decades, after they were signed. They also occasionally treated unratified treaties as binding and in force. Scholars have generally explained away these inconsistencies as strategic choices or the results of administrative blunders.<sup>12</sup> I offer a different answer based on re-reading the documentary record on nineteenth-century treaty-making in the Western Sudan across regional contexts. According to the norms prevailing in Europe at the time, the French head of state generally needed to ratify a treaty before it could become legally binding for France. However, the authorities of French Senegal and

<sup>6</sup>See, e.g., Van Hulle, *supra* note 3, at 9, 45 (describing various purposes of treaties including the prohibition of the slave trade, the regulation of trade and the delimitation of jurisdiction); see Hébié, *supra* note 3, at 49–50, 55–6 (noting the relative rarity of treaties transferring territorial sovereignty); Surun, *supra* note 3, at 317–29 (distinguishing treaties for the purchase of land as private property and treaties of protection from treaties for the cession of territorial sovereignty); S. Belmessous, 'What is a Colonial Treaty? Questioning the Visible and the Invisible in European and Non-European Legal Negotiations', (2022) 10 *Comparative Legal History* 137 (arguing that the terms 'colonial treaties' or 'unequal treaties' unduly 'homogenises and simplifies the history of treaty relations between European and non-European polities').

<sup>7</sup>See, e.g., Van Hulle, *ibid.*, at 165–205; see Hébié, *ibid.*, at 72, 79–80. Interestingly, while Van Hulle stresses Great Britain's use of force to compel Africans to accept treaties and argues that British territorial expansion in West Africa occurred primarily through treaties, Hébié contends that French territorial expansion relied primarily on armed conquest because of Africans' reluctance to cede territorial sovereignty.

<sup>8</sup>See, e.g., Van Hulle, *ibid.*, at 16, 23, 83–4, 87–92; Hébié, *ibid.*, at 28, 56–9; Surun, *supra* note 3, at 317–18, 335–44.

<sup>9</sup>See, e.g., Hébié, *ibid.*, at 27–33; see Surun, *ibid.*, at 336–44 (both arguing that African leaders were generally capable of understanding the content and legal effects of treaties). On cases of forgery, deception, and misunderstandings see, e.g., Van Hulle, *ibid.*, at 55, 89–90; P. Marty, *Études sur l'Islam et les tribus maures: Les Brakna* (1921), 360; M. Diouf, *Le Kajoor Au XIXe Siècle: Pouvoir Ceddo et Conquête Coloniale* (1990), 205–7, 212–13.

<sup>10</sup>See Van Hulle, *ibid.*, at 23 ('While the Western sources on which this book is based have been thoroughly contextualized, they still reflect a predominantly British perspective.'). Surun, *supra* note 3, at 315–16 (proposing reading the archival record both 'against' and 'along the grain'). See also note 11 and accompanying text, *infra*.

<sup>11</sup>See Hébié, *supra* note 3, at 37.

<sup>12</sup>See notes 38–39 and accompanying text, *infra*.

Western Sudanian powers required ratification by the governor of Senegal rather than the French head of state to recognize a treaty as binding. As a result, at least through the 1880s, French authorities followed distinct ratification practices, depending on whether they sought to claim rights under Franco-Sudanian treaties against a Western Sudanian or a European power. It is in this bifurcated approach to ratification that the two faces of Franco-Sudanian treaties – one Western Sudanian and the other European – emerge. Ultimately, bifurcation reflects the transposition of Franco-Sudanian treaties across autonomous inter-polity normative orders in the Western Sudan and Europe.

The article proceeds in four sections. In Section 2, I outline the methodological approach undergirding my rereading of Franco-Sudanian treaties. In Section 3, I introduce the geographic and political context in which Franco-Sudanian treaties were concluded. In Section 4, I present my main argument: that, in the nineteenth century, different rules governed the ratification of treaties in European and Western Sudanian international relations and French officials adapted their treaty-making practices to satisfy the rules of both regional orders. I conclude with thoughts on the applicability of this method more broadly to historical treaties between Western and non-Western nations.

## 2. Imperial treaties, peripheral practice, and contextual readings

Recent scholarship on Euro-African treaties has demonstrated the relevance of peripheral practice across methods of legal-historical inquiry, spanning both ‘external’ and ‘internal’ approaches. Inge Van Hulle, for example, situates her work within the tradition of ‘external’ approaches, which study law within its social context and its time, taking into account political, economic, and cultural factors. She aims to analyse law as a discourse, highlighting its structures, limitations, and internal contradictions.<sup>13</sup> From this perspective, the challenge of applying legal rules among peoples with vastly different cultures and political traditions reveals contradictions and constraints that were easily overlooked from European salons. Isabelle Surun also stresses the ‘chaotic character’ of imperial legal discourse. However, she pushes further by drawing on the political, economic, and cultural context of Euro-African interactions to trace the evolving meaning of juridical concepts found in treaties.<sup>14</sup> Rather than highlighting the external factors that shape the law’s evolution, Mamadou Hébié adopts an internal point of view and describes his analysis as ‘positivist’. This approach focuses on applying basic rules of the legal order regarding sources of law and legal authority to identify the prevailing norms. Hébié identifies sovereign consent as the basis for binding international rules. As he astutely observes, an ‘internal’ approach based on consent as a source of law entails considering both the European and African understandings of treaties, and the practice of international law in imperial settings provides an authoritative source to do so.<sup>15</sup> Despite their distinct methodological approaches, these scholars thus agree that constituting a proper juridical and historical understanding of Euro-African treaty-making requires ascertaining the perspectives of African treaty parties.<sup>16</sup>

Yet, Van Hulle, Surun, and Hébié all struggle to engage seriously with African understandings of treaty terms. They rely predominantly on Western juridical concepts and norms to interpret the legal consequences of treaties. In contrast, they use African perspectives, usually drawn from historical scholarship, primarily to provide general background.<sup>17</sup> They then employ this background to show whether African parties were generally capable of understanding and consenting to treaty

<sup>13</sup>See Van Hulle, *supra* note 3, at 25.

<sup>14</sup>See Surun, *supra* note 3, at 316–17.

<sup>15</sup>See Hébié, *supra* note 5, at 4–9; Hébié, *supra* note 3, at 24–6.

<sup>16</sup>See Hébié, *supra* note 3, at 24–6; Van Hulle, *supra* note 3, at 23; Surun, *supra* note 3, at 313–16. See also Van der Linden, *supra* note 5, at 25–6, 74–5.

<sup>17</sup>See, e.g., Van der Linden, *supra* note 5, at 44–5, 65, 86–7 (drawing general conclusions about African conceptions of land tenure, sovereignty, and international agreements).

terms.<sup>18</sup> Thus, these scholars turn to African perspectives to answer *whether* African parties consented. However, they mainly use Western understandings to determine *what* African parties consented to. This approach largely presumes as settled the meaning and legal consequences of treaties. It implies that terms in Euro-African treaties can be interpreted according to their generally accepted meaning in Europe at the time. This often-unstated presumption impedes a particularized inquiry into what an African party consented to and foresaw with respect to a specific treaty.

To overcome this obstacle, I adopt a method for reading treaties that is contextual, intertextual, and translingual. For a contextual reading, I interpret treaties through the social, historical, and cultural background that informed their conclusion. I draw not only on the extensive historical literature on Euro-African colonial encounters as previous authors have done, but also on more recent scholarship in African history and Islamic studies. This recent scholarship uses varied sources from West Africa, including oral histories and written sources in Arabic and other regional languages. In doing so, it brings to light the political and diplomatic traditions of the Western Sudan and their roots in both regional and Islamic thought and practices.

Following Isabelle Surun, I also analyse treaties intertextually. I draw context directly from treaties themselves, reading them alongside other Franco-Sudanian treaties. I also read treaties as embedded within a record of correspondence, draft treaties and other legal instruments that elucidate how terms and concepts are used between treaty parties.

I further extend this generative approach by adopting a translingual perspective.<sup>19</sup> I not only compare the French and Arabic texts of treaties and diplomatic correspondence, I also scrutinize markers of translation and transcription from the other languages of the region.<sup>20</sup> Rather than approaching different copies of treaties as interchangeable vessels carrying identical content, I take them as differentiated records of the ‘social life’ of treaties, records bearing the marks of a diplomatic agreement’s evolution and transmission between textual and oral forms and across languages. Acts of translation and transcription were often obscured by writers, copyists, and publishers, but they were also sometimes memorialized purposefully to evince the authenticity of a document and its contents. As such, this reading method strives to attend to the processes of negotiation, translation, and transcription. I contend that attention to these processes is essential to reading Euro-African treaties in context.

A second challenge faced by scholars of Euro-African treaties reflects a broader methodological problem in studies of peripheral practice. Research into peripheral practice inevitably unearths contradictions in the practice of international actors or between practice and doctrine. Scholars have often presumed that the contradictions between the understanding and practice of international law within Europe and in imperial settings result from ignorance, pragmatic adaptation, and other extra-legal factors.<sup>21</sup> I propose another view: that these contradictions reflect

<sup>18</sup>See, e.g., Hébié, *supra* note 3, at 32–3 (drawing on the historical literature to argue that West African polities recognized the principle of ‘*pacta sunt servanda*’ and were therefore capable of consenting to treaties with France); see Van Hulle, *supra* note 3, at 27–72 (discussing how African norms regarding the regulation of trade, territorial sovereignty and military protection, *inter alia*, established an initial basis for voluntary diplomatic exchanges with Great Britain but sometimes caused misunderstandings). Isabelle Surun has arguably been most successful in drawing out African perspectives by focusing on patterns and concepts across Franco-African treaties. She thus argues that certain African authorities developed a conception of territorial sovereignty analogous to the European ‘Westphalian’ model. Yet she too ultimately uses this insight to stress the capacity of African parties to understand and accept treaties with France, without exploring how African perspectives may support alternative understandings of legal concepts and practices. See Surun, *supra* note 3, at 317, 335–48.

<sup>19</sup>I borrow the concept of a translingual perspective from Lydia H. Liu. See L. H. Liu, *Translingual Practice: Literature, National Culture, and Translated Modernity—China 1900–1937* (1995), at 25–7.

<sup>20</sup>On the importance of translation to the spread of Western international law in the nineteenth century see, generally, L. H. Liu (ed.), *Tokens of Exchange: The Problem of Translation in Global Circulations* (1999); E. Fiochi Malaspina and N. Keller-Kemmerer, ‘International Law and Translation in the 19<sup>th</sup> Century’, (2014) 22 *Rechtsgeschichte – Legal History* 214.

<sup>21</sup>See, e.g., Hébié, *supra* note 3, at 76 (discussing French violations of a purported rule invalidating treaties with dependent political entities); see Van Hulle, *supra* note 3, at 54–5 (attributing British enforcement of unratified treaties to strategic concerns); Surun, *supra* note 3, at 328–9 (qualifying Alexandrowicz’s claim that the inconsistent and incorrect use of legal terms in Euro-African treaties was due to the ignorance of European negotiators by stressing the need to adapt to local conditions).



the distinct rules governing international affairs in autonomous normative orders. In short, contradiction is not a defect, it is a design feature.

I use the phrase autonomous normative orders to describe communities of international actors engaged in a dense cluster of interaction amongst themselves – interactions that give rise to a geographically bounded set of common practices and norms.<sup>22</sup> To be autonomous, these communities of interaction need not be isolated from each other. On the contrary, each community is often tied to others through commercial, religious, migratory, and other links. However, a community of interaction enjoys relative autonomy in that links to other communities are generally weaker than links among community members. Moreover, community members do not necessarily apply the full set of community norms to their interactions with outsiders. The most elaborate inter-polity normative orders feature a set of professionals, such as diplomatic agents and advisors, who are trained in the community's diplomatic practices and norms and apply these practices and norms in relations among member polities. It is in this sense that I argue that distinct inter-polity normative orders existed in Europe and the Western Sudan.

Ultimately, my conclusions do not rest on newly discovered archival material. Instead, I draw on readily available primary sources published in print or online. The insights I present flow, in part, from introducing to legal scholarship on the 'peripheral practice' of international law sources from West Africa's rich Arabic-language documentary record. While previously cited in historical scholarship, these sources have been largely overlooked by legal scholars. Just as importantly, these insights also result from a different reading of familiar sources, one that seeks to understand Euro-African treaties in both European and African contexts.

Indeed, we should interpret Euro-African treaties not merely as products of imperial legal imaginations but also as instruments of African diplomacy. This is not to say that Africans faced no material and structural constraints in defending their interests and autonomy against Western imperial forces. Interpreting Euro-African treaties in their African context shows instead where exactly those constraints lay. Constraints that have long been imputed to treaties themselves result in fact from an external cause: the removal of treaties from their original interpretive context and their subjection to a distinct and increasingly hegemonic mode of interpretation that rendered African legal arguments inaudible.

### 3. The political geography of the Western Sudan in the nineteenth century

For most of the nineteenth century, the French administration in Senegal was largely confined to two islands on the Atlantic coast. These were Saint-Louis, the colonial capital located at the mouth of the Senegal River, and Gorée, an island facing the Cape Verde Peninsula, the westernmost point of the African mainland where the city of Dakar now stands. From their enclaves, colonial authorities established relations with neighbouring polities belonging to two main cultural groups. Regions north of the Senegal River were controlled primarily by polities dominated by southern Saharan peoples who spoke an Arabic dialect known as Hassaniyya (see, e.g., Trarza and Brakna in Figure 1). These peoples were commonly referred to as 'Moors' in Western languages but they called themselves 'bayḍān' or 'whites' (hereinafter Baydan). Meanwhile, south of the river lay Wolof-dominated polities that had once been united within an empire (see, e.g., Kajoor and Walo in Figure 1). Upriver, on the southern bank of the middle Senegal, lay a region known as Futa Toro whose primary inhabitants, the Futanke,<sup>23</sup> spoke the Pulaar language and belonged to the broader Fulani<sup>24</sup> cultural group.<sup>25</sup>

<sup>22</sup>I draw this sociological understanding of normative inter-polity order from scholarship in socio-legal theory and international relations. See, e.g., H. Bull, *The Anarchical Society: A Study of Order in World Politics* (1977), at 10; R. M. Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (1977), at 48–58.

<sup>23</sup>This group was commonly referred to by the exonym Toucouleur in French correspondence.

<sup>24</sup>Also known as Fulbe. Commonly referred to in French by the exonym Peul.

<sup>25</sup>See, generally, Y. Person, 'States and Peoples of Senegambia and Upper Guinea', in J. F. A. Ajayi and Unesco (eds.), *Africa in the Nineteenth Century until the 1880s* (1995), 636.

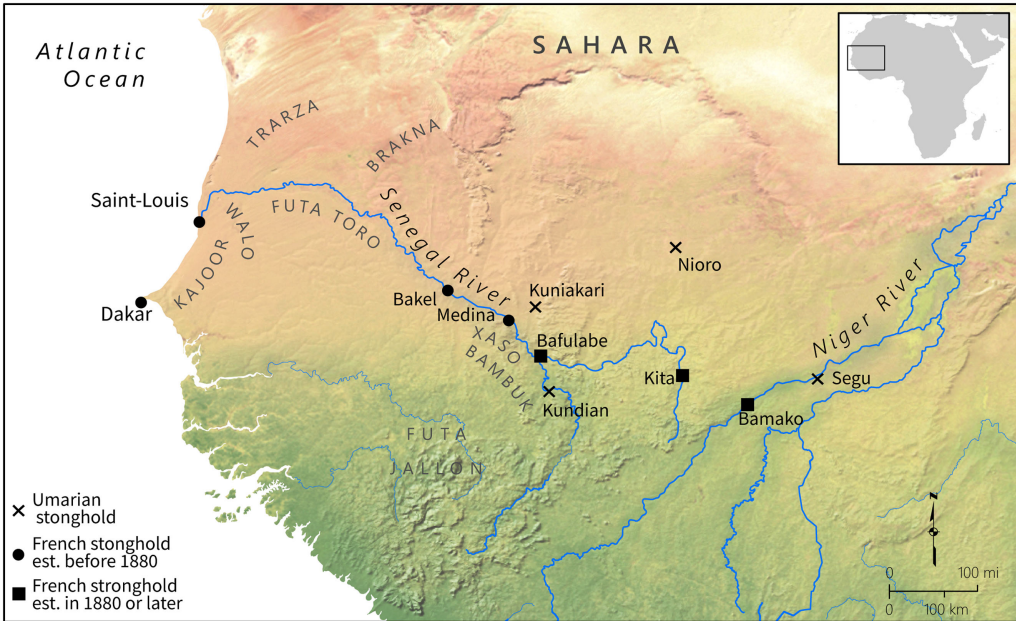


Figure 1. Map of the Western Sudan c. 1889<sup>26</sup>

Over time, the Senegalese administration expanded its military presence to the upper Senegal River, in what is today far Western Mali. This region, populated primarily by Mande-speaking peoples, was organized into groups of culturally integrated autonomous city-states that had once formed united polities (see, e.g., Xaso and Bambuk in Figure 1). From the 1850s to the 1880s, the upper Senegal region was a meeting point between the zones of influence of French Senegal and its greatest regional rival, the Umarian Empire based in Segu (Ségou), on the middle Niger. From Segu, Umarian authorities came to administer a vast but often fragmented territory from the upper Senegal to the middle Niger. The empire's population was diverse, including Baydan, Fulani, and various Mande-speaking groups. The Umarian Empire was established in the wake of a revolutionary religious movement led by the Futanke religious scholar Umar Saidu Tall (in Arabic, *Shaykh* al-Ḥajj 'Umar bin Sa'īd al-Futi).<sup>27</sup> His was one of numerous Islamic reformist movements headed by Fulani intellectuals that led to the establishment of Islamic theocracies across the Central and Western Sudan, from Lake Chad to the Senegal River valley.<sup>28</sup>

As this short sketch shows, Franco-Sudanian treaties were concluded among a culturally and politically diverse group of polities spanning a vast region. Despite this diversity, the Western Sudan was historically a region of dense interaction forged through centuries of commercial, social, and cultural exchange. Indeed, for periods between 1200 and 1600 of the Christian Era the region had been united under common rule within sprawling empires spanning from the Atlantic

<sup>26</sup>This map is based on an 1889 French map of the region. See 'Carte du Soudan occidental', Schomburg Center for Research in Black Culture, Jean Blackwell Hutson Research and Reference Division, The New York Public Library, available at [digitalcollections.nypl.org/items/510d47dc-838d-a3d9-e040-e00a18064a99](https://digitalcollections.nypl.org/items/510d47dc-838d-a3d9-e040-e00a18064a99). I thank Scott Walker of the Harvard Map Collection for helping to create this map.

<sup>27</sup>Note that 'Shaykh' and 'al-Ḥajj' are titles. The personal name is Umar ('Umar). Saidu (bin Sa'īd) is the patronymic while Tall is the family name.

<sup>28</sup>See generally, M. Ly-Tall, 'Massina and the Torodbe (Tukuloor) Empire until 1878', in Ajayi and Unesco, *supra* note 25, at 600.

coast to the middle Niger.<sup>29</sup> These historical links meant that French officials could draw on their experience in the Senegal River valley to guide their interactions with Sudanian authorities further inland. Indeed, French Senegal and Western Sudanian polities relied on a small corps of African polyglots to serve as diplomats, advisors, interpreters, translators, and scribes in their diplomatic relations. Familial, educational, and professional networks tied these diplomatic agents to each other. Moreover, they often served the leaders of multiple polities over the course of their careers.<sup>30</sup> The shared intellectual and professional background of diplomatic agents allowed them to overcome cultural and political differences within the region and ultimately contributed to the coherence and autonomy of the Western Sudanian normative order. As argued in the next section, the shared background of these African diplomatic agents in regional and Islamic diplomatic practices also shaped the patterns of Franco-Sudanian treaty-making.

#### 4. Ratification and international relations across autonomous normative orders

In early 1888, the French government accelerated preparations for what it anticipated to be consequential and intricate negotiations with Great Britain. The two rival colonial powers were expected to discuss the delimitation of their respective possessions and protectorates in West Africa. In support of its claims, the French government planned to present dozens of treaties signed by the colonial administration of French Senegal with representatives of polities throughout West Africa. However, there was a pressing problem: most of these treaties had yet to be formally ratified by the French president.<sup>31</sup> Concerned about the possible invalidity of these treaties, the French minister of foreign affairs pressed the minister of the navy and the colonies to help collect copies of all the relevant treaties and prepare for their ratification. The minister of foreign affairs stressed the urgency of the task with bureaucratic euphemism. In light of the forthcoming negotiations, he wrote, it would be ‘prudent’ to ‘regularize’ the situation by ratifying the treaties without delay.<sup>32</sup>

Officials at the ministry of the navy and the colonies were caught off guard. While the ministry had been duly notified of the conclusion of the treaties, it struggled to find copies in its archives. As a result, ministry officials had to request certified copies from the government of French Senegal.<sup>33</sup> Moreover, most of the treaties had been concluded several years earlier, and it seemed no one had thought to request their ratification until preparations began for the negotiations with Great

<sup>29</sup>See, generally, S. M. Cissoko, ‘The Songhay from the 12th to the 16th Century’, in D. T. Niane and Unesco (eds.), *Africa from the Twelfth to the Sixteenth Century* (1984), 187; D. T. Niane, ‘Mali and the Second Mandingo Expansion’, in Niane and Unesco, *ibid.*, at 117.

<sup>30</sup>Y. J. Saint-Martin, *L’empire toucouleur et la France: Un demi-siècle de relations diplomatiques (1846–1893)* (1967), at 145–6 (referring to the diplomatic agents Boubakar Saada, Ahmadou Coumba, Samba N’diaye and Tambo Bakhiri). For a general introduction to this diplomatic personnel see T. M’bayo, *Muslim Interpreters in Colonial Senegal, 1850–1920: Mediations of Knowledge and Power in the Lower and Middle Senegal River Valley* (2016); T. E. M’bayo, ‘Bou El Mogdad Seck, 1826–1880: Interpretation and Meditation of Colonialism in Senegal’, in F. J. Kolapo and K. O. Akurang-Parry (eds.), *African Agency and European Colonialism: Latitudes of Negotiation and Containment; Essays in Honor of A.S. Kanya-Forstner* (2007), 25.

<sup>31</sup>See generally ‘Communication de traités conclus avec le Sénégal et dépendances en vue d’une négociation avec la Grand-Bretagne [sic]’ in Box 40 COL 727, Ministère des Colonies, Fonds ministériels, Archives nationales d’outre-mer, Aix-en-Provence (hereinafter ANOM), available at [recherche-anom.culture.gouv.fr/ark:/61561/uq106hechfh](https://recherche-anom.culture.gouv.fr/ark:/61561/uq106hechfh).

<sup>32</sup>Letter from R. Goblet, French Minister of Foreign Affairs, to J. F. E. Krantz, French Minister of the Navy and the Colonies, 25 May 1888, at 7b, in 40 COL 727, ANOM, available at [recherche-anom.culture.gouv.fr/ark:/61561/uq106hechfh](https://recherche-anom.culture.gouv.fr/ark:/61561/uq106hechfh).

<sup>33</sup>See especially *ibid.*, at 5–6a (discussing successive requests to the ministry of the navy and the colonies for copies of treaties and agreement to request missing copies from the governor of Senegal); Annotated Copy of Letter from R. Goblet, French Minister of Foreign Affairs, to J. F. E. Krantz, French Minister of the Navy and the Colonies, 25 May 1888, in *ibid.* (indicating various treaties that officials at the ministry of the navy of the colonies were unable to find).



Britain.<sup>34</sup> Indeed, French authorities had already executed their obligations under certain treaties<sup>35</sup> and published many of them in official collections.<sup>36</sup> For his part, the minister of foreign affairs did not intend to have the president ratify *all* the treaties signed by French imperial agents in West Africa. He focused squarely on ratifying those treaties that reinforced French territorial claims against Great Britain. However important their subject matter, the treaties which tended to limit or throw doubt unto French claims were dutifully ignored.<sup>37</sup>

The attitude of French authorities presents a contradiction. On the one hand, the foreign minister treated presidential ratification as crucial; he suggested that without it, France's treaty-based territorial claims were vulnerable to a British challenge. On the other hand, colonial officials in Paris and in Senegal seemed to act as if presidential ratification was superfluous; they implemented and enforced treaties in the Western Sudan without bothering to have the president ratify them. Historians and legal scholars who have studied nineteenth-century European treaty practice in Africa have tended to attribute contradictory attitudes toward ratification to a mix of extra-legal factors: strategic prudence, deception, ignorance, and even bureaucratic incompetence. For example, historian of diplomatic relations between France and the Umurian Empire Yves Saint-Martin maintains that French and Umurian authorities enforced their unratified treaties strategically. He suggests that the two parties thus reserved the option to discard these treaties whenever they no longer served their interests.<sup>38</sup> In her study of British treaty practice in West Africa, legal historian Inge Van Hulle casts European attitudes toward ratification as resulting as much from incompetence as from self-interest. She notes that, due to administrative confusion, British officials were unable to establish a definitive list of ratified treaties for most of the nineteenth century. She further argues that African parties often treated unratified treaties as binding either because they did not fully grasp the notion of ratification or because British officials never notified their African counterparts that the British government had refused ratification.<sup>39</sup>

Analysing Franco-Sudanian treaties in regional context leads to a different conclusion: that the rules governing ratification in Franco-Sudanian relations were simply different to those prevailing in inter-European diplomacy. The long history of cultural, economic, and diplomatic exchange within the Western Sudan allowed a broadly coherent set of norms and practices to spread across the region. These norms were undoubtedly influenced by the growing French presence and diplomatic activity in the Western Sudan. In the case of Great Britain's treaty-making in coastal

<sup>34</sup>Discussions regarding the ratification of treaties in anticipation of negotiations with Great Britain began as early as 1884. See draft letters from F. Faure, French Under-Secretary of State for the Colonies, to J. Ferry, French President of the Council of Ministers and Minister of Foreign Affairs, 22 April and 31 May 1884, and reply, 25 August 1884, in 40 COL 743, ANOM, available at [recherche-anom.culture.gouv.fr/ark:/61561/uq106jgeijs](https://recherche-anom.culture.gouv.fr/ark:/61561/uq106jgeijs). Efforts to conclude treaties in anticipation of negotiations with Great Britain began even earlier in 1882–1883. See C. W. Newbury and A. S. Kanya-Forstner, 'French Policy and the Origins of the Scramble for West Africa', (1969) 10 *Journal of African History* 253.

<sup>35</sup>For example, the 1881 treaty with Bamako, listed in the foreign minister's letter among the unratified treaties, provided for the construction of a fort. The fort was completed in 1883, long before the treaty's eventual ratification in 1889. Letter from Goblet to Krantz, *supra* note 32, at 6b (listing an 1881 treaty with 'Bammako'); Ministère de la marine et des colonies (France), *Sénégal et Niger: La France dans l'Afrique occidentale, 1879-1883* (1884), at 259–60 (indicating that the fort of Bamako was completed in 1883); 1881 Treaty between G. Brière de l'Isle, Governor of Senegal, and the Chiefs of Bamako (France-Bamako), in 40 COL 612, at 3a, ANOM, available at [recherche-anom.culture.gouv.fr/ark:/61561/uq106vsvpvc](https://recherche-anom.culture.gouv.fr/ark:/61561/uq106vsvpvc) (indicating the date of ratification as 23 May 1889).

<sup>36</sup>See, e.g., Ministère de la marine et des colonies (France) (ed.), *Annales sénégalaises, de 1854 à 1885, suivies des traités passés avec les indigènes* (1885), 395–479.

<sup>37</sup>See Draft Letter from E. Barbey, French Minister of the Navy and the Colonies, to E. Flourens, French Minister of Foreign Affairs, 2 September 1887, in 40 COL 712, ANOM, available at [recherche-anom.culture.gouv.fr/ark:/61561/uq106hecheg](https://recherche-anom.culture.gouv.fr/ark:/61561/uq106hecheg); Letter from E. Flourens, French Minister of Foreign Affairs, to E. Barbey, French Minister of the Navy and the Colonies, 30 July 1887, in *ibid.*, (arguing that, although they touched on such crucial matters as international protection, trade duties, and the exploitation of natural resources, treaties with the Umurian Empire and 'Tambouora', in Bambuk, were less favourable to French claims than subsequent treaties and should not be submitted for ratification).

<sup>38</sup>See Saint-Martin, *supra* note 30, at 100–10, 131–4, 144.

<sup>39</sup>See Van Hulle, *supra* note 3, at 55, 89–90.

West Africa, for example, Inge Van Hulle argues that the British presence considerably expanded the use of written agreements in the region's international affairs.<sup>40</sup> France likely had a similar influence in the Western Sudan, though a tradition of diplomacy through Arabic-language correspondence and ritualized public deliberations known as *palavers* also prevailed.<sup>41</sup> Ultimately, diverse European, Islamic, and regional traditions all informed Sudanian approaches to ratification. France followed this regional approach in its relations with Western Sudanian powers, all the while adhering to inter-European norms of ratification in its relations with Great Britain.

In this section, I first briefly lay out a concept of ratification that allows for comparison across distinct legal and political traditions (Section 4.1). I then address respectively the rules governing the ratification of treaties within Europe (Section 4.2) and the Western Sudan (Section 4.3) as well as diverging French practice in the two regions.

#### 4.1 The concept of international ratification

Ratification in this article refers to the act, after a treaty's initial signature, by which a treaty party confirms that it consents to be bound by the terms of the treaty. I adopt a functional approach to ratification to allow comparison across different cultural and normative contexts. I treat ratification not as a substantive concept with a precise definition but as a legal argument or device that triggers certain rights.<sup>42</sup> The ratifying act can take different forms. Its core effect, though, is to provide conclusive evidence of a party's consent to treaty terms and thereby create legal obligations and rights for that party. From this perspective, a treaty's ratification enables treaty parties to enforce the treaty and the various rights that arise thereunder. This article is thus concerned with the rules determining the enforceability of treaties on the international plane.

This approach distinguishes between the norms operating on the domestic and international levels. A polity's internal constitutional order may prescribe certain procedures for the acceptance of a treaty. For example, some polities may require a representative body such as parliament to approve a treaty before the head of the polity declares its ratification. However, the act that renders a treaty binding upon a signatory under international law need not incorporate a polity's domestic ratification process. Conceived exclusively, ratification could correspond to the act by which a designated authority notifies other treaty parties of the polity's consent to be bound by the terms of the treaty. This act of notification would trigger the international responsibility of the polity even if the ratifying authority failed to follow the procedures prescribed by the polity's domestic law. Understood inclusively, however, ratification could incorporate the requirements of domestic law. This could be the case if only duly authorized notifications rendered a treaty binding upon the signatory polity. Still, domestic prescriptions do not *necessarily* determine the international rules in relations between polities. The rules determining the enforceability of treaties within an international order are thus ultimately autonomous from – though not necessarily unrelated to – the constitutional order of its individual members.

Whether construed exclusively or inclusively, a valid ratification thus generally comports three elements: (i) a ratifying act, accomplished by (ii) a ratifying authority, and (iii) duly notified to the other treaty parties. In the earlier example of exclusive ratification, the ratifying act and the notification are effectively the same. This act must often be performed by the sovereign or head of

<sup>40</sup>*Ibid.*, at 138–42.

<sup>41</sup>On *palavers* as a deliberative practice see, generally, J. G. Bidima, *Law and the Public Sphere in Africa: La Palabre and Other Writings* (2014). On their use in diplomacy see R. Smith, 'Peace and Palaver: International Relations in Pre-Colonial West Africa', (1973) 14 *Journal of African History* 599, at 609–10. For an example of *palavers* in Franco-Sudanian diplomacy see, e.g., J.-S. Gallieni, *Voyage au Soudan français (Haut-Niger et pays de Ségou), 1879–1881* (1885), at 83.

<sup>42</sup>Here, I adapt an analytical frame developed by Ntina Tzouvala. See N. Tzouvala, *Capitalism as Civilisation: A History of International Law* (2020), at 14, citing W. N. Hohfeld 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', (1913) YLJ 16.

the polity.<sup>43</sup> In contrast, in the case of inclusive ratification, the ratifying acts could be a vote of approval and a signature performed respectively by the legislature and the head of the polity. Ratification would then be complete once the polity notifies the other treaty parties of its consent.

#### 4.2 Ratification in inter-European relations

Although Western jurists disagreed on precisely when a treaty required ratification, a broad consensus emerged in the second half of the nineteenth century. In European affairs, the head of a polity was generally recognized as the competent authority to express the signatory polity's consent as they spoke for the polity in international affairs. As such, ratification was generally not required when the treaty was signed directly by the head of a polity.<sup>44</sup> In all other cases and unless its terms indicated otherwise, a treaty usually became binding only upon ratification.<sup>45</sup> Accordingly, during the 1878 Congress of Berlin, European powers agreed that 'it is ratifications, rather than signatures alone, that confer upon treaties their definitive character'.<sup>46</sup>

Despite this consensus, opinions diverged regarding the appropriate standards to determine the validity of a polity's ratification under international law. Jurists notably debated whether these standards should incorporate a polity's domestic laws, opposing inclusive and exclusive conceptions of ratification. On the one hand, proponents of an exclusive approach contended that a notification of ratification by the head of a polity made a treaty binding upon the polity, even if the head of the polity had failed to follow the procedures prescribed by domestic law. On the other hand, those who defended an inclusive approach argued that a polity could not be bound by a leader who declared the polity's ratification in manifest violation of its domestic law.<sup>47</sup> Still, Western jurists generally agreed that the official authorized to represent the polity abroad bound the polity when, acting in conformity with their powers, the official declared that the polity had ratified a treaty.

Absent a formal declaration or notification by the head of a polity, European jurists also recognized the possibility of tacit ratification. According to this view, if the two parties to a bilateral treaty executed the treaty's terms, the treaty became legally binding. This tacit form of ratification rendered a formal declaration or notification superfluous.<sup>48</sup> Significantly, the fulfilment of treaty terms by one party did not qualify as a tacit ratification. It functioned merely as a unilateral act of goodwill that, at best, allowed the provisional application of a treaty.<sup>49</sup> Moreover, to tacitly ratify a treaty, a party had to act pursuant to the treaty in a way that would be incompatible with its non-recognition of the treaty as binding.<sup>50</sup> As a result, not all acts that complied with the terms of a treaty – including its provisional application – necessarily implied its

<sup>43</sup>I use the term head of the polity by analogy to head of state as a generic term to refer to a polity's ruler or the highest authority in charge of foreign affairs.

<sup>44</sup>J. Basdevant, 'La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités', (1926) 15 *Recueil des cours - Académie de Droit International de La Haye* 539, at 574–5 and note 7; A. Rivier, *Principes du droit des gens* (1896), vol. II, at 74. Basdevant notes that the Treaty of the Holy Alliance of 14–26 September 1815 and the Preliminary Peace of Villafranca of 11 July 1859 did not provide for ratification because they were signed by heads of states competent to conclude treaties.

<sup>45</sup>ILC Draft Articles on the Law of Treaties with Commentaries, 1966 YILC, vol. II, Art. 11 Commentary 2, at 197. See also Basdevant, *supra* note 44, at 577–8.

<sup>46</sup>See Basdevant, *ibid.*, at 574, note 7, citing *Congrès de Berlin: Protocoles et Traités, Juin-Juillet 1878* (1878), Protocole N° 19 (Séance du 12 juillet 1878), at 5 ('[L]e Congrès considère . . . que ce sont les ratifications, et non pas seulement la signature, qui donnent aux traités leur valeur définitives').

<sup>47</sup>See Basdevant, *ibid.*, at 577–82 (citing Bittner as supporting consideration of a state's internal rules and Anzilotti as rejecting any such consideration).

<sup>48</sup>P. Pradier-Fodéré, *Traité de droit international public européen et américain suivant les progrès de la science et de la pratique contemporaines* (1885), vol. II, at 727, 780, paras. 1066, 1111; Rivier, *supra* note 44, at 76.

<sup>49</sup>See Rivier, *ibid.*, at 76.

<sup>50</sup>See Pradier-Fodéré, *supra* note 48, at 727, para. 1066.

tacit ratification. In European international relations, treaty ratification therefore took two main forms. Often, heads of state formally declared that their polity accepted the treaty. Less frequently, the parties simply executed the terms of the treaty.

Applying these general standards to Franco-Sudanian treaties threw their validity into doubt. During the nineteenth century, the French head of state was generally either the ruling monarch or the president. Under the Third French Republic, founded in 1870, French law conferred upon the president the power to ratify treaties by decree, with certain exceptions.<sup>51</sup> Thus, according to prevailing Western international norms, treaties signed by a French official other than the monarch or president generally required ratification unless the treaty's terms provided otherwise. Only once the head of state declared the treaty's ratification could such a treaty become binding upon France.<sup>52</sup> Unsurprisingly, the Franco-Sudanian treaties were not signed by the French head of state. Instead, the signatories were a variety of French imperial agents under the authority of the ministry of the navy and the colonies, including the governor of Senegal and French military officers. Moreover, treaties rarely provided for their definitive entry into force without ratification. To be considered legally binding by European standards, these treaties would thus have required either express or tacit ratification.

French authorities do not appear to have considered a claim of tacit ratification a viable option. Such a claim presented problems of proof. Officials in Paris only had limited access to evidence demonstrating the execution of Franco-Sudanian treaties. Moreover, France had yet to fulfil its obligations under many of the treaties. In their correspondence, French officials acknowledged that the colonial administration maintained no effective presence in some of the territories that France claimed to have placed under its protection.<sup>53</sup> Indeed, such a presence would have defeated what French officials saw as the purpose of treaties of protection: claiming sovereignty without the significant costs required to occupy new territories. More generally, French officials' careful selection of treaties to send to the president for ratification suggests that they did not consider this process superfluous. The minister of foreign affairs described presidential ratification as establishing the 'definitive approval of the Government of the Republic'<sup>54</sup> and essential to establishing French territorial claims in negotiations with Great Britain. This attitude shows that French authorities believed that presidential ratification served a purpose that the mere execution of the treaties did not.

Ultimately, presidential ratification provided conclusive evidence to other European powers that the Franco-Sudanian treaties were duly ratified and in force. French officials were concerned that, without such evidence, France could not oppose its rights derived from these treaties to Great Britain.<sup>55</sup> With its European rivals in mind, the French government thus expedited the presidential ratification of treaties. In so doing, it sought to ensure the legal grounding of French claims to territorial sovereignty and protectorates in West Africa.

<sup>51</sup>See, e.g., A. Esmein, *Éléments de Droit constitutionnel* (1896), at 573–9.

<sup>52</sup>An 1840 law explicitly required that the governor of Senegal submit the treaties he concluded for ratification by the French head of state. See Ordonnance du Roi concernant le gouvernement du Sénégal et dépendances, 7 September 1840, Art. 49, para. 2, in *Bulletin des lois de la République française* (1841), Series IX, Vol. 21, Bulletin 775, at 671.

<sup>53</sup>See, e.g., Letter from Flourens to Barbey, *supra* note 37 (noting that the entry into force of the treaty with 'Tambaoura', in Bambuk, is conditioned on an effective French presence in 'Tambaoura' and asking whether the colonial administration had fulfilled this condition or planned to do so in the near future); 'Note pour la 1ère Sous-Direction, 1er Bureau', at 3, in 40 COL 807, ANOM, available at [recherche-anom.culture.gouv.fr/ark:/61561/uq106vsqpwv](https://recherche-anom.culture.gouv.fr/ark:/61561/uq106vsqpwv) (acknowledging that the 'Manding de Kangaba' and 'Bouré' were not under the effective protectorate of France).

<sup>54</sup>See, e.g., Letter from J. Ferry, French President of the Council of Ministers and Minister of Foreign Affairs, to A. Peyron, French Minister of the Navy and the Colonies, 25 August 1884, at 8b, in 40 COL 743, ANOM, available at [recherche-anom.culture.gouv.fr/ark:/61561/uq106jgeijs](https://recherche-anom.culture.gouv.fr/ark:/61561/uq106jgeijs).

<sup>55</sup>The principle of privity of treaties (*res inter alios acta*) would normally make the terms of a Franco-Sudanian treaty unopposable to Great Britain. Insofar as these treaties transfer sovereign title, however, they are a source for a right *in rem*, opposable to the world.

If the belated and rushed process of presidential ratification pre-empted a possible British challenge to French territorial claims, it also left those treaties without presidential approval vulnerable to contestation. This contestation ultimately came not from France's imperial rivals, but from private litigants in French Senegal. In the early twentieth century, a series of land disputes pitted the administration of French Senegal against litigants claiming title based on acquisitions preceding the establishment of French rule.<sup>56</sup> These litigants challenged the validity of treaties concluded in 1764, 1765, and 1861 in which Kajoor purportedly ceded territory to France. In a case that appeared before the Court of Appeal for French West Africa in 1907, the litigants argued that 'contrary to the principles of international law . . . these treaties had not received in France, the ratification of the sovereign power'.<sup>57</sup> The court rejected this argument, reasoning that 'the ratification of treaties ha[d] not always been conducted in the forms required by our modern constitutions' and that 'one could even state that, under the old regimes, there were no absolute rules on this point'.<sup>58</sup> The court thus concluded that at least for treaties concluded before the establishment of the Third Republic in 1870,<sup>59</sup> the formal approval of the head of state was not necessary for the ratification of a treaty. Yet the court did not specify what alternative actions had fulfilled the requirements for ratification at the time. A commentator suggested that the treaties had been executed and therefore tacitly ratified.<sup>60</sup>

Ultimately, the decisions of French courts do not significantly clarify whether Franco-Sudanian treaties had been duly ratified according to European standards in the 1880s. The treaties in the litigation concerned territories adjacent to major colonial towns where the colonial administration was firmly implanted by the turn of the twentieth century.<sup>61</sup> While these treaties transferring territory from France to Kajoor were arguably executed through the deployment of the colonial administration, the same did not apply to most other treaties.<sup>62</sup> More importantly, while the litigants challenged the validity of the treaties under international law, the court limited itself to reviewing the treaties' conformity to requirements of French domestic law. The court observed that treaties being acts of the sovereign power, the court lacked jurisdiction to question their validity beyond this purview.<sup>63</sup>

<sup>56</sup>See, e.g., Cour d'appel de l'Afrique occidentale française (hereinafter CA AOF), 1 March 1907 (*Abdou Cognia Diop et Louis Abadie c. Alpha Diol, domaine de l'Etat et Ficatier*), (1907) 10(III) Recueil Dareste de législation, de doctrine et de jurisprudence coloniales (hereinafter R. Dareste), 97; CA AOF, 8 February 1907 (*Daour Diop et consorts et Louis Abadie c. domaine de l'Etat*), (1907) 10(III) R. Dareste, 78. For a comprehensive list of cases see Cour de cassation (chambre civile), 7 March 1910 (*Rawane Boye v. Chemin de fer de Dakar à Saint-Louis*), 7 March 1910 (1910) 13(III) R. Dareste 145, at 146, note 4; see Hébié, *supra* note 5, at 483–7. I thank Tom Westland and Reviewer 1 for drawing these cases to my attention.

<sup>57</sup>CA AOF, 8 February 1907 (*Daour Diop*), *ibid.*, at 92 ('Considérant que Daour Diop et consorts . . . ont prétendu que, contrairement aux principes du droit international . . . ces traités n'avaient point reçu, en France, la ratification de la puissance souveraine . . .'). See also CA AOF, 1 March 1907 (*Abdou Cognia Diop*), *ibid.*, at 106.

<sup>58</sup>See CA AOF, 8 February 1907 (*Daour Diop*), *ibid.*, at 92 ('Considérant que la ratification des traités n'a pas toujours été pratiquée dans les formes exigées par nos constitutions modernes; et qu'on peut même affirmer qu'il n'existait, sous les anciens régimes, aucune règle absolue sur ce point'). See also CA AOF, 1 March 1907 (*Abdou Cognia Diop*), *ibid.*, at 107.

<sup>59</sup>While the Third Republic was founded in 1870, its constitution was only adopted through a series of laws in 1875. On the ratification of treaties see Loi constitutionnelle du 16 juillet 1875 sur les rapports des pouvoirs publics, (1875) 7(195) Journal officiel de la République française 5489 (18 July 1875), Art. 8.

<sup>60</sup>The commentator further argued that treaties concluded before 1840 may not have required ratification because the governors of Senegal held full powers to conclude treaties with Western Sudanian powers on behalf of France. In 1840, a law required royal approval for treaties concluded by the governor of Senegal. See CA AOF, 8 February 1907 (*Daour Diop*), *supra* note 56, at 79, comment 3. See also the commentary in [1908] Recueil général des lois et des arrêts (Recueil Sirey) 209, at 211, comment 1. On the 1840 law, see note 52, *supra*.

<sup>61</sup>The land in dispute was located on the Cape Verde peninsula and near Rufisque, which were under direct French administration by the 1880s. See Annuaire du Sénégal et dépendances (1882), 45–59; see CA AOF, 1 March 1907 (*Abdou Cognia Diop*), *supra* note 56, at 107. See also Diouf, *supra* note 9, at 285–6.

<sup>62</sup>See note 53 and accompanying text, *supra*.

<sup>63</sup>See CA AOF, 1 March 1907 (*Abdou Cognia Diop*), *supra* note 57, at 108 ('Considérant, au surplus, que les traités de 1764 et 1765 constituent des actes diplomatiques rentrant dans l'exercice du pouvoir souverain, dont le contrôle n'appartient pas aux tribunaux; que ceux-ci ne peuvent pas être appelés à en apprécier la validité ni à en fixer les conséquences' ('Considering,



More than anything, the competing arguments surrounding the ratification of Franco-Sudanian treaties show the relative uncertainty regarding alternative modes of ratification at the end of the nineteenth century. A declaration by the head of a polity was recognized in Europe as conclusive evidence of the polity's acceptance of a treaty. In the absence of such a declaration, there was considerable doubt whether a treaty would be recognized as binding.

### 4.3 Ratification in Franco-Sudanian international relations

In accordance with the experimental nature of Euro-African international relations before the twentieth century, French and Sudanian authorities were not always consistent in their approach to ratification.<sup>64</sup> Indeed, Sudanian administrators, diplomats and scholars do not appear to have theorized the concept of ratification in the way nineteenth-century European jurists sought to. Still, patterns emerge from the numerous treaties and considerable correspondence between French and Sudanian authorities. These sources evince that ratification was a well-established practice in nineteenth-century Franco-Sudanian affairs. Nevertheless, the practice and recognized forms of ratification in Europe and the Western Sudan differed.

In this sub-section, I reconstruct the Western Sudanian conception of ratification. First, I describe the standard form and practice of ratification in the region. Second, I argue that the governor of Senegal was the competent authority to ratify treaties for France in Franco-Sudanian relations. Third, I show that the governor's political subordination to the metropolitan French government was compatible with his competence to ratify treaties.

#### 4.3.1 Ratifying acts and statements

Ratification in Franco-Sudanian treaty-making was anchored in a personal approach to inter-polity relations.<sup>65</sup> Both the French and Arabic texts of treaties generally identified the parties as individual leaders rather than abstract political entities. Accordingly, most Franco-Sudanian treaties were presented, by their terms, as agreements between Sudanian rulers and the governor of French Senegal, as representatives of their respective polities. The personal style of Franco-Sudanian treaties should not be interpreted as signalling that these agreements committed leaders of polities in their personal capacities rather than binding the polities they represented.<sup>66</sup> Sudanian authorities generally treated their treaties with the French as governing relations between peoples rather than between individual leaders. In the treaties they negotiated and the correspondence they exchanged, Sudanian leaders stated expressly that the terms they agreed bound not only

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moreover, that the treaties of 1764 and 1765 constitute diplomatic acts falling within the exercise of sovereign power, the review of which does not belong to the courts; that the latter cannot be called upon to assess their validity or to determine their consequences').

<sup>64</sup>It should be noted that Western approaches to ratification were also very inconsistent in the nineteenth century. See Basdevant, *supra* note 44, at 574–82.

<sup>65</sup>Inter-European relations were perhaps similarly personalized before the nineteenth century. See, e.g., P. Haggénmacher, 'L'Etat souverain comme sujet du droit international, de Vitoria à Vattel', (1992) *Droits* 11 (arguing that, although Vitoria and his successors recognized the state as a possible bearer of rights, they did not distinguish clearly between the legal personality of the state and the person of the ruler or the collective body of the people); A. Osiander, *The States System of Europe, 1640–1990: Peacemaking and the Conditions of International Stability* (1994), at 102–9 (describing the predominant role of princes and ruling houses as international actors in the eighteenth-century European international relations and the personal forms of address used by monarchs).

<sup>66</sup>Cf. Hébié, *supra* note 3, at 23, note 6 ('In this research, I do not make a distinction between the terms "local chiefs" and "local political entities". However, in colonial practice, the local chief was relevant only when he lawfully represented a political community by virtue of applicable local rules. Thus, local chiefs were not strictly speaking parties to the agreements with colonial powers. They signed them on behalf of their community.'): see Surun, *supra* note 3, at 337 ('[La présence de dignitaires musulmans] confère à l'acte signé la garantie de l'écrit qui engage l'Etat au-delà de la personne du roi.' ('[The presence of Muslim dignitaries] conferred the guarantee of writing on the act, and committed the state beyond the person of the king.')).

themselves but also their people, including their successors and all those under their authority.<sup>67</sup> This approach to treaties as agreements between peoples is also evident in the extension of collective privileges to security, protection, or trade to all members of a polity or subjects of a ruler.<sup>68</sup> The personal nature of Franco-Sudanian inter-polity relations more likely reflects the idea that rulers or political leaders spoke authoritatively for the political community they governed. In this way, personalized language was not solely a formal feature of Franco-Sudanian treaties; it also reflected substantive understandings of ratification and international relations in the Western Sudan.

The personal approach to Franco-Sudanian relations emerges in the treatment of ratification as the personal act of the head of a polity. In their treaties and correspondence, French and Sudanian authorities described ratification as performed by a ruler or a concert of political authorities rather than by the political community itself. Accordingly, in their relations with France, Sudanian polities generally did not ratify treaties that were initially signed by the polity's supreme political authorities. Ratification was reserved for treaties negotiated by envoys on behalf of these leaders. Sudanian leaders often refused to recognize treaties that, according to them, they had not personally approved. For example, Umarian officials consistently rejected French claims based on a purported 1860 treaty, arguing that this treaty had never been approved by the Umarian leader at the time, Shaykh al-Hajj Umar.<sup>69</sup> In turn, French authorities refused to recognize an 1880 treaty with the Umarians, after declining to ratify the original version as negotiated and signed.<sup>70</sup> These instances indicate that, in Franco-Sudanian relations, claims based on an unratified treaty could be precarious.

The simplest way for political leaders to ratify a treaty was for them to simply sign below the text and the signatures of their envoys. Indeed, translators working for the administration of French Senegal often rendered the French term 'ratification' into Arabic as 'placing one's name' (*ja'ala ismahu*).<sup>71</sup> The Arabic expression made the abstract concept of ratification concrete by describing the act by which it is performed: in this context, signing. The signatures usually

<sup>67</sup>See, e.g., 1858 Treaty between L. Faidherbe, Governor of Senegal, and Muḥammad al-Ḥabib, Emir of the Trarza (France-Trarza), Arts. 7–8, in Box 40 COL 34, ANOM, available at [recherche-anom.culture.gouv.fr/ark:/61561/uq106qjnsse](https://recherche-anom.culture.gouv.fr/ark:/61561/uq106qjnsse) (signature of Muḥammad al-Ḥabib for his successors and his people). Regarding the differences between the Arabic and French texts of this signature see note 85, *infra*.

<sup>68</sup>See, e.g., 1858 France-Trarza Treaty, *ibid.*, Arts. 7–8. Van Hulle argues that the collectivization of rights was a feature of European treaty-making in West Africa. While African polities had generally extended individualized rights to European traders, treaties extended those rights collectively to European nationals, undermining the bargaining position of West African leaders. See Van Hulle, *supra* note 3, at 27. While this may be true, it does not exclude a pre-existing practice of extending collective rights and privileges based on political belonging in West Africa. Indeed, there is strong precedence in Islamic law and collective grants of protection are attested before the nineteenth century in the Western Saharan and Sahelian zones. See C. Cahen et al., 'Ḥimāya', (2012) *Encyclopaedia of Islam*; J. Schacht, 'Amān', in *ibid.*; Marty, *supra* note 9, at 18–19.

<sup>69</sup>Letter from Ahmadu Tall, Commander of the Faithful, to G. Brière de l'Isle, Governor of Senegal, received 6 September 1878, in Box 40 COL 799, ANOM, available at [recherche-anom.culture.gouv.fr/ark:/61561/uq106tqnsuq](https://recherche-anom.culture.gouv.fr/ark:/61561/uq106tqnsuq). See also Saint-Martin, *supra* note 30, at 100–10 (discussing the negotiation of the 1860 treaty).

<sup>70</sup>This treaty is commonly known as the Treaty of Nango. The colonial administration rejected the Arabic translation of the treaty provided by the Umarians because of divergences with the French text prepared by the French envoys. The colonial administration accordingly negotiated a new treaty in Saint-Louis with an ambassador of the Umarian ruler. However, Umarian authorities never accepted this last version. Box 40 COL 344, ANOM, available at [recherche-anom.culture.gouv.fr/ark:/61561/uq106f2z52e](https://recherche-anom.culture.gouv.fr/ark:/61561/uq106f2z52e); Box 40 COL 616, ANOM, available at [recherche-anom.culture.gouv.fr/ark:/61561/uq106khelft](https://recherche-anom.culture.gouv.fr/ark:/61561/uq106khelft). See also Saint-Martin, *supra* note 30, at 264–92.

<sup>71</sup>In addition to the 1829 France-Trarza Treaty mentioned below see, e.g., the series of 1881 treaties concluded by Dr. Bayol, providing for presidential ratification. These treaties stated that they would enter into force only once the French president ratified them. The Arabic expression used was *ḥattā yaktab amīr Frāns ismahu fawqa al-qirtās* ('until the emir of France writes his name on top of the paper') while the French expression was *lorsqu[e] le traité aura été revêtu de la signature du Président de la République* ('once [the treaty] bears the signature of the President of the Republic'). 1881 Treaty between Killa and France, in 40 COL 618, ANOM, available at [recherche-anom.culture.gouv.fr/ark:/61561/uq106tqnupn](https://recherche-anom.culture.gouv.fr/ark:/61561/uq106tqnupn). Killa was likely situated between Futa Jallon and Xaso.

followed short notifications or statements designating the signatures as acts of ratification. The French and Arabic statements often differed slightly.

The representatives of the governor of Senegal and the emir of the Trarza, a Baydan people, chose this approach for their respective leaders' ratification of an 1829 treaty (the 1829 France-Trarza Treaty). The treaty provided that within thirty days of its signature by the representatives, the governor and the emir would meet in person to ratify the treaty. The two leaders duly met and signed their names within the prescribed delay. The ratifying statement in French was brief, stating only the place and date of ratification. It read: 'Ratified at the Seat of Government in Saint-Louis on 15 April 1829' with the two signatures appearing below.<sup>72</sup> The Arabic version of the ratifying statement dispensed with the place of ratification but explicitly identified the ratifying authorities. It stated: 'Muḥammad al-Ḥabīb, Emir of the Trarza, and Monsieur Jubelin, Emir of N'Dar, have placed their names on this paper on 15 April 1829 of the Christian calendar'.<sup>73</sup> Emir of N'Dar was a common title used in the region to refer to the governor of Senegal, N'Dar being the Wolof name for Saint-Louis. Ultimately, this form of ratification remained limited because leaders rarely met in person to ratify treaties together. In-person ratification became especially inconvenient as French Senegal established relations with polities based farther from Saint-Louis.

More often, the competent officials approved the treaty separately and notified the other treaty party of their consent. This notification could be sent separately or appended to a copy of the treaty. The governor of Senegal frequently wrote a brief statement of ratification and signed below a treaty in the way described above in addition to sending a separate notification to the other treaty party. Sudanian authorities, for their part, more often appended their notifications directly to treaties. While the form varied, Sudanian notifications often followed a regional epistolary style, characteristic of a personal approach to inter-polity relations.<sup>74</sup> The standard format consisted of three parts: a greeting, a ratifying statement and, on occasion, a signature. As was common with Arabic versions of treaties, the writer (or speaker) used the first or third person to refer to themselves and addressed the other party in the second person. The opening greeting identified the sender and the addressee, who were typically the two treaty parties. The ratifying statement expressed a ruler's approval of the terms using the Arabic verb 'raḍiya', meaning to consent or to accept.<sup>75</sup> The sentence conveying the ruler's approval generally contained a succinct description of the object of the treaty and the conditions under which it was negotiated. In some cases, political authorities added conditions for their ratification. Because the governor of Senegal usually represented France as a treaty party, Sudanian authorities tended to address notifications and ratifying statements to him.

Statements illustrating this more common approach to ratification appear at the bottom of an original copy of an 1835 treaty. The treaty sealed an agreement between the ruler of Walo, known as the 'brak', and the governor of Senegal (hereinafter the 1835 France-Walo Treaty). As was standard for Franco-Sudanian treaties, the original copy features the French text written on the left

<sup>72</sup>1829 Treaty between J. Jubelin, Governor of Senegal, and Muḥammad al-Ḥabīb, Emir of the Trarza (France-Trarza), in P. Marty, *L'Émirat des Trarzas* (1919), 420 ('Ratifié à l'hôtel du Gouvernement à Saint-Louis le 15 avril 1829').

<sup>73</sup>*Ibid.*, ('Muḥammad Lḥabīb amir al-Trarza wa mūsī Jubalī amir Indar ja'alū [sic] ismayhumā fi hadha al-qirtās khamsat 'ashr min abril sanat alf wa ḥamānumi'a wa tis' wa 'ashr min tārikh al-naṣāra').

<sup>74</sup>Surun has identified the significance of these 'brief missives' as expressions of consent that were analogous to the governor of Senegal's ratification. However, she limits herself to arguing that these acts of ratification constituted assertions of sovereignty. See Surun, *supra* note 3, at 337–8. Regarding the epistolary style of treaty-making in the region see, e.g., T. P. Koltermann, 'Die Ältesten Arabischen Briefe der Emire von Trärza (Mauretanien): Dokumente der Maurischen Bündnispolitik mit Holland und England 1721–1782', (2006) 7(2) *Zeitschrift für Weltgeschichte* 75. A French translation of this article has been published as T. P. Koltermann and U. Rebstock, 'Les plus anciennes lettres des émirs du Trarza (Mauritanie): Témoins de la politique maure d'alliances avec la Hollande et l'Angleterre, 1721–1782', translated by E. Martinoli, 2006 *Ouest Saharien* 3.

<sup>75</sup>*Raḍiya* is the base form of the verbal noun *riḍā*. According to Wael B. Hallaq, *riḍā* in Islamic contract law means 'wholehearted consent without any trace of coercion whatsoever'. W. B. Hallaq, *Sharī'a: Theory, Practice, Transformations* (2009), 240. I am grateful to Jealool Amari for this reference.

side of each page and the Arabic text written on the right side. Below the treaty text appear the governor's ratifying statement and signature in French and Arabic. The statement follows the exact format of the 1829 France-Trarza Treaty. The French text states 'Ratified at the Seat of Government in Saint-Louis on 4 September [1835]',<sup>76</sup> while the Arabic text states '[t]he būr of N'Dar has placed his name on this paper on [4 September 1835]'.<sup>77</sup> 'Būr' is a loan word from Wolof in the Arabic dialect of the Senegal River region that means king or ruler. As with the 1829 France-Trarza Treaty, the Arabic statement of ratification omits the place where the governor signed and attributes the act of ratification directly to the governor.

A message from the *brak* of Walo, written only in Arabic, follows the governor's bilingual ratifying statement. The absence of a French translation indicates that the statement's writer served the authorities of Walo rather than French Senegal. It also suggests that the message was written after the governor's ratification. If that is the case, a messenger would have brought the copy of the treaty bearing the governor's ratifying signature to the authorities of Walo, thus notifying them of the governor's ratification. With their message, the authorities of Walo responded accordingly. The unsigned and undated message transmits a statement from the *brak* addressed to the Emir of N'Dar.<sup>78</sup> The message reads as follows:

Thanks be to God who has made the pens put the feet to rest. Greetings of peace brought from Brak Fara Pinda to the Emir of N'Dar. The Brak has said: "O Emir, I have accepted (Arabic: *raḍiytu*) that by which my envoys have made peace [between us]".<sup>79</sup>

This message follows the epistolary style of Sudanian notifications with a greeting and a ratifying statement. It opens with a standard greeting that indicates the sender and the addressee.<sup>80</sup> The message then notifies the governor of Senegal, the other treaty party, that the *brak* has ratified the treaty by quoting a ratifying statement. As is standard, the statement alludes to the envoys who negotiated the treaty and establishes the treaty's object as the establishment of peace between France and Walo. The statement further presents ratification as a personal grant of consent or approval (Arabic: *riḍā*) by the *brak*.<sup>81</sup> The use of a quotation reveals how an oral process, presumably conducted in Wolof, was rendered in writing into Arabic for the purposes of diplomatic correspondence. The message is written by an unidentified scribe who relates a ratifying statement spoken by the *brak* himself. It is the *brak*'s utterance that constitutes the ratification as such, while the written message merely notifies the other treaty party of the act. The direct reference to the *brak*'s utterance stands for a signature.

Although French authorities tended to omit the Arabic text when publishing copies of Franco-Sudanian treaties, published versions often include translations of Sudanian ratifying statements. A notable example is a published version of an 1871 treaty between the ruler or '*dame*' of Kajoor and the governor of Senegal (hereinafter, the 1871 France-Kajoor Treaty). This version appears in a treaty collection published by the French ministry of the navy and the colonies in 1885. The published text includes a ratifying statement by Lat Joor, whose statement is rendered in French as follows:

<sup>76</sup>1835 Treaty between L. Pujol, Governor of Senegal, and Fara Pinda, Brak of Walo (France-Walo), in Box 40 COL 31, at 2a, ANOM, available at [recherche-anom.culture.gouv.fr/ark:/61561/uq106byu0zd](https://recherche-anom.culture.gouv.fr/ark:/61561/uq106byu0zd) ('Ratifié à l'hôtel du Gouvernement à Saint-Louis le 4 septembre mil huit cent trente cinq.').

<sup>77</sup>*Ibid.*, ('Abūr Indar jala'ahu [sic] ismahu fi hadhihi al-qirtās min shahar sitinbir 'awām [side annotation: arba'a ; sana] wa thamānūmi' a wa khamis wa thalāthīn 'awām min al-tārikh al-naṣr [sic]').

<sup>78</sup>*Ibid.*

<sup>79</sup>*Ibid.*, ('Al-ḥamdu li-llāh alladhī ja'ala al-aqlām rāḥatan lil-aqdām. Tabliḡh al-salām min Barak Fara Binda ilā amīr Dar. Qāla Barak: "Yā amīr Dar, raḍiytu mā ṣālaḥa bihi rusuli").

<sup>80</sup>Letters using similar greeting formulas are common in the correspondence between the authorities of French Senegal and Sudanian leaders. See, e.g., Marty, *supra* note 72, at 401, 443, 453, 457; Marty, *supra* note 9, Ann. XVIII.

<sup>81</sup>On *riḍā*, see note 75, *supra*.

From Lat Joor, king of Kajoor, to Governor Valière, the fullest greetings. I inform you that I, Lat Joor, accept the above conditions that you impose upon me for this land of Kajoor, know this surely. Greetings. Signed: Lat Joor.<sup>82</sup>

This message too follows the standard three-part notification format. It opens with a greeting identifying the sender and addressee. In his ratifying statement, the *damel* also uses the first and second persons and addresses the governor of Senegal directly. The statement expresses the ruler's approval with a terse description of the object of the treaty and the conditions of negotiations. In this case, Lat Joor presents the treaty as relating to the administration of Kajoor and as having been imposed upon him by the governor. Finally, Lat Joor's signature follows the message.

Some notifications followed variations on this format. In a message ratifying an 1858 treaty with the governor of Senegal (hereinafter the 1858 France-Trarza Treaty), Muḥammad Lḥabīb – the leader of the Trarza, a Baydan people – addressed, not the governor himself, but an unspecified reader. He wrote:

To inform whoever shall come upon this that Muḥammad Lḥabīb has accepted what Akhiyāruhum (Khiaroum) has brought on behalf of his father in the matter of the settlement (Arabic: *ṣulḥ*) between himself [Muḥammad Lḥabīb] and the French. Done on the tenth of the month of shawwāl of the year one-thousand two-hundred and seventy-four of the Hijra, Sunday.<sup>83</sup> Muḥammad al-Ḥabīb, Emir of the Trarza, all his heirs and all his people.<sup>84</sup>

This message features an abridged greeting followed by a ratifying statement and a signature. Unlike the messages appended to the 1835 France-Walo and 1871 France-Kajoor treaties, the ratifying statement is not addressed to the governor of Senegal but to an unspecified reader. Moreover, the writer does not use the first and second persons.<sup>85</sup> Still, the statement uses language similar to that appearing below the 1835 France-Walo treaty, presenting ratification as a personal act of the emir and describing the object of the treaty and its negotiators. The message states that Muḥammad al-Ḥabīb has approved (Arabic: '*raḍiya*') terms of settlement negotiated by his

<sup>82</sup>1871 Treaty between F. Valière, Governor of Senegal, and Lat Joor, Damel of Kajoor (France-Kajoor), in *Annales sénégalaises*, *supra* note 36, at 411 ('De la part de Lat-Dior, roi du Cayor, au gouverneur Valière, salut le plus complet, Je vous fais savoir que moi, Lat-Dior, j'accepte les conditions ci-dessus que vous m'imposez pour ce pays du Cayor, sachez cela sûrement. Salut. Signé: Lat-Dior'). The original copy is in Box 10D1/62, chemise 5, dossier 3, Archives nationales du Sénégal, Dakar (hereinafter ANS). This ratifying statement is discussed by Surun, *supra* note 3, at 338.

<sup>83</sup>The 10 Shawwāl 1274 of the Hijri calendar used in the Senegal River valley corresponds to 23 May 1858 of the Gregorian calendar. The Hijri calendar used in the region was one day behind the standard Hijri calendar. See, e.g., *Annuaire du Sénégal et dépendances* (1861), at 10.

<sup>84</sup>1858 France-Trarza Treaty, *supra* note 67, at 3a ('Li-ya'lam man sa-yaqif 'alayhi inna Muḥammad Lḥabīb raḍiya mā jā' bihi Akhiyāruhum min 'ind abīhi fī amr al-ṣulḥ alladhī baynahu wa bayn al-Franṣa māḍin 'induhu fī 'ashr min shawwāl 'ām arba' wa sab' 'in ba'da al-mi' atayn wa alf min al-Hijra yawm al-aḥad. Muḥammad Lḥabīb amir al-Tarāriz wa man yarithuhu wa qawmuhu kulluhum'). See note 85, *infra*, regarding the translation of the signature.

<sup>85</sup>While this statement does not use the first and second persons, it retains some elements of a personal message. It is written as coming from Muḥammad al-Ḥabīb himself and addressed to an unspecified reader. This reader could be the other party or an individual under the authority of the emir and charged with enforcing the terms of the treaty. In fact, the French translation included on the original copy of the treaty renders the signature as 'Mohammed-el-Habib, king of the Trarza, to his successors and his people' ('Mohammed-el-Habib, roi des Trarza, à ses successeurs et à son peuple'). This shifts the meaning from an expression of approval given in the name of the emir, Muḥammad al-Ḥabīb, as well as his successors and his people, to a message of approval by the emir conveyed to his successors and his people to enable the enforcement of rights under the treaty. This translation thus supports the interpretation that by addressing an unknown reader of the treaty, the emir had in mind any individual under his authority to whom the treaty may be presented to claim a right thereunder. Cf. Surun, *supra* note 3, at 337 (overlooking the difference between the Arabic and French texts).



representative and reported to him by the representative's son, an individual identified in Arabic as 'Akhiyāruhum' and in French as 'Khiaroum'.<sup>86</sup>

Sudanian authorities sometimes wrote messages conditioning their approval on the acceptance of certain terms – a sort of treaty reservation. Lat Joor, the *damel* of Kajoor, transmitted such a message following the signature of two agreements with the French in 1879. The agreements consisted of a treaty and a supplementary act regarding the construction of a railway through Kajoor linking Saint-Louis and Dakar (hereinafter, respectively, the 1879 France-Kajoor Treaty and the 1879 Supplementary Act). Lat Joor set conditions for his approval of the supplementary act. He demanded the inclusion of a clause limiting the amount of work demanded of local workers recruited to help build the railroad. The negotiators of the agreements were Bou El-Moghdad Seck (Arabic: Abū al-Mughdād bin 'Abd Allāh al-Shaykh),<sup>87</sup> the qadi of Saint-Louis, representing the governor of Senegal, and Madiakate Kalla, the qadi of Kajoor, representing the *damel*. While the term qadi refers generically to an Islamic judge, in Saint-Louis, as in Kajoor, this role was often combined with significant political functions.<sup>88</sup> Bou El-Moghdad and Madiakate Kalla not only represented the Muslim community before the governor and *damel*, they also served as diplomatic agents for their respective governments. Accordingly, it is Madiakate Kalla who conveyed Lat Joor's conditions to the authorities of French Senegal. A translator rendered Madiakate Kalla's message into French as follows:

We, the Qadi of Kajoor, in the name of Lat Dior and in his presence, declare that he accepts the conditions in the present act but with the strict limitation to be included in article 1 to demand from the people of Kajoor employed as workers an amount of work within the limits of their strength.<sup>89</sup>

In a similar message, Madiakate Kalla, signalled Lat Joor's approval of the main treaty. He is recorded as writing:

By order of Lat Dior, King of Kajoor, and in his presence, we, the Qadi of Kajoor, declare that he accepts all the conditions contained in the agreement presented by the Governor's envoy, Si-El-Hadj Bou El Moghdad.<sup>90</sup>

These statements, though consistent with the epistolary style of Arabic-language treaties and ratifying statements, nonetheless depart from the standard form in their attribution of the ratifying act. Notably, the ruler's consent is not conveyed by a direct utterance or a statement purportedly in his hand but declared by his representative. While the 'acceptance' is still attributed personally to the *damel*, it is the *qadi*'s voice that appears in the foreground as the author of the

<sup>86</sup>The French translation of the message clarifies that Akhiyāruhum's father is 'Mokhtar-Sidi'. Mokhtar Sidi (al-Mukhtar bin Sayyid) was a senior Trarza official (*simsār*). His son Akhiyāruhum would succeed him in this role. See Marty, *supra* note 72, at 124; Marty, *supra* note 9, at 71.

<sup>87</sup>On his life see M'bayo, 'Bou El Mogdad Seck', *supra* note 30.

<sup>88</sup>Bou El-Moghdad was also *tamsir*, a title conferred upon the most learned Islamic scholars in the region and which came from the Arabic *tafsir*, meaning exegesis. In Saint-Louis, the *tamsir* was the leader of the Muslim community.

<sup>89</sup>1879 Supplementary Act to the 1879 Treaty between Kajoor and France, at 8b, in Box 40 COL 597, ANOM, available at [recherche-anom.culture.gouv.fr/ark:/61561/uq106yvsrzj](https://recherche-anom.culture.gouv.fr/ark:/61561/uq106yvsrzj) ('Nous Cadi du Cayor au nom de Lat Dior et en sa présence, déclarons qu'il accepte les conditions contenues dans le présent acte mais avec cette restriction formelle à inscrire dans l'article 1er de n'exiger des gens du Cayor qui seront employés comme travailleurs, qu'une somme de travail dans la limite de leurs forces.')

<sup>90</sup>1879 Treaty between Lat Joor, Damel of Kajoor, and G. Brière de l'Isle, Governor of Senegal (France-Kajoor), at 5b, in Box 40 COL 597, ANOM, available at [recherche-anom.culture.gouv.fr/ark:/61561/uq106yvsrzj](https://recherche-anom.culture.gouv.fr/ark:/61561/uq106yvsrzj) ('Par ordre de Lat Dior, roi du Cayor et en sa présence, Nous Cadi du Cayor déclarons qu'il accepte toutes les conditions contenues dans cette convention présentée par l'envoyé du Gouverneur Si-El-Hadj Bou El Moghdad.')

message and declarant. Although references to the *dame*'s 'presence' and his 'order' seek to tie the act to the ruler, they do so less directly than a quoted utterance or a statement signed by the ruler.<sup>91</sup>

As these messages indicate, treaty-making in Franco-Sudanian relations approximated a form of letter writing.<sup>92</sup> The notifications and ratifying statements that appear on treaties represent only a partial record of the notifications of ratification exchanged between the authorities of French Senegal and Sudanian powers. French notifications are particularly rare in treaty records. That is likely because the administration sent these notifications separately rather than appended to treaties. This has left the governor's abbreviated ratifying statement and signature as the primary evidence of French Senegal's ratification practice. Still, the correspondence between French Senegal and Sudanian powers presents additional evidence of French notifications, even when the original copies of treaties have been lost.

The extensive correspondence between France and the Umarian Empire regarding an 1866 treaty between the two states offers an example. The treaty was negotiated by the French envoys Eugène Mage and Louis Quintin in Segou, the Umarian capital, and brought back to Saint-Louis for the governor's approval. Upon receipt of a copy of the treaty, the sitting governor, Émile Pinet-Laprade, sent a letter confirming his approval of the treaty to the Umarian caliph and son of al-Hajj Umar Tall, Ahmadu Tall<sup>93</sup> (Arabic: Aḥmad bin 'Umar bin Sa'īd al-Madani). The governor wrote:

Messieurs Mage and Quintin have arrived in Saint-Louis in good health. They have told me that they received exquisite hospitality from you. I will not forget it. I accept the treaty that these officers have handed me, and by which we both commit ourselves, you and me, to protect the travellers and the caravans between the Upper Niger and all the lands where you rule, and our trading posts of Medina and Bakel. Trade relations can only solidify our friendship and will also be useful to our peoples.<sup>94</sup>

This letter bears many of the standard features of Sudanian notifications. Notably, the sentence by which Governor Pinet-Laprade accepts the terms of the 1866 treaty evokes the ratifying statements of the *brak* of Walo, the emir of the Trarza, and the *dame* of Kajoor. The statement expresses the governor's personal approval and briefly describes the object of the treaty and the conditions under which it has reached him. This letter thus further evinces the well-established practice of ratification between French Senegal and Sudanian powers.

As argued in this sub-section, ratification was integral to Franco-Sudanian treaty practice in the nineteenth century. French and Sudanian officials alike ratified treaties initially signed by their envoys. They also both denied the validity of treaties signed by their envoys but never ratified by a competent authority. The governor of Senegal played a central role in Franco-Sudanian relations, often appearing as the named treaty party representing France and approving treaties signed by subordinate officials. The personal style of Franco-Sudanian treaties and the designation of the

<sup>91</sup>The unusual features of this expression of consent do not suffice by themselves to conclude definitively that Kajoor's ratification of the 1879 France-Kajoor Treaty was irregular. The seal of Lat Joor purportedly appears below Madiakate Kalla's statement. Still, previous treaties were signed directly by the *dame*. These elements may indicate an attempt by Lat Joor to retain the ability to renege on the treaty, which he finally did in 1881. See Diouf, *supra* note 9, at 267–72.

<sup>92</sup>See sources cited in note 74, *supra*. The use of letters to consent to a treaty or of signing statements to condition approval to a treaty was not unique to Franco-Sudanian relations. For examples from relations between the Marathas of southern India and Portugal in the eighteenth and nineteenth centuries see, e.g., Annex E Nos. 5–11, Counter-Memorial of India, *Case concerning Right of Passage over Indian Territory (Portugal v. India)*, ICJ Pleadings, vol. II, at 257–65.

<sup>93</sup>In official Umarian correspondence, Ahmadu was styled Aḥmad the Great the native of Medina (Aḥmad al-Kabīr al-Madani).

<sup>94</sup>See Saint-Martin, *supra* note 30, at 133, citing Document 33, Folder 1 G 32, ANS ('MM. Mage et Quintin sont arrivés à Saint-Louis en bonne santé. Ils m'ont dit qu'ils avaient reçu de toi une noble hospitalité. Je ne l'oublierai pas. J'accepte le traité que ces officiers m'ont remis, et par lequel nous nous engageons, toi et moi, à protéger les voyageurs et les caravanes entre le Haut-Niger et tous les pays où tu commandes, et nos comptoirs de Médine et Bakel. Les relations commerciales ne peuvent que rendre plus solide notre amitié et seront également utiles à nos peuples.')

governor of Senegal as the French treaty party account, in part, for the practice of gubernatorial ratification in Franco-Sudanian relations. By themselves, however, these characteristics of regional diplomacy do not answer whether the governor's assent sufficed to render treaties enforceable in Western Sudanian international affairs. The next sub-section addresses the questions raised by French Senegal's practice of gubernatorial ratification. Who was the competent French official to ratify treaties in Franco-Sudanian relations? Was it the governor or the president?

#### 4.3.2 Ratifying authorities

The attitude of French authorities before their negotiations with Great Britain in the 1880s offers one answer to the question of who was the competent French ratifying authority. As previously argued, French authorities rushed treaties through the process of presidential ratification to buttress their claims against Great Britain. These efforts strongly suggest that gubernatorial approval alone did not suffice to render a treaty binding. Indeed, doctrinal sources confirm that only the French head of state could authoritatively declare France's ratification of a treaty in late nineteenth century inter-European relations.<sup>95</sup> Yet, the behaviour of the administration of French Senegal and Sudanian authorities point to a wholly different answer to the same question. Both French and Sudanian officials in the region treated the governor of Senegal's approval as fulfilling all the requirements of ratification in Franco-Sudanian relations, thus allowing a treaty to enter into force. Viewed from the banks of the Senegal and Niger rivers, the competent French ratifying authority was the governor of Senegal rather than the French president.

The extensive correspondence between successive governors of Senegal and the Umarian ruler Ahmadu regarding the 1866 Franco-Umarian Treaty sheds light on the significance of gubernatorial ratification in Franco-Sudanian relations. We have already seen that, upon receiving the treaty, the governor of Senegal, Pinet-Laprade, sent a letter to Ahmadu confirming his acceptance of its terms. However, the French government took no further steps to ratify the treaty. The historian of Franco-Umarian relations Yves Saint-Martin observes that, despite Pinet-Laprade's letter, '[t]he treaty of 3 May 1866 was not ratified by Paris'.<sup>96</sup> Saint-Martin concludes that the treaty never entered into force.<sup>97</sup> In drawing this conclusion, Saint-Martin presumes that, per inter-European custom, the treaty could only become enforceable with the approval of France's metropolitan authorities. Yet, the subsequent correspondence between the governors of Senegal and the Umarian ruler reaffirmed their common commitment to the 1866 treaty as the legal basis for their relations.

An 1870 letter from Ahmadu to the Commander of the French post of Bakel protesting against violations of the 1866 treaty usefully summarizes the Umarian view. Ahmadu wrote:

The treaty concluded between us and the envoy of the king of France, Mr. Mage, posed well known conditions which were supposed to remain unchanged for a long time and to be respected by both parties . . . If you do not respect the treaty and do not fulfill [the] term [prescribing the free circulation of people], let me know.<sup>98</sup>

<sup>95</sup>See Section 4.2, Ratification in inter-European relations, *supra*. By doctrinal, here, I mean not only the writings of international lawyers, but also legal opinions, practice, and case law.

<sup>96</sup>See Saint-Martin, *supra* note 30, at 134.

<sup>97</sup>*Ibid.*, at 134, 144.

<sup>98</sup>French translation of Letter from Mouhamadou the Great of Medina, son of Al-Hadj-Omar, to the Commander of Bakel, translated into English in J. H. Hanson and D. Robinson, *After the Jihad: The Reign of Ahmad Al-Kabir in the Western Sudan* (1991), 169–70. The original French translation is reproduced in *ibid.*, at 355–6 ('Le traité conclu entre nous et l'envoyé du roi de France, M. Mage, consiste en plusieurs conditions connues et qui auraient dû rester longtemps impérissable et respectées de part et d'autres . . . Si vous ne respectez pas ce traité et que vous ne remplissez pas cette condition faites le moi savoir.'). The original document is identified as Document 28, Folder 13G 141, ANS.

This letter was one of successive missives in which Ahmadu pressed French authorities to allow Futanke caravans from the middle Senegal River to migrate east to Umarian territory as agreed in the 1866 treaty. In response, Pinet-Laprade's successor as governor, François Valière, never denounced the treaty. Nor did he argue that the treaty was unratified and therefore invalid. On the contrary, the governor ordered his subordinates to grant Ahmadu's requests and return property confiscated from migrants. He also confirmed the French commitment to the 1866 treaty.<sup>99</sup>

Although the 1866 treaty never underwent presidential ratification, the colonial administration continued to recognize it as being in force. Officials in Paris, who were notified of the administration's actions, did not object.<sup>100</sup> Umarian authorities, for their part, consistently sought to enforce their rights under the 1866 treaty. In stark contrast, Umarian and French officials forcefully rejected as invalid treaties that were not approved by the Umarian leader and the governor respectively. The Umarians, in the case of the 1860 Franco-Umarian treaty, and the French, in the case of the 1880 Franco-Umarian treaty, showed that they regarded ratification by a competent authority as a prerequisite to a treaty's entry into force.<sup>101</sup> However, their treatment of the 1866 treaty demonstrates that neither French nor Umarian officials considered *presidential* ratification necessary. In their view, the governor had duly ratified the treaty.

The conflict between France and Kajoor following the signature of their 1879 treaty offers yet another illustration of gubernatorial ratification in Franco-Sudanian relations. The French government never submitted the 1879 France-Kajoor Treaty to the president for ratification. The treaty, which was approved by the governor with ministerial authorization, did not contain any clauses governing its ratification and entry into force.<sup>102</sup> Yet, French authorities presented the treaty as valid and in force when Lat Joor, the ruler of Kajoor, sought to repudiate it. Soon thereafter, the colonial government launched a military attack against Kajoor on the pretext that Lat Joor had violated his obligations under the treaty.<sup>103</sup> By holding out a violation of the 1879 treaty as the justification for the invasion of Kajoor, the administration of French Senegal treated the treaty as ratified and binding. Yet, the treaty had not been formally approved by the French president, nor had it been previously executed. Indeed, French authorities claimed that its military action was necessary to *allow* the execution of the treaty which provided for the construction and operation of a railway by the French in Kajoor. The colonial administration thus recognized as binding a treaty that had been formally approved by the governor of Senegal but did not meet the European standards for either express or tacit ratification.

<sup>99</sup>See Saint-Martin, *supra* note 30, at 146–7 ('Valière ne crut pas utile de répondre directement à Ahmadou. Il fit savoir à ses représentants, par le capitaine Pauvert, que les caravanes du Toro pourraient passer, et qu'il attendait Amadou Coumba et Boubacar Saada à Saint-Louis dès qu'on pourrait les y envoyer . . . Mais revenons à 1870 et aux ambassadeurs d'Ahmadou: ils parvinrent finalement à Saint-Louis, mais leur insistance à obtenir des armes échoua. Ils n'obtinrent que la restitution de quelques troupeaux, saisis sur des caravanes toucouleurs, et la confirmation du libre passage du Fouta vers Nioro, et inversement.' ('Valière did not see any point in replying directly to Ahmadou. He let his representatives know, through Captain Pauvert, that the Toro caravans could pass through, and that he expected Amadou Coumba and Boubacar Saada in Saint-Louis as soon as they could be sent there . . . But back to 1870 and Ahmadou's ambassadors: they finally reached Saint-Louis, but their insistance on acquiring weapons failed. All they got was the return of a few herds seized from Toucouleur caravans, and confirmation of free passage from Fouta to Nioro and vice versa.')), citing Documents 43, 44 and 64, Folder 13G 171, ANS.

<sup>100</sup>*Ibid.*, 150–2. In his 1874 correspondence with Ahmadu, Valière contested the application of additional terms to the 1866 treaty that Ahmadu originally proposed in a letter of amendment. He nonetheless confirmed that the treaty's original terms remained in force.

<sup>101</sup>See notes 69–70 and accompanying text, *supra*.

<sup>102</sup>See 1879 France-Kajoor Treaty, *supra* note 90.

<sup>103</sup>See Diouf, *supra* note 9, at 273 ('L'entrée de la colonne dans le Kajoor fut précédée d'une proclamation mettant l'accent sur la violation du traité de septembre 1879 par Lat Joor et sur l'« oeuvre de civilisation » qu'était la construction du chemin de fer.' ('The [military] column's entry into Kajoor was preceded by a proclamation emphasizing Lat Joor's violation of the September 1879 treaty and the "work of civilization" that was the construction of the railroad.')).

In addition to enforcing treaties ratified by the governor, French officials also published them in official collections. Collections of treaties published by the French government feature numerous treaties approved by the governor but not yet submitted for ratification by the French head of state.<sup>104</sup> These treaties span all the constitutional changes France underwent during the nineteenth century, as it vacillated between republican, imperial, and royal governments. Altogether, these patterns of enforcement and publication show that, at least through the 1880s, French and Sudanian authorities consistently recognized the governor of Senegal as competent to ratify treaties for France in Franco-Sudanian relations.

Treaty clauses that required approval from metropolitan authorities do not contradict the governor of Senegal's role as France's ratifying authority in Franco-Sudanian affairs. In the 1870s, the governor of Senegal conditioned his ratification of some treaties to 'ministerial approval'. The condition appeared either in a treaty clause as a prerequisite for the entry into force of the treaty or in a statement preceding the governor's signature.<sup>105</sup> In the 1880s, new treaties also emerged providing for their entry into force after presidential ratification.<sup>106</sup> As far as Western Sudanian leaders were concerned, these details related to the internal functioning of the French state. Their only interlocutor was the governor of Senegal, and it was he or one of his agents who would notify them of France's ratification. As historian Yves Saint-Martin observed, in West Africa, the governor was not merely a regional warlord – or to use Saint-Martin's more flattering term a 'generalissimo'; he was also France's minister of foreign affairs.<sup>107</sup> He spoke and acted authoritatively for France in regional international relations.

The content of treaties subject to ministerial approval confirms the ultimately domestic character of this procedure. The requirement to obtain ministerial approval reflected the new constitutional regime established by the Third Republic. Ministerial approval primarily concerned treaties that fell within the purview of parliament because they modified the trade regime or implicated major infrastructure plans funded and approved by parliament.<sup>108</sup> If French officials added express language conditioning the entry into force of treaties on ministerial approval, it is likely in part because gubernatorial ratification was not usually subject to such conditions in Franco-Sudanian practice. These terms functioned much like express reservations in inter-European practice, where a signatory could condition a treaty's entry into force on the fulfilment of procedures mandated by its domestic law.<sup>109</sup> Accordingly, terms conditioning a treaty's entry into force on ministerial approval did not negate the governor's general authority to ratify treaties for France in Franco-Sudanian relations.

The subsequent emergence of clauses providing for presidential ratification in the 1880s reflected the increased importance of Franco-Sudanian treaties in relations among European

<sup>104</sup>See, e.g., the 1879 France-Kajoor Treaty and the 1880 France-Kita Treaty published in *Annales sénégalaises*, *supra* note 36, at 413–17, 443; J. de Clercq and Ministère des affaires étrangères (France) (eds.), *Recueil des traités de la France* (1881), vol. XII, at 481–9.

<sup>105</sup>See Surun, *supra* note 3, at 338, note 74.

<sup>106</sup>See, e.g., 1881 France-Killa Treaty, *supra* note 71.

<sup>107</sup>See Saint-Martin, *supra* note 30, at 136 ('Si le rôle du gouverneur était pour les territoires d'administration, directe, celui d'un préfet, face aux royaumes indigènes il était ministre des Relations extérieures . . . et parfois généralissime.' ('While the governor's role in directly-administered territories was that of a prefect, in the case of indigenous kingdoms he was Minister of Foreign Affairs . . . and sometimes Generalissimo.')). French law attributed the power to conduct foreign relations in the region to the governor. See Ordonnance du Roi concernant le gouvernement du Sénégal et dépendances, *supra* note 52, Art. 49.

<sup>108</sup>See, e.g., 1879 France-Kajoor Treaty, *supra* note 90, (regarding the construction of a major railway); 1879 Supplementary Act to the 1858 Treaty between the Governor of Senegal and the Emir of the Brakna (Brakna-France), in *Annales sénégalaises*, *supra* note 36, at 404–5 (modifying the trade regime).

<sup>109</sup>See, e.g., Rivier, *supra* note 44, at 80, citing the 1860 Treaty of Turin (France-Sardinia), 24 March 1860, Art. 7, ('Pour la Sardaigne, le présent traité sera exécutoire aussitôt que la sanction législative nécessaire aura été donnée par le parlement.' ('For Sardinia, the present treaty will be enforceable as soon as the necessary legislative sanction has been given by parliament.')).



powers. In other parts of Africa, France concluded treaties requiring approval by the French head of state earlier.<sup>110</sup> In the Western Sudan, however, the treaties containing such clauses were almost exclusively those purporting to establish protectorates in areas between French and British establishments, areas thus subject to the competing influence of the European rivals.<sup>111</sup> Presidential ratification in these cases, as in the rushed and belated ratifications described earlier, thus served to better legitimize French claims against European imperial rivals. By pursuing a dual process of ratification for Franco-Sudanian treaties, French officials ensured that these treaties produced legal effects across Western Sudanian and European normative orders. While gubernatorial ratification allowed a treaty to enter into force in Western Sudanian inter-polity relations, presidential ratification ensured that France could enforce its sovereign rights derived from the treaty against other European powers. In this way, dual ratification facilitated France's conduct of international relations across two regions with different norms governing the enforceability of treaties.

#### 4.3.3 Governor and emir

Although potentially unusual in the context of inter-European treaty practice,<sup>112</sup> the designation of the governor of French Senegal as the ratifying authority for treaties was consistent with French Senegal's status in the region's inter-polity relations. Within the political structure of the French empire, the governor of Senegal was a subordinate official answerable to the minister in charge of colonial affairs. However, in Franco-Sudanian diplomatic exchanges, the governor was the highest-ranking interlocutor and he spoke authoritatively for the French polity.<sup>113</sup> Further yet, colonial and Sudanian officials alike came to recognize the governor as a West African ruler much like any other.

The colonial administration consistently presented the governor as the autonomous ruler of a regional power. Over the course of the nineteenth century, the administration's translators used various synonymous titles to designate the governor in Arabic. Though slightly different, all these titles broadly meant ruler of Saint-Louis. By far the most common title was that of Emir of N'Dar ('amir Indar'), meaning Emir of Saint-Louis. This title became standard in Arabic-language documents drafted by the administration and its employees by the second half of the century. The administration's agents also occasionally styled the governor the *būr*, sheikh, or sultan of N'Dar.<sup>114</sup> The administration did not choose these titles by coincidence; they were among the most commonly used by Wolof and Baydan authorities of the lower Senegal River.<sup>115</sup> The colonial administration intended to portray the governor as an equal of Wolof and Baydan leaders, who

<sup>110</sup>See, e.g., 1868 Treaty of Cession between France and Dahomey, Art. 3, at 3, in 40 COL 588, ANOM, available at [recherche-anom.culture.gouv.fr/ark:/61561/uq106ey144c](https://www.recherche-anom.culture.gouv.fr/ark:/61561/uq106ey144c); 1863 Treaty of Commerce between France and Porto-Novo, Art. 13, at 3b, in 40 COL 76, ANOM, available at [recherche-anom.culture.gouv.fr/ark:/61561/uq106mgjmje](https://www.recherche-anom.culture.gouv.fr/ark:/61561/uq106mgjmje).

<sup>111</sup>See, e.g., 1881 France-Killa Treaty, *supra* note 71, as well as treaties following the same model concluded by Dr. Bayol. Compare the 1883 treaty with Kajoor which provided for the entry into force of the treaty after the approval of the governor of Senegal, in 40 COL 362, at 3a, ANOM, available at [recherche-anom.culture.gouv.fr/ark:/61561/uq106rolmlv](https://www.recherche-anom.culture.gouv.fr/ark:/61561/uq106rolmlv).

<sup>112</sup>Scholars such as Andreas Osiander have challenged the widely held idea that only independent states – that is polities without any duty of allegiance to a superior political authority – could engage in European inter-polity relations after the Peace of Westphalia.

A. Osiander, 'Sovereignty, International Relations, and the Westphalian Myth', (2001) 55 *International Organization* 251.

<sup>113</sup>See note 107 and accompanying text, *supra*.

<sup>114</sup>See, e.g., 1835 France-Walo Treaty, *supra* note 76 (references to 'būr Indar'). See also L. A. G. Colvin, *Kajor and its Diplomatic Relations with Saint-Louis du Sénégal, 1763–1861* (1972), PhD thesis, Columbia University, at 93.

<sup>115</sup>See Colvin, *supra* note 114, at 93–4; A. A. Duri, 'Amir', (2012) *Encyclopaedia of Islam*; J. H. Kramers et al., 'Sultān', (2012) *Encyclopaedia of Islam*. The Muslim rulers of the middle Niger were commonly known by the honorific 'shaykh' or its West African variant 'seku'. See Hanson and Robinson, *supra* note 98, at 54, note 7 and 57, note 16; D. Robinson, *The Holy War of Umar Tal: The Western Sudan in the Mid-Nineteenth Century* (1985), at 327. Regarding the diplomatic language of the Baydan see also, Koltermann, *supra* note 74.

were French Senegal's first major diplomatic interlocutors.<sup>116</sup> These practices served to indigenize the governor and French Senegal respectively as a regional ruler and polity.

By styling the governor as the Emir of N'Dar, the colonial administration did not seek to deny the governor's allegiance to the French government. On the contrary, by designating the title of emir as the standard Arabic rendition of governor, the administration clarified the governor's relationship to the metropolitan French government. In the Islamic political tradition, the title of sultan usually applies to leaders of polities claiming absolute or near-absolute political independence, whereas the title emir usually implies either less power relative to other politically independent polities or less political autonomy.<sup>117</sup> For example, in the political structure of the Umarian state, the ruler claimed the title of caliph while the commanders of Umarian fortresses, whom he appointed and who also administered the surrounding provinces, assumed the title of emir.<sup>118</sup> Moreover, Franco-Sudanian treaties regularly alluded to the governor's allegiance to metropolitan French authorities. The governor often purported to act in the name of the French sovereign, whether that be the monarch, under monarchical governments, or the people, under republican governments.<sup>119</sup> As such, the administration of French Senegal did not occlude the governor's allegiance to superior authorities overseas.

For their part, Sudanian authorities were generally aware that the governor of Senegal owed allegiance to the metropolitan French government. Lucie Colvin notes, for example, that as early as the late eighteenth century the authorities of Kajoor asked a French envoy about the king of France. According to Colvin's account, the authorities of Kajoor showed little interest in the metropolitan authorities beyond the amusement procured by what they saw as fantastical stories about the wealth and might of the French monarch.<sup>120</sup> Indeed, for Kajoor, as for other Sudanian powers, their relations with France passed exclusively through the administration of French Senegal. What lay beyond the sea was of little concern. In the 1880s, Umarian authorities often distinguished between French Senegal and the French Empire's central authorities. Umarian correspondence from this period used the term 'the French nations' ('umam Frāns') to refer to France and its various dependencies, including N'Dar, which designated not only Saint-Louis proper but all of French Senegal.<sup>121</sup> One treaty draft prepared by Umarian diplomats was a rare example of a document designating a treaty as an agreement between a Sudanian leader and the French nations rather than between a Sudanian leader and the governor of Senegal.<sup>122</sup> In the late 1880s, when relations between the governor and Umarian ruler Ahmadu soured, Ahmadu addressed a letter directly to the 'chief and grand council of the French' to denounce the actions of

<sup>116</sup>In communications with the people under its administration, the colonial government also referred to the governor as the Emir of N'Dar. Tellingly, in the 1880s, when the Third Republic was firmly established in Metropolitan France, the administration continued to refer to the colony of French Senegal in Arabic as a 'mamlaka' meaning 'kingdom' or 'state'. See, e.g., 'Avis et Communications', *Journal officiel du Sénégal et dépendances*, 5 April 1887, 120.

<sup>117</sup>See Duri, *supra* note 115; Kramers et al., *supra* note 115.

<sup>118</sup>See, e.g., Hanson and Robinson, *supra* note 98, at 197, 265, 368 (referring to Ahmadu's brother and commander of the fortress of Nioro Muntaqā as an emir and defining 'amir' as 'the title of a military leader or governor').

<sup>119</sup>See, e.g., 1819 Treaty between J. Schmaltz, Administrator of Senegal, and Amar Boye, Brak of Walo (France-Walo), in Box 40 COL 416, ANOM, available at [recherche-anom.culture.gouv.fr/ark:/61561/uq106jgchek](https://recherche-anom.culture.gouv.fr/ark:/61561/uq106jgchek) (referring to the king of France); see 1858 France-Trarza Treaty, *supra* note 67 (referring to the emperor of the French, Napoleon III); 1880 Treaty between G. Brière de l'Isle, Governor of Senegal, and the Chiefs of Kita (France-Kita), in Box 40 COL 341, at 19, ANOM, available at [recherche-anom.culture.gouv.fr/ark:/61561/uq106qnkqmx](https://recherche-anom.culture.gouv.fr/ark:/61561/uq106qnkqmx) (referring to the French Republic).

<sup>120</sup>See Colvin, *supra* note 114, at 94–5.

<sup>121</sup>1880 Treaty of Peace between Ahmadu the Great of Medina, Commander of the Faithful, and the French nations (France-Umorian Empire), in Box 40 COL 616, at 5b, ANOM, available at [recherche-anom.culture.gouv.fr/ark:/61561/uq106khelft](https://recherche-anom.culture.gouv.fr/ark:/61561/uq106khelft) ('Al-ṣulḥ wa al-hudna wa al-mu'āmalā al-mun'aqida bayn Aḥmad al-Kabir al-Madani . . . wa bayn umam Frāns' ('The treaty of peace, truce, and commercial relations concluded between Ahmad the Great the Medinan and the French nations')). See also Saint-Martin, *supra* note 30, at 267.

<sup>122</sup>See 1880 Franco-Umorian Treaty, *ibid.*

the governor.<sup>123</sup> Most Sudanian authorities did not insist as much on this distinction. Still, these references suggest that, while the people of the Western Sudan came to know the governor of Senegal as the ruler of Saint-Louis, they were not ignorant of his allegiance to a superior authority.

Ultimately, the governor's allegiance to a distant authority was of little consequence to most Sudanian leaders, as it posed no obstacle to its conduct of international relations like any other regional power. The authorities of French Senegal and the Western Sudan alike recognized the competence of autonomous polities owing allegiance to a foreign power to participate in regional inter-polity relations and conclude treaties.<sup>124</sup> It is beyond the scope of this article to identify the precise regional norms governing who or what constituted an international actor. For the present purposes, it suffices to recall that the Trarza leaders declared allegiance to the sultan of Morocco but nonetheless concluded treaties with France and neighbouring Wolof states.<sup>125</sup> Much like the Moroccan sultan, the French government represented a distant and ultimately hypothetical authority for most Sudanian officials. It was ultimately the governor, not the French government, who took on the task of enforcing the terms of treaties with regional powers. As such, Sudanian authorities were largely ambivalent regarding the governor of Senegal's relationship to France.

In this respect, the titles used to refer to the governor of Senegal are instructive once again. Although Emir of N'Dar became the preferred title adopted by the administration of French Senegal, it was but one of many ways West Africans referred to the governor.<sup>126</sup> For example, even when a treaty's main text referred to the governor as the Emir of N'Dar, annotations and signing statements by the Sudanian party sometimes referred to the governor as the *būr*. For example, in an 1850 treaty between Futa Toro and France, the Futanke signatories wrote a note alongside their signatures. They stated that '[t]hese are terms between the imām (*almamy*) of Futa and the būr of N'Dar'.<sup>127</sup> The *imām*, or *almamy* in Pulaar, was the theocratic leader of Futa Toro. This use of the term *būr* outside the Wolof-speaking regions of the lower Senegal suggests that the governor was associated with the Wolof and Baydan polities neighbouring Saint-Louis. Indeed, the governor came to be known orally throughout the central and upper Senegal as the '*borom*', a related Wolof term for owner or master.<sup>128</sup> The flexible understanding of the governor of Senegal's status further emerges from the appearance of the standard title 'amir Indar' alongside the unusual term 'mālik Indar' (master or sovereign of Saint-Louis) in an 1839 treaty with the Baydan emir of the Brakna.<sup>129</sup> Like the Wolof term *borom*, the classical Arabic term *mālik* has a root meaning of owner and an extended meaning of master or sovereign.<sup>130</sup> 'Mālik Indar' thus appears to be a classical Arabic translation of the Wolof 'borom N'Dar', confirming the prevalence of this term and the analogy between the governor and a sovereign. The diversity of terminology suggests that the governor of Senegal's ultimate allegiance to a distant authority was not a prominent concern

<sup>123</sup>Letter from Ahmadu Tall, Commander of the Faithful, to the Governor of Senegal, received 6 September 1886, in Box 40 COL 378, ANOM, available at [recherche-anom.culture.gouv.fr/ark:/61561/uq106zwtzyt](https://recherche-anom.culture.gouv.fr/ark:/61561/uq106zwtzyt).

<sup>124</sup>See, e.g., *Sénégal et Niger*, *supra* note 35, at 246 (discussing French attempts to conclude a treaty with Muntaqā, an Umarian emir); see Ahmadu Tall to Brière de l'Isle, *supra* note 69 (referring approvingly of French exchanges with the Umarian commander Basiru, known in Arabic as Bashīr, and the possibility for the French, their subordinates and Basiru to independently conduct wars absent a prohibition from their superiors). Cf. Hébié, *supra* note 3, at 76 (describing relations between the French and subordinate Umarian polities as violating the subordinate polity's duty of allegiance).

<sup>125</sup>See Marty, *supra* note 72, at 68–9.

<sup>126</sup>See Colvin, *supra* note 114, at 93.

<sup>127</sup>1850 Treaty between Muḥammad, Imam of Futa Toro, and A. Baudin, Governor of Senegal (France-Futa Toro), at 3a, in Box 40 COL 826, ANOM, available at [recherche-anom.culture.gouv.fr/ark:/61561/uq106xxrszk](https://recherche-anom.culture.gouv.fr/ark:/61561/uq106xxrszk) ('*hadhihi shurūt bayn al-imām Fūta wa būr Dar*').

<sup>128</sup>See, e.g., 1837 Treaty between Samba Coumba Thiam, Sultan of Tuabo, and L. L. A. Guillet, Interim Governor of Senegal, at 2a, in Box 40 COL 546, ANOM, available at [recherche-anom.culture.gouv.fr/ark:/61561/uq106rokrmb](https://recherche-anom.culture.gouv.fr/ark:/61561/uq106rokrmb). Tuabo was located between Bakel and Medina.

<sup>129</sup>1839 Treaty between Charmasson, Governor of Senegal, and Amédou oud Sidy Ély (Aḥmad bin Sayyid A'li), Emir of the Brakna, at 2, in Box 40 COL 548, ANOM, available at [recherche-anom.culture.gouv.fr/ark:/61561/uq106heahgg](https://recherche-anom.culture.gouv.fr/ark:/61561/uq106heahgg).

<sup>130</sup>I am grateful to Mamadou Diouf for confirming this insight.

for Sudanian leaders. In this regard, the colonial administration was no different. It consistently translated the panoply of terms for West African rulers, including *damel*, *brak*, *būr*, *almamy* (*al-imām*), emir, and *tunka* as ‘roi’ (king) or ‘souverain’ (sovereign). The ultimate information these terms conveyed was that the individual in question represented an organized polity and participated in the region’s international relations.

Ultimately, in the context of Franco-Sudanian affairs, the official competent to declare France’s ratification of a treaty was not the French head of state, but the governor of Senegal. Neither French nor Sudanian authorities treated the approval of the French president as a prerequisite for a treaty’s entry into force between them. They recognized treaties signed by the governor as valid without formal presidential approval. Moreover, for treaties signed by the governor’s agents, French and Sudanian authorities viewed a statement of approval from the governor as sufficient for ratification. This practice and understanding of ratification diverged from France’s attitude toward ratification in its relations with other Western powers.

As the French government rushed to ratify treaties between France and Sudanian powers in preparation for its negotiations with Great Britain, the ministers do not appear to have realized the contradictions in their conduct. Indeed, the historical record shows little evidence that French authorities were conscious of the way their treaties mediated between distinct yet increasingly imbricated inter-polity normative orders. Yet, a few moments of serendipitous lucidity shine through. In a letter to his colleague in charge of the colonies, the minister of foreign affairs stressed the urgency of completing the collection and ratification of what he called ‘treaties concluded by the *sovereign* of Senegal . . . with the various peoples’ of the region.<sup>131</sup> Upon receipt of the letter, an official from the ministry of the navy and the colonies sought to rectify the error and wrote ‘governor’ in pencil where the author had written ‘sovereign’.<sup>132</sup> This seemingly anodyne slip of the pen was perhaps as insightful a description as the bureaucrat’s dutiful correction.

## 5. Conclusion

Historians and legal scholars alike have often sought to paper over the contradictions between European powers’ conduct of international relations inside and outside Europe. Yet, recognizing these contradictions as integral to nineteenth century international relations – a feature rather than a design flaw – arguably paints a more coherent picture. Although ratification was well established in European and Western Sudanian inter-polity relations, the practice took on different forms in each region and was governed by different norms. France adapted to these distinct sets of norms by bifurcating its practice of international relations with Western nations, on the one hand, and the powers of the Western Sudan, on the other.

Recognizing this bifurcation reveals a crucial yet underappreciated aspect of nineteenth-century Franco-Sudanian treaty-making. The extension of inter-European relations beyond Europe and across the Americas, Africa, Asia, and the Pacific gave rise to legal tools to mediate between autonomous systems of international relations. Until the late nineteenth century, Franco-Sudanian treaties were instruments of a Western Sudanian regional order. However, the rise of Franco-British rivalries in West Africa led French authorities to ground claims against their European rivals on instruments drafted in a non-European normative order. Enforcing rights derived from these treaties in an inter-European context required a process of legal transposition. French authorities accomplished this transposition through presidential ratification. By the late nineteenth century, this work of transposition or interfacing between autonomous orders was

<sup>131</sup>E. Flourens, French Minister of Foreign Affairs, to J. F. E. Krantz, French Minister of the Navy and the Colonies, 7 March 1888, at 1, in Box 40 COL 727, ANOM, available at [recherche-anom.culture.gouv.fr/ark:/61561/uq106hechfh](https://recherche-anom.culture.gouv.fr/ark:/61561/uq106hechfh) (emphasis added) (‘traités conclus par le souverain du Sénégal et dépendances avec les diverses peuplades qui habitent le territoire de notre colonie’).

<sup>132</sup>*Ibid.*

embedded within treaties themselves, giving them a dual or Janus-faced quality as instruments of Western Sudanian and European relations. A staggered process of gubernatorial and presidential ratification thus emerged to allow treaties to simultaneously produce legal effects in the regional orders of the Western Sudan and Europe.

This insight emerges from a method that consists in approaching treaties as artefacts of a longer process of treaty-making. This approach reveals often obscured elements of the social life of treaties, bringing to light the work of conceptual translation, of transferring between written and oral forms, and of persuasion and approval. This work brings into relief previously overlooked African voices and practices that have left their marks on the material document. Scholars studying inter-polity normative order in West Africa have often run up against what they describe as a partial documentary record, both fragmentary and skewed. Sources on Euro-African relations abound, but their production and collection by imperial institutions often impose a seemingly inescapable imperial view of normative order based on a European ideal. The West African Islamic library offers a precious corrective but no panacea.<sup>133</sup> Using contextual, intertextual, and translanguagual approaches to revisit the arcane but substantial documentary record of nineteenth-century diplomatic activity in West Africa offers a path forward by drawing greater potential from both Euro-African and Islamic sources and confronting these two archives productively.

This approach also provides a path forward for historians of inter-polity order in other parts of what is today known as the ‘Global South’. Imperial constraint may manifest itself in the content of treaties as much as in their transposition to new contexts. Indeed, the inequality of so-called unequal treaties lies not merely in the acceptance of one-sided terms regarding jurisdiction, trade, and the use of force, but also in the decontextualization and re-interpretation of terms and of treaties themselves in a Western and imperial frame. While this article has focused on methods used in legal and historical scholarship, this history of decontextualization raises questions about the interpretation of imperial treaties and practice by international courts and institutions. Mamadou Hébié and Mieke van der Linden’s critiques of the International Court of Justice’s 2002 judgment in *Land and Maritime Boundary between Cameroon and Nigeria* have convincingly shown that the Court’s interpretation of an 1884 treaty between the leaders of Old Calabar and Great Britain did not accurately reflect Western practice and norms prevailing at the time.<sup>134</sup> Yet, the question remains whether international courts and institutions today have the tools to move beyond Western perspectives and appropriately consider historical practice and treaties in non-Western contexts.

<sup>133</sup>I borrow the phrase ‘West African Islamic library’ from O. O. Kane, *Beyond Timbuktu: An Intellectual History of Muslim West Africa* (2016).

<sup>134</sup>See Hébié, *supra* note 5, at 530–52; Van der Linden, *supra* note 5, at 252–60.